

GMS Flash Alert



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United Kingdom - New Rules: Corporate Criminal Offence

Tax evasion and its facilitation are already criminal offences, however it has, until recently, been difficult to attribute criminal liability to a corporation where such instances occur.¹

The Corporate Criminal Offence (CCO) legislation came into effect in the U.K. on 30 September 2017, making organisations liable if they fail to prevent their agents from criminally facilitating tax evasion.

The legislation introduces a new corporate offence of failure to prevent the facilitation of tax evasion, with a wide-ranging scope that applies to all businesses—including partnerships—irrespective of size and sector. These rules also apply to partnerships.

WHY THIS MATTERS

The consequences of failing to comply are significant and potentially involve criminal prosecution, an unlimited fine, ancillary orders (such as confiscation orders or serious crime prevention orders) and reputational damage.

It is appropriate for organisations to perform an effective risk assessment and gap analysis of their exposure for facilitating tax evasion.

It is also important that all relevant global mobility and employment tax stakeholders are involved when performing the risk assessment to ensure that all potential areas of tax evasion are considered.

Critical areas for consideration include:

- Managing supplier contracts
- Appointing a third party to act for your organisation or to provide services on your behalf, and
- Managing pay, benefits and expenses for 'associated persons'.

The only defence against penalties is where potential risks have been previously identified and that 'reasonable procedures' have been implemented or are already in place to prevent the facilitation offence.

Many organisations will be implementing CCO compliance projects and it is important for HR, employment tax and global mobility teams to consider what areas of their responsibilities could be impacted and how they can contribute to their internal CCO compliance projects.

What Constitutes an Offence?



Who is an 'Associated Person'?

- A person (or entity) who provides services for or on behalf of the entity.
- Where services provided are not provided directly or indirectly to the customers, clients or counterparties of an entity, it is likely that services are provided 'to' the entity, rather than 'for or on behalf of' the entity, and suppliers of such services may not be treated as 'associated persons'.

How It Works

There can be two areas in which the facilitation of tax evasion can occur:

- 1) Revenue generating (client facing)
- 2) Back office (internal support functions)

For example, if a global assignee requests that the assignee's trailing compensation (provided post-assignment) be sourced to a country to benefit from its lower tax rate, facilitation could occur when a global mobility service provider approves the incorrect sourcing period.

CCO is a worldwide issue as it applies to any global organisation that fails to prevent its agents from criminally facilitating a foreign tax loss, where there is a U.K. nexus. It is important to note that a nexus includes having a branch in the U.K.

To be charged under CCO, dual criminality is required in respect of overseas tax evasion offences. That is, the underlying evasion has to be an offence in the country where it is committed, and both offences would have been criminal if the activities took place in the U.K.

The Defence – 'Reasonable Procedures'

The only defence is that an organisation has 'reasonable procedures' in place to prevent the facilitation offence.

As part of 'reasonable procedures', HMRC's guidance requires organisations to perform a risk assessment to identify the risk of an offence occurring.

Once the areas of businesses susceptible to the risk of facilitating tax evasion have been identified, the existing controls in place to mitigate these should be evaluated.

Additional steps are then needed to bridge the gap between the existing controls and what 'reasonable procedures' should then be put in place for these areas. This will provide a foundation for the robust defence against possible failures.

The 'reasonable procedures' should be designed following six guiding principles:



Next Steps

1. KPMG has developed a 12 point plan to guide organisations through the actions they should start undertaking now.
2. Understand the legislation
3. Determine who should be involved - ownership, implementation and subject matter experts
4. Pull together a high-level team to lead the work; decide on resources
5. Carry out a high level risk assessment "in the mind of a criminal"
6. Set and communicate a tone from the top
7. Carry out a series of more focused risk assessments, particularly where inherent risk is found to be higher
8. Map out the procedures needed to ensure the response to these risks is reasonable; draw on existing procedures
9. Cross-check against HMRC/industry guidance and amend approach where relevant
10. Document conclusions setting out risks, procedures and why they are reasonable
11. Plan for making the necessary changes in procedures and the staff training needed to deliver these
12. Deliver the changes in procedures, staff training, etc.
13. Plan for review of procedures after 1-2 years, learning from own and others' experience

KPMG NOTE

The key message is that organisations need to perform an effective risk assessment and gap analysis of their exposure for facilitating tax evasion.

In addition, organisations need to make sure to follow the guiding principles in the HMRC and industry guidance, to deliver an approach that is proportionate, led from the top of your organisation and implemented in an integrated and sustainable way.

FOOTNOTE:

1 For the regulations, [click here](#). For the original legislation, Criminal Finances Act 2017, [click here](#).

RELATED RESOURCE

For related coverage, see “Corporate criminal offence – final HMRC guidance published” (8 September 2017), published by KPMG LLP (U.K.).

Contact us

For additional information or assistance, please contact your local GMS or People Services professional or one of the following professionals with the KPMG International member firm in the United Kingdom:



Eloise Knapton
Partner
People Services Tax
+ 44 (0) 20 7694 8477
Eloise.Knapton@kpmg.co.uk



James Siswick
Partner
Financial Services Banking
+ 44 (0) 20 7311 6514
James.Siswick@kpmg.co.uk



Christopher Hawkes
Director
People Services – Global Mobility
+ 44 (0) 20 7694 5097
Christopher.Hawkes@kpmg.co.uk

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