



HM Revenue
& Customs

Tackling tax evasion: legislation and guidance for a corporate offence of failure to prevent the criminal facilitation of tax evasion

Summary of Responses

13 October 2016

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1. Introduction

- 1.1 At the March 2015 Budget the Government announced that it would make it a crime for corporations to fail to put in place reasonable procedures to prevent their staff from criminally facilitating tax evasion. Between July and October of 2015 HMRC consulted on a new criminal offence of failure to prevent the facilitation of tax evasion¹. Following this consultation the Government published a response document in December 2015 outlining its policy alongside draft clauses².
- 1.2 Between April and July 2016 the Government consulted on updated draft clauses and draft guidance for the new corporate offences³. This Response Document summarises the feedback received from stakeholders both in writing and in discussions. It also summarises the changes that have been made in response to these comments.
- 1.3 As planned, there have been substantial additions to the draft Government Guidance following the submission from stakeholders of illustrative case studies and examples.
- 1.4 The Government Guidance published alongside this Document will remain draft guidance and will not be finalised until the legislation has been passed by Parliament. Once the legislation has received Royal Assent the Government will publish formal guidance. The Government encourages stakeholders to continue to engage with HMRC on the draft guidance and welcomes further comments and additions to the guidance.

¹https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/445534/Tackling_offshore_tax_evasion_-_a_new_corporate_criminal_offence_of_failure_to_prevent_facilitation_of_tax_evasion.pdf

² <https://www.gov.uk/government/consultations/tackling-tax-evasion-a-new-corporate-offence-of-failure-to-prevent-the-criminal-facilitation-of-tax-evasion>

³ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/517020/Tackling_tax_evasion-legislation_guidance_corporate_offence_of_failure_to_prevent_criminal_facilitation_tax_evasion.pdf

2. Responses

A. The offence

- 2.1 For a corporation to be liable to the new offence, there must have been two criminal offences under the existing law:

Stage one: criminal tax evasion by a taxpayer

Stage two: criminal facilitation of this offence by a person acting on behalf of the corporation, whether by taking steps with a view to; being knowingly concerned in; or aiding, abetting, counselling, or procuring the tax evasion by the taxpayer.

Stage three: If there has been a criminal offence at stage one and stage two, a corporation is then liable for having failed to prevent a person associated with it from committing the criminal act at stage 2.

- 2.2 The overall offence was articulated using the following language:

Failure of relevant bodies to prevent tax evasion facilitation offences by associated persons

2 Failure to prevent facilitation of UK tax evasion offences

(1) A relevant body (B) is guilty of an offence if a person associated with B commits a UK tax evasion facilitation offence when acting in the capacity of a person associated with B.

(2) In proceedings for an offence under this section it is a defence for B to prove that, when the UK tax evasion facilitation offence was committed—

(a) it had in place such prevention procedures as it was reasonable in all the circumstances to expect B to have in place, or

(b) that in all the circumstances, it was not reasonable to expect B to have any prevention procedures in place.

(3) In subsection (2) “prevention procedures” means procedures designed to prevent persons associated with the body from committing UK tax evasion facilitation offences.

- 2.3 The consultation asked the following question in relation to the articulation of the new offences:

QA1. Do you believe that the draft legislation, when read with the draft guidance, adequately articulates the offence and defence? The Government would welcome alternative or additional wording for inclusion in the guidance that stakeholders believe adds clarity to the offence and defence.

- 2.4 Respondents made a number of comments about the predicate offences, i.e. stages 1 and 2 of the corporate offence: these are discussed in detail in Section D below under the title “the aspects of non-compliance covered by the offence”.
- 2.5 Stakeholders were broadly content with the articulation of the overall offence and welcomed the addition of S.2 (2)(b) and the recognition that there will be circumstances where it is reasonable for a business not to have put any preventative measures in place.

B. Those for whom a corporation can be liable

2.6 The draft clauses define those in respect of whom a corporation may be liable for failing to prevent them from criminally facilitating tax evasion as “associated persons”.

(4) A person (A) is associated with a relevant body (B) if A performs services for or on behalf of B and for this purpose—

(a) the capacity in which A performs services for or on behalf of B does not matter (so, for example, A might be an employee, agent or subsidiary of B), and

(b) subject to subsection (5), whether or not A provides services for or on behalf of B is to be determined by reference to all the relevant circumstances and not merely by reference to the relationship between A and B.

(5) An employee of B is to be presumed, unless the contrary is shown, to be a person who performs services for or on behalf of B.

