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# National Insurance Contributions Bill

## Bill 53 of 2005-06

In the *Pre-Budget Report* published on 2 December 2004 the Government announced measures to remove the ability to avoid income tax under the Pay As You Earn (PAYE) system and National Insurance contributions (NICs) on certain remuneration arrangements. The Government also stated that it was prepared to introduce legislation to outlaw any avoidance schemes of this type not yet identified, and that, if necessary, this legislation would be effective from that day.

To this end the *National Insurance Contributions Bill* 2005-06 was introduced in the Commons on 11 October 2005. It is expected to be debated on second reading on 27 October 2005. The Bill contains the power to make anti-avoidance NICs regulations effective from 2 December 2004, the same date as the anti-avoidance tax measures. It also extends the tax avoidance disclosure rules – introduced in Budget 2004 – to NICs avoidance arrangements, and ensures employers cannot pass their NICs liability on past payments of share-based earnings to their employees.

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# Summary of main points

In the 2004 Budget the Chancellor Gordon Brown announced the introduction of a new regime whereby direct tax avoidance schemes would be required to be disclosed to the revenue departments.[1] Similar rules would be introduced for businesses that used or marketed VAT avoidance schemes. These provisions were enacted under the *Finance Act 2004*: specifically part 7 (direct tax) and s 19 & schedule 2 (VAT). Prior to this there had been speculation that the Government might introduce a 'general anti-avoidance rule' – or GAAR – to tackle the problem of tax avoidance.[2]

In the *Pre-Budget Report* in December 2004, the Government stated that the disclosure rules were "already achieving their purpose of allowing earlier and more targeted action against avoidance schemes" and that it intended "to continue to use disclosures received to counter avoidance and to ensure improved design of tax policy in the future."[3] In a written statement the Paymaster General, Dawn Primarolo, announced measures to be included in the 2005 Finance Bill to counter certain contrived remuneration arrangements that had been revealed by the new regime. The Minister went on to state that as the Government was "not always able to anticipate the ingenuity and inventiveness of the avoidance industry", she was "giving notice of our intention to deal with any arrangements that emerge in future designed to frustrate our intention that employers and employees should pay the proper amount of tax and NICs on the rewards of employment."[4]

The *National Insurance Contributions Bill* 2005-06 was introduced in the Commons on 11 October 2005,[5] and published the same day along with explanatory notes [Bill 53-EN]. The date for its second reading is 27 October.[6] Further information on the Bill is collated on the department's internet site.[7] This includes a series of frequently asked questions of the Bill, one of which is:

> Q2. Why is the Bill necessary?
> A. It is an essential element in the Governments intention to stop this avoidance activity permanently. The Bill builds on the statement and the anti-avoidance provisions introduced in Finance Act 2005 to ensure there is a serious and credible deterrent against future avoidance activity … Currently, a NICs liability can only be charged from the date NICs regulations are made (except in limited circumstances where the regulations can be backdated to the beginning of the tax year). This is in contrast to tax where liability can, if the legislation so provides, be applied back to the date of an announcement. The Bill is necessary because unlike income tax, there is no annual equivalent of the Finance Bill for NICs. This Bill will ensure that the Government can deal with any arrangements that emerge in future that are designed to frustrate its intention that employers and employees should pay the proper amount of tax and NICs on the rewards of employment.

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1 HC Deb 17 March 2004 c 329

2 Further background on this issue is given in a Library standard note: "Tax avoidance: a 'General Anti-Avoidance Rule' (GAAR) and disclosure requirements" SN/BT/2956, 21 October 2005.

3 Cm 6408 December 2004 para 5.88

4 HC Deb 2 December 2004 cc 44-46WS

5 HC Deb 11 October 2005 c 169

6 HC Deb 20 October 2005 c 985

7 http://www.hmrc.gov.uk/employers/nicbill05.htm

A more technical summary of the Bill is given in a press notice issued by HM Revenue & Customs (HMRC) when the Bill was published:

> Clauses 1 to 4 contain provisions that will enable HMRC to make regulations that may take effect back to 2 December 2004 if necessary. The new power may only be used where income tax provisions that relate to employment income are effective from a date before the Royal Assent of the Finance Bill. So that any prior payments made under a tax and National Insurance contributions (NICs) avoidance scheme or arrangement (back to 2 December 2004 if necessary) can be treated as earnings for NICs purposes as if liability arose at the time the payment was made.
>
> Clauses 5 and 6 ensure that joint NICs Agreements and Elections can only be used for their intended purpose. It will specifically prevent the use of these arrangements by employers who seek to recover from their employees any NICs liability that may be imposed on past payments under the powers being introduced by this Bill. Clause 7 provides a power for regulations to apply the tax disclosure rules to NICs proposals and arrangements as they apply to income tax schemes.[8]

The department has also published a regulatory impact assessment, and this summarises the costs and benefits of the Bill as follows:

- Employers that have engaged in avoidance will have to submit supplementary end of year returns of NICs now payable and that we estimate 500 employers and 10,000 employees may be affected, incurring additional costs estimated not to exceed around £3,000 per employer.
- The cost of processing these additional returns for HMRC is estimated to be £20,000 in additional manpower costs.
- We estimate 21,000 small businesses, and potentially a further 90,000 self-employed persons, specialising in accountancy and tax will incur learning and familiarisation costs but these costs will be negligible.
- We estimate that this measure will secure an additional £95 million in NICs in 2004-05 and £240 million per annum thereafter.
- We have evidence that that some employers may have abandoned plans to channel bonuses through these schemes and instead paid cash bonuses following the Paymaster General's announcement of 2 December 2004.[9]

National taxation (including NICs) remains a reserved matter. As noted, regulations made under the Bill may change NICs liability back to 2 December 2004. In addition regulations made under the Bill may make consequential changes to contributory benefit and statutory payments. Both contributory benefits and statutory payments are reserved matters with respect to Scotland and Wales, but they are transferred matters under the Northern Ireland Act 1998. Changes made to these payments by regulations made under the Bill would have to be agreed to by the relevant Northern Ireland department.[10]

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[8] HM Revenue & Customs press notice NAT37/05, *National Insurance Contributions Bill*, 11 October 2005

[9] HM Revenue & Customs, *RIA: National Insurance Contributions Bill*, October 2005 pp 11-12. This is available at: http://webarchive.nationalarchives.gov.uk/20090108195357/http://www.hmrc.gov.uk/ria/ria-nicbill05.pdf

[10] Bill 53-EN, 11 October 2005 para 15

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# I Background

## A. Tax avoidance on employment income

In July 2005 Dave Hartnett, Director General at HM Revenue & Customs (HMRC), gave a speech as part of the 75th anniversary celebrations of the Chartered Institute of Taxation. Mr Hartnett spoke about tax avoidance on employment income – how the tax authorities had tackled the issue over the years, and the rationale for the latest developments in this area – in particular, the statement by the Paymaster General alongside the 2004 *Pre-Budget Report* (PBR) that, if necessary, the Government would introduce legislation to tackle NICs avoidance, backdated to 2 December 2004.[11] As he explained, in general terms avoidance schemes in this area seek to do two things:

> First, to establish that the transfer of value from employer to employee, or from 3rd party to employee on behalf of the employer, is not something that requires the employer to account for tax under PAYE. It's usually accepted that the employees should pay tax on what they get – but that it should be accounted for under self assessment some considerable time later (or in earlier years included in their Sch E assessment).
>
> Second, and more important, that the transfer of value to the employee does not represent a payment of earnings to an employed earner – so that the charge to National Insurance, in particular the charge on the employer, is avoided. It is generally the potential NICs advantages that are the main driver for schemes.[12]

It may be helpful to say a word about NICs on employment income. Class 1 contributions are paid by both employees and employers on the employee's earnings - the employee's share is known as the primary contribution, the employer's as the secondary contribution. At present primary contributions are payable at 11% of earnings above £94 up to £630 per week (the upper earnings limit - UEL) and 1% of earnings above this limit. Secondary contributions are payable at 12.8% of *all* earnings above £94 per week.[13] As Mr Hartnett explained, a key development in this type of tax avoidance was the removal of a cap on employer contributions in 1985/86. Prior to this employers paid NICs on earnings only *up to* the UEL, not above it:

> For as long as NI contributions on earnings stopped being payable at the UEL, there wasn't much mileage in trying to get round them – the amount of NICs at stake was capped and the tax advantage represented a deferral of payment rather than a way out of paying … [The removal of the cap] dramatically changed the potential amounts to be gained by avoiding the charge. And with no charge to

[11] Dave Hartnett (HMRC), Address to CIOT as part of 75th anniversary celebrations, (hereafter *CIOT speech*) 19 July 2005.

