



HM Revenue
& Customs

Tackling offshore tax evasion: a new corporate criminal offence of failure to prevent the facilitation of tax evasion

Summary of Responses
December 2015

Contents

	Foreword	3
1	Introduction	4
2	Summary of Responses	7
3	Responses to questions posed in the consultation document	9
4	Next steps	36
Annex A	List of consultation respondents	37
Annex B	Draft legislation	39

On request this document can be produced in Welsh and alternative formats including large print, audio and Braille formats

Foreword

Tax evasion is a crime which deprives the Government of much needed funds to run our public services and reduce the deficit, placing a greater burden on the vast majority of people who pay their fair share of tax. Tackling tax evasion is an important part of this Government's long-term economic plan and it will take tough action against evaders and those who help others to evade tax.

For too long it has been too easy for people to hide their money overseas to evade tax. We have changed that. Over the last two years the UK has led the drive in Europe, in the G20 and through its G8 Presidency to revolutionise international tax transparency. We now have agreement, reached with over 90 countries and jurisdictions, to exchange information on financial accounts automatically every year. Starting in 2016, HMRC will receive a wide range of information on offshore accounts held by UK tax residents. This will be an unprecedented step change in HMRC's ability to tackle offshore tax evasion, as for the first time it will reveal the details of billions of pounds worth of assets held offshore.

HMRC is today publishing the responses to four consultations on new tougher sanctions announced at the March 2015 Budget. It is right and fair that we make sure that the penalties evaders face, and the penalties for those who help them, reflect the wider harm caused by their actions and act as an effective deterrent to others.

The Government will legislate for:

- A new criminal offence for corporations that fail to take adequate steps to prevent the facilitation of tax evasion;
- Tougher financial penalties for offshore evaders, including a penalty based on the value of the asset on which tax was evaded as well as wider public naming of offshore evaders;
- A new penalty regime for those who enable tax evasion, based on the amount of tax evaded and public naming of enablers;
- A new criminal offence to make prosecution easier by removing the need to prove intent where a large amount of tax has not been paid on offshore income and gains.

The vast majority of people and businesses in the UK pay the tax they owe on time and do not attempt to dodge their responsibilities. Our message to evaders and enablers is clear and simple – HMRC is closing in on you, so come forward now or face tougher sanctions, both civil and criminal.

David Gauke

Financial Secretary to the Treasury

1. Introduction

- 1.1 This document summarises responses to the consultation paper '*Tackling offshore tax evasion: a new corporate criminal offence for failing to prevent the facilitation of evasion*' published on 16 July 2015.
- 1.2 HMRC is grateful to all those who responded or participated in meetings for taking the time to consider the issues raised by this consultation document. Responses to the consultations on civil sanctions for enablers and on civil and criminal sanctions for tax evaders are set out in separate response documents.

Context for the consultation

- 1.3 Offshore evasion is illegal and has a real impact on honest taxpayers. While most people pay their taxes correctly, a small minority do not. They ignore their tax responsibilities when their money is outside of the UK, or actively take advantage of the challenges that offshore jurisdictions pose to HMRC and use these to evade the tax which is due.
- 1.4 HMRC's strategy for tackling offshore evasion [No Safe Havens](#)¹, sets out five key objectives:
- There are no jurisdictions where UK taxpayers feel safe to hide their income and assets from HMRC;
 - Would-be offshore evaders realise that the balance of risk is against them;
 - Offshore evaders voluntarily pay the tax due and remain compliant;
 - Those who do not come forward are detected and face vigorously-enforced sanctions; and,
 - There will be no place for the facilitators, or enablers, of offshore evasion.
- 1.5 In order to achieve these objectives there needs to be a strong deterrent against non-compliance, which includes ensuring that both civil and criminal sanctions are available, and that there is a real risk of prosecution for those who do not comply.
- 1.6 Progress on new automatic exchange of information agreements, including the Common Reporting Standard (CRS), will be a major step forward. Over 90

¹ A copy of the No Safe Havens strategy can be found at:
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/303012/No_safe_havens_2014.pdf

jurisdictions have committed to automatically share information on offshore assets from 2017. This will greatly enhance HMRC's ability to detect, and then challenge, offshore evasion.