2.7 The consultation posed two questions in relation to associated persons:

QB1. Do consultees consider that this clause, when read with its associated guidance, will enable them to identify when a person acts for or on behalf of a corporation? The Government welcomes suggested case studies from stakeholders for inclusion in the guidance to illustrate when a person can be said to be associated with a corporation for the purposes of the offence.

QB2. Do you believe the draft clauses, when read with the associated guidance, clearly exclude instances where the corporation’s representative is acting in a private capacity, rather than providing services for or on behalf of the corporation? The Government welcomes suggested language or case studies for inclusion in the guidance.

Feedback received

2.8 Over half of respondents were satisfied with the draft clauses and had no suggested changes. The changes suggested by respondents focused on the following issues:

- A. Whether a corporation should have to benefit from the associated person’s illegal act in order to be criminally liable
- B. The level of control a corporation must have over an associated person before being criminally liable for failing to prevent their illegal actions

- C. Clarifying that those persons acting in a private capacity are not associated with a corporation in relation to those private actions
- D. What constitutes the provision of services for the purpose of a person being associated with a corporation?

A. The requirement to benefit

2.9 A number of stakeholders felt that, in order for a corporation to be guilty of the new offence, the prosecution should have to show that the corporation benefited from the actions of the associated person. There was no agreement between stakeholders as to how this should be expressed. A number of different approaches were suggested; broadly, they were that:

- The prosecution should have to prove an actual benefit that was a direct result of the associated person's illegal actions, for example the payment of fees by a client.
- The prosecution should have to prove any general benefit to the corporation from the associated person's illegal act, for example the ongoing use of the corporation's services by a client.
- The prosecution should have to show that the associated person, when performing the illegal act, was doing so in order to secure a benefit for a corporation, and not to secure a benefit for themselves. For example the associated person was motivated by a desire to gain or retain business for the corporation, and any financial benefit to themselves, for example remuneration for attracting clients or increases to their personal bonus, was not a factor in their decision to commit the illegal act.

2.10 However, some respondents were strongly of the view that "*the mere fact that a corporation gains no benefit should not prevent the corporation being found guilty of the new offence*".

2.11 Whether to include a benefit requirement was considered as part of the Government's policy consultation on the new corporate offence⁴ and the Government's position on this issue was set out in the Government's 2015 Response Document⁵ at paragraphs 3.39 – 3.46. The Government's position on these issues remains the same.

2.12 Including a loosely defined requirement that a corporation must benefit from the associated person's illegal activity would potentially be a near redundant test as it would be easily met. This may also be true of showing a specific benefit, for example the payment of fees or the retention of business, as an individual acting in the capacity of an associated person will be providing services for or

⁴https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/483367/A_new_corporate_criminal_offence_of_failure_to_prevent_the_facilitation_of_tax_evasion_-_summary_of_responses_7011.pdf

⁵https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/483367/A_new_corporate_criminal_offence_of_failure_to_prevent_the_facilitation_of_tax_evasion_-_summary_of_responses_7011.pdf

on behalf of the corporation and will likely be providing these to benefit the corporation.

- 2.13 The respondents suggesting that a test should be included that requires that an associated person perform the illegal services with the intention of securing a benefit for the corporation felt that this would exclude criminal liability for the corporation where an individual deliberately circumvents the corporation's policies of not facilitating financial crime. This is not necessarily so, as an individual, whilst circumventing the written policies and governance of a corporation, may still argue that they were seeking to secure a benefit for the corporation, for example securing or retaining high net worth clients. It could also be argued that an individual can never be acting for the benefit of the corporation when committing an illegal act as, if that act is discovered, the corporation will suffer the adverse regulatory, civil or criminal consequences and so there will be no benefit for it.
- 2.14 The desire for a requirement to benefit seems largely driven by a concern that a corporation may be found liable in a circumstance where it had an expressed policy that its associated persons should not be knowingly complicit in financial crime, and procedures in place to ensure that this was adhered to, but an associated person nevertheless sought to be complicit in financial crime and circumvented the corporation's procedures to achieve this.
- 2.15 It should be noted that corporations in the regulated sector can already be held responsible through regulatory enforcement where there are failings in the corporation's financial crime procedures, even where this does not result in a financial crime being committed. As such, it is expected that those corporations most affected by the new corporate offences will already be seeking to guard against persons providing services for or on their behalf circumventing their financial crime procedures.
- 2.16 If a corporation has done as much as it can reasonably be expected to do to address the risk that its associated person ignores its policies against being complicit in financial crime and seeks to circumvent its procedures, then the corporation will have a defence of having put in place reasonable procedures. Reasonable procedures need not be fool-proof and need not have actually stopped the financial crime from occurring.

