Improving Large Business Tax Compliance
Response to Consultation published 22 July 2015

Introduction

I welcome the opportunity to respond to this consultation.

I think that the general sentiment behind these proposals is well understood and HMRC's desire to work with large companies to improve compliance is to be applauded. There are, however, already a number of other recently introduced initiatives to improve compliance and it is a shame that more effort has not been made to properly evaluate and, if necessary, enhance these measures before introducing yet more regulation. Furthermore, these measures are a little one-sided and the proposed "voluntary" code of practice is an unfortunate step. I would rather see HMRC being properly funded and resourced instead of the introduction of "big stick" sanctions.

The extension of the "voluntary" code of practice concept is a negative move; citizens should be taxed by statute, not by code of practice. Greater effort is needed to enhance both the quality of the UK's tax legislation and the effectiveness of HMRC.

Overall, I find it difficult to accept that these measures are appropriate and necessary. I am sure, however, that they will be implemented regardless, so I have attempted to answer each question on its merit.

Responses to specific questions

Q1. Do you agree that the threshold above (£200 million / £2 billion) is appropriate for these measures? What other thresholds might we use?

Are these the same threshold figures applied to companies dealt with by the LBD? Given the comment at paragraph 1.20 that "[t]he businesses intended to be in scope for these measures are broadly those businesses administered by HMRC's Large Business Directorate", I would expect the threshold criteria to be broadly the same. If they are not the same, how and why have you chosen them?

Transparency

Q2. Do you agree there should be a named individual at Executive Board level with accountability for a business's published tax strategy? If so, do you have any views on who should this be?

I do not believe that HMRC has successfully made the argument that there needs to be a named individual on the board with responsibility for this issue. The Board of a company have collective external responsibility for the strategy. As such, requiring a named individual seems a little aggressive.

That said, if you decide to insist on the requirement for a named individual I cannot see why it would be anyone other than the CFO. Tax will almost inevitably fall within the remit of the CFO anyway, so this seems an obvious answer.

Q3. Do you think the areas above are the right areas for a published tax strategy to include? If not, what other aspects of tax strategy are more relevant? Equally, what aspects do you think are less relevant?

I do not believe that HMRC has successfully demonstrated that publication of a tax strategy will necessarily lead to "better behaviour" by a company. That said, if you intend to proceed with such a strategy, the areas listed in the condoc do seem reasonable in themselves.

I do, however, think it needs to be recognised that "risk" and "risk management" are not synonymous terms. A company may have a relatively risk-averse attitude but be poor at managing the risk that it does take. Conversely, another company may be willing to accept a lot more risk but be very good at managing that risk. The two need to be looked at together.

I think the weakest area in the list is the question as to the existence or otherwise of a target ETR. Many companies have a broad target ETR; this does not mean that they will necessarily be "aggressive" in seeking to achieve that target. Furthermore, groups are likely to have a target ETR for the consolidated group rather than for individual companies.

Q4. Should the tax strategy be supported by publication of factual information on how it has been applied in practice? If so, what information would be most relevant to demonstrate the application of the strategy?

No. I really cannot see what factual information the company could publish that would add any value to this statement for HMRC. HMRC will have, or be able to get, all of the information needed to assess the statement in practice.

The tax affairs of UK companies remain confidential and this policy should not be a backdoor means to change that.

Q5. Do you think that businesses should be required to publish whether they are or are not a signatory to the 'Code of Practice on Taxation for Large Business' as part of this measure?

The first point to make here is that I do not accept that the case has been successfully made for introducing this Code in the first place. As I stated at the start of my response, I believe that the Code is a mistake and has no place in the UK's tax system. That said, if you are going to introduce it, I do not believe that businesses should be required to state whether or not they are signatories. The code is meant to be voluntary so publicly stating whether or not the company has signed up is a matter for the company. Making this a requirement would be a rather underhand way of forcing companies to sign up to the code. A rather strange thing to do with a voluntary code.

Q6. What is the right medium for publication of a tax strategy? Where do you think a business's tax strategy should be published?

There is really only one logical place for publication, the Annual Report. This is a publicly available document, often available for download from the company website. Why would you consider publication anywhere else?

