

IR35 + BEPS + DAC6 = ?

By David Goldberg QC

A little while ago, I had to argue a case about whether certain repayments of petroleum revenue tax should carry interest. Unusually in a tax matter there is no statutorily prescribed method for contesting HMRC's refusal to pay interest, so the challenge we made was by way of ordinary civil litigation. There were a number of interesting features about the case, but one of them was the relief I was seeking: I was not asking the Court to order HMRC to pay interest to my clients: I was just asking the Court to declare that the repayments in question carried interest, and, assuming that I got that declaration, I would then just sit back, as it were, and wait for HMRC to do what they ought to do. And, no matter what we might think about the Revenue, we all expected that they would do just that – and pay the interest. There are all sorts of situations in which declaratory relief is sought nowadays: the declaration is quite often aimed at some part of government, but all conditions of person can be affected by a declaration; the common feature of this kind of litigation is that, in the end, someone is told, "You ought to do that", and then they do it.

Legal philosophers spend quite a bit of time asking themselves why people do what they ought to do when they are not compelled to do it. The answer quite often given is that, long ago, people were compelled by the use of brute force to do things that a powerful sovereign or neighbour thought they ought to do, and, then – over time – societies became more consensual, and they managed to agree on a common way of doing things. And that brought the added advantage that, on the whole, violence could be done away with. The philosophers tell us that this degree of consensus can only be

achieved when a society has respect for its laws and its institutions. Doing what you ought to do, just because you ought to do it, is a sign of a civilised, mutually respectful society: my hope that if, in that litigation, I secured the declaration that I wanted, HMRC would do what they ought to do – shows that I had at least some belief that I lived in a civilised society; I did not expect to have to use force to make HMRC do what they ought to do. Civilisation cannot, of course, be unilateral: a society, in which one group did things without compulsion just because they ought to do them and another group only did things when compelled by force, could hardly be happy; and I do not think unhappiness is caused only by the actual use of force. A happy, civilised state, is one in which all groups have roughly equivalent expectations of each other: we all behave in a particular way because we are expected to do that and not because we are made to do it.

But, sometimes, when I think about the state of our tax system, I do wonder if we live in a society which can truly call itself civilised: does the group we call the Revenue and the group we call the taxpayers have similar expectations of each other, or has one been given excessive power over the other? In a phrase of which I am rather fond, the economist Joseph Schumpeter said that “You can hear the thunder of a nation’s history in its fiscal policy”. He meant, of course, that you could tell when a country was planning to go to war by how much money it was raising and what it was spending it on. But I am sure that we can tell more than that from a nation’s fiscal policy. And, here, I do not refer to the economics of that policy but to the machinery. There is, I think, a widespread belief that, nowadays, we should treat a claimant for social security benefits who lies on his claim form and a taxpayer who makes a mistake in his tax return (especially if the mistake relates to an overseas matter) in the same way, even though the former has been active in promoting error while the latter is, at worst, passive.

I understand why the belief exists, but I am not sure that I fully accept it: it does seem to me that we should have different expectations of those who contribute and those who take; and I have some concern that we are both asking too much, in terms of compliance, of those who contribute, and, are seeking to enforce that excessive demand by something akin to force. If I am right, the question arises whether the law deserves respect. And it can only do so if it passes a fourfold test.

First, it must be at least relatively intelligible and fair.

Secondly, it should respect legal choices and structures, recognising that people can choose to do things in different ways.

Thirdly, it must hold a proper balance between the ability of the State to demand money and the right of the citizen to challenge that demand.

Fourthly, it should show a proper respect to those who are subject to it.

I doubt if our tax system presently meets that test. Indeed, from my standpoint, the philosophy underlying our tax code is that it should set traps for people and then gleefully punish those who fall into them. I shall seek to illustrate my thesis by reference to three specific topics – IR35, BEPS, DAC 6, and, more generally, by considering the way the tax world is going.