B. Liability where a corporation has little or no control over persons providing services for or on their behalf

- 2.17 A small number of respondents expressed concerns that the definition of "associated person" in the draft legislation brought within scope individuals over whom a corporation "*had no realistic opportunity to exercise control*", especially where those associate persons were "*located overseas*". One respondent noted that "*a UK parent [company] may have relatively little oversight over subsidiaries and its staff/consultants in foreign jurisdictions*". Respondents did

not provide written examples of where they have individuals providing services for or on their behalf over whom they cannot currently exercise control.

- 2.18 It is important to differentiate between those individuals over whom a corporation cannot exercise control and those individuals over whom a corporation is unwilling to exercise control. During the course of both consultations, a number of corporations have been very open about historic instances of corporations deliberately turning a blind eye to the wrongdoing of those providing services for or on their behalf in order to deny knowledge of the wrongdoing and avoid liability.
- 2.19 It may be unwelcome to some corporations to have to take reasonable steps to exercise oversight over those providing services for or on their behalf, particularly if they have historically been operating in certain jurisdictions for the purposes of maintaining secrecy and avoiding unwanted scrutiny of their actions. But this should be distinguished from situations where a corporation is genuinely unable to exercise control over those providing services for or on its behalf.
- 2.20 For example, Royal Mail have a specific legal obligation to accept mail from customers for international delivery. To fulfil this legal duty, they are required to work with other organisations overseas to deliver items in those jurisdictions. They identified that they cannot refuse to use the services of other postal carriers in those jurisdictions as they have a legal duty to deliver items. They will not have control over the employees of those overseas entities and cannot refuse to enter into contractual agreement with those entities.
- 2.21 The level of control a corporation has over the associated person who has committed the illegal act of facilitating tax evasion will be a factor taken into account when considering what procedures are reasonable. The guidance includes the concept of “proximity”. Corporations can be expected to control those most closely proximate to them, such as employees, quite closely by way of training, procedures and disciplinary processes. However, a corporation can reasonably be expected to do less to control those less closely proximate, such as the staff of a sub-contractor. Here a term in the contract requiring the sub-contractor to control their staff might suffice. This is articulated in the guidance under principle two (Proportionality of risk-based prevention procedure), principle four (Due diligence) and within the ‘common terminology’ section.

For Example: Principle 4 – Due Diligence (p.27)

Procedures

“We recognise that the reasonableness of prevention procedures should take account of the level of control and supervision the organisation is able to exercise over a particular person acting on its behalf and the relevant body’s proximity to that person.”

C. Excluding those persons acting in a private capacity

- 2.22 A small number of respondents were concerned that the draft clauses did not exclude instances where a person was acting in a private capacity, i.e. where that individual was using their professional skills to facilitate tax evasion in their private life. A number of respondents felt that it would also be helpful for the guidance to set out examples of where a person might be using their professional skills in a private capacity to facilitate tax evasion and confirmation that this would be outside of the scope of an “associated person”.
- 2.23 Section 2(1) of the consultation clauses outlined that a person associated with a corporation will attract criminal liability for a corporation only when “acting in the capacity of an associated person”; this is defined within section 1.(4) as someone “performing services for or on behalf” of the corporation. A person will therefore not be an “associated person” for the purposes of the new criminal offences where they are carrying out activities which are not “for or on behalf of” the corporation and so a separate express provision in statute is not necessary. To make this exclusion clearer, further language has been included in the guidance under the ‘Common Terminology’ as well as in the Explanatory Notes.

D. Other comments

- 2.24 The inclusion of considering “all the circumstances” at S.2(2)(b) was welcomed by a large number of stakeholders who felt it was important that consideration should be given to a wide range of circumstances such as contractual proximity, the control that a corporation can exercise over an individual and the benefit the corporation gained from the individual’s illegal actions. One stakeholder however requested that this additional language was removed, citing a belief that a judge and/or jury would retrospectively expect a corporation to have had knowledge of circumstances which at the time of the offence they did not possess. When considering if a corporation has in place reasonable procedures a court may consider what a corporation ought reasonably to have known at the time the offending took place and may consider that individuals in a corporation ought reasonably to have known more than they did. However, no individual criminal liability occurs unless an associated person is deliberately and dishonestly involved in facilitating tax evasion. A corporation will not be liable because a person associated with it ought to have known that their actions were in fact helping a client to commit tax evasion.
- 2.25 One stakeholder felt that giving examples within statute or within guidance to illustrate who may be regarded as an associated person “*risks creating a perception that the scope of the offence is unduly narrowed, and provides encouragement to an industry whose raison d’être is to exploit gaps in legislation to do so here*”. The Government has carefully considered this concern and weighed it against the strong desire of the majority of business respondents for illustrative examples to help them identify the types of person that can be considered an associated person for the purposes of this offence. The Government believes that it is important that affected organisations should be able to correctly identify those for whom they might be liable for the

