



HM Revenue  
& Customs

# Tackling offshore tax evasion: A new criminal offence

## **Consultation document**

Publication date: 19 August 2014

Closing date for comments: 31 October 2014

<b>Subject of this consultation:</b>	A new strict liability criminal offence of failing to declare taxable offshore income and gains.
<b>Scope of this consultation:</b>	The Government has announced its intention to introduce a new strict liability criminal offence. This consultation seeks views on the design of this offence.
<b>Who should read this:</b>	HMRC would be interested to hear from tax and legal professionals, and those involved in offshore investments, including taxpayers who may be affected by the new offence.
<b>Duration:</b>	The consultation period runs from 19 August to 31 October 2014.
<b>Lead official:</b>	Chris Walker, Centre for Offshore Evasion Strategy, HM Revenue and Customs
<b>How to respond or enquire about this consultation:</b>	Responses can be submitted via email to:  <a href="mailto:consult.nosafehavens@hmrc.gsi.gov.uk">consult.nosafehavens@hmrc.gsi.gov.uk</a>  Or via post to:  Chris Walker HMRC Centre for Offshore Evasion Strategy Room 1C/26 100 Parliament Street London SW1A 2BQ
<b>Additional ways to be involved:</b>	While the technical nature of several of the issues involved lends itself to a written response, the consultation team would be happy to meet to discuss the proposals.
<b>After the consultation:</b>	HMRC will publish a response document later in 2014.
<b>Getting to this stage:</b>	This consultation takes forward HMRC's strategy for tackling offshore evasion, <i>No Safe Havens</i> . An update on this strategy was published in April 2014.
<b>Previous engagement:</b>	This is the first consultation on this topic.

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# Foreword

Offshore evasion is illegal and harmful. It is unfair that those who can afford to use expensive offshore banks and complex financial structures can evade their responsibility to pay the taxes which fund vital public services.

£1.5 billion has been recovered from offshore tax evaders over the past two years thanks to the Government's tough and effective approach, but the job is not done yet.

We have made huge progress on international tax transparency, none of which would have been possible without the Prime Minister's global leadership.

Since the end of June, financial institutions in the Isle of Man, Guernsey, Jersey, and all the UK's Overseas Territories with financial centres have been collecting information on UK residents' offshore accounts to share with HMRC. Shortly after, financial institutions in a further 33 jurisdictions will do the same under the new Common Reporting Standard.

We know some of these people will have tax to pay. That is why HMRC is offering time-limited disclosure facilities allowing people to come forward and settle their bills as quickly and easily as possible.

If taxpayers do not come forward to clear up their past non-compliance, or if they continue to fail to comply with their obligations in this new era of transparency, then they must face tough consequences. One of these consequences should be the realistic threat of a criminal conviction.

That is why we are bringing forward a new strict liability criminal offence for those who do not declare offshore income. I accept that it is a tough sanction, and rightly so. Offshore tax evasion has been a blight for too long, and it is time that those who exploit offshore arrangements to avoid paying their fair share face the consequences of their actions.

Our message to taxpayers is clear: if you are hiding undeclared income offshore, HMRC is closing in on you. So come forward now before they come to you.

**David Gauke**

**Financial Secretary to the Treasury**

# 1. About this consultation

- 1.1 This consultation document sets out the Government's plans to introduce a new strict liability criminal offence of failing to declare taxable offshore income and gains, and seeks views on the design of the new offence.
- 1.2 Chapter 2 sets out the background to this consultation and the reasons for introducing a new offence.
- 1.3 Chapter 3 sets out the proposed scope of the offence: the taxes to which it will apply, the nature of income and gains to which it will apply, and the geographic scope.
- 1.4 Chapter 4 discusses measures necessary to ensure the proportionality of the offence, including a threshold; and the severity of the sanctions that should be available to the courts.
- 1.5 Chapter 5 discusses what defences should be available, sets out the legal and operational safeguards and asks whether further safeguards are appropriate.

## 2. Introduction

2.1 HMRC's strategy for tackling offshore tax evasion is set out in the April 2014 publication, *No Safe Havens*. This strategy includes strong action to boost the deterrent against offshore tax evasion, including rigorously enforced sanctions.

2.2 For a number of reasons offshore non-compliance remains more difficult to detect and tackle.

- Those who knowingly facilitate offshore tax evasion have strong incentives to ensure that the evasion remains beyond detection – they are helping others to commit criminal activity and know they risk punishment. They deliberately make it difficult to find and track the flow of funds outside of the UK.
- This is aggravated by the fact that those who facilitate offshore tax evasion are often based outside the UK; it can be difficult to identify and tackle these facilitators.
- It can be difficult to obtain information from a number of jurisdictions for a range of reasons, including the nature of the exchange of information agreements in place or because of banking secrecy legislation.
- Traditional exchange of information agreements include a “no fishing expeditions” provision which means that tax authorities need to have already identified a risk of tax evasion. In some circumstances this can create a “Catch 22” situation where the tax authority needs the information from abroad to identify the tax risk.
- A number of jurisdictions have yet to recognise tax evasion as a predicate offence under their anti-money laundering rules.

2.3 Given these difficulties in detecting non-compliance, the Government believes there is a case for increasing the costs of being caught in order to compensate. This is a principle already embedded in the civil penalties regime for income tax and capital gains tax, where undeclared income or gains arising overseas in a less transparent jurisdiction attract a higher penalty.

2.4 Criminal sanctions should also form part of this tough response, both to build the deterrent effect for those engaged in offshore evasion and in order to visibly demonstrate to the compliant majority that the government is taking action against those who unfairly seek to cheat the system.

### Strict liability offences

2.5 A strict liability offence is a criminal offence where it is not necessary for the court to ascertain the state of mind of the defendant before convicting.

2.6 There are hundreds of offences which do not require the demonstration of the mens rea. Where a strict liability offence – or an offence which has some

characteristics of a strict liability offence – is found, Parliament has determined that the state of mind (the *mens rea*) of the defendant has no bearing on whether they should be liable to a criminal sanction.