If publication in the Annual Report is the chosen route, there will need to be some flexibility for companies whose report is due for publication shortly after the commencement of this legislation. Unless it is clear that the requirement to

publish a strategy is in relation to accounting periods starting after commencement of the legislation.

Q7. What would you see as an effective sanction for non-publication? To whom should this apply?

That's the problem with a policy such as this, how do you ensure effective compliance?

To be honest, I am quite sure that HMRC intends to factor such non-compliance into its existing risk assessment procedures as well as the assessment process for "Special Measures". This is likely to be a much more effective way of encouraging compliance than any financial penalty.

What are your intentions for situations where a company publishes a Strategy but HMRC doesn't like it? If a company, say, states that its strategy is to 'use legal tax planning to ensure it minimises its tax bill', will that satisfy this legislation? What if the published strategy is to 'comply with the legislation as enacted by Parliament'?

Code of Practice on Taxation for Large Business

If the Code is to be successful in achieving HMRC's objective of improving large business compliance, it is important that adoption of, and compliance with, the Code brings real benefits to companies. All other factors being equal, it is important that this results in a reduction of the company's risk rating and that agreement of its tax affairs with HMRC becomes easier. If there were no tangible benefit for companies, why would they bother signing up in the first place?

Q8. Do you agree that the openness and relationship behaviours contained within the Code of Practice are appropriate for large businesses? Are there any other behaviours you would expect to see?

Paragraph 3.2 of the consultation document is enlightening. You state that the "Code represents HMRC's view of the best practice behaviours that large business customers should adopt." You say you have received "guiding principles" on behaviour from a number of bodies but rather than taking a consensus view, you go for your own view.

In terms of the specific openness and relationship behaviours, they are perfectly reasonable in themselves. However, it is really disappointing to note that these behaviours do not appear to be two-way. If it is reasonable for HMRC to expect a company (of any size) to be open in its dealings, then is it not just as reasonable for the company to expect the same in return from HMRC.

For example, you want the company to undertake to "promptly provid[e] full, accurate and helpful answers to queries". Can the company expect the same courtesy in return from HMRC? Can the company expect prompt responses from HMRC? Can the company expect HMRC to provide full explanations and analysis of its arguments?

Indeed, I would strongly suggest that all of the suggested behaviours, apart from the final one, should be considered as being reciprocal.

I would imagine that greater openness and cooperation from *both* sides would inevitably lead to better compliance.

On the specific issue of providing information without the need for HMRC to invoke formal powers, the request for information must be relevant and proportionate. This cannot be considered *carte blanche* for HMRC to request anything and everything regardless of proportionality.

This then raises the question as to what happens if the company considers a particular request for information not to be reasonable. Is a company that signs up to the Code denied the right to decline to provide information it considers irrelevant to the particular issue being considered, or at least to question the relevance of that request?

Finally, paragraph 3.15 states that:

"These are behaviours which HMRC already expects from its large business customers – the Code simply provides a formal avenue for businesses to commit to meeting this standard."

I'm really not sure how encouraging companies to sign a Code of Practice will be any more effective at encouraging these behaviours.

Q9. Do you agree that the governance behaviours contained within the Code of Practice are appropriate for large businesses? Are there any other behaviours you would expect to see?

Yes, these governance behaviours seem reasonable. Whether they are really effective in achieving HMRC's objective of improving compliance, however, is another matter. Time will tell.

10. Do you agree that the tax planning behaviour contained within the Code of Practice is appropriate for large businesses? Are there any other behaviours you would expect to see?

Taken at face value, yes this behaviour is appropriate. My (considerable) concern, however, is that there is significant scope for disagreement here. In business, as in life, there are often alternative ways of doing something. This 'behaviour' in the Code is not the same as requiring a company to always structure transactions in a way that produces the biggest tax liability. HMRC should ensure that it is not used in that way.

Special Measures

Apparently, the problem HMRC is trying to address is limited to a "very small number" of large businesses. Frankly this begs the question as to why HMRC does not simply target those companies direct. Why introduce more compliance burdens for the many who are already exhibiting good behaviour just to target a "very small number"?