purposes of the new offences and that illustrative examples will aid them to do this.

C. Definition of a corporation

2.26 The draft clauses applied the corporate offences to all legal persons using the following language

1 Meaning of relevant body

(2) “Relevant body” means a body corporate or partnership (wherever incorporated or formed).

(3) “Partnership” means—

(a) a partnership within the meaning of the Partnership Act 1890,

(b) a limited partnership registered under the Limited Partnerships Act 1907,

or

(c) a firm or entity of a similar character formed under the law of a country or territory outside the United Kingdom.

2.27 The consultation posed the following question about the definition of relevant body

QC1. Do you have any comments on the draft clause above, when read with the associated guidance?

Feedback received

2.28 The majority of respondents were content with how “relevant body” was defined within the draft clauses.

2.29 One stakeholder rightly identified that the definition of relevant body gives the offences broad application, i.e. it applies to all legal persons. The stakeholder felt that this was too broad and prevented the legislation from having clarity. However, as the stakeholder correctly identified that the offences can apply to all legal persons, this suggests that the definition of “relevant body” is sufficiently clear.

2.30 A small number of respondents suggested making explicit reference to Limited Liability Partnerships, and their Scottish equivalent. These various types of legal person are already caught within the existing statutory definition of “relevant body” and therefore express reference is not necessary. However, to ensure this is easily understood the guidance has been updated to make this clear.

D. The aspect of non-compliance covered by the offence

2.31 The new offences require that:

- there is criminal tax evasion at the taxpayer level under the existing law, and:
- a person associated with the corporation criminally facilitates the commission of this offence by the taxpayer.

2.32 For the domestic corporate offence, the requirement for criminal tax evasion and criminal facilitation was articulated in the draft clauses with the following language.

2 Failure to prevent facilitation of UK tax evasion offences

(4) In this Act—

(a) “UK tax evasion offence” means—

- (i) an offence of cheating the public revenue, or
- (ii) an offence under the law of any part of the United Kingdom consisting of being knowingly concerned in, or in taking steps with a view to, the fraudulent evasion of a tax; and

(b) “UK tax evasion facilitation offence” means an offence under the law of any part of the United Kingdom which is committed by facilitating the commission by another person of a UK tax evasion offence.

2.33 The 2016 consultation expanded on 4(b) with the following language.

2 Failure to prevent facilitation of UK tax evasion offences

(5) For the purposes of subsection (4)(b) a person (A) facilitates the commission of a UK tax evasion offence by another person by doing any of the following (with the necessary knowledge or intent)—

- (a) aiding, abetting, counselling or procuring the commission of the offence,
- (b) being guilty of the offence as art and part only (contrary to the law of Scotland), or
- (c) doing anything that constitutes the commission by A of a UK tax evasion offence by virtue of being knowingly concerned in, or in taking steps with a view to, the fraudulent evasion of tax by another person.

(6) Steps taken by A with a view to the fraudulent evasion of tax by another person are not to be regarded for the purposes of subsection (4)(b) as having facilitated a UK tax evasion offence unless the other person has committed a UK tax evasion offence facilitated by the steps taken.

2.34 The 2016 consultation posed the following question about the two criminal offences required under the existing law for a corporation to be liable under the new domestic fraud offence.

QD1. Do you believe that the legislation, when read with the associated guidance, makes it sufficiently clear in respect of what criminal acts a corporation can be liable for failing to prevent its representatives from criminally facilitating? The Government welcomes suggested language or case studies for inclusion in the guidance.