- 2.7 That is, the act in itself warrants the imposition of a criminal sanction, regardless of why the individual broke the rules.
- 2.8 Examples of strict liability offences can be found in Box 1. Strict liability offences appear in a variety of circumstances, but often support a requirement to supply information, or underpin a clear-cut legal prohibition. The available sentences vary with the perceived seriousness of the offence, and can include financial and custodial sentences.

### **Box 1: Other strict liability offences**

There are several existing offences which can be construed to imply strict liability, including some carrying custodial sentences. These include, for example:

- Driving offences, such as driving while disqualified, which carries a maximum sentence of six months' imprisonment under English law (and 12 months in Scotland);
- Firearms offences, such as the possession of a firearm or ammunition otherwise than in accordance with a current firearm certificate, which carries a sentence on summary conviction of up to six months' imprisonment, and a sentence on indictment of up to five years (or seven years where the offence is aggravated);
- Tax and customs offences, including the section 167 CEMA<sup>1</sup> offence of failing to provide information when requested, which carries a maximum criminal penalty of level 4 on the standard scale;
- Cruelty to animals, including the offences of causing unnecessary suffering while transporting an animal or holding it at a market;
- Statistical reporting offences, such as the offence of failing to supply a supplementary declaration in accordance with the Intrastat system when required to do so, which carries a maximum penalty of level 4 on the standard scale.

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<sup>1</sup> Customs and Excise Management Act 1979

2.9 There are very few strict liability offences in tax law, and none in the field of direct tax. Prosecutions for direct tax non-compliance are usually brought under:

- the common law offence of cheating the public revenue (or conspiring to cheat the public revenue);
- the Fraud Act 2006, which introduced criminal offences of fraud by representation and fraud by failing to disclose;
- section 106A of the Taxes Management Act 1970 (TMA), which introduced an offence of fraudulent evasion of income tax;
- anti-money laundering legislation.

2.10 In each case, in order to obtain a criminal sanction for tax non-compliance, the state of mind of the defendant must be considered.

2.11 Yet tax non-compliance causes real harm. A failure to correctly account for and pay taxes deprives the Exchequer of funds which support vital public services. Regardless of the state of mind of the taxpayer, this failure harms the compliant majority, and undermines the public's confidence in the tax system's ability to deliver fair and even-handed outcomes.

2.12 Naturally, the case of a taxpayer who sets out to cheat the Exchequer through some fraudulent scheme must be met with the toughest response. That is the role of the offences set out in paragraph 2.9 above, which are tried on indictment and carry long custodial sentences.

2.13 However, having offered generous opportunities for people to put their offshore tax affairs on the right footing – see Box 2 – it is right to re-examine whether it should be necessary for prosecuting authorities to demonstrate that a person acted fraudulently in order for the court to convict.

2.14 **The Government has therefore decided to introduce a new strict liability summary criminal offence of failing to declare taxable income and gains arising offshore.** This means that the prosecution would need only demonstrate that a person failed to correctly declare the income or gains, and not that they did so with the intention of defrauding the Exchequer.

2.15 This will complement existing offences by introducing a new, simpler offence, with less serious sanctions than existing criminal offences – albeit more serious than a civil penalty – without the requirement to demonstrate the *mens rea*. HMRC will continue to investigate cases of fraud and cheat using existing powers, and with a view to ensuring the most serious cases receive the most serious punishment.

2.16 The requirement to demonstrate the tax non-compliance – the *actus reus* – already sets a high bar for the prosecuting authority. There is no intention to remove or reduce this requirement, nor to change the standard or the burden of proof. It will still be for the prosecuting authority to demonstrate to the criminal

standard that the taxpayer ought to have declared taxable offshore income or gains, yet failed to do so.

2.17 As with other strict liability offences, this offence would still allow a court to recognise the circumstances of the defendant:

- some such offences<sup>2</sup> carry statutory defences, such as having taken all reasonable precautions to avoid committing the offence (this is discussed in Chapter 5);
- the conduct and intention of the defendant are taken into account in sentencing.

### **Box 2: Progress on tax transparency and disclosure opportunities**

Recent years have seen significant progress in international tax transparency, and – thanks to the Government’s leadership in putting tax and transparency at the heart of the UK’s G8 presidency last year – the threat from offshore evasion is high in the public consciousness.

From this summer, financial institutions in the Crown Dependencies and the UK’s Overseas Territories will be collecting data on UK residents to share with HMRC, under intergovernmental agreements signed last year. A further 34 jurisdictions will begin to collect and share information soon afterwards under the Common Reporting Standard (CRS).

From 2016, HMRC will receive significant amounts of information on a broad range of financial assets held by UK residents in participating jurisdictions, including the annual balance and, depending on the type of account, details of income received. In advance, HMRC is offering time-limited disclosure facilities which allow taxpayers to come forward and clear up tax liabilities on the best terms available, including guaranteed low penalty rates and limited assessable periods. These disclosure facilities close in 2016.

Despite these advances in international co-operation there still remain challenges for HMRC in detecting and countering offshore non-compliance over and above those faced for domestic non-compliance, particularly where the tax transparency of other jurisdictions is limited or non-existent. This continues to be a major risk area for HMRC, as evidenced by the disclosure facilities – over 100 settlements made under the LDF were for amounts between £1m and £5m; seven were for more than £5m. HMRC has recovered over £1.5bn from offshore non-compliance over the past two years, yet the job is not done yet; the harm caused to society from such losses can be significant.

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<sup>2</sup> There is some argument that statutory defences, depending on their nature, may remove the "strict liability" element of the offence. This consultation uses the term "strict liability" to describe offences which do not require the court to take the state of mind of the defendant into account when determining guilt.

