



## Failure to prevent the facilitation of tax evasion – learnings one month in

New corporate offences of failing to prevent the facilitation of tax evasion came into force on 30 September. The offences apply to all industries.

Many businesses are already advanced in their implementation while others are in the process of determining their approach. This briefing gives a practical view of key points based on our experience to date and puts the offences in the context of wider regulatory trends.

### Headlines

- Businesses will not be liable if they have 'reasonable procedures' to prevent associates from facilitating evasion. 'Tone from the top' is a key element.
- Boards should now be considering what, if anything, has been done to protect the company from liability and whether this is sufficient. Taking the right action is more important than rushing to implement.
- It can be a cost-effective opportunity to review related areas such as anti-bribery which cover similar ground and may need reassessment in the light of learnings from recent enforcement actions.
- The emphasis on effective governance reflects key trends in regulation where boards and top level management are expected to ensure the right systems and procedures are in place.

## Our experience in a nutshell

- Most clients start with a **risk assessment** which is then used to create an appropriate **action plan**. Few businesses are choosing to do nothing in relation to the new offence, although this is an option.
- **Existing compliance frameworks** may cover much of the relevant ground, but it would be unwise to assume this. For example, relying on existing SOX controls is unlikely to be sufficient, as these primarily focus on process and control integrity and would not necessarily identify issues around the substance of the underlying transaction.
- **Responsibility** for the company's response tends to sit between **the tax and compliance functions**. Involvement of both makes for a more effective process with advice from lawyers when needed. As relevant policies and procedures become embedded, the response would naturally sit within the enterprise compliance framework, drawing on tax expertise to identify risk areas and red flags for incorporation.
- Some businesses are taking the **opportunity to review related compliance areas**, such as anti-bribery, where systems and procedures may not have been re-evaluated since the UK Bribery Act came into force in 2011. This can be a cost-effective way of reviewing the robustness of the overall framework in the light of learnings from enforcement actions.

## Key actions and timing

The first step is to carry out a risk assessment. This forms a solid foundation for identifying robust and cost-effective next steps. Without one, there is no basis to determine whether or not procedures are proportionate or 'reasonable'. This risks either underestimating or gold-plating actions, and thereby wasting resources on either inadequate protection or unnecessarily disrupting efficient business.

Ideally, the risk assessment should be completed by now, and realistic next steps agreed across relevant business areas. If not, a risk assessment should be planned as soon as possible.

## Examples of potential risk areas

- High volumes of casual workers and contractors
- Disposal of business assets where collusion could reduce acquirer's tax due
- Expat workers' packages – salary disguised as relocation or expenses allowances
- Share schemes and profit sharing schemes
- Complicated payment structures and financing arrangements
- Invoices split between countries and/or entities for no apparent reason

## An overview of the new offences



Businesses will be criminally liable if:

- **A taxpayer** commits criminal UK or foreign tax evasion, and
- **An associated person** of the business criminally facilitates that evasion



The business has a **defence** if had '**reasonable prevention procedures**' in place, or if it was reasonable in all the circumstances not to have such procedures.



'**Associated person**' means employees, agents and those providing services on your behalf. This is the same definition as in the UK Bribery Act 2010.



The offence relating to **foreign tax evasion** also requires that:

- Both the evasion and the facilitation must be offences in the relevant country, and
- The business has a **UK nexus** – for example, if the associated person is based here



**Penalties** are expected to be significant. Theoretically unlimited, they are likely to follow the UK Bribery Act approach in dwarfing compliance costs.

### Impact of delay

In practice, a delay in embedding reasonable procedures is only relevant if an offence is in fact committed before this happens. It is likely to be a higher risk in the mid to long term to rush a programme through than to take more time to plan and implement effectively. Helpfully, the government guidance recognises that procedures may not be fully in place at this stage, but this would always be dependent on the facts and circumstances. Deferred prosecution agreements with heavy financial penalties would remain an option.

During any delay, it would be worth considering interim 'quick wins', such as all-staff emails from senior management emphasising a zero tolerance of tax evasion facilitation or incorporating the message into other communications, or annual certifications if you have them. These can be a useful start to establishing a strong 'tone from the top', which is critical.

### Finding the right approach

The overall practical impact of the proposals on how people behave is key. It can be tempting to take a tick-box view of the six principles in the government guidance, but that misses the point and makes it more likely that gaps will be overlooked. The objective is to encourage companies to prevent tax evasion facilitation in practice, not for companies to second guess what might be a good defence if it happens.

Put simply, there can be no corporate exposure if the measures in place actually prevent the facilitation of tax evasion. If they do not, it would be an uphill battle to demonstrate a defence based on a non-holistic approach that has, in fact, failed.

The first enforcements under the similarly structured UK Bribery Act offence provide useful examples.

The courts consider substance, not form. In one case, the relevant staff had received anti-bribery training, and procedures were in place. The relevant policies, however, were not clear or tailored to actual risks, and the staff did not identify the red flags that could have prevented the bribery. Although the company had an active programme, the staff did not know what to do in the circumstances. This was not sufficient and the level of corporate culpability was found to border on 'high'.

An integrated approach is also more cost-effective, and less disruptive. For example, in a low risk business with strong processes and controls on authorisations, mass training on the law may be expensive and of little value, whereas circulating key messages to relevant staff may be both reasonable and more effective in practice.

### The six principles underlying 'reasonable procedures' set out in the government guidance

Risk Assessment	Proportionate Procedures	Top level Leadership
Looks at nature and extent of your exposure	Based on risk profile, level of control over associated person etc	Covers corporate culture and senior oversight of prevention measures
Due Diligence	Training and communication	Monitoring and review
A risk-based approach to assess associated persons	Ensures policies, procedures and expectations are embedded	Identify and make changes where necessary

Making sure staff know what to do if they know or suspect that tax evasion is being facilitated. This could include whistleblowing hotlines or other escalation processes. Legal advice should be taken promptly to consider next steps and possible self-reporting.

## A modernised approach to corporate regulation

The introduction of this offence reflects a wider trend in the nature of corporate regulation and enforcement. Businesses are increasingly expected to take responsibility for those acting on their behalf and for social and environmental impacts.

Corporate offences are only part of that picture. Criminal penalties for certain health and safety and environmental breaches have been raised through new sentencing guidelines. The impact has been significant - fines for health and safety trebled to £38.9 million after new guidelines focused on corporate liability, outstripping the estimated compliance costs of avoiding prosecution.

As with this corporate offence and the UK Bribery Act offences, robust systems and procedures are critical to avoiding heavy penalties and reputational harm. As part of this, evidence that compliance is taken seriously at a high level is now expected. It is likely that more regulatory areas will be added, as it is perceived to be an effective influencer of corporate behaviour. Further, greater transparency through reporting on social issues such as modern slavery, gender pay gaps, payment practices and environmental impacts has created further potential for reputational risks.

This raises the question of how to manage the increasing volume of competing issues that the board is expected or might wish to oversee. This will require streamlined accountability and reporting mechanisms, combined with risk profiling, to create focused outputs on the most critical areas for consideration. Managing regulation is becoming less about checklists and defined actions, and more about how outcomes, and whether measures work in practice.

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