- 1.7 One of the five key objectives of HMRC's strategy for tackling offshore evasion, *No Safe Havens*, is that there will be no place for the facilitators, or enablers, of offshore tax evasion. HMRC wants to address the problem of enablers who help evaders to hide income and gains offshore. Deliberately aiding and abetting another person to commit tax evasion is already a criminal offence under existing law. The consultation on *Tackling offshore tax evasion: Civil sanctions for enablers of offshore evasion* considered civil penalties to apply to the same behaviour, i.e. to those who knowingly help another to commit tax evasion.
- 1.8 The UK is not alone in increasing its focus on tackling those who enable tax evasion. Offshore tax evasion has historically been difficult to uncover, especially where taxpayers took advantage of the least transparent jurisdictions. To date, the focus of the international community has been on identifying non-compliant taxpayers and increasing international tax transparency. The UK made increasing international tax transparency a priority of its G8 presidency. Since then, over 90 jurisdictions, including all of the world's financial centres, have committed to automatically exchange taxpayer information with one another to tackle offshore tax evasion. With access to unprecedented data on offshore income and gains, the international community is now focusing increasingly on tackling those individuals and corporations who are facilitating cross-border tax evasion.

Background on the consultation

- 1.9 The consultation document gave an overview of the difficulties in attributing criminal liability to corporations where their representatives are committing criminal acts during the course of business. Under the existing law, attributing criminal liability to a corporation where their representatives are criminally facilitating tax evasion during the course of business requires the involvement of the directing mind and will of the corporation.
- 1.10 The consultation document outlined a number of ways in which a corporation can take steps to insulate those who can be said to represent the directing mind and will of the corporation from demonstrable knowledge and involvement in the criminal acts, so as to insulate the company from criminal liability.
- 1.11 Corporate knowledge of criminal facilitation of tax evasion by a representative can range from there being no knowledge due to inadequate supervisory mechanisms, through to the provision of facilitation services being a core part of the corporation's business. We are looking to tackle the full spectrum of behaviour by incentivising good corporate governance and ensuring the

necessary legislation is in place to allow corporations who are complicit in the facilitation of tax evasion to be held accountable.

- 1.12 Analysis from past investigations suggests that it is a minority of corporations who are deliberately involved in and encouraging the provision of services to criminally facilitate tax evasion. However, during the course of the consultation the majority of those spoken to stated that they do not routinely or systematically monitor for illegal acts carried out by their staff during the course of business. Those consulted were able to demonstrate compliance with the Anti-Money Laundering Regulations and Know Your Customer due diligence, but stated that they did not routinely or systematically monitor for whether their staff were seeking to deliberately provide services to facilitate tax fraud.

Structure of the consultation response

- 1.13 The remainder of the consultation response is divided into 3 sections:
- Chapter 2 sets out a summary of responses to the consultation and the Government's overarching response
 - Chapter 3 discusses the views received from respondents and stakeholder on the specific questions posed within the consultation document. The Government's view in light of the responses received is summarised in relation to each question.
 - Chapter 4 sets out the next steps for further consultation on the corporate offence.
 - Annex A sets out the list of those met during the consultation and those who submitted responses to the consultation.
 - Annex B sets out the draft legislation. There will be further consultation in 2016 on this draft legislation and its supporting guidance.