## This consultation

2.18 The Government's aim is to develop a new offence:

- whose applicability can be readily determined, both by taxpayers and by the courts;
- which is retained for use against conduct which causes significant revenue loss;
- which is limited to individuals' conduct in relation to their personal tax affairs;
- which will fit in the context of new agreements to share tax information automatically.

2.19 This consultation sets out the proposals for a new criminal offence in more detail and asks a number of questions about:

- a) the scope of the offence;
- b) measures to ensure the proportionality of the offence – including a *de minimis* threshold;
- c) the level of sanction which should be attached to the offence;
- d) the legal and operational safeguards and statutory defences.

2.20 The design of the new offence is still at an early stage, and the views expressed in response to this consultation will steer the way the offence is constructed and how it is ultimately used by HMRC.

## 3. Scope of the offence

3.1 This chapter considers the scope of the planned new offence:

- a) which taxes and duties the offence should cover;
- b) which aspects of non-compliance in relation to these taxes the offence should cover;
- c) the geographic scope of the offence.

3.2 The first two issues – the tax at stake (and whether inheritance tax should be in scope), and the definition of “offshore” – are also discussed in the context of potential extensions to the civil penalties regime in a parallel consultation<sup>3</sup>. While it is right that these issues are also raised here, the Government is minded to first settle both issues for the purposes of civil penalties, then to review the implications for this new criminal offence.

### Tax scope: tax at stake

3.3 The new offence could be limited to failures relating to income tax and capital gains tax. This would deliver the policy intention to increase the deterrent effect for individuals who engage in offshore non-compliance on their own account.

3.4 A wider proposal would draw in inheritance tax. Inheritance tax is not yet subject to increased penalties where offshore assets are concerned, although a parallel consultation is considering the merits of changing this.

3.5 Applying the new offence for inheritance tax would allow for alignment across personal taxes in a way which the parallel consultation envisages, and there may be merit in adding to the deterrent against inheritance tax non-compliance. However, it would make the operation of the offence more complex. It is the executors who are liable to ensure that inheritance tax returns filed on death are correct. In doing so, they usually need to rely on information from others, including beneficiaries and third parties. While this does not mean that sanctions are inappropriate where the tax is incorrectly accounted for, a strict liability approach may not be the best way to deliver this. In addition, the relative complexity of inheritance tax lifetime charges may result in a more complicated offence than originally envisaged.

3.6 The Government’s view is that the offence should, initially at least, only apply to income tax and capital gains tax, but that this should be kept under review as the new offence beds in and, if offshore civil penalties are extended to inheritance tax, that new regime settles down. Views expressed in response to the consultation on civil penalties will be taken into account in determining whether the scope of the criminal offence should be extended to inheritance tax in future.

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<sup>3</sup> *Tackling offshore tax evasion: Strengthening civil deterrents*, August 2014

Of course, those fraudulently causing an incorrect inheritance tax account to be filed will still be liable for criminal investigation under existing law.

**3.7 Do you agree that the applicability of the offence should be limited to income tax and capital gains tax?**

**Tax scope: defining “offshore”**

**3.8 HMRC’s offshore evasion strategy, *No Safe Havens*, defines offshore tax evasion as**

*...using a non-UK jurisdiction with the objective of evading UK tax. This includes moving UK gains, income or assets offshore to conceal them from HMRC; not declaring taxable income or gains that arise overseas, or taxable assets kept overseas; and using complex offshore structures to hide the beneficial ownership of assets, income or gains.*<sup>4</sup>

**3.9** The parameters of the offence could be drawn in line with this definition. However, this would lead to unclear boundaries, particularly around failures to declare income arising in the UK which is subsequently hidden offshore. Although there are proposals in the accompanying consultation to broaden this definition to provide for increased civil penalties where the proceeds of evasion are moved offshore, this is not yet a settled area. There is as yet no agreed legal definition of what would constitute the movement of UK income offshore, and while it is clear-cut in some instances – such as a merchant who diverts payments to an offshore account – it may be a more subjective matter where the movement of funds happens later. The accompanying consultation discusses these issues in more depth, with a view to arriving at clear definitions to underpin an extension of the penalty regime.

**3.10** This consultation therefore proposes, at least initially, to restrict the scope of the offence to failing to declare income and gains which arise offshore, and to review this position when a civil penalty regime is well established.

**3.11 Do you agree that the offence should be restricted to taxable income and gains which arise offshore?**

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<sup>4</sup> *No Safe Havens* 2013, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/193112/offshore-strategy\\_1\\_.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/193112/offshore-strategy_1_.pdf)

## Tax scope: types of income and gains

3.12 On the assumption that the offence is restricted to income and gains arising offshore, this section considers whether the scope should be further restricted so that the offence applies only where a person has failed to declare returns on financial investments. There are two options.

### Option 1: Apply the offence only to investment income and gains

3.13 The offence could be restricted to failures to declare savings and investment income and gains – for example, income which falls to be taxed under Part 4 of the Income Tax (Trading and Other Income) Act 2005 including interest, dividends, annuities and certain distributions.

3.14 This would target the offence at those who invest offshore and fail to declare the taxable returns. It would allow for a simple message to taxpayers, and align more closely with international progress on tax transparency, which principally allows for the automatic exchange of information on financial investments, albeit on a wider scale than merely the income or gains arising.

3.15 The return on offshore investments may be – and often is – small, particularly if the investment is held primarily for the purpose of concealing assets from HMRC. Information alerting HMRC to the existence of the account, whether from the financial institution or from the taxpayer, allows HMRC to factor the existence of the account into risk analysis, and to have a greater chance of tackling the underlying evasion.

3.16 However, this approach would remove common forms of non-compliance from the scope of the offence. For example, the offence would not apply if an offshore property were regularly let to bring in income, nor if the property were sold at a gain which is not declared.

### Option 2: Apply the offence to all offshore income and gains

3.17 If the offence were to apply to offshore matters, as defined in Schedule 24 to the 2007 Finance Act (as amended by Schedule 10 to the 2010 Finance Act), the offence would apply to all forms of offshore income and gains, including employment income, property income and gains, trading income and gains, and investment income and gains.