2.35 The majority of written responses preferred the updated clauses and felt that they more clearly articulated the underlying offences. A small number of comments were received in respect of the underlying offences, namely:

- A. The feasibility of listing all statutory or common law tax evasion offences in the UK
- B. A lack of understanding about what acts or omissions constitute a criminal offence under the existing law in relation to aiding and abetting the tax evasion of another person
- C. Whether a corporation will ever possess the necessary information to assess whether a person associated with them has criminally facilitated the tax evasion of another person

A. The feasibility of listing all statutory or common law tax evasion offences in the UK

2.36 A small number of respondents thought it would be beneficial to list all statutory tax evasion offences. Having considered this option, the Government believes that this would create confusion and detract focus from the core elements which businesses need to focus on.

2.37 The updated clauses refer to:

In this Part “UK tax evasion offence” means—

- (a) an offence of cheating the public revenue, or
- (b) an offence under the law of any part of the United Kingdom consisting of being knowingly concerned in, or in taking steps with a view to, the fraudulent evasion of a tax.

2.38 This language encompasses all statutory offences that involve deliberately and dishonestly cheating the public revenue, regardless of the category of tax which the offence applies to. It is the deliberate and dishonest non-payment of taxes that affected corporations should focus on, not individual tax offences, as these elements encompass all relevant tax offences.

B. The lack of understanding about what acts or omissions constitute a criminal offence under the existing law in relation to aiding and abetting the tax evasion of another person

2.39 As with the 2015 consultation, there continued to be an issue with awareness amongst some stakeholders about what acts and omissions constituted criminal activity under the existing law in terms of aiding and abetting tax evasion. This was discussed in the 2015 Government response at para 3.36⁶.

2.40 The updated guidance builds on the example provided in the 2015 response document with further explanation and examples of what constitutes aiding and abetting a crime under the existing law. This can be found within a series of case studies throughout the guidance.

C. Whether a corporation will ever possess the necessary information to assess whether a person associated with them has criminally facilitated the tax evasion of another person (see BBA comments)

2.41 One representative body expressed concern that the predicate tax evasion and tax evasion facilitation offences

“must only be committed and not necessarily that a conviction must be secured. This could lead to a circumstance in which an investigation into the corporate offence must effectively start with a retrial of the facts of the underlying offences before progress could be made. In relation to both the underlying offence and the facilitation offence, it may be the case that a corporate does not have adequate information to sensibly assess whether the underlying offences have in fact been committed”.

2.42 When a director or other senior officer is interviewed under caution on behalf of the corporation, the person interviewed will be given pre-interview disclosure guidance. PACE Code C11.1A states:

“[b]efore a person is interviewed, they and, if they are represented, their solicitor must be given sufficient information to enable them to understand the nature of any such offence, and why they are suspected of committing it (see paragraphs 3.4(a) and 10.3), in order to allow for the effective exercise of the rights of the defence”.

2.43 Typically this would require investigators to provide a summary of the reasons for suspecting that the underlying tax evasion offence by the taxpayer and tax facilitation offence by the associated person have been committed.

⁶https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/483367/A_new_corporate_criminal_offence_of_failure_to_prevent_the_facilitation_of_tax_evasion_-_summary_of_responses__7011_.pdf.

E. The Overseas tax fraud offence

2.44 The consultation document outlined how the original corporate offence had been separated into two distinct offences:

- An offence of failure to prevent the criminal facilitation of UK tax evasion, and
- An offence of failure to prevent the criminal facilitation of foreign tax evasion

2.45 The consultation asked:

QE1. Do you agree that the domestic tax fraud and overseas tax fraud elements of the corporate offence are better presented as two separate offences?

2.46 Respondents unanimously agreed that the original offence was better presented as two separate offences. **The Government will therefore proceed with introducing two separate distinct offences.**

2.47 The new separate offence for overseas tax fraud was articulated using the following language in the draft clauses:

3 Failure to prevent facilitation of foreign tax evasion offences

(1) A relevant body (B) is guilty of an offence if a person associated with B commits a foreign tax evasion facilitation offence when acting in the capacity of a person associated with B.

(2) B can only be guilty of an offence under this section if (when the foreign tax evasion facilitation offence is committed)—

(a) B is incorporated or formed under the law of any part of the United Kingdom, or

(b) where B is not within paragraph (a)—

(i) B is carrying on a business or other undertaking (or part of a business or other undertaking) from an establishment in the United Kingdom, or

(ii) any act or omission constituting part of the foreign tax evasion facilitation offence takes place in the United Kingdom. In paragraph (b)(i) “establishment” has the meaning given by section 1067(6) of the Companies Act 2006.

(3) In proceedings for an offence under this section it is a defence for B to prove that, when the foreign tax evasion facilitation offence was committed—

(a) B had in place such prevention procedures as it was reasonable in all the circumstances to expect B to have in place; or

(b) in all the circumstances it was not reasonable to expect B to have any prevention procedures in place.