Q11. Do you agree with the initial/preliminary framework for entry into special measures? If not what framework do you think would be appropriate?

It is not absolutely clear but I assume that the intention is to apply these criteria retrospectively. In other words, some companies could be at risk of entering Special Measures very soon.

The idea of having an Initial Notice Period during which a company can "improve" its behaviour is a sensible approach. The broad criteria for being considered for this Initial Notice Period appear sensible, although I would like to think that HMRC could firm up on the detail – for example, what constitutes a "significant number" – well in advance of the draft legislation being published.

It would be sensible for HMRC to be much clearer on what is meant by "tax avoidance schemes". Are we talking about anything that requires to be disclosed under DOTAS, or that is caught (successfully) by the GAAR? Or does it simply mean (as it appears) any tax planning that HMRC does not like, even if it is successful? The latter may be desirable for HMRC but is certainly not desirable for a fair tax system.

The big concern is that a lot of the criteria appear to be pretty subjective, with the phrase "it is reasonable for HMRC to take the view" featuring a lot. Who in the HMRC team will be exercising this judgement and what checks and balances will be in place to safeguard the company from the whims of this individual?

Q12. At what level should thresholds (number of schemes, number of information notices issued, tax at risk, etc.) be set?

To be honest, this is really a question for HMRC to answer. I rather assume that HMRC already has an idea as to what it considers to be reasonable and I would have expected you to include these suggestions in the condoc.

As far as schemes are concerned, my answer to Question 11 already flags the need to be very clear as to exactly what type of "scheme" will be taken into consideration.

On information notices, what do your statistics suggest is a reasonable level for compliant taxpayers? Presumably a more accurate test would be the number of times HMRC has had to request information from the company before it has been provided. I imagine a degree of flexibility will be needed in order to take into account any special circumstances. HMRC is very good at imposing a tight deadline for response but taking ages itself to respond to correspondence. One would imagine that HMRC would be sympathetic to the problems of conflicting demands on one's time!

What about circumstances where a company disputes the validity of a request, for example they feel that HMRC has no genuine reason to request the information. If HMRC then proceeds immediately to using powers to demand the information, counting this towards the Special Measures process will essentially make Special Measures a big stick to force compliance with all requests for information, even where the company genuinely feels the request to be invalid or unreasonable.

Q13. Do you agree that HMRC should look back at a business's recent behaviour when applying these criteria? If yes, to what extent (e.g. three years as in the 'Promoters of Tax Avoidance Schemes' regime)?

Looking back over, say, a three-year period may have the advantage of automatically taking account of any special circumstances (see my answer to Question 12). Ultimately, of course, that will depend upon how you structure the criteria.

The potential difficulty with this approach, however, is that during the initial phase you will be looking at behaviour that took place before the introduction of the legislation. This may need a bit of flexibility in applying the criteria. The company may have changed its approach and be making efforts to become more compliant; it should be possible to apply greater weighting to current and more recent behaviour.

Q14. Is 12 months an appropriate notice period to allow businesses at risk of special measures to demonstrate a significant improvement in their behaviours and approach to tax planning? If not, what period would you propose?

In principle, 12 months sounds a sufficient period of time. The potential difficulty, however, is how this 12-month period relates to the company's accounting period. It will, presumably, take HMRC a little while after the year-end to decide that it is appropriate to issue a notice, especially if factors such as use of "schemes" need to be considered. If (for the sake of example) this took 3 months after the year-end, the company would then only have 9 months of its accounting period left in which to modify its behaviour.

In this respect, it might be better to consider setting a period that runs to the end of the accounting period following the one in which the notice is issued.

It seems to me that HMRC should take the lead during this phase and require the board member who has signed off the tax strategy to attend a meeting with the CRM to discuss HMRC's concerns. I would hope that this would help to kick-start the process of improvement and (hopefully) give HMRC comfort that the company will make some effort.

Q15. Would introducing increased reporting and disclosure requirements for businesses who persistently refuse to engage with HMRC alter behaviour? If not, what other ways might we achieve this objective?

To be honest, I would say that this is unlikely to help. If a company were genuinely "refusing" to engage with HMRC, why would increased reporting and disclosure obligations alter their attitude? I think such a situation would be best addressed by discussion between the CRM and the CFO.