2. Summary of responses

Summary of responses

- 2.1 Written responses were received from 28 respondents. Those consulted during the consultation period extended considerably beyond those submitting written responses. Feedback received during the consultation process has been considered alongside written responses.
- 2.2 The consultation document sought views on a number of issues relating to the scope and design of a new criminal offence that would be committed by a legal person (for example a corporation) where its agent criminally facilitates another to commit a tax fraud, and the corporate had failed to put in place reasonable procedures to try and prevent such facilitation. The Government is very grateful to all those who responded or participated in consultation meetings between August and October 2015 (see Annex A for full list) for taking the time to consider the issues raised by the consultation paper.
- 2.3 The consultation invited submissions on:
- Those entities who could be liable under the new offence, i.e. how ‘corporation’ should be defined for the purposes of the offence.
 - The persons for whom a corporation should be liable, i.e. how ‘agent’ should be defined for the purposes of the offence.
 - The category of tax offences to which the offence should apply.
 - The geographic scope of the offence.
 - The nature of a defence or defences to the new offence.
 - The nature of guidance that should be given to those to whom the offence would apply, and its interaction with existing regulatory obligations and guidance.
- 2.4 Stakeholders and respondents were broadly understanding of the need for greater corporate responsibility in relation to the acts carried out by those who represent the corporation. The Bribery Act model of corporate liability, i.e. the ‘failure to prevent’ model, was welcomed by stakeholders who broadly understand how the Bribery Act operates and the type of due diligence required by that Act.
- 2.5 However, some respondents, particularly financial institutions and advisory firms, questioned the need for the new offence, preferring instead the current model of liability – i.e. that an offence is carried out by the “directing mind or will” of the corporation, though they noted that due to the limitations of the current law there had been no prosecutions.

- 2.6 The concerns of respondents focused broadly on three issues:
- those persons whom a corporation can be liable for;
 - the geographic scope of the offence; and
 - the procedures that a corporation will be expected to put in place to try and prevent those representing it from criminally facilitating tax evasion.
- 2.7 Some respondents strongly favoured the new offence applying as broadly as possible, both in terms of its scope and geographical reach. Respondents providing services most at risk of being misused to facilitate tax evasion, e.g. financial services, were cautious of the offence being cast so broadly as to place an unreasonable burden on them.
- 2.8 A number of respondents noted the practical difficulties of investigating and bringing a prosecution with an overseas element.

Government response

- 2.9 The Government has considered the responses to this consultation carefully. It is against the backdrop of unprecedented international co-operation and information exchange that the Government intends to proceed with the new offence.
- 2.10 The Government is mindful of the need to ensure that the offence is broad enough to capture the behaviour it is seeking to prevent, but not so wide as to unduly burden corporations who are within the scope of the offence.
- 2.11 As with any investigation and prosecution across borders, investigations and prosecutions under the new offence will require international co-operation and will inherently be more complex than one that is purely domestic. Whilst these are factors to consider when investigating and prosecuting a corporation under the new offence, the Government does not believe that the potential for practical difficulties is a justification for not proceeding with the new offence.
- 2.12 The Government intends to consult on draft legislation and guidance at the beginning of 2016 to ensure that the new offence strikes the correct balance.

