TAX

NEW CORPORATE CRIMINAL OFFENCES

An overview of the new corporate offenses of failure to prevent the facilitation of (UK and foreign) tax evasion

Criminal Finances Act 2017

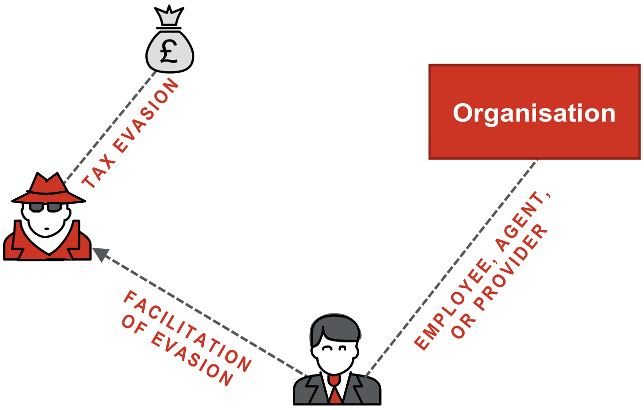
The Criminal Finances Act 2017 was passed on 27 April 2017 to, among other things, "create corporate offences for cases where a person associated with a body corporate or partnership facilitates the commission by another person of a tax evasion offence".

These two new strict liability offences of failing to prevent the facilitation of evasion (**FPFE**) come into force on 30 September 2017.

The FPFE offences

A company or partnership commits a FPFE offence where:

1. a person **commits tax evasion**, or takes steps with a view to committing tax evasion;
2. another person criminally **facilitates that evasion** (or attempted evasion); and
3. the facilitator **acts in the capacity of an employee, agent, or service provider** of that company or partnership while facilitating the evasion.



Tax evasion and facilitating tax evasion are already criminal offences in the UK. The new element is the criminal liability of the company for whom the facilitator works.

There is no intention required on the part of the organisation; the offence is one of strict liability. Nor is it relevant whether the organisation receives any financial benefit from the tax evasion or the facilitation. The only defence is that the organisation has "reasonable procedures" in place to prevent the illegal facilitation.

An organisation convicted of an FPFE offence is liable to a fine, with no upper limit on the total amount which could be imposed. Confiscation orders and serious crime prevention orders can also be imposed.

Territorial extent

There are two FPFE offences. The first, concerning evasion of UK tax, applies no matter the residence of the company or partnership, or the nationality of the facilitator or the evader. The only territorial requirement is that the evader commits (or attempts to commit) a UK tax evasion offence, meaning UK taxes must be involved.

There is also a FPFE offence under UK law for the facilitation of evasion of foreign taxes. However, this is subject to additional requirements that serve to connect the FPFE of the foreign tax to the UK. These are:

- "dual criminality" at the taxpayer level; that is, there must be an offence of tax evasion in the foreign jurisdiction which would also amount to tax evasion were it committed in the UK; and
- dual criminality at the facilitator level; that is, the facilitator must have committed a facilitation offence in the foreign country which would be a facilitation offence were it committed in the UK; and
- the organisation is incorporated or formed, or carries on business, in the UK, or any of the facilitation takes place in the UK.

Reasonable procedures

It is a complete defence to the FPFE offences to prove that the company or partnership had in place reasonable procedures to prevent the facilitation.

HM Revenue & Customs (**HMRC**) has issued draft guidance on what "reasonable procedures" should entail. It outlines six principles for companies and partnerships to use in evaluating what prevention procedures may be reasonable for their business.

1. Risk assessment

All organisations should assess their exposure to the risk of their employees, agents, or service providers engaging in facilitation of tax evasion. This can involve risks if, for example: the countries with which the organisation deals are frequently used as tax shelters; the particular sector the company operates in has a higher risk of facilitating evasion; the types of transactions involved are particularly complex or secret; the value of the projects or assets; the specific nature of certain business relationships; or the particular nature products or services.

Particular organisations may have heightened risk. HMRC notes that a bonus culture that rewards excessive risk taking may heighten the risk that criminal facilitation occurs. So might a lack of training, clarity in policies, or clear messaging from top-level management.

2. Proportionality

In assessing what procedures are reasonable to prevent the facilitation of tax evasion, organisations should consider whether the procedures are proportional to the risk identified. Smaller organisations with little exposure to high-risk sectors, jurisdictions, or clients may not be required to put in place significant procedures (though HMRC notes that a risk assessment should be done in the first place to establish this).

Larger organisations which are exposed to a higher degree of risk will need proportionally more prevention procedures. HMRC suggests that these may include:

- a risk assessment;
- overview of strategy and timetable for prevention procedures;
- ongoing monitoring and review of risks;
- enforcing compliance with procedures;
- a pathway for reporting noncompliance and protection for whistleblowers;
- a "commitment to compliance over profit".

3. Top-level commitment

Top-level management are expected to "foster a culture… in which activity intended to facilitate tax evasion is never acceptable". Senior management should communicate and endorse the organisation's prevention procedures and should be involved in their development and review. In some cases, it may be appropriate for senior management to make formal statements setting out a "zero-tolerance" approach to criminal facilitation and committing not to recommend the services of others who do not have in place reasonable preventative procedures.

4. Due diligence

The organisation is expected to undertake due diligence of service providers and clients, to evaluate the risk that the services could be used to facilitate tax evasion. If appropriate, the organisation may which to apply increased scrutiny to particular providers.

5. Communication

The prevention policies must be communicated and embedded through the organisation. The degree of communication and training required must be proportionate to the risk of facilitation in that organisation.

6. Monitoring

The organisation should commit to ongoing monitoring and review of its prevention procedures and the risk of facilitation. Procedures may need to be changed or intensified as the organisation's business evolves.

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