3.18 This would bring a wide range of income and gains into scope, and reduce the risk of perceived unfair outcomes where, for example, a person who fails to declare gains on a financial investment is liable to the offence, but a person failing to declare significant gains on real property in the same jurisdiction is not. For these reasons, this is the current lead option, though views are invited.

**3.19 In your opinion, which option would best deliver the policy intention?**

## Geographic scope

- 3.20 As set out earlier in this consultation, the main justification for the planned new offence is that HMRC's ability to detect offshore non-compliance and respond to it is more limited, so a harsher punishment is justified to redress the balance and enhance the overall deterrent.
- 3.21 The new Common Reporting Standard (CRS) will supply HMRC with extensive information on the offshore investments of UK residents. This should radically increase the detection of offshore non-compliance.
- 3.22 This means that the policy rationale for a new offence is weaker in the case of a CRS jurisdiction. The offence could therefore be designed so it does not apply to failures to report income and gains arising in connection with accounts reported under the CRS.
- 3.23 This would limit the scope of the offence. Forty-five of the world's most significant financial centres have committed to early adoption of the CRS, and investors in these jurisdictions would be outside the scope of the new offence, even if they fail to declare significant liabilities. On the other hand, the additional information which HMRC will receive will make it easier to detect non-compliance and to effectively respond to it, including through criminal investigations of offences under the existing law.
- 3.24 Regardless of whether the new strict liability offence applies to them, taxpayers who have outstanding tax liabilities and failed to take advantage of disclosure facilities are more likely to face criminal investigation. Those who move out of a CRS jurisdiction in an attempt to escape scrutiny will be prioritised for criminal investigation.
- 3.25 **Do you think that the offence should apply to income and gains which are reported under the Common Reporting Standard?**
- 3.26 Not all income and gains arising in CRS jurisdictions will be reportable under the CRS. This will have particular impact if the offence is to apply to all income and gains, rather than just investment returns.
- 3.27 One option is to apply the offence to income and gains which arise in CRS jurisdictions, but which are not reported under the CRS. This could extend to classes of income – such as employment income – which are not generally reportable under CRS, or to all income and gains which for whatever reason have not been reported by a financial institution.
- 3.28 While this would more closely follow the policy intention, there are a number of significant downsides. The taxpayer would not necessarily know if a particular amount had been reported, which would mean that they may be unable to establish the consequences of non-compliance in advance of reporting their income and gains to HMRC. In addition, such provisions would add complexity to the law, guidance and investigations.

3.29 There may be lessons to be learnt from the civil penalties regime. Civil offshore penalties apply at different levels depending on the tax transparency of a jurisdiction. Jurisdictions which automatically share tax information, for example under the EU Savings Directive, are placed in Category 1, which commands the lowest penalty rate. This penalty rate applies to all income and gains arising in these jurisdictions, regardless of whether information on these amounts is automatically shared. In effect, the existence of agreements to automatically share some information is used as an indirect measure of tax transparency. The Government's preference is to maintain this principle with the new criminal offence, and to exempt all income and gains arising in CRS jurisdictions from the offence.

**3.30 Should all income and gains in CRS jurisdictions be exempted from the offence, or should the offence apply to any income and gains which are not automatically reported to HMRC?**

### **Scotland and Northern Ireland**

3.31 It is the Government's intention that the offence should apply across the UK, and hence to introduce the offence into Scottish and Northern Irish law.

**3.32 Are there any further issues or impacts which should be taken into account when introducing the offence into Scottish and Northern Irish law?**

## 4. Proportionality and sanctions

### Proportionality

- 4.1 Prosecution through the criminal courts is the strongest action open to tax authorities. The consequences of successful prosecution include:
- a) loss of taxpayer anonymity, with a corresponding impact on reputation;
  - b) a criminal record, with corresponding effects on employment, qualification as a director, and fit and proper status;
  - c) the sentence of the court.
- 4.2 In addition, a successful prosecution will be followed by action to recover the tax lost.
- 4.3 To ensure that only conduct with a significant impact is subject to the offence, the Government is minded to operate a *de minimis* threshold. This would ensure that the new criminal offence is only prosecuted where the failure to declare taxable offshore income and gains leads to a tax loss over a certain amount, and therefore a sufficient amount of harm has been caused to warrant a criminal law response.
- 4.4 **Do you agree that a *de minimis* threshold is appropriate?**
- 4.5 The obvious proxy for the degree of harm caused by the offence is the amount of tax of which the Exchequer was deprived as a result of the failure to report offshore income or gains.
- The civil penalties regime creates a concept of “potential lost revenue” to quantify the impact of tax transgressions, and this could provide a good framework for measuring the scale of the failure and for setting the threshold.
- 4.6 **Should the *de minimis* be set by reference to the potential lost revenue arising from the failure/inaccuracy, or some other measure? If so, should the potential lost revenue be calculated in the same way as it is for the purposes of determining civil penalties?**
- 4.7 If a threshold is to be introduced, it could be written into statute or form part of HMRC guidance. Legislating for the threshold would bring inflexibility and a clear cliff-edge. It would also tie the authorities’ hands in respect of cases which fall below the threshold; in such cases, prosecutions could only be brought for the more serious offences, whereas if the tax lost had been above the threshold the strict liability offence might have been pursued.
- 4.8 On the other hand, a threshold written into HMRC’s policies, but ultimately available at HMRC’s discretion, would increase uncertainty for taxpayers. It

would – by the letter of the law – potentially criminalise a much broader range of taxpayers, including those whose conduct has led to a negligible loss of tax.

4.9 Both options have their merits and downsides, and the Government would welcome views on which would be most appropriate.

#### 4.10 **Should the threshold be incorporated in statute or guidance?**

#### **Level of threshold**

4.11 The threshold set for the criminal offence should:

- a) be sufficiently high so as not to constitute a disproportionate response to minor transgressions; yet
- b) potentially apply to enough cases to act as an effective deterrent.