Let me start with IR35. In some ways, being an employee is a bore particularly because, instead of getting what you are supposed to be paid, you get your money after stoppages for PAYE income tax and national insurance. Of course, in other ways, being an employee is quite liberating: it frees you to a large extent from the obligation to complete a tax return, which

means that you can go about your life without worrying too much about tax or the compliance burden. But, after all, a bird in the hand is worth two in the bush. So it is very good if you can get out of those stoppages. Of course, if you are going to work for – say – X, for a full working week, it seems fairly obvious that you will be employed by X and he will make those stoppages.

But is that what the analysis would be, if you formed a company which agreed to hire your services to X in return for a fee, and your company then paid you dividends instead of wages? Going back about 20 years, that would have been a wizard wheeze: there is clearly no employment relationship between your company and X, so X could pay the company gross (though, depending on the turnover, the company might have to charge VAT); and the company could pay you dividends which, when corporation tax and the tax credit were taken into account, carried what was in comparison to an employment a very attractive rate of tax. What you would have done, by entering into that arrangement, was to turn what would have been employment income carrying PAYE and NICs into dividend income – paid after corporation tax and then bearing the appropriate rate of income tax: you would have saved some tax, but I rather doubt if you would have thought of yourself as avoiding tax. I am quite sure that no one doing that would have thought themselves wicked, particularly because the arrangement had real consequences as against the State and third parties: one of those real consequences was that your protections against X taking a decision not to use your services, and the possible claims you might be able to make against the State, were significantly reduced. And it worked. It never seemed to me that an arrangement of that kind was objectionable: no doubt, it saved a bit of tax but, case by case, it does not appear to be large scale tax avoidance.

But it turns out that tens and tens of thousands of people were doing that sort of thing – people like nurses working for the NHS - and the government got a bit fed up with it, and they

enacted what is generally known as IR35, the main provision of which is found in ITEPA 2003 s.49. IR 35 applies where –

1. an individual, called the worker, personally performs or is under an obligation to perform services for another person, called the client;
2. the services are provided through an intermediary – what I referred to earlier as your company – rather than under a contract between the worker and the client; and
3. the circumstances are such that, if the services were provided under a contract directly between the client and the worker, the worker would be regarded for *income tax purposes* as an employee of the client. (And here the concept of *employee* is a strict one: a taxpayer does not escape the IR35 by saying not be in a true employment).

Where those three conditions are satisfied, as things stand, the intermediary – what I have been calling *your company* – has to pay the income tax and NICs that would have been due if there had been a direct employment relationship between the worker and the client.

These rules did not – for reasons I shall explain in a moment – work terribly well: they have caused a great many disputes. So, in an endeavour to reduce the disputes – and, I suppose, to make these provisions seem fairer than they presently do – the burden of applying the rules is, from next year, being moved from the intermediary to the client; and I sense that there are many clients here who want to know when they should be applying IR35 and when not. I say that the changes to IR35 are designed to make the rules seem fairer, because, as the IR35 cases now being heard show, very often the client has imposed the requirement for there to be an intermediary, and it does seem quite fair that the person who insisted on the arrangement in issue should bear the risks attaching to it.

In general terms, there is no difficulty in deciding whether the first two conditions for the application of IR35 – personal

performance and no direct contract – are fulfilled: the problems arise with the third condition, which is the employment condition. How do you tell whether a person with whom you do not have a direct contractual relationship would be an employee if you did have that relationship? The first thing you have to do is to invent the contract that would have existed if there had been one, and, in doing that, you have to do a bit of guessing. What terms would you have put in it? There will, of course, be an agreement between the intermediary and the client and that agreement may tell you a lot about what would go in the direct contract between the client and the worker if one existed. That is because, if the intermediary did not exist, the intermediary/client contract would, almost certainly, have been made between the client and the worker, and the importance of the worker in the relationship will often be emphasised by the terms of the intermediary/client relationship. For example, the intermediary/client agreement may require the intermediary to perform its services to the client by using Y and only Y to do the work; and it might also say that the work will be done for fixed periods of so many hours per week: provisions like this (not necessarily in this form, but like this) relating to the time to be spent working and where the work is to be done, tend to be an essential feature of any working relationship, and, since that is so, it is inevitable that they will be part of the hypothetical contract treated for the purposes of IR35 as existing between the client and the worker.

