1 Introduction

1.1 The Chartered Institute of Taxation is pleased to respond to the call for evidence on the delegation of powers as part of the legislative process.

1.2 Our interest is in taxation so we limit our response to matters concerning taxation and in particular the use of delegated powers in connection with the proposed ‘Great Repeal Bill’ (‘GRB’) as part of the Brexit process.

2 Executive summary

2.1 We consider it appropriate to review the use of secondary legislation, particularly in regard to its frequent application in the field of taxation. Overall, we consider that taxation is something that should be controlled actively by Parliament. Delegation of powers reduces that control and should be used only to deal with technical matters or the finer detail of matters decided by Parliament. That restriction is especially important if the Commons is not granted power to review the merits of SIs (see the response to question 6) and to amend them in appropriate circumstances (see the response to question 7).

2.2 The consultation process is an important part of the development of effective legislation and should not be allowed therefore to become a perfunctory process carried out simply to ‘tick boxes’. Adequate time should be allowed to receive, consider and act on responses. We therefore have concerns that secondary legislation may lead to legislative measures not receiving the proper level of external challenge and scrutiny before implementation, leading to a risk of unintended consequences and burdens for HMRC and taxpayers.

2.3 The process of developing effective and useful measures is complicated with secondary legislation because of the difficulties in amending, delaying or referring it back for further consideration. However, that process is to some extent necessary given the limited time available for detailed scrutiny. In relation to taxation, we take the view that there needs to be capacity to make changes to deal with significant issues.

2.4 Brexit will pose significant challenges for Parliament, the Government and interested parties generally. We believe that there needs to be continuous consultation from the outset and not just when legislation is developed and changes become difficult (if not impossible) to make. We recognise the inevitable temptation to use delegated legislation to deal with the complexities of Brexit and the volume of legislative change expected to arise as a result. That will make it more important for delegated legislation to be subject to effective scrutiny.

2.5 It will be important, whatever legislative approach is ultimately taken, to clarify which version of the European legislation the Government intends to follow (namely what happens should a Directive or Treaty subsequently be amended), and what position is to be taken on the decisions of the Court of Justice as to the proper interpretation of that European legislation. If decisions have arisen before Brexit, presumably Parliament intends to respect that interpretation of the European law
unless it expressly introduces legislation to the contrary. However, it needs to be clear what position the UK will take if there are interpretative decisions of the Court after Brexit but relating to the European legislation that Parliament has decided to reflect in the GRB. We believe consideration should be given to the inclusion of more explicit purposive explanations both in the legislation and the explanatory notes to address this.

3 General comments

3.1 We have always maintained that tax laws should be enshrined in primary legislation as far as possible but we accept that this is not always feasible and that there is therefore a need for secondary legislation.

3.2 Legislation should be the result of proper, full consultation that takes account of the technical and practical issues that surround it. While the process of consultation has improved, we have concerns about the extent of scrutiny that secondary legislation receives from Parliament and other stakeholders.

3.3 Both EU and UK law have primary and secondary legislation and, in principle, there is a remedy when secondary law conflicts with primary law. The EU remedy guarantees the ordinary person the right to an effective remedy (article 47 of the Charter of Fundamental Rights). In the UK, the remedy would be judicial review but that remedy would in practice be difficult for the ordinary taxpayer to access, which might deny a person effective access to a remedy.

4 Purpose of delegated powers

4.1 Question 1: For what purposes is it appropriate to delegate powers to make law to Government? Is there a clear boundary between subject-matters which are appropriate for primary legislation on the one hand, and for secondary legislation on the other.

4.2 In regard to taxation, we believe that there is a clear boundary between matters that should be enshrined in primary legislation and matters that can be delegated. In essence, delegated powers should be limited to matters of detail provided that measures resulting are subject to effective scrutiny. Some matters, eg administrative issues, may need less scrutiny than others.

4.3 We note that some delegated legislation further delegates powers. To take one example, one might consider paragraph 7 of the VAT (Tour Operators) Order 1987. That legislation concerns the determination of the taxable value and therefore directly affects the tax payable. It has now been the subject of very lengthy litigation involving two references to the Court of Justice of the European Union. The further delegation of powers to HMRC risks distancing the law created from the proper level of Parliamentary scrutiny. This may be inappropriate where the legislation creates tax obligations on citizens and, as in our example, involves the UK’s compliance with obligations under international law.
While Parliamentary scrutiny of primary legislation is not always perfect, it is necessarily fuller than with secondary legislation. We support the recommendations recently by the Chair of the Treasury Committee in relation to Parliament receiving objective input from academics, tax advisers and other professionals on the draft Finance Bill.¹ See also the recent report from the CIOT, the Institute for Government, and the Institute for Fiscal Studies, which outlines ten steps toward making better tax policy including:²