4.12 This section considers various options for setting the order of magnitude of the threshold and asks for views. In considering these options, it must be borne in mind that – subject to views on the previous chapter – the number of people affected by the offence may already be greatly restricted by the proposed exclusion of income and gains arising in CRS territories and the possibility that the offence is restricted to only investment income and gains.

4.13 Three possible approaches are discussed here.

#### Approach 1: Base the threshold on results of investigations

4.14 If the threshold were set at (or near to) the median potential lost revenue in an offshore case arising in a category 2 or 3 jurisdiction, half the cases of underdeclaration of offshore income and gains which currently attract a civil penalty should fall within the definition of the new offence.

4.15 Box 3 illustrates the typical scale of tax lost in offshore non-compliance cases.

### Box 3: 2013/14 offshore penalty analysis

An analysis of penalties charged for offshore non-compliance in 2013/14 shows that the potential lost revenue was:

Potential lost revenue	All cases	Cases of deliberate non-compliance	Cases involving cat 2 or 3
£999 or less	34%	38%	42%
£1000 to £4999	38%	33%	28%
£5,000 to £9,999	11%	11%	11%
£10,000 to £19,999	8%	8%	10%
£20,000 or above	8%	10%	9%

Source: HMRC analysis, total 467 cases. Percentages may not sum due to rounding.

The median potential lost revenue (PLR) in all offshore penalty cases was around £2,100. For cases which involved income or gains arising in a category 2 or category 3 territory – those which do not exchange savings income information automatically with the UK – the median PLR was around £1,850.

#### Approach 2: Base the threshold on the amount of capital generating the undeclared income and gains

4.16 If the offence were limited to apply only to underdeclaration of investment income and gains, the threshold would have to account for the fact that small returns – and therefore smaller amounts of tax – can arise on very significant offshore holdings, otherwise the offence would only ever be committed by those with very high offshore wealth. The following table shows, at a set of sample interest rates and assuming a marginal tax rate of 40%, the underlying balance required to achieve different levels of return on a savings account.

Tax	Interest income	Corresponding starting balance at the stated annual interest rate	
		5%	1%
£100	£250	£5,000	£25,000
£1,000	£2,500	£50,000	£250,000
£10,000	£25,000	£500,000	£2,500,000
£100,000	£250,000	£5,000,000	£25,000,000

#### Approach 3: Base the threshold on other thresholds in tax administration

4.17 The threshold could be set near other trigger points in tax administration, such as the financial threshold for entry into the Managing Serious Defaulters programme at £5,000 of potential lost revenue. This would mean the offence would apply only to a minority of cases of offshore non-compliance.

#### 4.18 Are there any further options?

**4.19 Which approach to setting the threshold do you favour?**

**4.20 The Government's view is that the threshold should apply for each tax year, rather than in respect of a cumulative amount of potential lost revenue, as a new offence would be committed for each tax period – e.g. each time an incorrect return is filed. Do you agree?**

## Sanctions

4.21 Sanctions for criminal offences are decided by the courts in accordance with the sentences allowed for by the law and after taking account of sentencing guidelines. This consultation discusses the maximum sentences which should be available to the courts. These sanctions could be limited to financial penalties or include all sentences including custodial sentences.

### Criminal financial penalties

4.22 The prospect of a criminal conviction is a significant deterrent, as it carries all the consequences set out in paragraph 4.1. These consequences can be more wide-ranging than a civil sanction. However, it would be perverse if the potential financial consequences of a criminal conviction were less severe than the equivalent sanction if the case were settled civilly. That is not to say that courts should not apply lower financial penalties than would be the case in a civil settlement, but the Government's view is that the available criminal sanction for offshore non-compliance should never be seen as more lenient than the available civil sanction.

**4.23 Do you agree with this principle?**

4.24 Some strict liability offences – such as the s167 CEMA offence referred to in chapter 2 – are met with a criminal penalty set by reference to the standard scale. The current standard scale for England and Wales is set out in the Criminal Justice Act 1982 (as amended by the Criminal Justice Act 1991):

- Level 1 - £200
- Level 2 - £500
- Level 3 - £1,000
- Level 4 - £2,500
- Level 5 - £5,000

4.25 For England and Wales, there is provision in sections 85-87 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 to remove the £5,000 limit for

penalties imposed by a magistrate on summary conviction, and to empower the Secretary of State to increase penalties at levels 1 to 4 by secondary legislation, though these provisions have not yet been brought into force as of the date of publication of this consultation. A draft Order was laid before Parliament in June setting out proposals to increase fines on the standard scale by a factor of four.<sup>5</sup>

4.26 By way of comparison, civil penalties for inaccuracies in returns which relate to offshore income and gains are set out in the box below.

**Box 4: Civil penalties for inaccuracies concerning offshore matters**

Civil penalties for inaccuracies in income tax and capital gains tax returns are set out in Part 2 of Schedule 24 to Finance Act 2008. The table below sets out the minimum and maximum penalty for each type of behaviour and for each level of disclosure in the case of income and gains arising in category 2 or category 3 jurisdictions. Penalties are defined as a percentage of the potential lost revenue arising from the inaccuracy.

Behaviour	Level of disclosure	Category 2	Category 3
Mistake despite taking reasonable care	N/A	No penalty	No penalty
Failure to take reasonable care	Unprompted	0%	0%
	Prompted	22.5%	30%
	Maximum penalty	45%	60%
Deliberate	Unprompted	30%	40%
	Prompted	52.5%	70%
	Maximum penalty	105%	140%
Deliberate with concealment	Unprompted	45%	60%
	Prompted	75%	100%
	Maximum penalty	150%	200%

Penalties of similar magnitude apply for failure to notify chargeability to tax, and for deliberate failure to file a return.

4.27 A penalty of level 1 to 4 on the standard scale would not deliver the policy intention. Depending on the amount, the maximum available penalty could reflect a significant discount on the likely civil penalty – for example where hundreds of thousands of pounds of tax has been undeclared.

