

# Corporate criminal offences

## Criminal Finances Bill 2016

### Background

Tax evasion and its facilitation are already criminal offences, however it has to date been difficult to attribute criminal liability to a corporation where such instances occur.

At the March 2015 Budget the Government announced that it would introduce new criminal offences to apply to corporations who failed to prevent their agents from criminally facilitating tax evasion ("the Corporate Offences"). These rules also apply to partnerships.

HMRC laid the draft legislation on the Corporate Offences before Parliament on 13 October 2016 as part of the Criminal Finances Bill. HMRC has published draft guidance which is expected to be finalised once the Bill has received Royal Assent. Other organisations, such as the BBA, are developing their own industry specific guidance.



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The Criminal Finances Bill was introduced in October 2016 and is expected to receive Royal Assent in Q2 2017.



Part 3 of the Bill introduces the Corporate Offences, comprising the failure of an organisation's agent(s) to prevent the facilitation of UK tax evasion and the failure to prevent the facilitation of foreign tax evasion offences. The draft legislation follows a period of consultation between April and July 2016.

The Corporate Offences are expected to take effect in September 2017.

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### The offences

There are three stages to the offences:

- criminal tax evasion by a taxpayer under the existing law;
- criminal facilitation of this offence by an "associated person" of the corporation, as defined by the Accessories and Abettors Act 1861; and
- the corporation failed to prevent its representative from committing the criminal act at Stage 2.



There does not need to be a conviction for either Stage 1 or Stage 2 for the third stage to be present.

The only defence the organisation has is that it had reasonable procedures in place to prevent the Stage 2 action, or, that it was not reasonable for that organisation to have procedures

In addition to a criminal conviction for the corporation, there are unlimited financial penalties associated with the Corporate Offences.

The legislation applies to evasion of both UK taxes and non-UK taxes where there is a UK element. Dual criminality is required in respect of overseas tax evasion offences (i.e. the underlying evasion is an offence in the country where it is committed, and both offences would have been criminal offences if the activities took place in the UK).

## Reasonable procedures

The failure of the organisation to take steps which are considered to be “reasonable in all the circumstances” to prevent its agents from committing the criminal act would render the business liable under either of the Corporate Offences.



HMRC’s draft guidance includes examples and suggestions of such reasonable procedures within the principles of:

1. Risk assessment
2. Proportionality of risk-based prevention procedures
3. Top-level commitment
4. Due diligence
5. Communication (including training)
6. Monitoring and review

The defence as drafted will cause a significant issue for any (otherwise) legitimate business as the primary issue is that an agent is engaging in criminal behaviour which they have every incentive to hide from the business they are connected to.

Another key concern is how “reasonable in all the circumstances” should be interpreted (emphasis added), e.g. should a business be expected to be able to identify and prevent such criminal behaviour by its agents where agents are actively hiding this behaviour and/or subverting a business’s internal processes to enable them to do so?

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## Sectoral issues

In undertaking a risk assessment, organisations should be mindful of HMRC’s identified common risk factors. These include sectoral risks arising in:

- the financial services industry; and
- legal and professional advisors.

These sectors are considered to provide services most at risk of being misused to facilitate tax evasion.

Common risk factors are also expected to be found in the interactions between all organisations, not just those in the sectors above, and their employees, contractors and supply chains.

## Advice to clients

KPMG has developed a 12 point plan to guide organisations through the actions they should start undertaking now.



1. Understand the legislation
2. Determine who should be involved - ownership, implementation and Subject Matter Experts
3. Pull together a high-level team to lead the work; decide on resources
4. Carry out a high level risk assessment "in the mind of a criminal"
5. Set, and communicate, a tone from the top
6. Carry out a series of more focused risk assessments, particularly where risk is found to be higher
7. Map out the procedures needed to ensure the response to these risks is reasonable; draw on existing procedures (e.g. AML/ABC)
8. Cross-check against HMRC/industry guidance and amend approach where relevant
9. Document conclusions setting out risks, procedures and why they are reasonable
10. Delivery: plan for making the necessary changes in procedures and the staff training needed to deliver these
11. Deliver the changes in procedures, staff training, etc.
12. Plan for review of procedures after 1-2 years, learning from own and others' experience

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