- Stick to the commitment to a single principal annual fiscal event and cut down Budget measure proliferation, enabling enhanced parliamentary scrutiny (step 1)
- Start consultation at an earlier stage, including early and regular calls for evidence on a particular policy problem (step 4)
- Develop more active approaches to consultation, such as conducting focus groups and a greater role for the Administrative Burdens Advisory Board (step 5)
- Overhaul internal processes, such as supplementing challenge from ministerial colleagues with introducing early expert challenge (step 8)
- Enhance Parliament’s (and the public’s) ability to scrutinise tax proposals, leading to improved Finance Bill scrutiny (step 9)

5 Consistency of approach

5.1 Question 2: Does the Government have a consistent approach to the delegation of powers and, if so, on what basis has that approach been adopted? Has the outcome of this approach been satisfactory?

5.2 We have previously expressed concerns in a submission to the Hansard Society about what seem to be arbitrary dividing lines between what goes in primary legislation and what goes in secondary legislation.³ Using SIs to set commencement dates; adjust monetary limits; and lay out administrative routines seems sensible. Using an SI to make significant changes to taxable boundaries is not.

5.3 We also have concerns regarding the lack of effective scrutiny of financial (including tax) SIs which indicates a lack of consistency of approach between financial SIs and other SIs.

6 Effective scrutiny

6.1 Question 3: How effective is parliamentary scrutiny of provisions in primary legislation that delegate power to the Government?

6.2 In our experience relatively little time is spent during Finance Bill debates considering such provisions (which appear frequently). It appears this is particularly

¹ See [http://www.parliament.uk/documents/commons-committees/treasury/Correspondence/Letter-from-Andrew-Tyrie-to-CIOT-cc-IFG-IFS-HoCClerk-Assistant-12-12-16.pdf](http://www.parliament.uk/documents/commons-committees/treasury/Correspondence/Letter-from-Andrew-Tyrie-to-CIOT-cc-IFG-IFS-HoCClerk-Assistant-12-12-16.pdf)
² See [https://www.instituteforgovernment.org.uk/publications/better-budgets-making-tax-policy-better](https://www.instituteforgovernment.org.uk/publications/better-budgets-making-tax-policy-better)
³ The content of that submission is included in the appendix
so for financial statutory instruments. We note the following from Briefing Paper 06509 ‘Statutory Instruments’ (House of Commons Library, 15 December 2016):⁴

- Many SIs are not subject to any parliamentary procedure (Summary);
- SIs are drafted by the legal office of the Government Department concerned, ‘often following consultations with interested bodies and parties whilst SI is in draft’ (para 1.3);
- SIs subject to the affirmative resolution procedure generally have to be approved by both houses, but the Commons alone approves financial SIs (chapter 2, p8);
- The Joint Committee on Statutory Instruments does not consider the merits of any financial SI, but the Select Committee on Statutory Instrument ‘sometimes’ sit separately to consider instruments laid before the Commons alone (para 3.1);
- The Secondary Legislation Scrutiny Committee of the House Lords has the exclusive power to consider the merits of an SI (para 3.2). Such power includes considering whether the special attention of the House of Lords should be drawn on matters including the following:
  - That it may inappropriately implement European Union legislation;
  - That it may imperfectly achieve its policy objectives.

6.3 It would appear to follow from the foregoing that financial SIs do not receive effective scrutiny.

7 Skeleton Bills

7.1 Question 4: Are there circumstances in which ‘skeleton’ Bills and clauses are appropriate? Are ‘skeleton’ Bills and clauses becoming more frequent, and if so, why?

7.2 We cannot recall any use being made of ‘skeleton’ bills in respect of taxation. We would regard it as wholly inappropriate were such a tax bill to be put forward.

8 Use of guidance

8.1 Question 5: How far are matters previously dealt with in secondary legislation moving into guidance, codes of practice and directions; and what are the implications of any such movement for Parliamentary scrutiny?

8.2 We do not know to what extent guidance has replaced secondary legislation but we and other bodies recognise that it is sometimes necessary to rely on guidance rather than further complicate legislation.