4.28 Some criminal offences – such as the section 72 Value Added Tax Act 1994 offence of fraudulent evasion of VAT – allow for financial penalties which are capped at the greater of a standard scale penalty, or a multiple of the revenue

<sup>5</sup> *The Draft Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Amendment of Standard Scale of Fines for Summary Offences) Order 2014*

lost. In the case of the VATA offence, the penalty is the greater of a penalty at level 5 on the standard scale or three times the revenue evaded.

4.29 In order to ensure the maximum available sanction is no lower than the equivalent civil sanction, the Government is minded to ensure a criminal penalty of a maximum of twice the potential lost revenue is available. In practice, given that there is no upper limit on the amount of tax lost, this means making an unlimited financial penalty available.

**4.30 Should an unlimited financial penalty be available to the courts in England and Wales?**

4.31 As noted above, the reforms to summary justice described here only apply in England and Wales. Separate criminal justice systems in Scotland and Northern Ireland, mean that, due to different sentencing limits and criminal law, a different approach would have to be taken to deliver the policy intention of a penalty that is geared to the amount of tax lost.

**4.32 As part of this consultation, HMRC would be interested in views as to how the policy intention of a tax geared penalty could best be delivered in Scotland and Northern Ireland.**

A custodial sanction

4.33 As set out in Chapter 2, there are several strict liability offences which carry custodial sentences. The risk of a custodial sentence may strengthen the deterrent effect. This section considers the case for making a custodial sentence available for this new strict liability offence.

4.34 The failure to declare offshore income has a real and detrimental effect on the Exchequer, placing additional burdens on the wider taxpaying public. Significant custodial sentences are available for the fraudulent evasion of tax, with maximum sentences of up to 7 or 10 years for fraudulent evasion of income tax or offences under the Fraud Act, and a maximum life sentence available for cheating the public revenue.

4.35 Such sentences would be disproportionate for this strict liability offence. However, the conduct – the underdeclaration of tax – could cause significant harm by depriving the Exchequer of funds and increasing the burden on other taxpayers.

### Box 5: Seriousness

Under section 152 of the Criminal Justice Act 2003, a court may not pass a custodial sentence “unless it is of the opinion that the offence, or the combination of the offence and one or more offences associated with it, was so serious that neither a fine alone nor a community sentence can be justified for the offence”.

Guidance on seriousness<sup>6</sup> is published by the Sentencing Council. This guidance states that

“A court is required to pass a sentence that is commensurate with the seriousness of the offence. The seriousness of an offence is determined by two main parameters; the culpability of the offender and the harm caused or risked being caused by the offence.”

The guidance goes on to note that:

“There are offences where liability is strict and no culpability need be proved for the purposes of obtaining a conviction, but the degree of culpability is still important when deciding sentence.”

4.36 Although the strict liability nature of the offence removes the requirement for the court to establish the state of mind of the defendant in order to convict, there will still be a range of factors that make the failure to report the offshore income or gains more or less serious. For example, more serious cases could be characterised where very large amounts of tax are lost, where a person has ignored prompts to tell HMRC about their offshore income and gains, where they have repeatedly failed to tell HMRC about their offshore liabilities, or where they have moved their offshore investments with the aim of escaping greater tax transparency. The Government contends that a custodial sentence should be available to the courts to deal with the most serious cases like these.

**4.37 Is the harm which could be caused by a failure to declare offshore income and gains sufficient that a custodial sentence could be justified in the most serious cases?**

4.38 If a custodial sentence is appropriate, then statute would have to set out the maximum term. Some strict liability offences, such as driving while disqualified, carry a maximum sentence on summary conviction of six months imprisonment. Given the intention to make this a summary offence, if a custodial sentence is justified, the Government is minded to provide for up to six months imprisonment, allowing the Courts to impose this significant sanction in the most serious of cases.

**4.39 If a custodial element is appropriate, should the maximum sentence be six months?**

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<sup>6</sup> *Overarching Principles: Seriousness*, The Sentencing Guidelines Council  
[http://sentencingcouncil.judiciary.gov.uk/docs/web\\_seriousness\\_guideline.pdf](http://sentencingcouncil.judiciary.gov.uk/docs/web_seriousness_guideline.pdf)

## 5. Safeguards and defences

5.1 The previous chapter discusses one of the main safeguards proposed for the new offence – a threshold to limit its application to significant cases of non-compliance. This chapter discusses legislative and non-legislative safeguards to ensure that the offence is appropriately applied.

### Defences

5.2 In practice, the principal defence against this offence is likely to be that any sums held offshore do not represent the proceeds of tax non-compliance. This may be because, for example:

- the taxpayer was not resident in the UK when the income arose;
- the taxpayer is not domiciled in the UK, is claiming the remittance basis of taxation, and the funds have not been remitted to the UK;
- the funds arose from a non-taxable source, such as a gift.

5.3 These defences will be intrinsic to the structure of the offence, which will only apply to taxable income or gains which should have been disclosed to HMRC, but have not been.

5.4 Some strict liability offences have statutory defences. For example, some offences may only be committed where the person does not have a reasonable excuse, or where the person has not carried out due diligence.

5.5 There are analogous “defences” in the taxes civil penalties framework. For example, where a person has filed an incorrect return, a penalty under Schedule 24 to the 2007 Finance Act is only due where the person did not take reasonable care in preparing the return. Reasonable care is not defined in law, but HMRC’s guidance (see Box 6) sets out its interpretation.

#### **Box 6: Reasonable care – HMRC guidance<sup>7</sup>**

Every person must take reasonable care, but ‘reasonable care’ cannot be identified without consideration of the particular person’s abilities and circumstances. HMRC recognises the wide range of abilities and circumstances of those persons completing returns or claims.

So whilst each person has a responsibility to take reasonable care, what is necessary for each person to discharge that responsibility has to be viewed in the light of that person’s abilities and circumstances.