But there might be all sorts of other features which are present in the intermediary/client relationship which might or might not feature in a direct worker/client relationship; and that means that there will be some element of choice as to whether they are included in the hypothetical contract. The theory of course, is that once you have constructed the hypothetical contract, it will be possible to determine from the contractual terms what the relationship between the parties

would be. But there is an element of circularity here: sometimes you cannot construct the hypothetical contract without knowing the true character of the worker. Most people would, I think, say that, in considering whether IR35 applies or not, constructing the hypothetical contract must precede any determination of the worker's status as an employee or not. And that is certainly logical. But it may be more honest to recognise that, sometimes, you cannot determine what terms will be in the hypothetical contract, until you know something about the worker and his or her character absent the contract. I rather think that the process might be iterative, so that the terms which you decide would be in the direct relationship hypothetical contract can only be determined once you have decided whether the worker is going to be self-employed or employed. In any event, and no matter what the order in which you do things or think you should do things, it is going to be necessary at some point to confront the question of whether the worker is an employee or not: you can do that after you have decided what the terms of the direct contract would be, or you can do it before then and allow it to inform your view of what will be in the hypothetical contract, but, either way, you cannot avoid answering the question. How do you go about doing that?

As with most areas of the law, the way in which we determine whether a person is an employee or not is developing: before the Second World War, the test was whether the person in question took orders, but that has rather gone out of fashion today; in the 1950s a distinction was made between a contract of service (which was an employment) and a contract for services (which was not an employment). The modern starting point for the enquiry is nowadays said to be found in the 1968 decision in the case of *Ready Mixed Concrete* in which McKenna J said this:

“A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own

work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service”.

This passage is often trotted out like some charming mantra which will provide the answer to the question, but – actually – on analysis, it says nothing. It is to be noted that it uses the terms servant and master, which are not common currency of the day and are not defined by the test – which is supposed to tell us whether there is a servant and master. In other words, the test is circular: if there is a servant and master, there is a servant and master. If we think in terms of a person other than a servant or master, the so-called test still tells us nothing.

The first limb of the test requires a person to agree that, in consideration of a wage or other remuneration, he will provide his own work and skill in performing a service. This is known as the mutuality obligation or, sometimes, as the wage/work bargain: one person provides work, the other pay. The existence of mutuality is essential to the contract of employment. If there is no mutuality, there is no employment. It sounds as if we are really beginning to get somewhere. But are we? Surely this mutuality obligation is only a requirement that there be a contract and contracts can exist between all sorts of different types of people: the existence of a contract cannot, on its own, be the test of whether there is an employment because there are many contracts which are not contracts of employment. Since the existence of a contract cannot, of itself, mean that there is an employment contract, the first limb is more or less a given in any relationship and not truly an indication of employment.

The second limb of the test is that the putative employee agrees that, in the performance of the agreed service, he will

be subject to the putative employer's control in a sufficient degree to make the putative employer the master. But nearly every contract provides for elements of control: for example, when I call the plumber, he has to do the job I have asked him to do, in the place and at the time I ask him to do it. There are certainly elements of control here. But are they sufficient to create an employment? The test does not answer that question. Almost every contract for work is, on the face of it, going to satisfy the first two limbs of the test: when I appear in Court. I am – nowadays - allowed to do that under a contract which will satisfy those two tests. I am fairly certain that I am not an employee, but why do I think that?

Perhaps the answer lies in the third limb of the test, which is that the other provisions of the contract (those which do not relate to the wage/work bargain or to control) are consistent with it being a contract of service. But what does that mean? What guidelines does it give us? And in determining whether the contracts are consistent with employment or not, what do I look at? Is it only the terms of the contract? If it is, the terms of the hypothetical worker/client direct contract are going to be very important indeed. Indeed, in my view, this third limb of the test is the one which carries all the weight. The way the test works is that, if the first two limbs are satisfied, there is an employment unless the existence of an employment, is negated by other factors. So this third limb has a lot of work to do. Just pausing here, I am not so far, at least, giving much hope for anyone who does not want to operate IR35. Given that the first two limbs of this test more or less deem there to be an employment, the safe course might seem to be to assume that there is an employment whenever there is a worker provided by an intermediary.