3. Responses to questions posed in the consultation document

Feedback on the introduction of the new offence

- 3.1 There was a general understanding and agreement amongst respondents and those spoken to during the consultation process that good corporate responsibility plays a key role in the prevention of tax evasion. For example, one respondent noted that “*punishment is the most effective deterrent*” and they therefore welcomed, in principle, the introduction of a new criminal offence.
- 3.2 All of those organisations consulted who undertake commercial activity were clear that their organisations had no appetite for the risk of involvement in criminal activity. Because of this such organisations would seek to be absolutely sure they complied with the requirements of the defence to the new offence by putting in place “reasonable procedures” to prevent those representing them from criminally facilitating tax evasion. Those same organisations expressed the view that they were less concerned about the risk of incurring civil liability for the same behaviour..
- 3.3 Whilst there was general consensus that corporate liability, be it civil liability or criminal liability, played an important role in deterring involvement in tax fraud, views on the introduction of a new corporate criminal offence were mixed. Some respondents strongly welcomed the introduction of the new offence, viewing the existing law as unsuitable and ineffective in tackling corporate involvement in tax fraud.
- 3.4 Other respondents felt that the existing deterrents, for example regulatory supervision and criminal liability under the identification doctrine, were underutilised, and the Government should instead focus resource on civil responses to corporate involvement in offshore tax evasion.
- 3.5 Those respondents in favour of introducing a new criminal offence to tackle corporate involvement in tax evasion highlighted the limitations of the existing law and the difficulties associated with proving the involvement of the directing mind and will of the corporation, particularly in relation to large multinational corporations.
- 3.6 A number of stakeholders drew comparisons to other jurisdictions which do not require involvement of the most senior members of the corporation in order to attribute liability, where there have been a number of successful investigations into and prosecutions for corporate involvement in facilitating tax crime, most notably the United States of America.

- 3.7 Those respondents opposed to the introduction of a new corporate criminal offence cited a number of reasons for their opposition. Some respondents felt that HMRC should instead focus on using the existing law, for example one respondent noted that they *“do not see the need to introduce further deterrents where existing deterrents are unused/underused. If existing deterrents were used more frequently they might create the deterrent effect HMRC is seeking”*.
- 3.8 Other respondents felt that whilst a corporate offence may be beneficial, the UK should await international consensus on corporate liability before seeking to make changes to the existing criminal law in the UK. These respondents felt that *“embarking on creating this new offence without similar efforts by other leading jurisdictions could harm the competitiveness of our financial institutions but imposing additional burdens on them that they do not face elsewhere”*.
- 3.9 Similar concerns were expressed when corporate liability was introduced under the Bribery Act.
- 3.10 One respondent expressed concern that requiring corporations to take reasonable steps to ensure that those representing them were not committing criminal acts during the course of business was *“akin to asking companies to police themselves”*.
- 3.11 Many of those spoken to during the course of the consultation felt that their existing systems of monitoring and due diligence could be amended to incorporate “reasonable procedures” under the new offence, provided that guidance as to what constituted reasonable procedures was drafted collaboratively with those affected by the new offence. They felt that their organisations’ records in relation to submitting suspicious activity reports (SARs) demonstrated their ability to detect, report and prevent tax crime.

Government response

- 3.12 The Government’s intention is to incentivise corporations to put in place better monitoring of their representatives’ actions which are undertaken during the course of representing that corporation. The new offence does not ask corporations to police their clients’ tax liability or put in place any additional requirements in relation to their clients. Rather, the offence seeks to ensure that corporations take reasonable steps to seek to prevent anyone committing criminal acts related to tax whilst representing the corporation during the course of business, for example by providing services to a client..

The entities to which the new offence will apply

Do you agree that the offence should cover all of the above entities? Do you have any comments on the entities which you believe the offence should apply or not apply to?

3.13 The consultation proposed a new crime where a corporation fails to prevent its agents from criminally facilitating tax evasion. For the purposes of the consultation, “corporation” was defined as broadly as possible to prompt discussion and invite views on how “corporation” should be defined for the purposes of the offence.

3.14 Within the consultation “corporation” was defined as:

“commercial organisations, e.g. companies and partnerships as well as not for profit companies that are not engaged in a business, profession or trade”

3.15 By comparison, the ‘failure to prevent’ offence within the Bribery Act applies to “relevant commercial organisations”, which is defined under s.7(5) as:

“as a body or partnership incorporated or formed in the UK irrespective of where it carries on a business, or an incorporated body or partnership which carries on a business or part of a business in the UK irrespective of the place of incorporation or formation²”

3.16 The majority of respondents felt that the new offence should apply broadly to all legal persons as the type of entity did not necessarily relate to the risk posed by the activities undertaken by that entity. Respondents recognised that some services will carry a higher risk of being used to criminally facilitate tax evasion, for example financial service. Additionally, some sectors will carry a minimal risk of having representatives who criminally facilitate tax evasion, for example not for profit organisations³.