For example, we do not expect the same level of knowledge or expertise from a self-employed un-represented individual as we do from a large multinational company. We

<sup>7</sup> HMRC Compliance Handbook (CH81120 - Penalties for Inaccuracies: Types of inaccuracy: What is reasonable care)

would expect a higher degree of care to be taken over large and complex matters than simple straightforward ones.

HMRC expects each person to make and preserve sufficient records for them to make a correct and complete return.

A person with simple, straightforward tax affairs needs only a simple regime provided they follow it carefully. But a person with larger and more complex tax affairs will need to put in place more sophisticated systems and follow them equally carefully.

In HMRC's view it is reasonable to expect a person who encounters a transaction or other event with which they are not familiar to take care to find out about the correct tax treatment or to seek appropriate advice.

If after that, the person is still unsure, they should draw attention to the entry and the uncertainty when they send the return or document to us. In these circumstances the person will have taken reasonable care to draw our attention to the point and if they are wrong they will not have been carelessly so.

- 5.6 There may be an argument for introducing a statutory defence to the new offence. Alternatively, a narrower definition could provide that, for example, a person who had sought appropriate professional advice about their tax affairs, and followed that advice, would have a defence. A person who had been careless would still be liable for the offence, a significant extension on the current offences.
- 5.7 On the other hand, the availability of such a defence could make it more difficult to secure successful prosecutions, undermining the case for introducing the new offence.
- 5.8 **Should it be a defence for (i) a person to demonstrate that they had taken reasonable care in conducting their tax affairs, or (ii) a person to demonstrate that they had sought and followed appropriate professional advice? What would be the impact on the likelihood of successful prosecutions if statutory defences are included?**
- 5.9 **Should any other statutory defences be introduced?**

### HMRC's criminal investigation policy

- 5.10 Existing tax offences are broadly drawn. Any person who is suspected of having deliberately underdeclared their tax liability could be criminally investigated. Yet the tax administration framework relies on civil settlements in the vast majority of cases. HMRC applies its criminal investigation capabilities selectively, in line with a published criminal investigation policy set out in the box below.

### Box 9: HMRC's criminal investigation policy

HMRC's aim is to secure the highest level of compliance with the law and regulations governing direct and indirect taxes and other regimes for which they are responsible. Criminal investigation, with a view to prosecution by the Crown Prosecution Service (CPS) in England and Wales or the Crown Office and Procurator Fiscal Service (COPFS) in Scotland and the Public Prosecution Service Northern Ireland (PPSNI) in Northern Ireland, is an important part of HMRC's overall enforcement strategy.

It is HMRC's policy to deal with fraud by use of the cost effective civil fraud investigation procedures under Code of Practice 9 wherever appropriate. Criminal Investigation will be reserved for cases where HMRC needs to send a strong deterrent message or where the conduct involved is such that only a criminal sanction is appropriate.

However, HMRC reserves complete discretion to conduct a criminal investigation in any case and to carry out these investigations across a range of offences and in all the areas for which the Commissioners of HMRC have responsibility.

Examples of the kind of circumstances in which HMRC will generally consider commencing a criminal, rather than civil investigation are:

- in cases of organised criminal gangs attacking the tax system or systematic frauds where losses represents a serious threat to the tax base, including conspiracy
- where an individual holds a position of trust or responsibility
- where materially false statements are made or materially false documents are provided in the course of a civil investigation
- where, pursuing an avoidance scheme, reliance is placed on a false or altered document or such reliance or material facts are misrepresented to enhance the credibility of a scheme
- where deliberate concealment, deception, conspiracy or corruption is suspected
- in cases involving the use of false or forged documents
- in cases involving importation or exportation breaching prohibitions and restrictions
- in cases involving money laundering with particular focus on advisors, accountants, solicitors and others acting in a 'professional' capacity who provide the means to put tainted money out of reach of law enforcement
- where the perpetrator has committed previous offences / there is a repeated course of unlawful conduct or previous civil action

- in cases involving theft, or the misuse or un lawful destruction of HMRC documents
- where there is evidence of assault on, threats to, or the impersonation of HMRC officials
- where there is a link to suspected wider criminality, whether domestic or international, involving offences not under the administration of HMRC

When considering whether a case should be investigated using the civil fraud investigation procedures under Code of Practice 9 or is the subject of a criminal investigation, one factor will be whether the taxpayer(s) has made a complete and unprompted disclosure of the offences committed.

However, there are certain fiscal offences where HMRC will not usually adopt the civil fraud investigation procedures under Code of Practice 9. Examples of these are:

- VAT 'Bogus' registration repayment fraud
- Organised Tax Credit fraud

5.11 The basis of HMRC's criminal investigation policy – that non-compliance will usually be pursued through civil means – will remain. HMRC will retain discretion over whether non-compliance is pursued through a criminal investigation or a civil compliance check.

### **The role of prosecutors and the criminal justice system**

5.12 Prosecutions for tax offences are taken forward by the Crown Prosecution Service (CPS) in England and Wales, the Crown Office and Procurator Fiscal Service (COPFS) in Scotland and the Public Prosecution Service Northern Ireland (PPSNI) in Northern Ireland.

5.13 In order for a prosecution to proceed in England and Wales, the CPS applies the Code for Crown Prosecutors. Prosecutors must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction and that a prosecution is required in the public interest. This provides a further safeguard to ensure that only appropriate cases are brought.

### **Further safeguards**

5.14 The financial threshold limits the applicability of the offence to cases of significant tax loss. The processes set out in this chapter provide further safeguards with the aim of ensuring that investigations and prosecutions are only carried out where appropriate. The courts serve as the ultimate safeguard, backed up by the usual rights of appeal.

5.15 However, given the novelty of the offence in the field of direct tax, and given the significant impact on those found to have committed it, the safeguards are crucial. The Government would like to hear views on whether further safeguards are necessary, and suggestions on what these should be.