[12] *CIOT speech*, July 2005 p 5

[13] Annex A to the explanatory notes to the *National Insurance Contributions Bill* give more detail (Bill 53-EN p 14). For a full description of NI see, Government Actuary's Department, *Quinquennial Review of the NI Fund* Cm 6008, October 2003 pp 73-92. At http://web.archive.org/web/20050302002022/http://www.gad.gov.uk/Publications/docs/QR5-FullReport.pdf

> NICs on payments in kind, schemes for remunerating employees in non-cash form became popular.[14]

Over the next twenty years the actions of the authorities and the accounting profession followed a clear pattern: "legislative action, new schemes designed to circumvent it, further legislative action and so on. It is clear that the history is one of squeezing the balloon in one area only to see a new bulge emerge in another."[15] Mr Hartnett's speech gives a detailed and quite technical chronology, though he gave a shorter, simpler version in evidence to the Lords Economic Affairs Committee in June 2005:

> My Lord, I hope you will indulge me a short history lesson because I think it will help ... When the upper level for National Insurance Contributions was removed for employers in the late 1980s, there was a short period of tranquillity before the tax avoidance industry began to suggest to business there were ways of making rewards to employees without incurring NICs. Initially it was gold bars, fine wines, jewellery and various other things, which were payment in kind and were not caught by the National Insurance legislation. What the planners wanted to do was defer the operation of Pay As You Earn by transferring the income tax liability from the employer to the employee—the employee paid later than the employer—and to remove the liability of National Insurance Contributions.
>
> All the way through to 1994 there were various counter measures taken by Government to bring various things within the scope of National Insurance, and the fine wines and gold bars and all of this were outlawed. 1994 saw some legislation, described as the tradable assets legislation, which said that, if something could be readily turned into cash in terms, then it was within the scope of National Insurance and Pay As You Earn, but it had to be readily able to be turned into cash on some sort of market. We then saw schemes which involved oriental carpets, reversionary interests in trusts, shares—funny shares, if I can put it like that—and, my favourite, platinum sponge. If all the awards of platinum sponge made to employees had actually been given in the jars that platinum sponge come in, there would have been none for the catalytic converters that go into all of our cars, so vouchers and all sorts of things were used. I hope you will forgive me for putting it as colourfully as I have, but I wanted to give a sense to how odd this period was in terms of forms of remuneration.
>
> The legislation which I described to Lord Roper earlier on in 1998,[16] the readily convertible assets legislation, which was quite simply about the potential to turn into cash, ended most of these schemes. But then what came were employee benefit trusts, which were usually offshore, and in that way whatever went into the employee benefit trust generally did not attract capital gains tax if it rose in value, and they became a favourite vehicle for remunerating employees, particularly City bonuses. That was stopped by saying there was no deduction in profit for tax purposes for business if a taxable payment was not paid out in the employee benefit trust, so that was shut down. Then we saw a new range of funny shares and securities paid by way of remuneration, and that really brings me to the Paymaster's statement of 2 December 2004.[17]

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[14] *CIOT speech*, July 2005 pp 5-6

[15] *CIOT speech*, July 2005 p 16

[16] [for more details, see Mr Hartnett's response to Q94]

[17] *First report: the Finance Bill 2005, 4 July 2005 HL Paper 13-II* 2005-06 Q109 pp 46-7

Over this period both Conservative and Labour Governments introduced legislation to frustrate the use of these avoidance schemes. For example, provisions were introduced in April 1995 to deal with payments made in the form of tradeable assets, and in December 1996 with payments made in shares and share options in the employee's own company. In April 1995 the then Secretary of State for Social Security, Peter Lilley, stated, "I shall act whenever necessary where there is evidence of devious practice whose main objective is to avoid national insurance contributions" and that he had "asked the Contributions Agency [which administered NICs at that time] to continue to monitor closely any further efforts to develop practices whose main aim is to avoid NI contributions."[18] Announcing the second of these changes in December 1996, Oliver Heald said "we are committed to acting against exploitation of the national insurance system by employers who undermine the contributory principle by avoiding paying their proper share of contributions on the earnings they pay to their employees."[19]

As Mr Hartnett commented in his July 2005 speech, "there has been political consensus that avoidance of tax and NICs on the rewards of employment – often in the context of high City bonuses – is something to be stopped in the interests of fairness and because of the amounts of money at stake."[20]

## B. Budget 2004 : the disclosure rules

In the first Budget following the Labour party's victory in the General Election in May 1997, the Chancellor Gordon Brown announced a review of the Government's approach to tax avoidance:

> A Government committed to the proper funding of public services will not tolerate the avoidance of taxation, and we will be relentless in our war against tax avoidance. I have instructed the Inland Revenue to carry out a wide-ranging review of areas of tax avoidance, with a view to further legislation in future Finance Bills. I have specifically asked the Revenue to consider a general anti-avoidance rule.[21]

In October 1998 the Inland Revenue consulted on the introduction of a general anti-avoidance rule, although the Government announced in the Budget the following year that it would not pursue the idea.[22] In the run up to the 2004 Budget there was speculation the Government might return to this idea, amid concerns about the growing extent of tax avoidance; in the event the Chancellor announced a new disclosure regime:

> It has been put to me that we should now introduce a general anti-avoidance rule. I do not at this stage intend to introduce this but I will today close loopholes in partnerships, finance leasing and VAT, and I will make it a requirement—as in the

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18 HC Deb 5 April 1995 c 1228W

19 HC Deb 4 December 1996 cc 713-4W. Mr Heald was Parliamentary Under-Secretary of State at the Department of Social Security at this time.

20 *CIOT speech*, July 2005 p 4

21 HC Deb 2 July 1997 cc 311-312

22 Further details are given in Library standard note SN/BT2956, cited above.

> United States of America—that accountancy firms and those promoting these schemes register them with the tax authorities: the Inland Revenue.[23]

The Government also proposed a similar disclosure regime for VAT:

> Budget 2004 introduces new measures to improve transparency in the tax system. The rules, aimed at those marketing and using certain tax avoidance schemes and arrangements, will allow early detection of such schemes and enable more effective targeting of avoiders. As a result of these measures:
>
> - promoters who market schemes and arrangements that meet certain criteria for direct taxes will be required to disclose details of these schemes to the Inland Revenue; and
> - businesses with an annual turnover of £600,000 or more using VAT avoidance schemes that appear on a statutory list, and businesses with an annual turnover of £10 million or more using VAT arrangements that meet certain criteria, will be required to notify HM Customs and Excise.[24]

The two schemes were enacted under the *Finance Act 2004*: specifically part 7 (direct tax) and s 19 & schedule 2 (VAT).[25] Dave Hartnett, Director General at HRMC, gave a good introduction to the new regime in evidence to the Lords Economic Affairs Committee in April 2004:

> Essentially the disclosure measures for both direct and indirect tax are about providing the Inland Revenue and Customs & Excise with earlier information about tax avoidance schemes and arrangements than we have ever had before to enable us to analyse them much earlier and, where appropriate, for us to provide advice to Government as to whether they should be countered or not. … It is about increasing transparency in a non-judgmental way. I say that because it is about exposing the scheme rather than any individual or corporate, trust or anyone else actually using the scheme. The disclosure requirement will be about the product or the package that has been put together. We also hope that in here will be a disincentive to the creation and use of contrived and elaborate schemes of the sort that both Customs and ourselves see … We have tried very hard to learn from other fiscal authorities, particularly in the United States, and, as the Chancellor himself said, this measure falls a very long way short of being a general anti-avoidance rule. It is about providing transparency … we do not think there is anything in this measure which will in any way inhibit the giving of normal, plain vanilla advice (if I may call it that) by tax professionals.[26]

To illustrate the purpose of the new rules Mr Hartnett gave three examples of past avoidance schemes:

> The first scheme I want to mention was one devised for the benefit of large corporates and in particular multinational enterprises. It involved stock lending where stock is lent one way and cash comes back the other way. It used an artificial scheme for helping to finance a multinational enterprise in a way that

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[23] HC Deb 17 March 2004 c 329

[24] *Budget 2004* HC 301 March 2004 para 5.84

[25] The provisions were debated in Committee: SC Deb (A) 6 May 2004 cc 69-91 (VAT) & 22 June 2004 cc 703-740 (direct tax). Guidance on the rules is published at: http://www.hmrc.gov.uk/aiu/index.htm

[26] *The Finance Bill 2004*, 25 June 2004 HL paper 109-II 2003-04 Q76 pp 16-17

> generated huge profits in the multinational enterprise but these were covered by losses which it already had, and it created very significant losses for the funding bank and it therefore got a reduction in its own corporation tax. This was a scheme marketed in 2001. I went back a little way for the reason I am just going to come to. We saw one case, and I hope this gives you a feel for the issues, where tax savings of well in excess of £150 million were to be split equally between the multinational enterprise and the bank, effectively creating a success fee of £75 million for the bank for arranging this. This was stopped in the Finance Act 2001.
>
> The second example is much more recent and there has been some mention of it in the media—what has been called the gilt strip scheme. This was marketed to and used by wealthy individuals in conditions of some secrecy. The aim was to create and sell options over gilt strips to generate income losses matched by gains that were outside the capital gains tax regime, and the losses were then used to match against other income and reduce tax liability. For some people—and we have not seen the relevant tax returns yet—we understand the aim was to reduce it to nil, so they would pay no tax. It was sold widely by major accounting firms for about six months in the summer of 2003, maybe a little earlier as well, and stopped by the Government by an announcement on 15 January.
>
> The third example is of a scheme that was marketed pretty narrowly and in conditions of even more secrecy to about 30 multinational or other large corporate enterprises. It involves tax efficient, off-market swaps, and I hope you are going to spare me explaining fully what those are, but I am going to give you the impact if I may. These have significant premiums which are front-loaded and those premiums were claimed to be deductible against corporation tax profits. Normally swaps are flat, if I can put it that way, in economic terms and in accounting and tax terms. It was sold mainly by one major accounting firm from January to September 2002 when it was blocked. I hope it will help the committee if I try and put a price tag on the last two. We think that the gilt strips scheme has cost the Exchequer around £200 million. We cannot put a better figure on that until we have seen the individual tax returns. The tax efficient off-market swaps scheme could well have cost a billion to the Exchequer in the time before it was stopped.[27]

