Analysis

Publishing corporate tax strategies

Speed read

New rules will see large businesses in the UK required to publish their tax strategy. A review of statements on tax published by FTSE 100 companies to date reveals that they mainly declare (with varying levels of detail) that 'we are doing what you would expect of a legally compliant business'. Over the next year, around 2,000 companies will need to begin publishing tax strategies. Will this make a difference to the public debate on tax avoidance and to the behaviour of individual companies, or will it only prompt a rash of bland boilerplate statements?

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When the Finance Bill 2016 passes through Parliament later this year, it will introduce a requirement for large UK companies to publish an annual statement explaining their tax strategy. This will apply to UK companies, partnerships and groups with a turnover above £200m or a balance sheet over £2bn. It will also apply to the UK operations of multinationals, where the group is large enough to be covered by the OECD country by country reporting rules (i.e. has a global turnover of more than €750m). Companies will not be required to publish evidence that the strategy is being applied; however, if their returns appear to be inconsistent with what they say in their strategy, this will raise a red flag for HMRC when it reviews risk.

Many of the biggest UK companies already publish something on their approach to tax, as part of their annual report, corporate responsibility or sustainability report, or in a free-standing statement. Nearly two thirds of the FTSE 100 publish something. Declarations range from haikus to epics. Marks & Spencer takes the most boiled down approach: 'We take our responsibility to pay our fair share of tax seriously and our approach is in keeping with our longstanding values and aligned to our shareholders' interests.' Others offer a paragraph or a page. A few companies, such as Anglo American, SABMiller, Unilever and Vodafone, produce extensive reports.

What do the tax strategies say?

Reviewing the statements reveals that the most frequently mentioned principle guiding companies' approach to tax is *legal compliance*, with 86% of FTSE 100 companies that publish a statement explicitly stating that they take their legal obligations seriously. (The others, presumably, assume that this goes without saying.) Some mention other guiding principles, such as the company's integrity and values, the 'spirit of the law' or balancing stakeholder interests. While a few companies talk about paying 'fair tax', others explicitly make the case that this is not their role to determine. Shell, for example, says: 'It is the right of governments to determine what a fair share of tax is and to draft tax laws accordingly. They do so against strong competition for capital and investment, which is internationally mobile. It is not the role of business to form views on what level of taxation is fair.'

When explaining how they put principles into practice, most FTSE 100 companies stress that they seek to maintain an open and constructive relationship with tax authorities, disclosing all relevant facts in all countries where they operate. Almost half the companies say they have a policy not to undertake contrived, artificial or aggressive transactions.

Many of the statements clearly draw on the seven tax principles, which were developed by the CBI in 2013; BIAC's *Statement of tax principles for international business*; or the OECD's *Guidelines for multinational enterprises*, where taxation is covered alongside issues such as human rights, employment, environment and combating bribery as an area of responsible business conduct.

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Where to draw the line?

A few companies give more detailed explanations of their approach to tax risk and offer some explanation of where they draw the line between 'aggressive' and 'acceptable' tax planning. For example:

- 'We will only undertake transactions that we are prepared to fully disclose, and … we will not undertake transactions that are without strong underlying commercial motivation, or that are (or appear to be) artificial or contrived.' (Anglo American)
- 'We seek to minimise the risk of uncertainty or disputes.' (BP)
- 'We carefully manage the tax risks and costs inherent in every commercial transaction, in the same way as any other cost. However, we do not enter into artificial arrangements in order to avoid taxation or to defeat the stated purpose of tax legislation.' (Centrica)
- 'We will not enter into tax planning, transactions or structures that are notifiable to tax authorities under mandatory disclosure regimes, which we consider to be abusive, or which otherwise have no ultimate commercial business purpose.' (RELX (which owns LexisNexis, publisher of this journal).) RELX also says it will only undertake transactions that are 'more likely than not to be sustained on examination by tax authorities'.
- 'We aim to pay an appropriate amount of tax according to where value is created within the normal course of commercial activity. Any transfer pricing is always calculated using the "arm's length" principle. We do not use contrived or abnormal tax structures that are intended for tax avoidance, have no commercial substance and do not meet the spirit of local or international law.' (Unilever)
- 'The commercial needs of the group are paramount and all tax planning will be undertaken in this context. All transactions must therefore have a business purpose or commercial rationale. Due consideration will be given to

the group's reputation, brand, corporate and social responsibilities when considering tax initiatives, as well as the applicable legal and fiduciary duties of directors and employees of the group and will form part of the overall decision-making and risk assessment process.' (Vodafone)

Vodafone and Unilever offer a brief example discussing how their principles were applied to an actual structuring decision.

