

Criminal Finances Act 2017

September 2017

Two new corporate offences of failure to prevent tax evasion come into force from 30 September 2017

BACKGROUND

In April 2016, the Government published its Action Plan for anti-money laundering and counter-terrorist finance. The Criminal Finances Act (CFA) is aligned to this plan. New offences mean that a 'relevant body' (companies and partnerships) can now be held criminally liable if they fail to prevent those who act for them, or on their behalf, from criminally facilitating tax evasion in the UK or abroad.

TWO NEW CORPORATE OFFENCES OF FAILURE TO PREVENT TAX EVASION

- Failure to prevent facilitation of UK tax evasion offences
- Failure to prevent facilitation of foreign tax evasion offences

For both these offences, all 3 of the following need to apply:

1. Criminal tax evasion by a taxpayer (either an individual or a legal entity).

This includes any fraudulent activity which, broadly speaking, intends to evade the payment of taxes due to the Exchequer. Any form of tax or duty is subject to the legislation, it is not just restricted to corporation tax, income tax or VAT. Dishonestly "taking steps with a view to" or "be knowingly concerned in" the evasion of tax is also covered. There is no need for the tax to have been successfully evaded.

2. Criminal facilitation of the taxpayer's tax evasion by an "associated person" of the relevant body.

'Facilitation' includes intentionally aiding and abetting. The underlying legislation for this term is the Accessories & Abettors Act 1861.

The associated person must have deliberately and dishonestly taken action to facilitate the tax evasion.

No precise definition of "associated person" is given in the legislation. It would generally be a director, employee, agent, contractors or other person who carries out services for or on behalf of the relevant body. It can be an individual or an incorporated body. Whether or not someone falls within the definition will depend on all the relevant facts and circumstances surrounding the relationship between the person and an organisation. The contractual status or title of the person carrying out the services for or on behalf of the organisation is irrelevant. Sub-contractors might therefore fall within the definition.

3. Failure by the relevant body to prevent its representative from criminally facilitating the tax evasion.

For the offence of UK Tax Evasion Facilitation, it does not matter if either the company or partnership or the associated person who facilitates the tax evasion is in the UK or abroad.

For the offence of Foreign Tax Evasion Facilitation, there are other considerations:

- UK Nexus – the relevant body must be sufficiently connected to the UK
- "Dual criminality"- broadly speaking the "facilitation" and "foreign tax evasion offence" must be criminal offences in both the foreign country and the UK.

These requirements are discussed in the HMRC guidance.

THE 4 PARTS OF THE ACT

Part 1 deals mainly with amendments to the Proceeds of Crime Act 2002 "POCA".

(POCA set out laws concerning recovery of criminal property and anti-money laundering procedures).

Part 2 comprises equivalent changes to amend the Terrorism Act 2000 ("TACT") and the Anti-Terrorism and Security Act 2001 ("ATCSA") in order to tackle terrorist financing and property .

Part 3 introduces two new corporate offences for failure to prevent the facilitation of tax evasion – within, or outside, the UK.

Part 4 deals with minor general amendments.

PRACTICAL GUIDANCE

Draft Government Guidance: "Tackling tax evasion: a new corporate offence of failure to prevent the criminal facilitation of tax evasion" is also available from the Government's website. This guidance explains the terminology and has a series of case studies, along with some practical guidance:

[https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/560120/Tackling_tax_evasion -](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/560120/Tackling_tax_evasion_-_Draft_government_guidance_for_the_corporate_offence_of_failure_to_prevent_the_criminal_facilitation_of_tax_evasion.pdf)

[_Draft_government_guidance_for_the_corporate_offence_of_failure_to_prevent_the_criminal_facilitation_of_tax_evasion.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/560120/Tackling_tax_evasion_-_Draft_government_guidance_for_the_corporate_offence_of_failure_to_prevent_the_criminal_facilitation_of_tax_evasion.pdf)

There is a brief overview on page 44 of this guidance on "Suggested Reasonable Prevention Procedures for lower risk SMEs" which may provide some useful pointers.

WHAT STEPS SHOULD I TAKE NOW?

The Act became law on 27 April 2017. Part 3 offences take effect from 30 September 2017.

HMRC guidance suggested that the following tasks should have been carried out by the relevant body by the time the legislation comes into force:

- Risk Assessment carried out to identify the major risks and priorities for the organisation
- Plans drawn up with a clear timescale for implementation

The guidance acknowledges that some aspects such as training programmes and updates to IT systems will take time to put into place. While there is also acceptance that prevention procedures planned but not yet in place will be taken into consideration should an offence occur, the expectation is one of "rapid implementation".

FURTHER INFORMATION AND GUIDANCE

Further information about the CFA, together with a number of factsheets, is provided on the Government's website:

<https://www.gov.uk/government/collections/criminal-finances-bill>

The full CFA wording is available from

<http://www.legislation.gov.uk/ukpga/2017/22/contents/enacted>

IS THE CFA SIMILAR TO ANY OTHER EXISTING LEGISLATION?

The CFA and Bribery Act 2010 both draw on the concept of "failure to prevent"; the new CFA offences are modelled on the Bribery Act.

HMRC mentions the Joint Money Laundering Steering Group in its draft guidance document.

Whilst familiarity with anti-bribery prevention measures and anti-money laundering procedures may help companies and partnerships assess the impact of the CFA, each relevant body needs to develop bespoke prevention procedures.

STATUTORY DEFENCE

- The only statutory defence available will be, where at the time of the offence, the relevant body had reasonable prevention procedures in place to prevent tax evasion facilitation offences, or where it is unreasonable to expect such procedures to have been in place. The onus will be on the relevant body to prove whether either of these apply.

PENALTIES AND FINES

- Penalties will include unlimited fines, confiscation orders or serious crime prevention orders.
- Any criminal conviction is likely to involve disclosure to professional regulators in the UK and abroad, and may prevent the award of public contracts to the company or partnership. Deferred Prosecution Arrangements will also be available to prosecutors.

GUIDING PRINCIPLES

6 Guiding Principles are listed in the HMRC guidance which may form a useful framework to work to:

1. Risk Assessment: This will be geared to assessing the relevant body's exposure to the risk of someone acting for or on its behalf in any activity which criminally facilitates tax evasion.
2. Proportionality of risk-based prevention procedures: Reasonable prevention procedures will be proportionate and reflect the risks an organisation considers it faces of tax evasion facilitation being carried out by those acting for it or on its behalf.
3. Top level commitment: Senior management should set the 'tone from the top' and foster a culture which seeks to ensure the facilitation of tax evasion is never acceptable.
4. Due Diligence: Due diligence procedures should be implemented to mitigate the risk of those acting for or on behalf of an organisation facilitating tax evasion.
5. Communication (including training): Prevention policies and procedures should be communicated in a proportionate and considered way both internally and externally. Appropriate training and support mechanisms should be delivered and maintained
6. Monitoring and review: The ongoing effectiveness and accuracy of prevention procedures should be monitored and changes made where necessary.

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