He went on to share an anecdote to show “the sort of issue we are wrestling with here”:

> I want if I may to read this short e-mail, which I think will give you some insight into how this industry works. It is an e-mail from a tax planner, I think a lawyer. I am not going to name him because I am not absolutely certain. It was sent around the City just before four o'clock on Budget day this year, so after the Chancellor had sat down. It is headed, "A complete relief from capital gains tax": "Our strategy, which provides complete relief from tax or capital gains of individuals, companies and most trusts, has survived the Budget."—I am tempted to say, "no longer"—"The proposals, which have been announced for the future, to prevent the use of tax planning schemes generally, however, represent a threat to the effectiveness of all the tax planning in the coming months."—and I think the reference is to disclosure schemes. "Therefore, if you have a client who

[27] HL Paper 109-II 2003-04 Q76 pp 16-17

> or which has realised or will realise gains of £500,000 or more, you should contact us immediately so as to implement our strategy before the taxpayer's ability to benefit from tax planning strategies is curtailed." I wanted to share that with you as an illustration of how fast this industry can react.[28]

In the *Pre-Budget Report* (PBR) in December 2004, the Government stated that the disclosure rules were "already achieving their purpose of allowing earlier and more targeted action against avoidance schemes" and that it intended "to continue to use disclosures received to counter avoidance and to ensure improved design of tax policy in the future."[29]

## C. The Pre-Budget Report 2004

In the December 2004 PBR the Chancellor announced further anti-avoidance measures "on contrived remuneration arrangements"[30] Details were given in a press notice:

> A number of avoidance schemes that seek to sidestep the rules that deal with rewards paid to employees in the form of shares and other securities are being stopped with effect from today. Employers are using these schemes to avoid paying the proper amount of income tax and National Insurance Contributions, particularly in relation to large bonuses in the City.
>
> The measures will:
> - extend the definition of securities to include certain insurance contracts;
> - tighten the rules relating to securities that have restrictions or rights of conversion placed on them; and
> - expand the provisions relating to benefits from employment-related securities.[31]

Alongside this announcement the Paymaster General made a written statement on the Government's approach "to dealing with any future attempts to frustrate its intention that employers and employees should pay the proper amount of tax and National Insurance Contributions on rewards from employment." It is reproduced in full below:

**Finance Bill**

> **The Paymaster General (Dawn Primarolo):** This Government are determined to ensure that all employers and employees pay the proper amount of tax and NICs on the rewards of employment, however those rewards are delivered. Despite the efforts of successive Governments of all persuasions over several years, we continue to be presented with ever more complex and contrived attempts to avoid paying tax and NICs on rewards from employment, particularly in relation to bonuses in the City. In the most recent year for which we have figures, well-

28 HL Paper 109-II 2003-04 Q76 pp 16-17

29 Cm 6408 December 2004 para 5.88. Mr Hartnett gave some examples of the schemes disclosed under the new rules in his *CIOT speech* pp 20-21. For more recent comment see, "Tax avoiders on the run from Brown", *Observer*, 23 October 2005.

30 HC Deb 2 December 2004 c 786

31 HM Treasury Pre-Budget Report press notice PN3, 2 December 2004

rewarded individuals receiving bonuses of at least £1.5 billion in total sought to avoid paying their fair share of tax and NICs.
The disclosure rules in Finance Act 2004 have revealed that this kind of avoidance is still rife. Without prompt and decisive action we think there could be up to £2 billion paid this year in bonuses on which the amount of tax and NICs properly due is at risk, as a result of increasing ingenuity and inventiveness of the tax avoidance industry. We cannot allow avoidance on this scale to continue. It is only right that everyone who should pay tax and NICs, does pay and that they pay their fair share when it is due. The overwhelming majority of employers and employees do pay their fair share. But for too long some employers and employees with the benefit of sophisticated tax advice have sought to avoid their responsibilities and to pass more of a burden onto the rest of us.

Early attempts at avoidance in this area took the form of paying bonuses and salaries in gold bullion, diamonds and fine wines. When these routes were closed, employers started to pay bonuses through shares and share options to reduce the amount of NICs they had to pay, avoid their obligation to operate PAYE, and reduce employees' tax bills. When, in 1998, assets readily convertible into cash were brought within PAYE, and NICs, avoidance schemes moved on to more complex arrangements. Despite extensive reforms to the tax legislation in 2003, employers and their advisers are continuing to devise and operate ever more contrived avoidance schemes. One such example of which Inland Revenue has learnt involves payment of a bonus to an employee in the form of dividends on shares in a specially constructed company. This avoids tax at 40 per cent. and employer and employee NICs.

The Inland Revenue will be challenging such arrangements in the courts where it is appropriate to do so. We cannot however await the outcome in the courts before taking action. We intend that from today both tax and NICs legislation should achieve our objective of subjecting the rewards of employment to the proper amount of tax and NICs, however the rewards are delivered. Taxpayers who contribute their fair share have a right to expect that others will also do so. We also want to make it plain that to the extent that legislation may still not achieve our objective in the face of continuing avoidance, we will ensure it does. To that end we will be including legislation in FB 05, effective from today, to close down the avoidance schemes we know about. A technical note explaining what we intend to do in FB 05 will be published today. We will also ensure that NICs is charged on these schemes with effect from today.

However, experience has taught us that we are not always able to anticipate the ingenuity and inventiveness of the avoidance industry. Nor should we have to. Our objective is clear and the time has come to close this activity down permanently. I am therefore giving notice of our intention to deal with any arrangements that emerge in future designed to frustrate our intention that employers and employees should pay the proper amount of tax and NICs on the rewards of employment. Where we become aware of arrangements which attempt to frustrate this intention we will introduce legislation to close them down, where necessary from today. This action will not affect employers and employees who organise their affairs in a straightforward and ordinary way—the vast majority. In particular, genuine employee share schemes and share option plans

> will not be affected. We continue to believe these make an important contribution to the Government's productivity agenda.[32]

As the Minister explained, details of the provisions to be included in the forthcoming Finance Bill were given in a technical note published by the Revenue.[33]

When asked about the genesis of the PBR statement, Dave Hartnett told the Lords Economic Affairs Committee, "I hope Treasury ministers will forgive me if I am about to use an inappropriate term, but I think they reached a stage of exasperation which any government would have reached with this, in that Pay As You Earn and National Insurance were not being accounted for in the way that it is intended."[34] In his speech to the CIOT Mr Hartnett explained the new disclosure regime and the PBR statement taken together were "designed to change the rules of the game so that the gamekeeper is not left in the position of always being several steps behind the poacher."[35]

The *Financial Times* reported on the possible impact on the City:

> High-fliers could see their pre-Christmas bonuses slashed after Gordon Brown launched a crackdown on sophisticated tax avoidance schemes … Frank Hollmeyer, partner at Armstrong International, the executive search company, spelt out the losses some City stars could face. "Some of the higher paid staff will receive between 10 and 30 per cent of their bonuses in non-cash equity or options," Mr Hollmeyer said. "This move will have an impact particularly as it has happened quickly and bonuses will be paid at some banks in three weeks' time" … "They're holding a sword of Damocles over people," said David Cohen, a partner at Norton Rose, the City law firm. "They're saying you can be as clever as you like, but when we close the loophole, we reserve the right to do it retrospectively."[36]

Commentators raised concerns about the prospect of retrospective legislation and potential difficulties for employers. Stephen Quest, a tax partner at Grant Thornton, was quoted as saying, "This is unique; it's not happened before. It changes the relationship between the government and taxpayer. It's questionable whether it's legal and whether they will be able to enforce it."[37] Loughlin Hickey, UK head of tax at KPMG, said that the announcement "introduces a huge area of uncertainty for employers as they construct competitive pay packages,[38] though another partner at KPMG, Anneli Collins, observed, "it won't kill City bonuses, it will just mean people have to pay tax on them. But it is a miserable time to announce it, just before Christmas."[39] Certainly there was a consensus that this was a major development in the field of tax avoidance: Simon Philip, a tax partner at Deloitte, said, "we're approaching the end game. This comes very close to a

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[32] HC Deb 2 December 2004 cc 44-46WS

[33] Inland Revenue, *Avoidance and employment-related securities – proposals to amend Part 7 of ITEPA 2003: Technical Note*, 2 December 2004

[34] HL Paper 13-II 2005-06 Q109 p 47

[35] *CIOT speech* p 20

[36] "Chancellor's tough regime aims to shoot down bonuses for the City's high-fliers", 3 December 2004

[37] "Net tightens around bonus payments", *Financial Times*, 3 December 2004

[38] "Tax avoidance industry receives call to arms", *Financial Times*, 4 December 2004

[39] "Net tightens around bonus payments", *Financial Times*, 3 December 2004

general anti-avoidance rule."[40] In June 2005 Ashley Greenback of the Law Society gave evidence to the Lords Economic Affairs Committee, and was asked what impact the statement had had; he replied, "in the usual run up to Christmas you get a lot of bonus schemes from investment banks coming across your desk. If you are judging it in those terms the legislation was very effective in terms of reducing the numbers of those sorts of scheme in the employment-related securities area."[41]

In an opinion piece in the *Financial Times* David Cohen, a partner in the law firm Norton Rose, argued that the December 2004 statement could be very positive for the long term prospects of employee share ownership:

> Until now, purveyors of these schemes could arm themselves with an opinion from an eminent tax QC that dissected all the Revenue's arguments, on the basis of existing legislation, and concluded that the courts would most probably uphold the existence of the relevant loophole. That will now be cold comfort because, however rock-solid the technical arguments, there will be the gnawing fear that the goalposts will be moved. If this is indeed a turning point, it can only be welcomed by all those who believe in the value of genuine employee share ownership.