Beyond the most often mentioned principles and commitments, a few companies tackle more contentious areas. Extractive industry companies in particular, such as Anglo American, BHP Billiton and Rio Tinto, discuss the issue of tax haven entities. Vodafone also provides a detailed discussion of the company's approach to its international structure. For each country in which the group operates, it provides a listing of all entities and gives a narrative summary of their purpose. A few companies highlight and discuss their efforts to influence and contribute to policy development, the positions they advocate and the organisations they belong to and support.

Shifting the curve on responsible tax

Over the next year, most of the companies already publishing statements will need to upgrade them to meet the requirements set out in the Bill, covering management of tax risks; responsibilities and governance; approach to tax planning; and their relationship with HMRC. Many more will publish tax strategies for the first time. In total, around 2,000 companies will be required to publish statements.

But will it make any difference, or will it be like asking supermarkets to apply 'may contain nuts' labels to jars of peanut butter? Even worse, will it be like supermarkets slapping 'may contain nuts' labels on everything? Publishing a tax strategy is currently an indicator that a company takes a low-risk approach to tax, but once everyone has to do it this correlation will disappear. There are fears that these requirements will result in no more than anodyne boilerplate text. And, as the Oxford University Centre for Business Taxation warned in response to HMRC's consultation, tax strategies can be drafted in vague language, which is so loosely worded that they do not effectively constrain tax planning behaviour.

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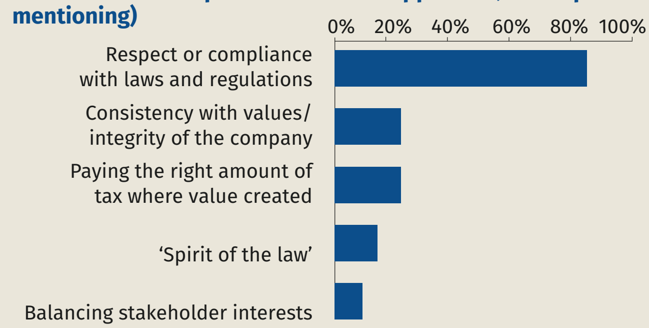
On the other hand, requiring businesses to articulate what they mean by responsible tax practice may be a step towards a better understanding of the issues and dilemmas. Mandatory disclosure has been a common policy tactic in trying to drive better practice in areas such as 'modern slavery', 'conflict minerals', carbon emissions, and anti-corruption and bribery. The thinking is that disclosure can work in three different ways: pressuring companies to achieve basic compliance; enhancing governance and management; and consolidating and rewarding leading practice.

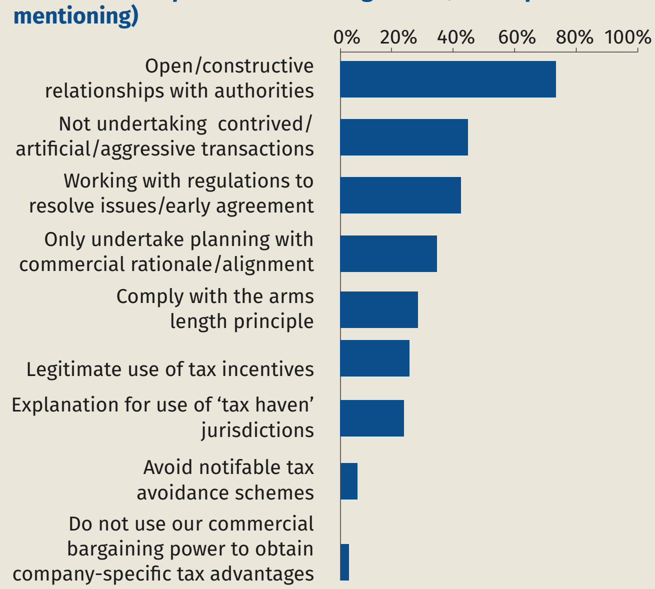
These three rationales target different groups of companies. HMRC says that its main focus is the small number of recalcitrant companies which persistently engage in tax avoidance or highly aggressive tax planning, as well as those which refuse to engage with HMRC in a full and open manner. For this purpose, the vast majority of the 2,000

Foundations of responsible taxation approach (% of reporters mentioning)