⁴ See http://researchbriefings.files.parliament.uk/documents/SN06509/SN06509.pdf
8.3 However, since most guidance does not have the force of law, and it cannot usually be relied upon by a taxpayer before a tribunal, there must be concerns about any decision not to legislate. Furthermore, guidance has proved difficult to access, particularly since its move to the gov.uk website. There is no reliable and straightforward way for ordinary citizens to be sure what version of the guidance was extant at the relevant time and we have seen numerous examples of changed HMRC policy not being reflected in their published guidance even many years after the shift.

8.4 There are examples where guidance does have the force of law, eg in VAT legislation:

- the Tour Operators Margin Scheme (VAT Notice 709/5);
- certain formalities concerning exports in (VAT Notice 703); and
- some of the VAT accounting provisions.

8.5 It would be a practical impossibility for guidance to be removed entirely and replaced with primary or secondary legislation. The focus must then be on ensuring guidance is up to date and available to all taxpayers, and that taxpayers should be entitled to rely upon the published guidance extant at the relevant time, where they have relied on it in good faith.

9 Scrutiny of secondary legislation

9.1 Question 6: The extent to which it is appropriate for Parliament to devolve power to the Government inevitably depends on the appropriateness of Parliament’s future scrutiny of the exercise of those powers. To what extent are current procedures for scrutinising secondary legislation effective?

9.2 It is apparent that there is very little interest among MPs in scrutiny of delegated legislation, largely it would seem because most is uncontroversial. Even where there is an element of controversy the inability to amend it may have an impact on the willingness of parliamentarians to devote time to it (see answer to question 7 below).

10 Should secondary legislation be amendable?

10.1 Question: 7: Is there a case for making secondary legislation amendable in certain circumstances (and if so, in which circumstances), or for greater use of an enhanced scrutiny process that allows Parliament to scrutinise draft instruments before a final version is introduced for approval (such as the existing super-affirmative procedure)? What problems arise from the ‘take it or leave it’ process currently used for agreeing secondary legislation?

10.2 There is clearly a need to prevent instruments that deal only with minor technical / administrative issues dissipating the resources of the House by allowing amendments to be proposed and debated just to make a point. However, some statutory instruments can have significant effects on taxpayers.

10.3 By way of example, the TIIN dealing with a draft statutory instrument concerning the VAT Flat Rate Scheme indicates that it will result in £195 million being raised in
2017. Much of that is probably attributable to countering abuse as suggested by HMRC, but the instrument as it stands may also create significant problems for innocent taxpayers not involved in abuse, potentially removing their access to a simplification scheme expressly provided for in European law.

10.4 We have received comments that question the need to use the method chosen in the draft SI to counter the abuse and pointing out three potential alternative means of countering the abuse using existing powers which would not impact so greatly on innocent taxpayers. The question therefore arises whether in such circumstances, Parliament should have the power to amend, limit or reject such an instrument or merely to refer it back to the Department responsible for further work.

11 Powers to reject or delay secondary legislation

11.1 Question 8: Is there a case for allowing either or both Houses of Parliament additional powers to delay or reject secondary legislation?

11.2 The same principle applies here as to question 7. We believe it should be possible, where appropriate, for legislation to be referred back by Parliament for further work. This might be limited perhaps to scenarios where the secondary legislation risks imposing obligations or removing rights beyond the bounds of what Parliament clearly intended, or where there is some other fatal flaw in the drafting.

12 Henry VIII powers

12.1 Question 9: Bills often include ‘Henry VIII powers’, which allow the Government to amend or repeal primary legislation by secondary legislation. For what reasons might such powers be appropriate, and with what level of scrutiny? Are there any subject-matters or purposes for which Henry VIII powers should never be used? Should Henry VIII powers ever be exercisable by a person who is not a Minister?

12.2 We have serious concerns about Henry VIII powers. Overall, it seems to us that taxation should be controlled actively by Parliament. When major changes are made, that control should be genuinely exercised. Absent any power to amend or delay legislation, even the ‘affirmative’ basis of SIs is inadequate for significant changes to the tax system.

12.3 Our concern in relation to taxation is to ensure that persons are only taxed according to the clear intention of Parliament, and that any protections given to taxpayers by legislation cannot be removed without consideration by Parliament.

13 Explanatory notes

13.1 Question 10: Do the Explanatory Notes that accompany a Bill contain sufficient information about what the proposed secondary legislation will do?
13.2 We have previously commented that explanatory notes are not always as helpful as they should be. They sometimes merely paraphrase what the legislation says without explaining the objectives behind the legislation, which we consider should be included. Further, tax information and impact notes (TIINs) frequently provide assessments of the impact on business which do not match the views of businesses and their advisers. Given the Government’s stated aim to have a transitional period after Brexit in which UK law reflects obligations and rights arising from relevant European legislation as at the date of exit, it will be more important than ever to make clear the purpose behind legislation arising after the exit date. In particular the explanatory notes should in our view set out clearly whether and to what extent the Government’s intention is to move beyond the previous ‘EU-compliant’ position.