Mr Cohen also questioned the degree to which this move could be considered retrospective:

> The conundrum for the authorities has been how to clamp down on avoidance without causing collateral damage to the genuine employee share plans in which millions of employees participate. The avoiders were shrewdly aware of this when they selected shares as their weapons of choice. Government frustration at always having to use kid gloves when dealing with this particular type of avoidance has finally boiled over. In future they will use their weapon of last resort, retrospective legislation.
>
> To be fair, it is not retrospective in the full meaning of the word, which ought to be reserved, in the tax arena, for situations where taxpayers have been given no prior indication that an activity will trigger a liability. In this case, anyone who in future sets out to avoid tax on remuneration by using convoluted share-related arrangements has been clearly warned that the attempt will be futile. This is contentious territory, though any suggestion that the European Convention on Human Rights may be breached probably owes more to the self-preservation instincts of certain tax "schemers" than to a disinterested legal analysis.[42]

In their report on the PBR the Treasury Select Committee discussed the reactions there had been to Ms Primarolo's written statement:

> 88. We note and welcome the evidence that the new tax avoidance disclosure regime put in place at the time of the 2004 Budget is working well and is having an effect both in terms of allowing the revenue departments to close off avoidance schemes earlier than was the case previously and in having a

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[40] "Tax avoidance industry receives call to arms", *Financial Times*, 4 December 2004

[41] *First report: the Finance Bill 2005*, 4 July 2005 HL Paper 13-II 2005-06 Q70 p 27

[42] "Brown's boost for genuine employee share plans", *Financial Times*, 6 December 2004

> measure of disincentive effect on the tax avoidance industry. Without wishing to challenge the legitimate right of individuals and businesses to manage their tax affairs in the most effective way for their purposes, we regard it as an equally legitimate objective for the government to seek to protect the tax revenue against inappropriate avoidance schemes.
>
> 89. One of the measures announced with the PBR appears to some commentators to go further than this [ie, the Paymaster General's statement] …
>
> 90. The indication in this statement that the Government will continue to announce proposed legislation, effective from the day of the announcement, to stop schemes which come to their attention is nothing new. What is new is the declaration that future schemes, not yet devised or which have not yet come to the Inland Revenue's attention, may be stopped as from 2 December 2004. This amounts to a general anti-avoidance rule in this area of taxation of income and rewards, although no new powers are being taken by government.[43]
>
> 91. Tax experts expressed some concern about this and felt there was an issue of retrospection in the rule. [John Whiting of PriceWaterhouseCoopers - PwC] told us that "...the system of tax we have in this country is that you are taxed on the basis of what the law says. If, therefore, there is a possibility of retrospectively altering your tax bill, then it does have very interesting human rights implications and it has been mooted that this idea of retrospection could now be vulnerable to human rights challenges if we go that far" (Ev 77)[44] [Anne Redston of Ernst & Young] noted that "enormous discretion is being proposed under which the executive… can decide whether or not the 'proper' amount of tax has been paid, and if it considers this is not the case, to exact it retrospectively" (Q325).[45]

When he appeared before the Committee the Chancellor argued that even if the measure were retrospective, it was quite justified:

> 92. The Chancellor defended the announcement in his oral evidence, stating that if it is accepted that there is a loophole which needs to be closed "whether it is of a specific nature or in a number of different areas…then it should be closed immediately… Once you accept that a scheme is wrong, that as a form of avoidance it is unacceptable, then I think it is reasonable to close it on the day you have announced you want it to stop. We are confident, I may say, that this does not conflict with the [European Convention on Human Rights]."[46] In the Government's view, therefore, it appears that the problem which has been identified is one which is sufficiently clear and specific now to justify a blanket announcement of this kind, even if the details of the ways which may be devised to avoid tax are not yet known.[47]

In conclusion the Committee were broadly supportive of this move:

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[43] See evidence of Mr Ramsden (Director, Tax and Budget, HM Treasury) Q 165
[44] Q 74
[45] *First report: the 2004 Pre-Budget Report*, 27 January 2005 HC 138 2004-05 pp 41-2
[46] Q 325
[47] HC 138 2004-05 p 42

> 93. The Paymaster General's announcement that future legislation to outlaw income/NIC avoidance schemes not yet identified will be backdated to 2 December 2004 raises significant issues. We support the Government's determination to tackle unreasonable tax avoidance schemes, which can have the effect of penalising the general public, but we recognise that some experts have indicated that their approach could lead to challenge in the courts. This can only finally be tested as and when the Government introduces any legislation on the basis of the announcement. It would be helpful if, at this stage, and without jeopardising their position, the Inland Revenue were to publish a paper setting out their thinking on the principles which will guide future decisions as to whether a scheme is reckoned to be within or outside the terms of the announcement.[48]

The Government's response to the Committee's concerns was published just after the 2005 Budget:

> The Government welcomes the Committee's comments on the Paymaster General's statement on avoidance of income tax and National Insurance Contributions on rewards from employment. The Government believes that the statement itself sets out the principles and context and encourages individuals, employers and their advisors to read the whole statement and its context to understand how it might apply to them. Parliament will of course have the usual opportunity to debate in full any future proposals on legislation in this area.[49]

Following the Budget John Whiting of PwC appeared before the Committee again, and John McFall asked him what impact he thought Ms Primarolo's statement had had:

> **Q72 Chairman:** Is creativity in the tax avoidance industry picking up again since you last gave evidence to us on it or are there signs of a permanent change of approach?
>
> **Mr Whiting:** I think there are definite signs of a permanent change of approach, yes. I would always say that people will look to minimise their tax bills within the law, that is never going to change, but the way one looks at it has changed and is changing. One of the things we discussed last time, the threat of retrospective action, has had a certain effect. I think it is becoming clear in certain sectors of the avoidance industry that they do have to play within slightly tighter rules than they have perhaps done in the past.[50]

As noted above, in his July 2005 speech to the CIOT, Dave Hartnett described the authorities' efforts to prevent tax avoidance on employment income as "squeezing the balloon in one area only to see a new bulge emerge in another." He went on to say that in his view the PBR statement "marks a break with the way we have done things in the past. It will be interesting to see what happens next – has the balloon burst or should we look for a new bulge elsewhere? One thing I think is clear, however – the gamekeeper is unlikely to go back to playing the game according to the poacher's rules."[51]

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48 *op.cit.* p 42
49 *First special report*, 24 March 2005 HC 483 2004-05 p 15
50 *The 2005 Budget: oral and written evidence*, 14 April 2005 HC 482 i-ii 2004-05 Ev 12
51 *CIOT speech*, July 2005 p 16, p 24

## D. Budget 2005

In the 2005 Budget the Government confirmed that the provisions to tackle *income tax* avoidance on employment related securities – announced in the 2004 PBR – would be included in the forthcoming Finance Bill.[52] The following paragraphs discuss these provisions in detail. Readers interested in the provisions to tackle *NICs avoidance* – first highlighted in the Paymaster General's written statement on 2 December 2004, and contained in the *National Insurance Contributions Bill 2005-06* – are referred to the next section of this paper.

Initially clause 32 & schedule 2 of the *Finance Bill 2005* – which was published on 24 March – made this provision.[53] The announcement of a General Election for 5 May meant a second, shortened version of the Bill, replacing the first, was presented to the House on 6 April, when it completed all of its stages in the Commons;[54] the Bill did *not* include this particular clause. When the Bill received a second reading the then Chief Secretary to the Treasury, Paul Boateng, explained that those measures not included in this version of the Bill would be brought back in a second Finance Bill after the election – presuming that the Labour party were returned to power. He went on to note that the Government would "aim to ensure that the statutory dates for these measures will continue to apply, as announced in the Budget."[55]

In fact this is what happened. Following the Labour party's victory in the General Election, the *Finance Bill 2005-06* was published on 25 May 2005.[56] Clause 12 & schedule 2 reproduced the earlier provisions relating to employee securities. The explanatory notes to the Bill restated the Government's reasons for pursuing this change as follows:

> Part 7 of the *Income Tax (Earnings and Pensions) Act 2003 (ITEPA)*, which was amended by *Finance Act 2003* to make the regime fairer, provides the income tax rules in cases where securities, interests in securities or securities options are acquired in connection with employment. Further amendments of the provisions were undertaken in *Finance Act 2004* to counter avoidance schemes of which the Revenue had become aware.
>
> The amendments made by the *Finance Act 2003* are designed to ensure that all of the value received by way of remuneration in the form of shares or other securities is subject to income tax and NICs at an appropriate time. The rules provide flexibility in respect of the timing of the charges. For example, the employer and employee can jointly elect to pay tax and National Insurance on a higher proportion when the shares are acquired, leaving future commercial growth in value of the shares in the capital gains tax regime.

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52 *Budget 2005* HC 372 16 March 2005 para 5.99

53 Draft clauses had been published by the Revenue on their site for consultation in February (Inland Revenue press notice, *Tackling avoidance: employment related securities*, 3 February 2005.

54 *Finance (No.2) Bill* [Bill 104 of 2004-05] was scrutinised in its entirety on the floor of the House (HC Deb 6 April 2005 cc 1432-1491) and received Royal Assent the next day (HC Deb 7 April 2005 c 1641).