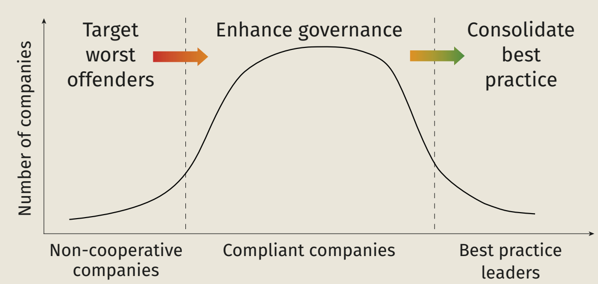
Source: Analysis of FTSE 100 companies by Maya Forstater, July 2016

Practices of responsible tax management (% of reporters mentioning)



Source: Analysis of FTSE 100 companies by Maya Forstater, July 2016

Approaches to shifting the curve on responsible tax practice



strategy statements (and indeed the most candid, thoughtful and detailed ones) are likely to be redundant. However, it is also hoped that requiring tax strategies to be owned and approved by the board of directors will ensure that that tax strategy is discussed at the highest governance level; and that this will encourage policies, decisions, KPIs and incentives to be aligned with long term business success, rather than over-weighted towards short term cost reduction.

Many companies at the leadership end of the scale already publish their tax strategies, driven by reputation, licence to operate and anticipation of policy shifts, as well as, in some cases, in direct response to controversy and public criticism. Making reporting less ad hoc is an opportunity to establish clearer benchmarks of best practice, including around some of the more contentious questions and areas of debate, such as the use of 'tax havens' and policy influence and lobbying.

Detoxifying the tax debates

A fourth potential impact of disclosure, and perhaps the most critical, is that it can help to bring together polarised public debates. Taxation has been called 'the open wound of corporate responsibility' and to date has been a wild west of opposing (or simply confused) expectations and rough justice. Consumer brand companies and those investing in the poorest developing countries, in particular, are vulnerable to public criticism, even where they are acting within legal compliance boundaries. 'We are not accusing you of being illegal; we are accusing you of being immoral,' as Margaret Hodge roared at Google. There is, though, little clarity about what reasonable expectations of corporate responsibility around tax might be. This not only makes it difficult to hold a robust discussion about an individual company's approach to tax, but undermines public trust in the tax system as a whole.

Having a better public debate on tax responsibility depends on clarifying expectations of acceptable and good practice. Providing and discussing specific examples, which show how structures are assessed according to the published strategy, may be particularly helpful in getting beyond very generalised and high-level principles.

Ultimately, for published tax strategies to be useful someone must read them, and they need a way to judge them. While extractive industry tax reports receive some scrutiny by specialist NGOs and local media, concerned with assessing the revenues from mining and oil operations, in most sectors even the most impressively candid and detailed tax reports raise little attention or response.

PwC gives annual 'building trust' awards to leading tax reporters, but as its business involves advising companies on managing tax, and on public tax reporting, it is hard for it to also act as an honest broker in offering a public assessment of good practice. The FTSE4Good Index and the Dow Jones Sustainability Index assess whether companies make declarations on complying with the 'spirit of the law', paying taxes according to where value is created, tax avoidance, transfer pricing and 'tax havens', but the analysts do not seek to assess the content of these statements, merely their existence. The Fair Tax Mark has made little headway in becoming a broadly adopted standard.

As disclosures on responsible tax become the norm, the state of the art of assessing them must also mature. Corporate responsibility and sustainable investment organisations, in particular, should up their game in providing analysis and convening multi-stakeholder dialogue. Investor interest in corporate tax practices is on the rise; for example, with major institutional investors such as Alliance Trust and Legal & General Investment Management, as well as ethical investors such as Domini Social and RobecoSAM, coming together as part of the 'Principles for responsible investment' initiative to explore how to better understand tax risk and responsibility. The NGOs Christian Aid, Oxfam and ActionAid have issued their own recommendations, in the discussion paper *Getting to good*, which they offer in the spirit of supporting constructive dialogue.

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Tax advisers and tax teams within companies will need to benchmark published policies against HMRC requirements and emerging corporate responsibility criteria, ensuring that policies make sense both internally and externally. Corporate responsibility teams lack tax technical knowledge but know how to build relationships with critical stakeholders. Corporate tax strategies, policies and codes of conduct are evergreen documents. Nevertheless, the Finance Bill proposes that companies be required to issue an annual tax strategy document. This suggests a dynamic of feedback and iteration. It offers the opportunity for companies, advisors, analysts, NGOs and industry groups, corporate responsibility and sustainable investment organisations to test and refine a clearer common understanding of responsible tax practice in an atmosphere of more light and less heat. Publishing a first strategy statement should only be viewed as the starting point. ■

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