

THE CRIMINAL FINANCES ACT 2017

The CFA has introduced the Corporate Criminal Offence, which covers the corporate facilitation of tax evasion.

Two new offences came into operation in late September 2017, introduced by the new Criminal Finances Act 2017 (CFA). These cover the corporate facilitation of tax evasion within the UK and a similar sanction for overseas offences. These offences are collectively known as the Corporate Criminal Offence (CCO).

What is notable about the CFA is that the penalties for evasion now apply not only to those who have directly committed the offence, but also to those who have passively allowed it to happen.

There have been a number of triggers for the legislation, including the now notorious 'Panama Papers' and also the BBC Panorama allegations concerning an international bank's private client team in Switzerland and its use of offshore accounts to conceal funds. Although prosecutions are going on in other countries following this, until now there was no equivalent law in the UK permitting prosecution proceedings of the UK parent company as being directly or indirectly responsible.

This guide explains how the offence and potential prosecution can be triggered and how businesses can reorganise their procedures to protect themselves.

THE UK OFFENCE

For the CCO to be committed, three stages all need to be present.

- **Stage one:** An act of criminal tax evasion has taken place by a third party taxpayer. This has of course long been a crime. However, for the purposes of this new legislation, it is not necessary for a successful prosecution or even a charge to be brought against that person.

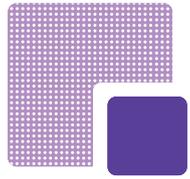
- **Stage two:** An associate (who could be an employee, a joint venture party or even integral contractor) who is deemed to be representing the entity, aids or orchestrates the facilitation of that crime.
- **Stage three:** The business entity is found not to have adequate reasonable procedures in place which would have been sufficient to prevent that facilitation from occurring.

As above, tax evasion is (and always has been) a crime. In essence it includes fraudulently making a misstatement concerning your tax affairs to reduce income, increase your eligible costs or deliberately conceal income. Tax avoidance by contrast is using the literal meaning of tax law in order to reduce or eliminate your current or future tax liabilities. The latter is legal although its current usage tends to refer to highly artificial schemes and is generally frowned upon by the courts (and press). Although evasion and avoidance still remain theoretically distinct, there is a tendency by HMRC to discuss them in the same context - which means that in practice there is a very blurred distinction.

OVERSEAS OFFENCES

In an almost identical way, the crime of facilitation is extended to foreign offences. This will however be limited to business entities which have:

- UK incorporation; or
- Where all or part of the business is carried on in the UK; or
- The associated person carried on the facilitation in Stage Two whilst located in the UK at the time.



Businesses must take immediate steps to place themselves into a position where they can be seen to have both reasonably anticipated the issues and put reasonable measures in place.

In addition, there needs to be 'dual criminality' involved. This comprises two stages:

- **Stage one:** the overseas jurisdiction must have an equivalent tax evasion offence at the taxpayer level AND the actions carried out by the individual would be a crime if they were carried out in the UK.
- **Stage two:** the overseas jurisdiction must have a similar offence covering the associated person's criminal act of facilitation AND the actions would also be a crime if they took place in the UK.

The effect of these new rules is to create an additional criminal offence of **failing to prevent the crime**. Stages one and two of the process of identification of the crime are already crimes in their own right dealt with under other statutes.

POTENTIAL PENALTIES

Where a business is found guilty of failure to prevent, the penalties include:

- unlimited fines;
- other ancillary orders, including confiscation of assets orders or serious crime prevention orders;
- although not an official sanction, businesses may also have to contend with the requirement to disclose to their own professional regulators in the UK and overseas, which may involve repercussions (including prevention from tendering from public contracts);
- even if there are no official regulators in a particular trade, there may nevertheless be untold damage from the business receiving a criminal prosecution, as suppliers and customers reconsider their trading relationship. Once these third party business entities begin their own process of ensuring compliance with the CFA, then the loss of key relationships for a guilty party becomes more likely.

A Deferred Prosecution Agreement (DPA) may be an alternative to the above penalties. DPAs are already available for

CRIMINAL FINANCES ACT 2017

crimes of fraud, bribery and certain economic crimes. Under these agreements, prosecution can be deferred for a defined period. They enable an organisation to put their 'houses in order' without the damage of a criminal conviction and avoid lengthy and costly trials (although subsequent compliance is a built in condition for this to be effective).

BUILDING A DEFENCE

Usually criminal prosecutions are the consequence of taking certain actions outside the law. Here though we see perhaps a more worrying trend – that of being prosecuted for passivity ie. not taking potential remedial action.

Therefore it is important that a business takes immediate steps to place itself in a position where it can be seen to have both reasonably anticipated the issues and have put reasonable measures in place to reduce or eliminate the likelihood of such offences taking place.

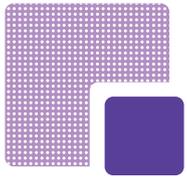
HMRC set out **six key defences** in their [Guidance of 1 September 2017](#).

If all of the six defences set out in that Guide are put in place, then this will significantly reduce (or indeed eliminate if done properly) the likelihood of prosecution. If you are already familiar with the Bribery Act 2010 then there will be strong parallels with this.

PRINCIPLE 1 - RISK ASSESSMENT

We recommend that all businesses likely to be affected by this new statutory requirement "sit at the desk" of their employees, agents and other service providers to consider all of the risks that could arise from their business, as well as how those individuals could facilitate the crimes of tax evasion by individuals outside the firm. This is fundamentally an assessment of all third-party arrangements and how those arrangements tie in with their own key risk employees.