14  Clarity of secondary legislation

14.1 Question 11: How far is the intended content of secondary legislation made clear when the Bill is going through Parliament? Should draft secondary legislation be routinely made available when Bills are scrutinised by Parliament? Are there any examples of secondary legislation that brought forward provisions which were unexpected in the light of information provided by Government when the primary legislation was being enacted?

14.2 We do not think there is much clarity of what secondary legislation will contain when a bill is proceeding through Parliament. This presumably arises because decisions are taken during the development process of new provisions that follow. There seems no practical reason why indications of what secondary legislation may contain should not be provided during consultations on primary legislation thus allowing some debate.

15  Brexit-related primary legislation

15.1 Question 12: To what extent, in Brexit-related primary legislation, might the use of secondary legislation be necessary or justified to convert the ‘acquis’ (the body of existing EU law) into British law?

15.2 EU derived law is considerable and it will clearly be logistically impossible to convert it to British law without some use of secondary legislation. However, it is necessary to bear in mind its nature when determining whether or not it is both necessary and appropriate to use secondary legislation to convert it or not. In our view, that depends on the nature of the law being converted.

15.3 EU law comprises –

- The treaties
- Legal principles
- The directives
- Regulations

15.4 Law derived from the treaties
Treaty law provides certain fundamental rights for persons in the EU. In regard to taxation, the Court of Justice of the EU has, on the basis of those rights, ruled as unlawful, certain restrictions in UK law.

15.5 Some of that case law has already been incorporated into UK law (either in legislation or in legal proceedings) and so may not be immediately affected by the GRB unless there are reasons why it is considered that, in a post-Brexit UK, it is not appropriate to retain that legislation. Because the legislation or case law might have created significant rights that are relied upon by business, it would be undesirable to use secondary legislation to withdraw it.

15.6 **Principles**

As noted, EU law does not rely on the wording of legislation alone; it incorporates a purposive approach based on principles. Those principles are derived from –

- Interpretation by the Court of Justice of principles deriving from treaties
- Recitals in legislation such as directives
- The Charter of Fundamental Rights of the European Union (LINK 5).

15.7 The principles above are currently effective in UK law because of the European Communities Act 1972 (ECA). Section 2 of that Act requires that ‘rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures’ will be given effect in UK law. It does not require specific legislation to do so.

15.8 The GRB will withdraw the ECA and incorporate EU law directly into UK legislation, but it is not clear how it will incorporate principles that are not already part of UK law and which are only stated in judgments of the Court of Justice. That is especially so if Parliament’s intention is to end the jurisdiction of the CJEU. For example, currently UK law must be given a conforming interpretation with EU law. Without such interpretation, the wording of the UK law can have a different meaning to that originally intended.

15.9 Because of the fundamental importance of principles that give rights to people in the UK, it would be inappropriate subsequently to withdraw or limit those rights by secondary legislation.

15.10 Nevertheless, it is clear that some of those principles only apply to a UK that is part of the EU and therefore may not apply post-Brexit eg references that apply only to trade between EU member states. It would be justified to use secondary legislation to repeal those parts of the GRB that relate to EU legislation that becomes otiose as a result of Brexit.

15.11 **Law derived from directives**

Directives addressed to the UK are required to be incorporated in its national law and as far as taxation is concerned that has largely been the case. However, the directives are prefaced by recitals that set out important principles that are applied in interpreting the legislation.

15.12 The recitals in the directives are not incorporated in national law. Instead, as noted above, they are given effect through section 2 of the European Communities Act 1972. These could presumably be brought directly into UK law using the GRB. It is essential to remember that to determine compliance with European legal rules, one looks at the effect achieved in practice in a member state, which could include how a tax authority applies certain rules or reliefs in practice (ie considering tertiary legislation, guidance and administrative practice). For the reasons set out earlier, we are of the view that primary and secondary legislation is preferable to the use of guidance or administrative discretion for most aspects of taxation, given the link to taxpayer obligations and rights.

15.13 Some of the legislation contained in the United Kingdom’s laws implementing the directives (eg the Principal VAT Directive) has numerous references to the European Union, which depending on what is agreed in regard to Brexit may no longer be appropriate. Dealing with repeals of such law using secondary legislation would be necessary and justified.