2.48 This was expanded with the following language:

3 Failure to prevent facilitation of foreign tax evasion offences

(5) In this Act—

(a) “foreign tax evasion offence” means conduct (carried out with the necessary knowledge or intent) which—

(i) is an offence under the law of a foreign country that relates to the evasion of a tax payable under the law of that country, and

(ii) would amount to an offence of being knowingly concerned in, or in taking steps with a view to, the fraudulent evasion of that tax (assuming that there was an offence of that kind in the United Kingdom in relation to that tax); and

(b) “foreign tax evasion facilitation offence” means an offence under the law of the foreign country concerned which is committed by facilitating the commission by another person of a foreign tax evasion offence under the law of that country.

6) For the purposes of subsection (5)(b) a person facilitates the commission of a foreign tax evasion offence by engaging in conduct in relation to such an offence (with the necessary knowledge or intent) which—

(a) is an offence under the law of the foreign country concerned, and

(b) would, if the foreign tax evasion offence were a UK tax evasion offence, amount to a UK tax evasion facilitation offence (see section 2(4) to (6)).

2.49 The consultation posed the following question on the overseas fraud offence:

QE2. The Government welcomes stakeholder views on the new clauses, whether they sufficiently articulate the requirement for dual criminality at both the taxpayer and facilitator level, when read alongside the associated guidance. The Government welcomes suggested language or case studies for inclusion in the guidance

2.50 Respondents had a number of queries and concerns in relation to the overseas fraud offence. These broadly covered the following areas:

- A. The level of knowledge a corporation would be expected to have of tax regimes in other jurisdictions
- B. Criminalising actions which are not criminal in the UK and a lack of requirement for dual criminality at the taxpayer level

A. The level of knowledge a corporation would be expected to have of tax regimes in other jurisdictions

- 2.51 A small number of respondents expressed concern that the overseas tax evasion offence would require them to have a detailed knowledge of every tax regime in the world and it would therefore be “*difficult for relevant bodies to assess whether both the underlying offence and the facilitation offence would be criminal acts overseas*”. Similarly, when considering the difference in scope of the Bribery Act and the overseas corporate offence, one stakeholder commented that “*foreign tax evasion is more difficult to identify and prevent than bribery and corruption*”.
- 2.52 It is not the case that the overseas tax evasion offence requires a corporation, or an individual within a corporation, to have a detailed knowledge of any country’s tax regime. The overseas tax evasion offence does not require corporations to prevent tax evasion (which does not, in any event, include inadvertent non-compliance with detailed and technical rules due to ignorance), rather it requires corporations to put in place reasonable procedures to prevent those providing services for or on its behalf from criminally facilitating tax evasion. This requires corporations to have a knowledge of fraud that is proportionate to the risks they face of having their service providers deliberately and dishonestly facilitate tax evasion. That it is a crime to lie or fake documents in order to escape tax liabilities is an idea common to very many tax regimes.
- 2.53 The level of knowledge that is expected of a corporation will depend on the facts, including its particular circumstances. For example, if a corporation’s main or sole business is providing advice to its UK clients on their French tax liabilities and obligations, it would be reasonable to expect that corporation to have a more detailed understanding of the French tax system than a firm which does not offer tax advice, or a firm with no presence in France and few clients with a known French tax liability. It could be reasonable for this corporation, based on its risk assessment, to have more detailed procedures in relation to the criminal facilitation of French tax evasion as the bulk of its business relates to French taxes, and lesser procedures in relation to tax evasion in other jurisdictions which form little or no part of its business activity.
- 2.54 It is possible that a corporation may use its procedures for the UK tax evasion offence as a basis for its procedures in relation to the overseas fraud offence. It is expected that the procedures will have the same hallmarks, for example:
- A clear message from senior management that deliberate and dishonest complicity in tax evasion (or financial crime more widely) is not tolerated and that any representatives found to be facilitating tax evasion (or financial crime more broadly), regardless of the country suffering the tax loss, will be subject to disciplinary procedures and reported to law enforcement
 - Training on what constitutes criminal complicity in tax evasion, for example forging documents, deliberately concealing a client’s income

from a revenue authority or law enforcement agency, making false statements etc

- Training on existing legal obligations to report suspected money laundering and other suspicious activity, targeted using a risk based approach
- Monitoring to identify representatives acting in a criminal manner which is against the corporation's stated policy of not being complicit in tax evasion (or financial crime more widely)
- A clear governance structure around the corporation's procedures which has oversight of all the relevant prevention measures and a mechanism for reviewing their effectiveness
- A clear and well understood mechanism for representatives to escalate concerns or whistle blow on suspected criminal activity.