55 HC Deb 6 April 2005 c 1432

56 HM Treasury press notice 52/05, 26 May 2005

> HM Revenue and Customs became aware through the operation of the disclosure rules introduced in *Finance Act 2004* of a number of schemes which use shares or other securities in order to pass remuneration value to employees in a way that attempts to avoid or reduce Income Tax and NICs. The changes to be made by Schedule 2, effective from 2 December 2004, will ensure that the proper income tax and National Insurance Contributions charges apply on the value from the shares and securities acquired from these schemes.[57]

The provisions were debated in Standing Committee on 21 June,[58] and now form section 12 & schedule 2 of the *Finance (no.2) Act 2005*. The Paymaster General Dawn Primarolo gave an example of the type of scheme targeted, to answer concerns that small businesses might be adversely affected:

> This is what happens. The employer pays the cash bonus into a bank and gets gilt futures in return, which he gives to the employee with a minor forfeitable condition. The employee transfers them to a special-purpose company that he already owns—let us call it Newco—in exchange for partly paid shares at a high premium, on call, equal to the amount of the bonus, plus a loan equal to the amount of the bonus. The employee then sells his shares in Newco to another, unrelated company—let us call it Purchaser—for their market value, which is very little as the gilt futures are matched with debt and the huge outstanding call on partly paid shares.
>
> Newco then calls on Purchaser to pay out the partly paid shares so that it can repay the loan to the employee. Purchaser is now worth the market value of the gilt futures. Newco then becomes unlimited to increase its distributable reserves, which are then distributed in specie so that the gilt futures end back with Purchaser. Purchaser refunds money to the bank by way of the gilt futures, and that completes the circle. In that way, the individual receives his bonus without paying tax or national insurance.
>
> Forgive me for saying this, but that is a highly complex contrivance—[*Interruption.*] I am glad to hear that Committee members are struggling with it.[59]

Speaking for the Conservatives Mark Field made the general observation, "It seems that the Government remain determined to close tax planning, rather than just tax contrivance, which reduces the PAYE and national insurance charge paid on salaries. Most measures have in the past been aimed at bonus payment structures, most visibly those implemented by large investment banks. No one on the Opposition Benches will defend the payment in wine, gold or in other ways that was clearly an abuse of the system."[60] However, Mr Field was critical that the provisions were effective from 2 December 2004:

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57 [Bill 8-EN] This section of the Bill's explanatory notes are at: http://web.archive.org/web/20060214045137/http://www.hm-treasury.gov.uk/media/148/1A/fb05_7-12.pdf

58 SC Deb (B) 21 June 2005 cc 36-72

59 SC Deb (B) 21 June 2005 c 46

60 SC Deb (B) 21 June 2005 c 44

> People and businesses need to be able to plan in a stable environment … Several companies and employees could end up having to pay additional PAYE and NICs unexpectedly due to the change being made under the Bill. If taxation legislation is to change, it should be effected by a change of policy going forward.[61]

The Minister responded to this concern as follows:

> On the question of retrospection, it is the practice of the Government, as it was of the previous Government—it is standard practice—to make anti-avoidance legislation effective from the day it is announced. The hon. Gentleman is wrong: the Government are not imposing a tax charge that could not have been anticipated by those affected. As I said in the statement that I made alongside the pre-Budget report on 2 December 2004, our objective is permanently to close those intricate arrangements that are designed to avoid income tax and national insurance on the rewards from employment. Those who make future attempts to frustrate this intention despite those warnings will now be well aware that legislation will be introduced to combat such avoidance.[62]

At this time the Lords Economic Affairs Committee considered these provisions as part of their scrutiny of the Finance Bill. Several witnesses from the profession were critical:

> The Institute for Chartered Accountants in England and Wales (ICAEW) expressed concern that the provisions were "very widely drafted and uncertain in scope."[63] They thought that they could have the unintended effect of discouraging employers and employees from entering into "commercial incentive arrangements of the type that it is government policy to encourage". A further objection was that, as drafted, the provisions might lead to double taxation …
>
> John Whiting [Tax Partner at PwC & Chair of Tax Policy Committee, Chartered Institute of Taxation] took the view that the objective should be "to corral what we might term acceptable share schemes and unacceptable". Starting from the premise that for proprietors and staff to have an interest in the company was very much encouraged by government, and given the fact that the rate of tax on capital gains was 10% compared to a marginal rate of over 50% in terms of income tax and NICs combined, "it is not wholly clear where the boundary is and whether it is acceptable to give them a capital gains based reward rather than an employment reward" (Q 25). Mike Warburton [Tax Partner, Grant Thornton] concurred. "Uncertainty is bad for business, bad for the economy and the threat of retrospective legislation is an uncertainty we could do without" (Q 25).[64]

The Committee raised these points with witnesses from the Treasury (Dave Ramsden, Director, Budget and Tax Policy) and HM Revenue and Customs (Dave Hartnett, Director General):

> 38. Dave Ramsden (HMT) chose to focus first on the issue of alleged practical difficulties for practitioners in advising clients in current circumstances. He said:

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[61] SC Deb (B) 21 June 2005 c 54

[62] SC Deb (B) 21 June 2005 c 57

[63] Memorandum of Evidence by ICAEW, 15 June 2005, at paragraphs 11-12

[64] *First report: the Finance Bill 2005*, 4 July 2005 HL Paper 13 2005-06 pp 17-18

> "We think the position is very clear. Clause 12 and Schedule 2 are targeted at contrived arrangements designed to avoid tax and NICs on reward for employment. We think they are entirely consistent with the clear steers that Government has set out in this area, particularly in the statement made by the Paymaster General alongside the PBR, which you referred to, and in the technical note that was also published on PBR day. The point that we have reiterated in a number of places, and again in our memorandum to you, is to highlight that in this area of tax… the amount of revenue which would have been put at risk was from up to £2 billion paid in bonuses in 2004–05 if we had not taken the action that we did" (Q 109) ...
>
> 40. Turning to detailed criticisms from witnesses that we had put to him, Dave Hartnett first defended the deliberately broad drafting of "something… has been done"[65] on the grounds that such provisions "are intended to have a broad impact to stop people weaving their way around the provision and coming up with something new" (Q 109). Second, on the matter of a perceived risk that a taxpayer who received remuneration in the form of a convertible security could ultimately be taxed on a greater value than the true value of the convertible security, his response was robust: "I am not sure we agree with this at all but, if there is a double charge, then in a sense that is part of the jeopardy of entering into these very fancy arrangements—less than straightforward arrangements—for remuneration" (Q 109). Third, concerning the problem that had been put to us about the practical difficulty for tax professionals of advising on remuneration packages in the current situation, he said that nothing in the legislation applied to "genuine share schemes made available to employees and share option plans", adding that this had been made clear in the statement. He held out an offer to tax advisers to talk to HMRC about any case "of genuine difficulty", saying that the Department would do its best to respond. In appropriate circumstances that response would be in a form that could be relied upon (QQ 110–115).[66]

For its part the Lords Economic Affairs Committee concluded as follows:

> 43. We listened with increasing concern to the catalogue of ingenious schemes devised over the years in order to pass remuneration value to employees (particularly bonuses to the higher paid) in a way that attempted to avoid or reduce income tax and NICs. We took note of the view of HMRC that, even after the measures in the present Bill had passed into law, "there will be something new, the whole history of this suggests there will be, and we will have to counter that when we get there" (Q 109).
>
> Given the vast amount of tax at stake and in the light of that history we were persuaded that an exception to the normal approach to backdating was justified. Moreover, it seemed to us that the suggestion that professionals might now find it difficult to advise about remuneration packages that included share schemes and share option plans for the generality of employees was an exaggeration. In any case, HMRC assured us that they stand ready to respond to enquiries in a form

[65] [The reference is to the wording used for a new purpose test – to determine if an award of securities to an employee would be disqualified for tax relief – that is, if "something has been done … as part of a scheme or arrangement the main purpose (or one of the main purposes) of which is the avoidance of tax or national insurance contributions." This is set out in paras 5 & 6 of sch 2 of *Finance (no.2) Act 2005*.]

[66] HL Paper 13 2005-06 p 18

> that could be relied upon in appropriate circumstances, and we welcomed that assurance.
>
> 44. At the same time, we were not persuaded of the justification for the robust line taken by HMRC to the case put to us that certain employees remunerated by a convertible security could ultimately be taxed on a greater value than the true value of the convertible security. Where a scheme is deemed to be abusive, frustrating its application should do no more than ensure that the correct amount of tax and NICs are paid. We recommend that HMRC and the professions should consult further on this point and that the Government should consider introducing the necessary amendment(s) to avoid any element of double taxation.[67]

Notably when these provisions were debated in Standing Committee the Paymaster General opposed an amendment designed to ensure that no avoidance scheme might give rise to a double taxation charge:

> If in attempting to avoid full tax and national insurance, the promoter or user of an avoidance scheme has employed an unusual form of payment that has its own tax consequences, facing those consequences is part of the price that they must pay for indulging in avoidance activities … If there is more than one charge as a disguised remuneration passes through its convoluted arrangements, so be it. Those who play with fire cannot complain if they get burned.[68]

[67] HL Paper 13 2005-06 p 19
[68] SC Deb (B) 21 June 2005 c 63

# II The Bill

## A. Contents and regulatory appraisal

The *National Insurance Contributions Bill* was introduced in the Commons on 11 October 2005. Information on the Bill is collated on the department's internet site – including a series of FAQs.[69] As this explains, the Bill is necessary, "because unlike income tax, there is no annual equivalent of the Finance Bill for NICs." Legislation dealing with NICs is not included in the annual Finance Bill, and generally changes to national insurance that require primary legislation are made by including such provisions within a much larger Act covering a range of social security issues. It is a Parliamentary convention that Finance Bills are concerned with moneys that go into the Consolidated Fund. As receipts from NICs go into the National Insurance (NI) Fund and not the Consolidated Fund, legislative provisions relating to NI are not contained in the Finance Bill.