But that does not seem to be very exciting advice. How can you tell when it is safe to think that IR35 does not apply? The best answer I can give you is, I think, that if the putative

employee is in business on his or her own account, then he or she will not be an employee. So what are the indications of being in business on your own account? The chief indication is that you have a number of clients, who change reasonably frequently and do not give any guarantee of repeat business. The second indication is that you are not guaranteed work, so you do not know whether you will actually earn anything. Many of the recent cases about IR35 concern TV presenters whose intermediary companies were given a guarantee that there would be a minimum amount of work over a fairly long period. In return the company promised that the presenter would turn up at certain specified times in the period. Both of these features are generally hallmarks of an employment. The third indication is the incurring of expenses by the worker which are borne in carrying out work for the client or in trying to find other clients: incurring expenses is generally the hall mark of an independent business. The fourth indication is that the worker is not integrated into the client's business organisation: if the worker does not have a regular place of work at the client's premises and provides his or her own tools for the job, he or she stands rather outside the business organisation and seems to be running his own business.

Where some or all of these features suggest that the worker has his or her own business, that should be enough to prevent the worker being treated as an employee. But, conversely, if the worker has only one client and, in particular, if the client has guaranteed to the worker or to the intermediary that there will be a minimum amount of work for him or her with a fixed payment, these are pretty clear hallmarks of an employment. Of course, there are going to be all sorts of cases which fall somewhere in the middle of the examples I have given, and the question then is, how does the law help you to resolve that type of case? The law used to be a system of apparently black-letter rules, but, in the last few decades, we have seen a blurring

of the hard lines creating something much softer: it has happened in all areas of the law, even tax; we tend nowadays to search for the fair answer. Is it fair to treat the worker as an employee? Is it fair to say that the worker is in business on his own account? If the answer is that he has his own business, there is no need to apply IR35. But err on the side of caution!

Under the new rules coming in this year, there are some quite burdensome information requirements, just as there are if the worker is an employee. There are inconveniences for the user of a worker's services, no matter whether the true relationship is treated as one of employment, as one to which IR35 applies or as one to which IR35 does not apply. Where IR35 applies, it treats as employment something which is not in law an employment. The question which arises is whether it is fair and right for the law to treat something which is not an employment as an employment, especially in circumstances where, apart from tax, the law says there is no employment. As I have mentioned, there can be penalties for being wrong about whether IR35 applies. It seems to me that the burden placed on the taxpayer is higher than is properly justified by the risks to the State: taxpayers, like revenue officials, tend to do what they are expected to do, so penalties do not seem to me to be justifiable.

Let me now turn to BEPS and DAC6 – other matters where the balance between taxpayers and revenue authorities is not quite right. The thinking behind BEPS is that the growth in the digital economy, which allows the value attributable to intangibles to be located outside what might be called the main population centres, has shown that there is something wrong with our national tax systems if they are not working in harmony with each other. According to the OECD's action plan, fundamental changes are needed to effectively prevent double non-taxation, as well as cases of no or low taxation associated with practices that artificially segregate taxable

income from the activities which generate it: what is needed is a “realignment of taxation and relevant substances to restore the intended effects and benefit of international standards.”

In my (perhaps rather old fashioned) view, this is all nonsense. It might have some coherence, if the view was that every state should tax everybody in the same way so that, whether you conducted your business in China, Peru or Timbuctoo, you ended up paying tax on the same amount of profit. But nobody really thinks that should happen: there are always going to be differences between countries in the way they tax business. Since that is so, it really does not make sense to choose a limited number of transactions and try to align their tax treatment. I also doubt if anybody is, as the OECD say they are, artificially segregating taxable income from the activities which produce it: there is usually a close alignment between profits and the activities which really produce them; it is just that the OECD chooses to characterise as the profit-making operation something which does not truly produce profits. Nonetheless, the OECD wants a realignment to take place, and it is to be achieved by the 15 actions which I have mentioned. On the whole, we can be relatively relaxed about all of them, unless there is a cross-border element, though that is not an absolute rule.