15.14 However, some substantive tax decisions may need to be taken as a result of Brexit, which will have a significant financial effect on individuals and businesses, and these decisions should be made by primary legislation. For example ‘exports’ of most services are effectively zero-rated if the customer is located outside the EU, which means that financial services businesses (whose supplies would otherwise be exempt from VAT) benefit from recovery of VAT on associated costs. Post Brexit, a decision will have to be made whether to treat the EU, going forward, like we treat the rest of the world now. Such a decision will have a significant exchequer cost (and might also interact with exit negotiations eg on access to the single market and on customs duties), and should not be left to secondary legislation.

15.15 *Law derived from regulations*

Regulations are directly effective in Member States without the need for national legislation. Two examples of directly effective regulations are –

- That laying down the universal customs code that determines how customs duty is imposed in the EU ([LINK](http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32013R0952&qid=1484584794940&from=EN)). UK legislation deals only with administrative issues.
- The VAT implementing legislation ([LINK](http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32011R0282&from=EN)) that deals with the implementation of certain aspects of the Principal VAT Directive.

As regards the first, ultimately it seems likely that it will be necessary and desirable to have UK primary legislation to implement a UK customs duty. Nevertheless, because it imposes taxation, it would be inappropriate to legislate any Brexit-related changes via secondary legislation.

The implementing regulations are ostensibly not contentious and therefore capable of implementation in UK law via secondary legislation.

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15.16 The important over-arching issues in mirroring EU requirements in UK law after Brexit will be, firstly, to clarify which version of the European legislation the Government intends to follow (namely what happens should a Directive or Treaty subsequently be amended) and secondly, what position is to be taken on the decisions of the Court of Justice as to the proper interpretation of that European legislation. If decisions have arisen before Brexit, presumably Parliament intends to respect that interpretation of the European law unless it expressly introduces legislation to the contrary. However, it needs to be clarified what position the UK will take if there are interpretative decisions of the Court after Brexit but relating to the European legislation that Parliament has decided to reflect in the GRB. We believe consideration should be given to the inclusion of more explicit purposive explanations both in the legislation and the explanatory notes to address this issue.

16 Changes to the procedures related to Brexit legislation

16.1 Question 13: Do you envisage that any changes will be required to procedures related to the delegation of powers or secondary legislation, to cope with the legislation likely to be required as a result of Brexit?

16.2 Given that the legislation will be required to deal with over 40 years of legislation covering subjects such as taxation, consumer law, employment law and environmental law to name but a few, it will be necessary to adopt an approach that is practical and founded in reality.

16.3 Nevertheless, Brexit should not be an excuse to allow a reduction in rights that UK citizens enjoy vis-à-vis the UK government merely because of the huge amount of detail that needs to be dealt with.

16.4 Accordingly, as hinted at by questions 7 and 8 above, it may be necessary to ensure that Parliament is able to intervene and amend, delete or delay secondary legislation that may have an impact on people’s rights.

17 The Chartered Institute of Taxation

17.1 The Chartered Institute of Taxation (CIOT) is the leading professional body in the United Kingdom concerned solely with taxation. The CIOT is an educational charity, promoting education and study of the administration and practice of taxation. One of our key aims is to work for a better, more efficient, tax system for all affected by it – taxpayers, their advisers and the authorities. The CIOT’s work covers all aspects of taxation, including direct and indirect taxes and duties. Through our Low Incomes Tax Reform Group (LITRG), the CIOT has a particular focus on improving the tax system, including tax credits and benefits, for the unrepresented taxpayer.

The CIOT draws on our members’ experience in private practice, commerce and industry, government and academia to improve tax administration and propose and explain how tax policy objectives can most effectively be achieved. We also link to, and draw on, similar leading professional tax bodies in other countries. The CIOT’s comments and recommendations on tax issues are made in line with our charitable objectives: we are politically neutral in our work.
The CIOT’s 18,000 members have the practising title of ‘Chartered Tax Adviser’ and the designatory letters ‘CTA’, to represent the leading tax qualification.
Introduction

1.1 The Chartered Institute of Taxation (CIOT) is pleased to be able to comment on the Hansard Society’s paper on Delegated legislation. We think this is a very timely addressing of an issue that is becoming ever more important.

1.2 The CIOT is primarily concerned with taxation; accordingly, our comments are almost wholly geared to our experience with tax law.

1.3 We start with some general comments and then comment against the questions raised in the (commendably brief) discussion paper. In keeping with the brevity of the paper, we have kept our own comments relatively short.