More detail of the Bill's purpose was set out in a press notice, part of which is reproduced below:

> The Bill's overall aim is to stop the avoidance of NICs on rewards of employment - by introducing powers to enable the making of NICs regulations that can take effect from an earlier date, if necessary going back to 2 December 2004. The powers will enable HMRC to deter and tackle tax and NICs avoidance more effectively by ensuring that payments of employment reward will be charged to tax and NICs from the same date.
>
> The first use of this power will be to introduce NICs regulations to apply NICs liability to employment related securities charged to income tax by Schedule 2 of *Finance (No. 2) Act 2005* effective from 2 December 2004. Other changes to the NICs regulations will provide for the payment and collection of the NICs liability on past payments and consequential effect on statutory payments and contributory benefits. The Disclosure Rules in *Finance Act 2004*, which required promoters to report tax avoidance schemes, did not cover schemes or arrangements that avoided NICs only. This Bill contains a power to make NICs regulations that will ensure that any NICs only avoidance scheme or arrangement is disclosed.
>
> The Bill will prevent the potential transfer of employers' secondary NICs liability in respect of past earnings that are caught by the regulations made under the provisions in this Bill, by way of Agreements or Joint Elections, due on earnings from certain types of share and securities to the employee … The Clauses in the Bill will not have effect until the Parliamentary process is completed and the Bill receives Royal Assent.[70]

The explanatory notes to the Bill give a detailed commentary on its clauses; it may be convenient to reproduce the overview the notes give of the Bill's three main provisions:[71]

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69 http://webarchive.nationalarchives.gov.uk/+/http://www.hmrc.gov.uk/employers/nicbill05.htm
http://www.hmrc.gov.uk/employers/faqs-nicbill05.htm

70 HM Revenue & Customs press notice NAT37/05, *National Insurance Contributions Bill*, 11 October 2005

71 Bill 53-EN pp 2-4 At: http://www.publications.parliament.uk/pa/cm200506/cmbills/053/en/06053x--.htm

**Overview of the *National Insurance Contributions Bill 2005-06***

**Power to make regulations to create a retrospective liability for National Insurance contributions etc**

6. The provisions in clause 1 will enable the Treasury to make regulations under specified existing powers that will have retrospective effect from dates as early as the 2 December 2004, if necessary. The new power may only be used where a provision of the Income Tax Acts which relates to income tax chargeable under the employment income Parts of [*Income Tax (Earnings and Pensions) Act (ITEPA) 2003*] is passed which has retrospective effect and the Treasury consider it appropriate to make NICs regulations under any of those existing powers for the purpose of reflecting the whole or part of the retrospective tax provision. It must also appear expedient to the Treasury for the NICs regulations to have retrospective effect in consequence of the retrospective tax provision. The regulations can ensure that payments made under a tax and NICs avoidance scheme or arrangement, used since the 2 December 2004, can be treated as earnings for NICs purposes. The resulting NICs liability will be calculated as if a liability had existed at the time the payments were made. The Government only envisages exercising these powers where the retrospective tax provision is a provision tackling avoidance of the income tax payable on employment income.

7. Clause 1 also provides for wide powers to make consequential changes or other changes that may be required through exercise of the powers described in paragraph 6 above for the purposes of contributions, contributory benefits, statutory payments, contracted-out pension rebates or other purposes. In particular it is anticipated the powers will allow for:-

- earnings that originally avoided NICs liability to count towards benefit entitlement and statutory payments [statutory maternity pay (SMP), statutory sick pay (SSP), statutory paternity pay (SPP) and statutory adoption pay (SAP)];
- the NICs paid on avoidance earnings to be treated as having been paid in the year in which the avoidance occurred.

8. Clause 3 introduces powers to enable the Treasury to make regulations in relation to matters affecting the law relating to Class 1A NICs [payable by employers on most taxable benefits in kind] where this is expedient in consequence of retrospective tax legislation which affects a person's general earnings. The regulations may have retrospective effect to dates as early as the 2 December 2004, if necessary.

**Voiding of NICs Agreements and Elections**

9. Currently, employers and employees can jointly agree or elect to transfer any future potential secondary NICs liability, due on certain employment income from shares and securities acquired by employees, from the employer to the employee. These provisions are found in paragraphs 3A(2)-(4) (agreements) and 3B of Schedule 1 (joint elections) to the [*Social Security Contributions and Benefits Act (CBA) 1992*]. This facility was introduced on 28 July 2000 by the *Child Support, Pensions and Social Security Act 2000*, to help employers deal with the problem of their unpredictable future NICs costs due on gains from share options. Amendments made by the *National Insurance Contributions and Statutory Payments Act 2004* extended this facility to include employment income derived from restricted securities and convertible securities.

10. Clause 5 ensures that Joint NICs Agreements and Elections can only be used for their intended purpose and specifically prevents the use of these agreements and elections by employers who seek to recover from their employees any NICs liability that may be imposed retrospectively under the powers being introduced by this Bill.

**Disclosure of NICs avoidance schemes and arrangements**

11. Part 7 of the *Finance Act 2004* requires disclosure of arrangements or proposals for arrangements where:

- use of the arrangements might be expected to confer a tax advantage;
- that tax advantage might be expected to be the main benefit, or a main benefit, of using the arrangements; and
- the arrangements fall within a description prescribed in Treasury regulations.

12. The *Finance Act 2004* disclosure provisions apply to income tax, corporation tax, capital gains tax, stamp duty land tax, stamp duty reserve tax, inheritance tax and petroleum revenue tax. The *Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2004* (SI 2004/1863), as amended, describe the notifiable arrangements in relation to income tax, corporation tax and capital gains tax. These include arrangements that concern employment. The *Tax Avoidance Schemes (Information) Regulations 2004* (SI 2004/1864), as amended, specify the information required to be disclosed. The *Tax Avoidance Schemes (Promoters and Prescribed Circumstances) Regulations 2004* (SI 2004/1865), as amended, specify the circumstances in which persons are not to be treated as promoters.

13. It was recognised that many employment schemes relate to both tax and NICs. However, NICs were not included in the disclosure rules because that would have required NICs primary legislation. In practice the tax disclosure rules provide the information necessary to counter both tax and NICs avoidance in the usual situation where a scheme seeks to avoid both. But they do not provide information in relation to schemes seeking to avoid only NICs. Clause 7 provides for the tax disclosure rules to apply to NICs proposals and arrangements as they apply to income tax schemes.

**Application of the Bill to Northern Ireland**

14. Clauses 2, 4 and 6 mirror for Northern Ireland the provision made in clauses 1, 3 and 5 for Great Britain. Clause 7 extends to Northern Ireland as well as Great Britain. Under the provisions of Schedule 2 to the *Northern Ireland Act 1998* NICs are an excepted matter. The Bill therefore amends relevant Northern Ireland legislation relating to NICs.

15. Where the powers in the Bill allow for retrospective changes to earnings, Treasury regulations made by virtue of the Bill which make consequential changes to matters which are the responsibility of a Northern Ireland department require the concurrence of that department. Contributory benefits and statutory payments are transferred matters under the *Northern Ireland Act 1998* and responsibility for them lies with the Department for Social Development and the Department for Employment and Learning (in respect of SPP and SAP).

The number of people who are expected to be affected by the Bill is discussed in HMRC's regulatory impact assessment: "the true extent of the actual avoidance is always difficult to accurately assess [though] from the information we have, we conservatively estimate that around 500 employers and 10,000 employees are likely to be affected." It is thought "around £2 billion in bonuses could have been paid in 2004-05, with the aim of avoiding income tax and NICs." It is estimated that the Bill will raise

"an additional £95 million in NICs in 2004-05 and £240 million per annum thereafter," though it is not anticipated that it will give rise to significant administration costs:

> The additional administration costs for business will be small. Most employers deterred from avoidance will simply be paying a larger amount via PAYE than they would otherwise have done in the normal way. This generates zero additional cost because they operate PAYE already and remuneration avoidance schemes used of late have commonly involved paying over some tax through PAYE anyhow.
>
> If employers are caught by the measures they may incur a small additional cost, where they have to submit a further end of year return to account for the NICs. It is estimated that this element will involve HMRC in £20,000 additional manpower costs, but could rise depending on the number of cases. We estimate that there will be negligible additional HMRC IT costs associated with this measure.[72]

The Bill provides for the tax disclosure rules to apply to NICs proposals and arrangements in the same way that they apply to income tax schemes. (The current disclosure rules do not extend to schemes seeking to avoid *only* NICs.) HMRC foresee certain administrative costs with this change:

> Promoters of NICs schemes (or in some cases users) who are required to disclose information to HMRC may incur the following:
>
> - one-off learning and professional education costs associated with understanding the new rules;
> - set up costs in putting systems in place to identify schemes required to be notified; and
> - compliance costs in having to provide information to HMRC.
>
> Where a scheme affects tax and NICs, a single disclosure covering tax and NICs is all that will be required. The information contained will be substantially the same, as that presently required for tax disclosures. In practice, since schemes normally cover tax and NICs, persons required to disclose will incur additional compliance costs at a result of this proposal only insofar as they are involved with NICs only schemes. We expect such cases to be very few and the additional costs to be marginal.[73]

There has been a rather limited response to the Bill, with almost no press comment. A short story in the *Observer* after the Bill's first reading quoted John Whiting at PwC, as saying that "the latest measure 'sends a very clear message'."[74] *Accountancy Age* reported that, "tax advisers said that the bill was 'draconian', but not particularly surprising given Dawn Primarolo's statements during the pre-Budget report last year":

> Advisers said they had been surprised that NICs had been left out of the disclosure programme initially, adding that the bill gave a clear indication of the direction of government policy on tax. Mike Warburton, senior tax partner at Grant Thornton, said: 'The bill explains the draconian nature of what we are now

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72 *RIA: National Insurance Contributions Bill*, October 2005 paras 29, 39, 30-1

73 *op.cit.* paras 34-36

74 "Taxman gets tough on City bonus", *Observer*, 16 October 2005

> dealing with. It makes it very debatable whether it's worth anybody's while doing things that are seen as aggressive by HMRC.' John Whiting, tax partner at PwC, said: 'It is fundamentally an enabling bill, and the regulations that presumably will follow will tell us what's really going to happen. But it is a very important signal in terms of [the idea of] retrospection.'[75]

Professional representation on the Bill is expected but has not been published to date.