Understanding exactly what risks are likely as part of a process of risk assessment is fundamental to any defence. It is recommended that all businesses refer to any relevant trade bodies that may have their own guidance on this, eg. Financial Conduct Authority and the Law Society.



UHY has developed work programs, particularly for those in high risk sectors, which will assist you with risk assessments, processes, guidance and training.

A risk assessment which involves senior management should not only be seen to be taking place, but sufficient resources should be allocated to the ongoing detection and monitoring of risk. Companies should therefore document the key risks identified and show clearly what action is going to be taken to minimise or eliminate those risks.

Risks identified could include: country location risk, sector risks, transaction risks, business opportunity risks, product risks and customer risks. In addition, businesses will need to consider the nature of all of their joint ventures and other partnership type structures.

The process is very subjective but the questions that will need to be asked might include:

- Can you safely say you are low risk?
- Where and how your payments for goods and services are made?
- Are transactions in cash?
- Are payments made to offshore accounts?
- Do you use offshore accounts and in what way?

A walkthrough of your typical sales and purchase processes may help to draw out any wrong conclusions. It will be useful to include a detached professional adviser in this process as a sounding board.

PRINCIPLE 2 - PROPORTIONALITY OF RISK BASED PREVENTION PROCEDURES

HMRC accepts that, for some types of business, many procedures which might be otherwise appropriate could in fact become burdensome.

In these instances they do not expect businesses to address every conceivable risk, particularly where those risks are quite remote. We recommend that clients, when undertaking risk assessments, also consider the remoteness and relevance of each risk. Documentation of such assessments and clear decision-making in terms of

proportionality is essential. The size of the business and the complexity or otherwise of the trade will be highly relevant in making such an assessment of proportionality.

PRINCIPLE 3 - TOP LEVEL COMMITMENT

It is expected that the most senior levels of any organisation are heavily involved in setting up the defences and identifying the risks. They must be seen to be involved and fostering a culture of compliance and the shunning of any tax evasion possibilities.

Communication and endorsement of the organisations' stance on tax evasion is essential, as well as the involvement in preventative procedures.

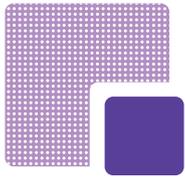
Business need to communicate:

- a commitment to zero tolerance to criminal facilitation of tax evasion;
- a clear statement of the consequences for anyone involved with such breaches;
- their commitment not to get involved with third parties who do not have relevant and reasonable prevention procedures; and
- their support of the prevention of tax evasion, for example the benefits to its own reputation.

As well as communication, there needs to be designated responsibilities to ensure preventative measures are implemented and maintained. An active process of engagement with relevant associated persons needs to take place and a clear structure of responsibility established, again at senior level, for implementing disciplinary procedures for such breaches of policies.

Finally, there also needs to be a commitment to whistleblowing policies in this respect. This commitment will need to be seen as genuine and ensure that protection for those individuals is both communicated effectively and, where relevant, visibly taking place.





WHAT UHY CAN DO TO HELP

Our experts can assist with:

- helping your management team undertake their risk assessment processes and set up appropriate and proportionate procedures;
- ensuring that there is clear documentation of the review and action plans demonstrating the thought process, including whether a process has been recognised but rejected;
- undertaking a detached walk through of your operations to probe for third party risks, identifying how and/or who could be involved in facilitation, including an overview of means and opportunity;
- minimising the risks for main board directors, who have now become responsible for the actions of employees in subsidiaries, wherever located;
- providing guidance and training to your teams;
- giving an objective view of your communication, both internal and external (eg. use of your intranet for posting staff policies and your staff handbook);
- sourcing and working with an HR consultant to provide a template set of policies if you haven't yet taken this step.

PRINCIPLE 4 - DUE DILIGENCE

Once risks have been identified from the risk assessment process, then some of the actions taken will involve a process of due diligence on the third-party or particular type of risk. This may include, for example, understanding more about the customer, supplier or other third party and to what extent they are likely to have been involved in any form of tax evasion, or have the opportunity and / or means to do so.

Any due diligence must also take into account the proportionality role above to consider whether appropriate.

PRINCIPLE 5 - COMMUNICATION

This has been partly covered by the commitment by senior management in Principle 3, but it is essential that an organisation is seen communicating in every way possible its stance on tax evasion. This could include, for example, rewording of all standard contracts, internal communications with staff and adding a clear policy on its website.

Training of staff is also likely to be highly relevant. It is possible that organisations in the higher risk

categories such as professional and financial services will already have training in place in connection with anti-money-laundering procedures and anti-bribery procedures. These new aspects will be an extension of that training but will need to be updated accordingly.

Training needs to cover the organisation's policy and procedures, explaining how and when to seek advice and report concerns or suspicions of tax evasion, whistleblowing procedures, and defining and explaining the term of tax evasion and other associated fraud.

PRINCIPLE 6 - MONITORING AND REVIEW

The whole process outlined above will need to be continuous and should change and evolve over time if necessary, through internal feedback from staff members and more formal periodic review with documented findings. In addition, it is likely that trade bodies and other forms of representation will share experiences, as well as and identify new risks emerging.

THE NEXT STEP

UHY has already begun the process of developing work programs to assist clients, particularly in high risk sectors such as legal and professional firms and FCA registered businesses. If you would like to discuss how your business can be safeguarded, then please contact Andrew Snowden or your local UHY tax partner.

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