

Facilitating tax evasion: how to avoid being unwittingly caught by the Criminal Finances Act 2017

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The Criminal Finances Act 2017 came into force on 30th September 2017. It has introduced a new corporate criminal offence of failing to prevent tax evasion. This new offence is aimed at companies who have failed to put in place the reasonable procedures to prevent tax evasion. The activities of the finance and professional services industries will inevitably come under particular scrutiny, but the new law has a much broader application. Every company should be adapting its controls in order to ensure they will provide protection. In the context of the current focus on tax evasion in many countries and offshore centres, the CFA brings prosecutors in the UK a clear mandate to take enforcement action.

The Act has created two types of tax offences: (1) failure to prevent facilitation of UK tax evasion offences (the “**UK Tax Offence**”); and (2) failure to prevent facilitation of foreign tax evasion offences (the “**Overseas Tax Offence**”). There are three stages to both:

Stage one – criminal tax evasion is committed by a taxpayer, under the existing law. Non-compliance, falling short of fraud, is not sufficient;

Stage two – there is criminal facilitation of this tax evasion by an “associated person” of the relevant body who is acting in that capacity. An associated person is someone who provides services for or on behalf of the relevant body and could be an employee, an agent or a subsidiary; and

Stage three – the relevant body failed to prevent its associated person from committing the criminal facilitation act.

The UK authorities will only have jurisdiction over the Overseas Tax Offence if two further criteria are met:

- (1) Both the tax evasion stage and facilitation stage must be criminal offences in the UK as well as the foreign jurisdiction; and
- (2) Either the firm is incorporated in the UK, the firm carries on business (or part of its business) in the UK or part of the facilitation was performed in the UK.

For each offence it will be a defence for the corporate to show that it had **reasonable** procedures in place to prevent such facilitation, or that it was not reasonable to expect it to have such procedures.

The offences themselves may not be totally straightforward to prosecute. Each offence requires another two underlying criminal offences – regarding the tax evasion and the facilitation – to be proved (although not necessarily prosecuted). In addition, it is often difficult to distinguish between criminal tax evasion and aggressive (but legal) tax avoidance. There are potential workarounds for these issues, but the main impact of the new offences is highly likely to be compliance-related: as with the Bribery Act, businesses will need to ensure their procedures are sufficiently robust to provide a defence.

What should these procedures look like? This will be determined on an individual basis, but HMRC guidance suggests that they should be focused on six guiding principles:

- Risk assessment: Have you conducted a documented business-wide risk assessment to identify your associated parties and understand where tax evasion and facilitation are more likely to occur?
- Proportionality: Are your current prevention procedures proportionate to the risks you face? Are additional or updated procedures required for specific areas of your business?
- Top-level commitment: Are top-level management delivering a clear message (internally and externally) that facilitation of tax evasion is unacceptable? Are they fostering a culture that supports this message?
- Due diligence: Do you conduct appropriate due diligence on associated persons to identify and mitigate these risks? Do your contracts with them have appropriate language regarding conduct and reporting of issues? Do they understand what they should and should not do?
- Communication and training: Do your personnel know about and understand your prevention procedures? Do they understand how to recognise potential issues, and what they should and should not do?
- Monitoring and review: Do you have sufficient measures in place?

HMRC have made it clear, however, that whilst the principles may be similar to those adopted following the introduction of the Bribery Act, corporates cannot simply rely on their existing anti-bribery controls or make token additions to their current policies in an attempt to be compliant. Instead they need to be able to demonstrate that they have considered the above principles specifically in relation to these offences, and as a result applied the appropriate procedures.

We have provided further guidance in our [Criminal Finances Act: A Checklist](#) document, which you can download [here](#).

Penalties

A corporate guilty of any of those offences will face an unlimited fine and any of a number of ancillary orders. Alternatively, a deferred prosecution agreement (“DPA”) could be obtained regarding either offence. A DPA would have the effect of suspending criminal proceedings for a period of time and a corporate would expect to pay a fine.

Other points of note

The Act also makes further provisions in respect of [Suspicious Activity Reports \(“SARs”\)](#)¹ (extending the current regime) and the creation of [Unexplained Wealth Orders](#)² (allowing law enforcement agencies to investigate and seize property from a person, without needing to prove serious criminality, where there are reasonable grounds to suspect that the person’s known lawful income would have been insufficient to obtain that property).

¹ <http://www.legislation.gov.uk/ukpga/2017/22/section/10/enacted>

² <http://www.legislation.gov.uk/ukpga/2017/22/section/1/enacted>

Conclusion

Unlike the Bribery Act, which was introduced in a fanfare of publicity, the Criminal Finances Act has had a much lower profile and has, to a certain extent, sneaked in under the radar. Its provisions, however - particularly the creation of the “failure to prevent the criminal facilitation of tax evasion” offences - will have a significant effect on businesses, requiring them to focus on whether or not their existing policies and procedures are sufficient to protect them in the event of scrutiny by law enforcement. Companies are well advised to, as soon as possible, address their corporate minds as to the six principles set out by HMRC and how to incorporate them into their policies and procedures.

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