## B. Retrospection and human rights

In evidence to the Treasury Committee in December 2004, John Whiting at PwC suggested that the Paymaster General's statement on forthcoming avoidance legislation "does have very interesting human rights implications":

> There is never any objection to the Government, the Minister, standing up and saying, "As of today, we are going to block such and such", so let's get that clear, that is known. The idea that you can stand up and say, or put a written statement down and say, "Right, if something turns up in the future, we don't know what it is, but we reserve the right to come back to today and basically change the way the tax law operates', let's be clear, the system of tax we have in this country is that you are taxed on the basis of what the law says. If, therefore, there is a possibility of retrospectively altering your tax bill, then it does have very interesting human rights implications and it has been mooted that this idea of retrospection could now be vulnerable to human rights challenges if we go that far.[76]

Anne Redston at Ernst & Young discussed the issue at more length in written evidence to the Committee:

> This is a radical new departure for the UK, which has for centuries accepted that tax cannot be levied unless parliament has passed specific legislation authorising its collection. This principle was set out by Lord Simonds *Scott v Russell* (1945) 30 TC 375 at 424: "My Lords, there is a maxim of Income Tax law which, though it may sometimes be over-stressed, yet ought not to be forgotten. It is that the subject is not to be taxed unless the words of the taxing statute unambiguously impose the tax upon him."
>
> It is a principle with deep roots, deriving essentially from the Magna Carta. As Simon Sharma puts it in his *History of Britain*: "The Magna Carta . . . spelled out for the first time, and unequivocally . . . that the law was not simply the will or whim of the king but was an independent power in its own right." The history of democratic government in Britain has, as one of its fundamental themes, the establishing of the right of citizens not to be taxed by government fiat, but by the clear words of statute, following the introduction of specific legislation agreed by parliament. The statement of the PMG suggests a departure from that fundamental principle …

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[75] "Minister delivers on threat to end City bonus abuse", *Accountancy Age*, 13 October 2005

[76] HC 138 2004-05 Ev Q74

> Article 1 of Protocol No 1 to the Human Rights Convention provides that: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."
>
> Contracting states thus have a wide margin when collecting taxes (*Svenska Management Gruppen AB v Sweden*, Application 11036/84, 45 DR211 [1985]), but this is subject to an interference that they must achieve a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights and that there must be a reasonable relationship of proportionality between the means used and the aim pursued, see *AGOSI v the United Kingdom, 1986*, Series A no 108, p 17, para 48.
>
> In the *Sunday Times v UK* [1979-80] 2 EHRR 245 at 271, para 49, the European Court of Human Rights gave its opinion that: "A norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able—if need be with appropriate advice—to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice."
>
> If the principle of retrospection set out in the Paymaster General's statement is enacted, it is likely that it will be tested in the European Court of Human Rights, in order to ascertain whether the citizen can "foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail". It seems, on the bare words of [this] ... statement, that the new principle would fail this test.[77]

Ms Redston concluded that "the proposed new powers are a fundamental departure from the tax principles established over many centuries in Britain; they are unnecessary, as the disclosure rules are proving successful, and they will place an intolerable burden of uncertainty on ordinary taxpayers who will not know if or when the government will decide that certain arrangements are unacceptable."[78]

When he appeared before the Committee its chairman John McFall, asked the Chancellor "is this not retrospective legislation and do you think you can act in this way and stay within the Human Rights Act?" The Chancellor replied:

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[77] HC 138 2004-05 Ev 77-9

[78] HC 138 2004-05 Ev 79

> Well, I think that is, in my view, not an acceptable way of proceeding. If it is accepted that there is a loophole which has got to be closed, whether it is of a specific nature or in a number of different areas, then it should be closed immediately. If people are not going to act in a way that allows it to be closed through the Finance Act legislation, we just said that we would insist that it would be from the date of the Pre-Budget Report, and I think that is perfectly reasonable. Once you accept that a scheme is wrong, that as a form of avoidance it is unacceptable, then I think it is reasonable to close it on the day you have announced that you want it to stop. We are confident, I may say, that this does not conflict with the ECHR.
>
> **Chairman:** And you do not think that you will be breaching the Human Rights Act?
>
> **Mr Brown:** Well, I think the basis of the European Convention on Human Rights is that it gives a government the power on behalf of the tax-paying public to raise taxes in a fair and proportionate way.[79]

For its part the Committee observed that the question could "only finally be tested as and when the Government introduces any legislation on the basis of the announcement."[80]

As noted above, in June 2005 the Lords Economic Affairs Committee conducted an enquiry into the Finance Bill published after the General Election; one issue discussed was the operation of the new disclosure regime and the 'five day reporting time limit'.[81] In general terms an adviser who provides a client or clients with a tax scheme must disclose this to the authorities within five days of the scheme being promoted – that is, 'made available for implementation.'[82] Lord Roper noted that some accountants found this requirement was overly difficult and costly, particularly when providing one-off bespoke advice on the structuring of a specific commercial transaction. In response Dave Hartnett (HMRC) gave some insight into the tax avoidance industry:

> We had a lot of discussion about the five days while we were developing the rules with the help of accountants and lawyers. If I may, I would just describe for the Committee very quickly one discussion we had with a team of planners whose concern was bespoke planning, and they were saying to us in a big M&A deal it may be the very last minute before the contract is signed that they actually decide which way they are going to jump on that particular issue. We gave them, and representative bodies and others, an assurance that, if that was what happened, then there were not five days in which they could tell us—they told us at that moment in time.
>
> One of their other concerns was that five days is a very short period of time and it really did not give them long enough to put everything in place to make it proofed

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79 HC 138 2004-05 Ev Qs325-6

80 HC 138 2004-05 para 93

81 For details of this time limit see HMRC, *Disclosure of direct (IT, CGT, and CT) tax avoidance schemes The Main Guidance*, July 2005 para 2.3 http://webarchive.nationalarchives.gov.uk/20070101104354/http:/www.hmrc.gov.uk/aiu/main-guidance.pdf

82 In its report on the Finance Bill the year before the Committee had suggested a 30 day limit might be preferable (*The Finance Bill 2004*, 25 June 2004 HL Paper 109 2003-04 paras 38-9).

> against the challenge we would make. It was very open of them to tell us that. If I could say something about the five days generally. We are now beginning to see exploitation of the five day rule in a way that I think we expected but hoped not to see, and that is with schemes rather than bespoke issues, planners lining all the customers up and not quite finishing the arrangement and then selling at the earliest moment with five days to go. We are having to think very hard at the moment about how we address that because I think that is testimony to how the more extreme parts of this industry behave.[83]

Lord Wakeham, chairman, went on to ask why the time limit could not be longer. The exchange is worth reproducing at length:

> **Q95 Chairman:** … If, say, the five days was 30 days and not five days, to make sure we understand, tell me why you would lose out and how would you lose out? How would the Revenue lose out on that?
>
> **Mr Hartnett:** An awful lot, my Lord, could happen … When I was answering Lord Shepperd's question—it may have been Lord Lamont's—I mentioned that we had seen a scheme that was marketed and sold to willing clients and actually stopped being sold at the end of 30 days and then was given to us—I think, so that we could advise the Government to shut it down. I think that was done to ensure that no-one else used it, although I do not think we realised that at the time, but I am reasonably confident that was what happened. The value of the tax saving in those 30 days was in excess of a billion pounds.
>
> **Q97 Chairman:** That is not the point. Why can you not stop it right back from the day? You notified them of 30 days, why can you not then stop it right at the beginning?
>
> **Mr Hartnett:** Back to Day One of the 30 days?
>
> **Q98 Chairman:** Yes.
>
> **Mr Hartnett:** That sort of retrospective counter to these measures has not been used by Government of either party for some long time now …
>
> **Q100 Chairman:** - you would have to use retrospective legislation in order to stop it?
>
> **Mr Hartnett:** Yes.
>
> **Q101 Lord Sheldon:** What is the disadvantage of using retrospective legislation?
>
> **Mr Hartnett:** I think, my Lord, business would say that would create great uncertainty for business, even for 30 days, for some of the scale of transactions involved.
>
> **Q102 Lord Roper:** But if you are going back to the day they have notified it to you, that is not really retrospection. It is merely going back to the date of notification.