The actions have been grouped under three headings, the first of which is establishing international coherence of corporate taxation which covers Actions 1 to 5. The first action is to think about the digital economy and see how to tackle the opportunities which it provides to taxpayers to make sure (in our context) that profits arise outside the UK rather than in the UK. We here in this country have done some thinking about that, and we have come up with the diverted profits tax, which is capable of increasing the taxable profit of a non-resident doing business here or of a UK resident which has sought to mitigate its tax bill by seeking to exploit tax mismatch

arrangements. The second action is to neutralise the effects of hybrid mismatch arrangements which occur when, for one reason or another, a country allows a deduction for a payment which is then not taxed or not fully taxed in the country where the recipient is resident; and we have done our bit about that with Part 6A of the Taxation (in International and Other Provisions) Act 2016 dealing with hybrid and other mismatches. Actions 3 and 4 relate to limitations on the deduction of interest and other financial payments both for domestic companies and for CFCs, and, here again, we have been active in introducing provisions which are capable of limiting the deductions available for interest. Action 5 is to counter harmful tax practices more effectively, taking into account transparency and substance, which seems to be an action intended to encourage, in particular, non-OECD members not to provide preferential tax regimes. I rather doubt if it will be particularly successful in abolishing preferential tax regimes: whether the OECD likes them or not, they are popular with people who feel that they are being overtaxed, and there are a lot of people like that.

The second heading under which the Actions are grouped is “restoring the full effects and benefits of international standards” and this is dealt with by Actions 6,7,8,9 and 10, which are to prevent treaty abuse, largely by updating the concept of a permanent establishment, and by making transfer pricing rules more sophisticated (by which I mean more effective at locating profits in jurisdictions in which the OECD thinks they should be located) with particular reference to intangibles, risks and capital and other supposedly high-risk transaction. I do not think these actions restore international standards at all: they allow Country A to impose tax on the activities of a resident of Country B who could, up until now, arrange his affairs so as not to pay tax in Country A. That is

not a restoration but a change, allowing the imposition of tax, when it was once accepted that tax should not be charged.

The next four actions – 11 to 14 are under the heading “ensuring transparency while promoting increased certainty and predictability”, and that is to be done by efficient data collection, by requiring taxpayers to disclose their aggressive tax planning arrangements, by thinking even more about transfer pricing, and by making dispute resolution mechanisms more effective. Quite how all this transparency will promote increased certainty and predictability is beyond me. Cutting through the verbiage, Actions 11 to 14 are designed to increase the information-gathering powers of revenue authorities, and experience suggests that doing that will be productive of increased uncertainty and unpredictability. The last action is to develop a multilateral instrument designed to make sure that all the countries are using the same principles in taxing their taxpayers, so that, to adopt the OECD’s language, opportunities for double non taxation do not exist.

Let me put that piece of pie in the sky to one side for the moment and revert to Actions 11 to 14 relating to transparency, because those actions and DAC 6 quite obviously have something to do with each other. DAC 6 requires notification to domestic tax authorities of reportable cross border transactions. Although DAC6 does not require notifications to be made until August 2020, the notifications which have to be made then include notifications of reportable transactions undertaken before August 2020, but only when the first step in the transaction is taken on or after 25th June 2018. So, by the time reporting has to occur, we shall have just over two years of transactions to report. DAC6 raises two initial questions: the first is, what is a reportable cross-border arrangement, and the second, who has to do the reporting. A reportable cross-border arrangement must, of course be

cross-border, though that on its own does not make it reportable. But let us start with the concept of cross-border.

In UK terms, an arrangement is cross-border where it concerns more than one country, and

- a) not all the participants are resident for tax purposes in the same jurisdiction; or
- b) one or more of the participants is simultaneously resident in more than one jurisdiction; or
- c) one or more of the participants carries on business outside the UK through a permanent establishment, and the arrangement forms at least part of the business of the permanent establishment; or
- d) one or more of the participants carries on an activity in another jurisdiction, without being resident there for tax purpose or creating a permanent establishment there; or
- e) the arrangement has a possible impact on the automatic exchange of information or the identification of beneficial ownership.