General comments

2.1 The CIOT has always argued that tax laws should be enshrined in primary legislation as far as possible. Taxpayers should be taxed by the plain words of the statute, not by intention or practice.

2.2 Legislation should be the result of proper, full consultation so that it is developed to take into account the technical and practical issues that surround it. The quantity and quality of consultation over tax law changes has much improved in recent years. The government’s recent paper ‘Tax Policy Making – a new approach’ has been greatly welcomed and very much reflects the CIOT’s view on the need for, and benefits of, proper consultation. Unfortunately, this ‘best practice’ is not always followed.

2.3 Although we always prefer primary legislation, we accept that it is not possible to put all the tax rules into primary law. We accept the need for secondary legislation.

2.4 We also have longstanding concerns about the poor scrutiny that secondary legislation receives both by experts and by Parliament. Thus, we were heartened by the commitment in the Tax Policy Making document to include secondary legislation in the consultative process – at least to the extent of regularly exposing Statutory Instruments (SIs) in draft for comment.

This has happened more than used to be the case with, we think, beneficial results on all side. The time available for comment on draft SIs is, though, often rather short.

2.5 Scrutiny of revised drafts, following amendment, can be negligible. Revised versions are often only published when they are laid before Parliament, meaning that scrutiny by experts of late changes is often non-existent or ‘up against the wire’ (assuming they actually manage to see the laying of the SI in time). At that stage, there is no formal route for raising concerns or inputting to MPs who may well be completely
unaware that the SI is in any way controversial.

2.6 We have concerns about what seems to be arbitrary dividing lines between what goes in primary legislation and what goes in secondary. Using SIs to set commencement dates; adjust monetary limits; and lay out administrative routines seems sensible. Using an SI to make significant changes to taxable boundaries – the current proposals on addressing VAT anomalies and the introduction of a cap in the enactment of Extra Statutory Concession (ESC) C16 are cases in point – seems inappropriate.

2.7 We also have very serious concerns about the granting of very significant powers in primary legislation to make regulations. These are exemplified in what are often termed ‘Henry VIII’ clauses. We note two particular instances:

1. The current Scotland Bill, at clause 25, introducing new s80G gives the Treasury power to amend virtually anything to do with Scottish income tax – even retrospectively – seemingly without reference to the Scottish Parliament.
2. Much of the recent modernisation of HM Revenue and Customs’ (HMRC) powers contain standard formulations that give wide powers to change the primary laws. Examples include sections 122(4)&(5) and 123(4)&(5) FA 2008; sections 106(4)&(5) and 107(4)&(5) FA 2009 and have been argued to be safeguards against errors in the primary laws but give powers that seem well beyond what is appropriate or necessary.

2.8 We can also accept that secondary legislation can be appropriate to allow rules to be developed through thorough consultation when that consultation does not fit with the rigid Finance Bill timetable. The Debt Cap legislation is an example, as is Clause 219 of the current Finance Bill on Financial sector regulation.

2.9 Overall, it seems to us that taxation is something that should be controlled actively by Parliament: and when major changes are made, that control should be genuinely exercised. Even the ‘affirmative’ basis of SIs is inadequate for significant changes to the tax system.

2.10 One particular problem with tax law is the lack of involvement of the House of Lords in the main legislative process. We have always believed that there is scope for the Lords to have greater involvement in tax lawmaking, without eroding the essential primacy of the Commons. It may be that consideration of secondary legislation offers scope for this: if the secondary law being contemplated seems to be outwith the Lords’ limited remit on taxation (which might be termed administrative matters) that could be a signal that the proposed SI is beyond what is appropriate for secondary law.

2.11 A model that we think is worth considering for extension into other sectors is the Social Security Advisory Committee (SSAC)\textsuperscript{8}. This is a body established with a formal mandate and a good, wide membership. It has, we understand, the following broad features:

- In principle SSAC can look at any area of social security law, though they can only look informally at SIs laid within six months of the primary Act (on the basis that such SIs should reflect the Act);
- The Secretary of State has to submit draft regulations to SSAC, which

\textsuperscript{8} http://ssac.independent.gov.uk/index.shtml
considers whether the regulations will meet the objectives stated and the aims of the Act;
- The SSAC can do formal consultation with other bodies – and the Minister cannot move ahead with the regulations whilst such consultation is taking place;
- SSAC report on their findings and make recommendations; the report is placed in the House of Commons library. They liaise closely with the Works & Pensions Committee and the Merits Committee; and
- The government has to formally respond to the SSAC reports.