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[83] *First report: the Finance Bill 2005*, 4 July 2005 HL Paper 13-II 2005-06 Q93 pp 43-44

> **Mr Hartnett:** I think there are human rights issues here which our lawyers have wrestled with and told us that there would be difficulty with this.[84]

Further details on this issue were given in a supplementary note submitted by the Treasury:

> As Dave Hartnett pointed out at the hearing, the practice of successive Governments over many years has been to protect the Exchequer against avoidance by announcing its intention to introduce amending legislation at the next opportunity (usually the next Finance Bill) and to invite Parliament to make the amended legislation effective from the date of announcement. This practice has become known as the Rees Rules since it dates back to a statement made in 1978 by Peter Rees QC MP. As long as this practice is adhered to, there is no incentive for promoters to disclose a scheme any earlier than they have to, and so we would expect a 30-day period to mean 30 days before HMRC knew of the scheme. Extending the deadline from five to 30 days would therefore give that much longer for schemes to be disseminated and the tax advantage taken before any action could be taken to prevent them.[85]

The origin of the Rees Rules lies in two provisions included in the *Finance Act 1978*. In his Budget speech on 11 April 1978 the then Chancellor Denis Healey announced two measures related to tax avoidance:

> This has emerged recently in a new form which involves marketing a succession of highly artificial schemes – when one is detected, the next is immediately sold – and is accompanied by a level of secrecy which amounts almost to conspiracy to mislead. The time has come not only to stop the particular schemes we know about but also to ensure that no schemes of a similar nature can be marketed in future. So the provisions I shall be introducing this year to deal with artificial avoidance by certain partnerships dealing in commodity futures will go back to 6 April 1976, that is, before the date when the intention to legislate was announced in a parliamentary answer. My proposed measures against avoidance by means of land sales with the right to repurchase will go back to 3rd December 1976, the date foreshadowed in a parliamentary answer.[86]

Both measures were quite controversial. When the first of these was debated in Standing Committee, Peter Rees MP argued that when retrospective legislation was used to deal with tax avoidance – to "give a warning in the House of Commons by some recognised method – either by an answer to a Parliamentary Question or by some statement – and to legislate in the subsequent Finance Bill back to the date of that warning" – it should be subject to four conditions:

> First, the warning must be precise in form. A mere suggestion that there are vague schemes of tax avoidance that must be counted should not suffice. Secondly, the problem at which the warning has been directed should

[84] HL Paper 13-II 2005-06 p 44
[85] HL Paper 13-II 2005-06 p 53
[86] HC Deb 11 April 1978 c 1202. These formed clauses 27 & 28 of the *Finance Bill 1978*; they were enacted as ss 31-2 of the *Finance Act 1978*.

> immediately be referred to a committee which I understand exists … composed of members of the Inland Revenue and of the accountancy and legal professions … [the committee] should to left … to devise the precise legislative measures which should then be introduced. Thirdly, if the committee can hit on appropriate legislative provision, the draft clause … should immediately be published in advance of the Finance Bill so that those who are likely to be in the field of fire will have a second clear intimation of what to expect. Fourthly, such a clause must, without fail, be introduced in the following Finance Bill … I believe there may be situations in which [this approach] … is the only solution if we are to counter avoidance of the sophistication and scale which we understand has been current of late. But if a Government are to adopt that remedy, it must be on [this] basis.[87]

At the Report stage of the Bill both provisions were debated, when the Conservative Opposition tabled amendments to restrict their scope – unsuccessfully as it turned out. Sir Geoffrey Howe took the opportunity to give a detailed speech on retrospective legislation, when he referred to a number of precedents since the Second World War.[88] He concluded, “a long tradition has developed which may be untidy but which can be regarded as an acceptable convention of the constitution along the lines set out by my hon. and learned Friend the Member for Dover and Deal [Mr. Rees] in the rules that were enunciated upstairs.”[89]

Turning back to the present day, Dave Hartnett gave some details of the response there had been to the Paymaster General’s PBR statement to the Lords Economic Affairs Committee in June 2005:

> I think what the Paymaster's statement did was to put everyone on notice that, if they were going to carry on doing this, they could expect Government to act and act back to that date. We had a huge number of e-mails and letters from tax advisers saying "Why did you not give this advice before? It is time all this was stopped". They did not see uncertainty, and I have to say I do not see uncertainty going forward because those who promote these arrangements know exactly what they are doing and, if they want to do it in future, they are on notice now as to what the Government's response is going to be. We have seen a very significant downturn in these arrangements as far as we can make out so far. I think terms like "something has been done" [used in the legislation to identify avoidance schemes] … are broad terms, but they are intended to have a broad impact to stop people weaving their way around the provision and coming up with something new. I am sure there will be something new—the whole history of this suggests there will be—and we will have to counter that when we get there.[90]

Lord Blackwell went on to ask directly if Mr Hartnett thought the PBR statement was retrospective; he replied:

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87 SC Deb (A) 6 June 1978 cc 718-9

88 HC Deb 12 July 1978 cc 1629-1642

89 *op.cit.* cc 1641-2

90 HL Paper 13-II 2005-06 Q109 p 47. Mr Hartnett is referring to the wording used in sch 2 of *Finance (no.2) Act 2005*, which, generally speaking, targets schemes for employee securities whose main purpose is the avoidance of tax. The Government resisted an amendment to remove this test at the Committee stage of the Finance Bill: SC Deb (B) 21 June 2005 c 58.

> I do not think there is anything retrospective here in terms of what we were discussing earlier. The Paymaster-General has put businesses and their advisers on notice prospectively as to the action the government will take if these fancy schemes continue. Anyone bold enough to market something which is akin to what has been seen before knows exactly what they are doing and the risk they take. In the context of human rights and other issues that arise, there are both formal and widely publicised notices as to how the government will react.[91]

On this question the Committee said, "we took note of the view of HMRC that, even after the measures in the present Bill had passed into law, "there will be something new, the whole history of this suggests there will be, and we will have to counter that when we get there" … Given the vast amount of tax at stake and in the light of that history we were persuaded that an exception to the normal approach to backdating was justified."[92]

In February 2005 the Tax Faculty of the Institute of Chartered Accountants in England and Wales (ICAEW) published a paper arguing that "although we understand the Government's desire to counter unreasonable avoidance …. we do not think that the introduction of retrospective legislation has a place in UK taxation." The Faculty gave a number of reasons for this view, including reference to the Rees Rules:

> We are now concerned that, even before the FA 2004 [disclosure] rules have been given time to bed down properly and their success measured, taxpayers face the prospect of targeted legislation introduced with retrospective effect. Although we appreciate that retrospective legislation may have some superficial attraction in countering unreasonable tax avoidance, we are opposed to it in principle, for the following reasons.
>
> - It fails the test of certainty … Taxpayers are entitled to assume that any actions they take will be taxed in accordance with the law in existence at the time that the action is entered into. In relation to countering tax avoidance, the current practice of making a specific announcement that a scheme will be blocked from that day, even if draft legislation follows in due course, is well understood and is reasonably certain in its effect. This practice follows closely the guidelines agreed by the Government in the Parliamentary debate about the 1978 Finance Bill (the so-called Rees rules) where it was agreed that any warning about prospective retrospective legislation must be clear in form. We do not think that the announcement made on 2 December 2004 meets the required standard of certainty as set out in the Rees rules.
>
> - The legal basis for retrospective legislation is now questionable, particularly in the wider context of EU and Human Rights laws. Emerging EU case law provides that the state cannot retrospectively remove a right without a transitional period (the so-called legitimate expectation right as found in *Marks-and-Spencer v C&E Commrs (C-62/00)*). If there is no transitional period, then the removal of the right will be illegal under EU law if it interferes with an EC treaty freedom and the state will be liable in damages. We accept that the extent of the legitimate expectation right

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[91] HL Paper 13-II 2005-06 Q110 p 47
[92] HL Paper 13 2005-06 para 43

> has yet to be determined precisely in cases where tax avoidance may be an issue, but in our view emerging ECJ decisions suggest that the introduction of retrospective legislation relying on the statement made on 2 December 2005 would still fail the legitimate expectation right, thus making such legislation illegal under EU law.
>
> - Retrospective legislation has the potential to undermine the credibility of the UK tax system in the eyes of taxpayers … if credibility in the system is undermined, it may have very undesirable consequences. For example it may lead to poorer compliance, potentially leading into non-compliance and possibly to evasion.[93]

HMRC's guidance on the Bill addresses the concern that in being retrospective, the Bill might conflict with human rights law:

> Q5. What safeguards are there to ensure that provisions in the Bill comply with Human Rights legislation?
>
> The Government has a duty under Human Rights legislation to ensure that it does not act incompatibly with the European Convention on Human Rights in making regulations under this Bill.
>
> The power to make anti-avoidance regulations is restricted to reflecting employment remuneration measures in tax legislation (normally Finance Acts) and will only be used to reflect tax anti-avoidance measures. The Bill also includes a prohibition that where, as part of a package of anti-avoidance measures, there is exceptionally a reduction of NICs liability for past periods, accrued benefit entitlement will not be affected.
>
> To ensure that there is adequate Parliamentary scrutiny when regulations are made, such regulations will be subject to the Affirmative Resolution procedure.[94]

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93 ICAEW, *Retrospective legislation TAXREP 8/05*, 10 February 2005 paras 11, 10

94 http://www.hmrc.gov.uk/employers/faqs-nicbill05.htm