So the type of arrangements which may be cross-border include, for example, reinsurance transactions where the reinsurer is in a different, perhaps low-tax, jurisdiction; cross-border leasing transactions; cross-border financing; the payment of property rentals from one country to another; and securities lending (because that can create issues with the identification of beneficial ownership). Purely domestic transactions are not cross-border.

Even if there is a cross-border transaction, it is not reportable, unless it bears a hallmark: the hallmarks are set out in Annex 4 of Council Directive 2011/16 EU which I found, but only with great difficulty. The hallmarks bear some similarity to those which have to be satisfied before we need to report a transaction under our DOTAS rules but, of course, they are not exactly the same. Some of the hallmarks only exist where the cross-border transaction fulfils the main benefit

test, which is that one of the main benefits of the arrangement is the obtaining of a tax advantage. This is to be defined, - by domestic legislation and here by Article 12 of the proposed statutory instrument – generally in fairly familiar terms, but, in a way which is quite novel, only catches a tax advantage where the obtaining of it cannot reasonably be regarded as consistent with the principles and policy objectives on which the provisions giving rise to the tax advantage are based.

Other hallmarks exist regardless of whether they give rise to a tax advantage or not. Each hallmark is identified by a letter. The hallmarks which have to satisfy the main benefit test are (using the lettering adopted in Annex 4) –

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| Hallmark A | which essentially relates to marketed tax avoidance arrangements, that is, arrangements where a participant has to enter into a confidentiality undertaking, or which have standardised documentation or where there is an intermediary who gets a fee fixed by reference to whether the arrangement achieves a tax saving or by reference to how much it saves; |
| Hallmark B | arrangements involving the use of loss-making companies and their losses, the conversion of income into capital or into non-taxable income or the use of circular transactions; and |
| Hallmark c(b)(1),
(c) and (d) of
Category C1 | arrangements involving cross-border deductible payments, where the recipient does not bear tax on what he gets or gets preferential tax treatment on what he gets. |

The hallmarks which do not have to satisfy the main benefit test are those falling in the rest of Hallmarks C, D and E. The

residue of Hallmark C relates to deductible cross-border payments paid to a person not resident for tax purposes in any tax jurisdiction or to a person who is resident in a proscribed non co-operative tax jurisdiction; it also relates to payments where deductions for depreciation are claimed in more than one jurisdiction, or where double tax relief is claimed in more than one jurisdiction, or where a transfer of assets is treated as occurring at different prices in different jurisdictions. One of the things which DAC6 does is to require the automatic exchange of information between Member States to enable the tax authorities of Country B to know that it is taxing its taxpayers on the full amount of income they are getting from Country A and Country B. Any arrangement which has the effect of undermining these reporting requirements, whether by trying to change the nature of a payment or by hiding the beneficial ownership of an asset, bears Hallmark D. The last hallmark, Hallmark E, is concerned with transfer pricing and exists where a taxpayer is seeking to make use of unilateral safe harbour rules, where there is a transfer of hard-to-value intangibles or where there is a transfer which more than halves the expected EBIT of the transferor.

Where you have a cross-border arrangement which bears a Hallmark, there is a reporting obligation, and the question then is, who has to do the reporting? Reporting obligations fall first on an intermediary, who is defined in Article 3.2.1 Council Directive 2011/16/EU as “any person that designs, markets, organises or makes available for implementation of a reportable cross border arrangement” – though only if he has some sort of presence in a Member State. So anybody who advises on an arrangement is likely to be an intermediary, and any bank providing finance for a cross border arrangement is also likely to be an intermediary – and will have a reporting obligation requiring them to make a return of the reportable information (as defined in DAC6 Article 6) in its knowledge

possession or control. Where there is an intermediary with a reporting obligation, there is no need for the relevant taxpayer (a person who is party to the relevant cross border arrangement) to make a return, but, if there is no intermediary, then the relevant taxpayer must make a return. The returns will have to be made electronically: no employee of an intermediary or of a relevant taxpayer is required to make a return (Article 13 of the draft regulations); there are, of course, penalties for non-compliance with the reporting requirements.