**5.16 Are further safeguards appropriate? What should these be?**

## 6. Assessment of Impacts

### Summary of Impacts

<b>Exchequer impact (£m)</b>	2011-12	2012-13	2013-14	2014-15	2015-16
	The final costing of this measure will depend on the outcome of the consultation and will be subject to scrutiny by the Office for Budget Responsibility.				
<b>Economic impact</b>	The measures may have a positive impact on tax compliance.				
<b>Impact on individuals and households</b>	No impacts are expected on tax compliant individuals or households.				
<b>Equalities impacts</b>	We do not have data which will indicate who might be affected by this measure. However, any affected equality groups are likely to be those over represented amongst those of above average wealth.				
<b>Impact on businesses and Civil Society Organisations</b>	No Impacts are expected on tax compliant businesses.				
<b>Impact on HMRC or other public sector delivery organisations</b>	The operational impact of investigating the new criminal offence has not yet been quantified in detail. This will depend on the parameters of the new offence and the number of cases.				
<b>Other impacts</b>					

**Do you have any views, comments or evidence which may help inform our understanding of likely impacts?**

**Do you have any views, comments or evidence which may help inform our understanding of likely equalities impacts?**

## 7. Summary of Consultation Questions

### Scope of the offence

- Do you agree that the applicability of the offence should be limited to income tax and capital gains tax?
- Do you agree that the offence should be restricted to taxable income and gains which arise offshore?
- In your opinion, which option (to apply the offence only to investment income or gains, or to apply the offence to all offshore income and gains) would best deliver the policy intention?
- Do you think that the offence should apply to income and gains which are reported under the Common Reporting Standard?
- Should all income and gains in CRS jurisdictions be exempted from the offence, or should the offence apply to any income and gains which are not automatically reported to HMRC?
- Are there any further issues or impacts which should be taken into account when introducing the offence into Scottish and Northern Irish law?

### Proportionality and sanctions

- Do you agree that a *de minimis* threshold is appropriate?
- Should the *de minimis* be set by reference to the potential lost revenue arising from the failure/inaccuracy, or some other measure? If so, should the potential lost revenue be calculated in the same way as it is for the purposes of determining civil penalties?
- Should the threshold be incorporated in statute or guidance?
- Are there any further options (for setting the threshold)?
- Which approach to setting the threshold do you favour?
- The Government's view is that the threshold should apply for each tax year, rather than in respect of a cumulative amount of potential lost revenue, as a new offence would be committed for each tax period – e.g. each time an incorrect return is filed. Do you agree?

- **Do you agree with the principle that the available criminal sanction for offshore non-compliance should not be seen as more lenient than the available civil sanction?**
- **Should an unlimited financial penalty be available to the courts?**
- **Is the harm which could be caused by a failure to declare offshore income and gains sufficient that a custodial sentence could be justified in the most serious cases?**
- **If a custodial element is appropriate, should the maximum sentence be six months?**

### Safeguards and defences

- **Should it be a defence for (i) a person to demonstrate that they had taken reasonable care in conducting their tax affairs, or (ii) a person to demonstrate that they had sought and followed appropriate professional advice? What would be the impact on the likelihood of successful prosecutions if statutory defences are included?**
- **Should any other statutory defences be introduced?**
- **Are further safeguards appropriate? What should these be?**

### Assessment of impacts

- **Do you have any views, comments or evidence which may help inform our understanding of likely impacts?**
- **Do you have any views, comments or evidence which may help inform our understanding of likely equalities impacts?**

## 8. The Consultation Process

This consultation is being conducted in line with the Tax Consultation Framework. There are 5 stages to tax policy development:

- Stage 1 Setting out objectives and identifying options.
- Stage 2 Determining the best option and developing a framework for implementation including detailed policy design.
- Stage 3 Drafting legislation to effect the proposed change.
- Stage 4 Implementing and monitoring the change.
- Stage 5 Reviewing and evaluating the change.

This consultation is taking place during stage 2 of the process. The purpose of the consultation is to seek views on the detailed policy design and a framework for implementation of a specific proposal, rather than to seek views on alternative proposals.

### How to respond

A summary of the questions in this consultation is included at chapter 7.

Responses should be sent by 31 October 2014, by e-mail to [consult.nosafehavens@hmrc.gsi.gov.uk](mailto:consult.nosafehavens@hmrc.gsi.gov.uk) or by post to: Chris Walker, HMRC Centre for Offshore Evasion Strategy, Room 1C/26, 100 Parliament Street, London SW1A 2BQ.

Telephone enquiries can be addressed on 03000 586803 (from a text phone prefix this number with 18001).

Paper copies of this document or copies in Welsh and alternative formats (large print, audio and Braille) may be obtained free of charge from the above address. This document can also be accessed from [HMRC Inside Government](#). All responses will be acknowledged, but it will not be possible to give substantive replies to individual representations.

When responding please say if you are a business, individual or representative body. In the case of representative bodies please provide information on the number and nature of people you represent.

### Confidentiality

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes.

These are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004.

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals with, amongst other things, obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on HM Revenue and Customs (HMRC).

HMRC will process your personal data in accordance with the DPA and in the majority of circumstances this will mean that your personal data will not be disclosed to third parties.

### Consultation Principles

This consultation is being run in accordance with the Government's Consultation Principles. [If you wish to explain your choice of consultation period, this is the place. Also, if you are holding additional meetings or using alternative means of engaging, please mention this here].

The Consultation Principles are available on the Cabinet Office website: <http://www.cabinetoffice.gov.uk/resource-library/consultation-principles-guidance>

If you have any comments or complaints about the consultation process please contact:

Oliver Toop, Consultation Coordinator, Budget Team, HM Revenue & Customs, 100 Parliament Street, London, SW1A 2BQ.

Email: [hmrc-consultation.co-ordinator@hmrc.gsi.gov.uk](mailto:hmrc-consultation.co-ordinator@hmrc.gsi.gov.uk)

Please do not send responses to the consultation to this address.