2.55 It is important to remember that, if the proposed act would be lawful if committed in the UK in relation to UK tax, then the new offence will not be committed regardless of the foreign country's laws, as the requirement of dual-criminality will not be fulfilled. There is only a need to consider the foreign criminal law where the proposed acts would be a crime if committed in the UK.

B. Criminalising actions which are not criminal in the UK and the lack of requirement for dual criminality at the taxpayer level

2.56 A small number of respondents expressed concern that the updated draft legislation did not require dual criminality at the taxpayer level, or that it was unclear from the legislation if this was required. Clause 5(a)(i) and (ii) of the draft legislation require dual criminality at the taxpayer level. To ensure that this is understood the guidance has been expanded including in section 3.6 on the Foreign Tax Evasion Facilitation Offence.

2.57 One stakeholder expressed concern that:

"The fact that there is no need for a successful prosecution to have been made in respect of the overseas offence means that if the other conditions for the new offence are met, a UK entity could be liable even where on any realistic view of the position there has been no criminality and none has been proven in the UK or overseas".

2.58 This is factually incorrect. If there had been no prosecution of the taxpayer, or of the corporation's associated person for criminally facilitating the taxpayer's tax evasion, then both offences would have to be proved to the criminal standard within the trial of the corporation in the UK. This would require proof that their actions were criminal in the country in question and that the criminal laws that have been breached in that country have equivalence to the UK's criminal offences. The overseas fraud offence cannot be committed by a

corporation without criminality by a taxpayer and an associated person which is proved in a UK court to the criminal standard of “beyond all reasonable doubt”.

Other comments

- 2.59 Respondents and stakeholders also presented conflicting arguments that the offence was not necessary because a country suffering a tax loss would always take the necessary action, and at the same time that some countries suffering a tax loss could not be trusted to conduct a fair trial because of corruption.
- 2.60 Comments received on this point included that *“it should be the responsibility of the authorities in those jurisdictions to uphold their laws and where appropriate prosecute the agents and subsidiaries involved in the offending in those countries”* and that *“where a foreign tax authority has suffered a tax loss, it would be more pragmatic for that foreign country to prosecute those who facilitated the tax evasion.”*
- 2.61 The Government agrees that it will always be preferable for the country or jurisdiction suffering the tax loss to take civil, criminal or regulatory action in relation to those involved. Similarly, where the country suffering a tax loss fails to act, it may be for the country in which the illegal acts take place to take the necessary civil, criminal or regulatory action against those involved. However, it should not be the case that justice fails to be done because of an unwillingness or inability to act on the part of those countries or jurisdictions involved. It has been demonstrated that those involved in financial crime will take advantage of the inaction or inability of certain countries to tackle financial crime in order to further their criminal activities. It is therefore for every country to take what steps it is able to, in order to tackle international financial crime. For its part, the United Kingdom expects businesses carrying out a business in the United Kingdom to do what is reasonable to prevent its representatives from being deliberately and dishonestly involved in facilitating tax evasion.

F. Geographic scope

2.62 The consultation posed the question

QF1. Do you believe the amended draft legislation brings within scope only those corporations with a sufficient presence in the UK, or those corporations whose representatives are committing the relevant criminal act(s) from within the UK?

- 2.63 A number of respondents, particularly those in the financial services sector expressed concern that their overseas operations would be within scope of the overseas fraud offence by virtue of them carrying out a business in the UK through a branch (s3(2) of the draft clauses). The Government appreciates that the drafting departed from that used within the Bribery Act 2010 which may have caused confusion for some stakeholders by giving the impression that jurisdiction was being exercised in a way that departed from the Bribery Act. The clauses have therefore been amended to mirror the language of the Bribery Act.
- 2.64 The updated clauses refer to a corporation (B) being in scope of the overseas fraud offence if:
- (a) B is a body incorporated, or a partnership formed, under the law of any part of the United Kingdom;
 - (b) B carries on business or part of a business in the United Kingdom;
 - (c) any conduct constituting part of the foreign tax evasion facilitation offence takes place in the United Kingdom.
- 2.65 The effect of the clauses remain, as with the Bribery Act, that corporations are within scope of the offence where they are carrying out a business activity in the UK. This will include where this activity is carried out through a branch.
- 2.66 Some stakeholders expressed the view that their overseas corporations, particularly those based in countries with a weaker compliance culture, would not put in place procedures to prevent their representatives from facilitating tax evasion. They felt that a UK branch could be negatively impacted by the inaction of the wider corporate structure and its refusal to put in place procedures to prevent its representatives from facilitating tax evasion. This is a real possibility. Much in the same way that a UK branch could be negatively impacted where the corporate entity is prosecuted in the country suffering the tax loss. It is up to each corporation to decide what, if any, procedures it wishes to put in place to guard against criminal prosecution and HMRC have and continue to make resource available to support corporations who ask for assistance in developing their procedures. Ultimately each corporation will decide how to proceed and the corporation (not the UK branch) will be held to account for its decision.