3 The delegation of power: primary or secondary legislation?

3.1 *A1) Is there clarity about how and why decisions are made about what provisions go into primary and what go into secondary legislation? Is it possible for Parliament and others to influence this process effectively?*

We think there is little clarity; presumably decisions are taken during the development process of new provisions and when parliamentary counsel are instructed. There seems no reason why indications are not given within consultation documents of areas/issues that might be in secondary legislation, thus allowing some debate.

3.2 *A2) Are there instances where you believe the delegation of power in a bill has been particularly inappropriate? If so, why, and what were the consequences?*

The main consequence is that secondary legislation gets less debate, less publicity and thus can be much less well understood. The majority of the new HMRC powers and penalty provisions have been brought into effect by SIs; although we accept that this is an appropriate use of secondary legislation, there has been much confusion about what starts when. There should have been greater efforts to publicise what was going on – tabling and passing an SI is not enough.

3.2.1 SIs themselves sometimes grant a power to a Department such as HMRC to issue directions which have the force of law. Such directions only need approval by two HMRC Commissioners. For particularly technical areas we can see the merit in this process. However, there is no requirement for the draft directions to be scrutinised. As with SIs, even if a draft is laid open to scrutiny it can be amended (without exposing it to the public) before it is approved. The effect of this is that insufficient scrutiny can lead to inappropriate directions being issued.

3.2.2 An example of this is the directions in relation to regulations 3(7) and 10(3) of the Income and Corporation Taxes (Electronic Communications) Regulations 2003 (SI 2003/282) in respect of mandatory filing of Corporation Tax returns online. The version made on 6 January 2010\(^9\) provided for agents to attest to the veracity of their clients’ returns submitted online, causing consternation amongst tax agents. Following pro-active input by the CIOT, the directions were revised. The amended version was made on 8 December 2010\(^10\) and applied from 4 January 2011. Proper advance scrutiny may have prevented the need for change. There is no warning on HMRC’s website that the earlier directions they only apply up to 3 January 2011.

\(^9\) [http://www.hmrc.gov.uk/ebu/mandatory-online-filing.pdf](http://www.hmrc.gov.uk/ebu/mandatory-online-filing.pdf)
\(^10\) [http://www.hmrc.gov.uk/ebu/mandatory-online-filing-version04012011.pdf](http://www.hmrc.gov.uk/ebu/mandatory-online-filing-version04012011.pdf)
3.3 **A3) Would the adoption of a set of criteria/standards be helpful in order to establish a more consistent approach to the delegation of power within primary legislation in the future?**

Yes; there are some good examples in the current Finance Bill – for example, schedule 24 on the new Machine Games Duty allows, at para 24, regulations to be made about registration. Importantly, it goes on to say what the regulations will in effect cover so that the secondary rules are not completely unconstrained.

3.4 **A4) Should the volume of delegated legislation be reduced? Is there any realistic prospect of doing so?**

This question cannot be considered without considering the volume of legislation as a whole. With a 670-page Finance Bill – with some more legislation to come in secondary rules the only possible conclusion is that we have too much tax legislation at the moment.

3.5 **A5) Are there grounds for the wider use of delegated powers to free up Parliament to concentrate on the key issues of principle in primary legislation?**

Yes – but again this is a wider issue than just secondary legislation. There are strong arguments for making full and proper consultation over all tax legislation compulsory, so that parliament concentrates on principles, leaving details to be hammered out between experts on all sides. That process would need to be monitored by Parliament of course. We cannot have a position where significant tax legislation effectively escapes parliamentary scrutiny of any kind.

4 **Constitutional concerns**

4.1 **B1) Should ministers have the power to amend or repeal primary legislation by Order, even where that primary legislation does not itself include delegated powers to allow this?**

No

4.2 **B2) Has Parliament in recent years granted delegated powers in a way that is bordering on the unconstitutional? Was it justified in doing so?**

As noted in our general comments, we have serious concerns about the use of ‘Henry VIII’ clauses.

4.3 **B3) Is Parliament and the public sufficiently aware of the scope and nature of the delegated legislation that is made by ministers?**

Probably not; the lack of publicity for most secondary legislation means there is limited awareness of what is going on.

4.4 **B4) Is a review of delegated powers now warranted to identify those powers that might be deleted and those that should be implemented? If so, which body(s) would be best placed to carry out such a review?**
It is probably more a case of developing guidelines for what is and is not suitable for secondary legislation; and requiring consultation – at a minimum exposure of the proposed SI in draft, and any amended version prior to laying before Parliament.

5 Drafting and consultation

5.1 C1) Is the consultation process for delegated legislation effective in relation to (i) affected stakeholders and (ii) the ordinary citizen? If not, how might it be improved?