I am also really not sure that the suggestion of removing the need for information to be requested is sensible. This feels like a bit of a slippery slope, as it would give HMRC access to information it might not otherwise reasonably have. This might be argued to be reasonable when dealing with an "awkward" company but it could also be seen as giving HMRC a real incentive to put a company into Special Measures! It would also circumvent safeguards put into legislation to prevent HMRC abusing its position to make unreasonable demands. Again, this might seem reasonable when dealing with a "difficult" company but I believe it will be difficult to apply such a regime without at least significant accusations of abuse by HMRC.

Q16. Would businesses behaviour be influenced by the withdrawal of certainty from those who refuse to work with HMRC in a transparent or collaborative way? If not, what other ways might we achieve this objective?

This might be a more practical sanction for such "problem" companies. Indeed, it seems most reasonable for HMRC to decline to provide non-statutory clearances

or informal opinions to a company that is refusing to enter into open and constructive dialogue.

Q17. Would removing the defence of "reasonable care" from businesses who repeatedly engage in unacceptable tax planning be successful in changing behaviours? If not, what other ways might we achieve this objective?

Whether it would influence behaviour or not, I believe that this would be a step too far. This is one of the fundamental safeguards available to taxpayers in our regime against HMRC accusation of wrongdoing. It is not reasonable to strip away safeguards just because HMRC feels a company is not cooperating as it would like.

It is, surely, a question of fact as to whether a company could reasonably believe that a course of action was reasonable in the context of the legislation. This is one of the problems with complex tax legislation, until such time as the treatment is challenged and found to be wrong (either by acceptance or by decision of the courts) then – unless the treatment is obviously wrong, in which case "reasonable care" could never be in point – it might be right.

This proposal would, in effect, mean that a company would not be able to disagree with HMRC. It would have to blindly follow HMRC's interpretation of legislation. That is wrong.

Q18. Would businesses behaviour and approach to tax planning be influenced by public naming by HMRC as being subject to special measures? If not, what other ways might we achieve this objective?

Honestly, I don't know for sure. However, I find such "naming and shaming" procedures distasteful. There would have to be very strong safeguards in place to ensure that HMRC did not wave this threat around simply to beat companies into submission.

Q19. Given the objectives of the 'Special Measures' regime are there any other sanctions that you think should be considered, either in addition to, or instead of, those described above?

The "objectives" of Special Measures would seem to be to get the company to adopt a more 'reasonable and cooperative' approach to its tax affairs. You have split this into two streams – transparency and openness, and tax planning. In both of these cases I would like to see HMRC (and the company) making a lot more effort to resolve differences through dialogue before the big stick is brought out. In the context of publishing a tax strategy, you want to have a named member of the Board responsible for this. Why not have a first phase of Special measures where that individual is required to attend a regular update meeting with the CRM to discuss concerns and progress?

Q20. In addition to those outlined above, what other safeguards do you think might be required in applying sanctions within special measures?

The safeguards outlined (very vaguely) at 4.34 and 4.35 do not instil any confidence whatsoever.

The statement at 4.34 is, to be honest, meaningless. What is "appropriate" to one person may be totally inadequate to another. Also, it is impossible to comment on these safeguards until you have actually defined them!

The comment at 4.35 that the sanctions "will follow from a judicial decision" is a little disingenuous. Yes, there will have been a judicial decision but only that the company's interpretation of the legislation was incorrect or that the company should provide certain information to HMRC. The decision to impose sanctions, however, is not, in itself, subject to any judicial review.

Q21. Do you agree that two years is a suitable length of time to remain in special measures? If not, what duration would you suggest?

Yes.

Q22. Do you agree the criteria for determining exit from special measures are appropriate? If not, what criteria would you suggest?

No. The whole process is subjective and susceptible to accusations of abuse by HMRC. The exit criteria can essentially be paraphrased as "do we now like this company?" Further, requiring the company to remain in Special Measures for a further two years smacks of vindictiveness. If a company is genuinely making efforts but HMRC is not yet completely satisfied with progress, an extension of Special Measures for another two years will do little to encourage the company to up its game.

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