- 2.67 This flows from the fact that a company is a legal person: it has its own distinct legal personality. In the same way that each director and each shareholder is a different person, so too is the company. Where a single company has various offices or branches, these various offices and branches are part of the company but have no separate legal identity. They can be regarded as arms and legs. They are part of the legal person that is the company. A subsidiary is different from a branch or an office. A subsidiary is another entirely separate and distinct company: it is a separate legal person. Thus company A and its subsidiary company B are different legal persons with their own distinct legal identity.
- 2.68 Some respondents highlighted that the wider corporate entity could shield itself from criminal liability for the overseas tax fraud offence if instead of having a branch in the UK it had a subsidiary, as this subsidiary would be a separate legal entity. It is correct that the subsidiary would be a separate legal entity and capable of criminal liability in its own right, but would not be criminally liable for a “sister” corporation or a parent corporation’s action or omissions. Stakeholders noted however that they did not wish their UK branches to be set up as separate legal entities, as their branch status brought advantages for them in terms of their own tax liability and their capital requirements. It is for each corporation to balance the benefits and duties that come with having a presence in the UK as either a branch or as a subsidiary, depending on their own circumstances. During the course of consultation, many corporations were keen to stress that they go beyond their legal duties and take a global and holistic view of financial crime prevention. It is hoped that corporations will take the same approach to implementing procedures to prevent their representatives from deliberately and dishonestly facilitating tax evasion, choosing to foster a global culture of compliance based on best practice, rather than taking a narrow focus on insulating themselves from criminal liability in certain jurisdictions.

G. Other comments

- 2.69 The consultation invited evidence from stakeholders on the financial impacts on them of the new corporate offences. No written feedback was provided with an estimate of costs to business. However a number of stakeholders discussed on a one to one basis the likely impacts on their business and the changes they would be making.
- 2.70 Many corporations highlighted that they were already required by regulation to have in place financial crime prevention procedures, many of which they could leverage and bring into an overarching governance structure to form part of their reasonable procedures for the purposes of preventing their associated persons from deliberately facilitating tax evasion.
- 2.71 Businesses highlighted that they may face additional costs where they are required to exercise oversight over the actions of the third parties who are providing services on their behalf, where they have typically chosen not to exercise oversight or control and have instead relied on the assumed good governance of the corporate entity that contractually employs those individuals.

3. Next steps

- 3.1 The Government has published the updated draft clauses for the new corporate offences, which will form part of the Criminal Finances Bill. The Government has also published updated draft guidance for the new offences. Stakeholders should be aware that this guidance remains draft guidance and may change to reflect changes to the legislation during the Parliamentary process. Where requested, HMRC will continue to work with industry bodies to support them in drafting their own sector specific guidance for the offence.

- 3.2 Any organisation interested in discussing drafting tailored guidance for their sector should contact: [consult.nosafehavens@hmrc.gsi.gov.uk/](mailto:consult.nosafehavens@hmrc.gsi.gov.uk)

4. List of written responses received

The Alternative Investment Management Association
Ashurst
Association of Accounting Technicians
Association of British Insurers
Association of Foreign Markets in Europe
Association of International Accountants
BDO
British Bankers Association
British Land
The City of London Law Society
The Chartered Institute of Taxation
Deloitte
Ernst and Young
Grant Thornton
The Investment Association
The Law Society of Scotland
The Liverpool Law Society
The London Criminal Courts Solicitors Association
The London International Insurance Brokers' Association
Mazars
Moore Stephens
The National Farmers Union
Pinsent Masons
Peters and Peters
PWC
Royal Mail
RSM
The Serious Fraud Office
Simmons and Simmons
Taylor Wessing
The Wine and Spirit Trade Association
Virgin Money