It is not realistic to expect the ordinary citizen to participate in most consultations. The important thing is to make sure that consultation over secondary legislation of any significance takes place, with proper efforts made to involve relevant bodies. To be fair, this is happening more regularly in the field of taxation, but it is still something at the gift of (usually) HMRC rather than being an established norm.

5.2 C2) Should Statutory Instruments always be published in draft? How useful is draft delegated legislation in practice – do drafts prove to be an accurate reflection of the content of a Statutory Instrument? Should Parliament more often demand to see draft delegated legislation before passing bills giving delegated powers to ministers?

As already noted, we think that SIs should invariably be published in draft for consultation – and that consultation should be over a sensible period (eight weeks is mentioned in the Tax Policy Making paper). It is impractical to require a draft of delegated legislation at the time of the Bill being debated as we accept that the practical aspects of the rules – the sort of things we accept SIs should be used for – will often be under development. However, once a Finance Bill has been drafted Parliamentary Counsel could address certain key SIs so that a draft might be available during the course of later readings of the Bill. In addition, it should surely be a requirement that the Minister makes a statement explaining what the secondary legislation will cover, so that Parliament can have assurance that they are not giving unfettered powers. That statement would cover the sort of ground set out in provisions such as Finance (No 4) Bill 2012, schedule 24, para 24 (Machine Games Duty).

5.3 C3) Is the level of explanatory/supporting information provided to Parliament about a Statutory Instrument sufficient? How might the provision of such information be improved?

See our comments in relation to the previous question. Also, unlike with the Finance Bill procedure, there is very limited scope for those experts with concerns about a draft SI to put forward comments to MPs on the relevant committee. Names of committee members due to vote on an affirmative SI are not readily available in advance of the vote, the date of which can be difficult to determine.

Again, referring to the enactment of ESC C16, the definition of distributions straddling the implementation date that are caught by the provisions is ambiguous. Better advance scrutiny or access to MPs to discuss this may have resulted in better legislation. Coupled with this, MPs’ inability to amend draft SIs presents a logistical problem – the tendency is to approve SIs rather than refer them back to the department, as demonstrated by the proportion that is accepted. This can give the impression of mere ‘rubber stamping’.
5.4  **C4) How effective are government departments at planning and managing the preparation and introduction of SIs in their policy area? What criteria would constitute good practice in the management of SIs?**

Difficult for us to say; but as many tax SIs come out very close to their implementation date without having been exposed in draft, this does suggest that HMRC/HMT have difficulties in managing the flow.

6  **Scrutiny**

6.1  **D1) Is there any objective way of pre-determining the type of parliamentary scrutiny that should be extended to particular types/categories of delegated legislation? If so, how, and what types/categories of delegation should it extend to?**

The key split should be between instruments that simply develop administrative routines and those that actually change the law, lay down how compliance with the law is to be effected, or impose penalties.

6.2  **D2) Should the distinction between affirmative, negative and super-affirmative procedures simply be abolished and replaced with a different system of scrutiny? If so, what might that new system look like?**

We can accept the current categorisation – but there need to be better rules about which instruments fall into which category. It might be better to look at the whole procedures surrounding SIs. Requiring exposure in draft of regulations that have been developed in line with clear skeletons laid down in primary legislation would mean there is genuinely less need for parliamentary scrutiny of any kind, especially if there is better control about preventing secondary legislation being used for significant changes to the law.

6.3  **D3) Could more scrutiny through the super-affirmative process offer a usefully different and more inclusive way of legislating outside the pressures of the parliamentary timetable?**

Possibly – but see our earlier comments about the need to look at the process of developing and effecting tax law in the round and indeed simplifying and reducing the volume of tax law.

6.4  **D4) Should there be a greater role for external experts in the scrutiny of delegated legislation? How might such external scrutiny function? How would parliamentary accountability be maintained?**

Yes, very definitely – consultation on draft SIs should be compulsory, with proper time allowed for comment and consideration of views, plus eventual reporting back by the government of how significant comments were dealt with.
6.5  **D5) How might scrutiny of delegated legislation by Parliament’s committees be improved?**

Apart from the comments above, we think there should be a requirement in tax for HM Treasury and HMRC to report on the quantity on secondary legislation used, the extent of prior consultation and an analysis justifying why secondary legislation was appropriate. That report might go to the Treasury Committee.

7  **Conclusion**

7.1  We would be happy to discuss our views further if that would be helpful.

The Chartered Institute of Taxation
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