Now, why do we have all of this? What is the justification for requiring all this information, especially when there are domestic requirements for returns to be made of very similar but not identical information? According to Recitals (1) and (2) of Council Directive 2011/16/EU, “the tremendous development of the mobility of taxpayers, of the number of cross-border transactions and of the internationalisation of financial instruments...affects the functioning of taxation systems and entails double taxation which incites tax fraud and tax evasion...Therefore, a single member state cannot manage its internal tax system”. What is the evidence for the proposition that increasing internationalisation means that a Member State cannot manage its own tax system? I do not believe there is any evidence for that at all. When Country A allows a deduction in accordance with its own rules, how can it matter to it how Country B taxes the receipt in its jurisdiction? It is of no moment at all to Country A, whether Country B fails to tax the payment, taxes it favourably or taxes it unfavourably; in any of those cases, Country A's tax system is working exactly as it should and, indeed, in most cases, so is Country B's system.

So why the fuss? Why do we have BEPS and DAC6? According to the OECD, globalisation has opened up opportunities for multi-national enterprises “to greatly minimise their tax burden”. This, they say, “has led to a tense situation in which

citizens have become more sensitive to tax fairness issues” which has become a critical issue for all parties because

Governments are harmed;
Individual taxpayers are harmed;
Businesses are harmed.

Well, I shall agree with all of that, but I think that what is causing the harm is the exploitative reaction of revenue authorities around the world, which, in an endeavour to cash in on the supposed tax fairness issues, have overloaded their systems with rules which are too complicated to be applied with the necessary degree of clarity and certainty, while, at the same time, becoming increasingly aggressive in the way they seek to enforce their tax systems. Every rational person knows that a tax system does not operate on the basis of fairness: it operates through rules, which, increasingly, have departed from the essential basis of income taxation (which leads to taxation of one measure of a commercial profit) by the introduction of arbitrary rules that sometimes tax unexpected amounts. Fairness has got nothing to do with it; and the idea that it does represents a political and administrative failure on a huge scale.: it is used as an excuse for BEPS which encourages the introduction of more and more artificial rules that bear no resemblance to tried ways of measuring commercial profit and impose increasing burdens on individual taxpayers. Of course governments are harmed, but they are harmed not by the absence of BEPS but by its introduction, which interferes with the core of their sovereignty and, by overloading their citizens with rules, harms the relationship between wealth creators and the state.

Of course taxpayers and businesses are harmed, but not by allowing the commercial practices which BEPS seeks to prohibit, but by prohibiting them. Quite often these days when I am

researching a case I will pick up my Yellow Book and look at a particular provision, and, when I have done that, I put it to one side. As I do that, my Yellow Book sometimes opens at a random page, and I see that there is a penalty for doing this or that – there is a penalty for error, there is a penalty for not rectifying error within a reasonable time after it is discovered, and HMRC have incredible powers to obtain information. There are provisions which limit or are intended to limit the ability to get advice and provisions that limit the ability to appeal decisions of HMRC. It seems to me that the message which the tax system sends to those subject to it is that the revenue authorities do not trust them – do not expect them – to comply with their obligations voluntarily, and want to have powers to coerce them into paying tax whether it is due on a fair reading of the legislation or not. That situation does not match the criteria for a civilised society. Taking each of the topics which I have examined briefly – IR35, BEPS and DAC6, I doubt if any of them is sufficiently certain to be called intelligible or fair. IR35 certainly does not respect legal choices and structures and large parts of BEPS suffer from a similar defect. And each of the topics I have considered weights the system in favour of the taxing authority and so shows a lack of respect for those subject to the tax system. The vast body of taxpayers is highly responsible: taxpayers do not deserve to be weighed down by burdens such as these. I have recently learnt that there are some highly irresponsible marketers of tax fraud, who make a living by selling arrangements which are never going to work. I am shocked to discover how large that problem is, but, no matter how large, it does not need and should not be covered by changes to our tax laws which increase the burden on the law abiding. It is time to restore better balance to our tax system, but I cannot promise that it will be restored soon.