3.17 Some stakeholders felt that not for profit organisations should be specifically excluded from the scope of the new offence as they presented a low risk of involvement in the facilitation of tax evasion. Of the two written responses received from not for profit organisations, both supported applying the offence

² Para 34, The Bribery Act guidance, (available at <https://www.gov.uk/government/publications/bribery-act-2010-guidance>) Section 7(5) Bribery Act 2010.

³ For a more detailed consideration of risks associated with money laundering for different sectors see the Government’s national Risk Assessment, available at: <https://www.gov.uk/government/publications/uk-national-risk-assessment-of-money-laundering-and-terrorist-financing>

to not for profit organisations, on the basis that in theory not for profit organisations “*can be the facilitators of tax evasion too*”.

- 3.18 One stakeholder felt that only financial service providers should be subject to the new offence, because ‘*monitoring for evasion is a specialised task, requiring a high level of tax and other financial understanding*’, and that all other corporations should remain subject only to the existing range of offences.

Government response

- 3.19 The Government believes that the responsibility to put in place reasonable procedures to prevent one’s representatives from criminally facilitating tax evasion should rest on all legal persons, e.g. companies, partnerships, LLPs, regardless of whether they operate commercially or for other reasons (such as charity). For ease of reference, this document continues to use the word “corporation”, however, in doing so, “corporation” should be read as including all legal persons.

- 3.20 However, we recognise that some organisations, such as those in the charitable sector, present a lower risk of their representatives deliberately facilitating tax evasion. The Government believes that the most appropriate way to ensure that the offence applies to all entities whose representatives may criminally facilitate tax evasion, whilst not unduly burdening those whose risk of such activity is low, is to factor risk into the consideration of what procedures are considered “reasonable” for the purposes of mounting a defence to the new offence, for example, the procedures that are considered reasonable will be proportionate to the risk faced by the corporation. This is the approach taken under the Bribery Act.

Those for whom a corporation can be liable if the corporation fails to prevent them from criminally facilitating tax evasion

- 3.21 The consultation proposed imposing criminal liability on corporations who failed to prevent those acting as its representatives from committing criminal facilitation of tax evasion. For the purpose of the consultation “agent” was defined broadly to prompt discussion and invite views on how “agent” should be defined for the purposes of the offence.

- 3.22 Within the consultation “agent” was described as:

a person who acts on behalf of the corporation

- 3.23 We recognise that identifying those for whom a corporation can be liable is key to considering the impact the new offence will have on affected entities and the supervisory mechanisms they will need to put in place.

- 3.24 The Bribery Act holds commercial organisations liable for failing to prevent acts by a “person associated” with the corporation. This is defined as a person who *‘performs services for or on behalf of’*⁴ the corporation and the capacity in which this is done does not matter. This can include an employee, representative or subsidiary. This is determined by *‘reference to all the relevant circumstances and not merely by reference to the nature of the relationship between that person and the organisation’*⁵. The intention being to give the offence a broad scope so as to include all those (natural or legal) persons who may act on the corporation’s behalf.
- 3.25 Many stakeholders stressed that how the term “agent” is defined within the offence will be key to the extent and practicality of supervisory mechanisms affected corporations put in place. For example, a corporation can more easily exercise supervision and control over somebody whom it directly employs. By comparison a corporation may have less control over a subcontractor or somebody providing additional services to the corporation’s client in conjunction with an employee of the corporation (as opposed to providing services to the same client completely separately). Stakeholders also stressed the importance of having the term “agent” defined as far as possible in primary legislation to give affected corporations certainty over those for whom they can be liable.
- 3.26 During the course of the consultation HMRC met with a number of stakeholders who explained their organisations’ interactions with third parties during the course of business, for example how corporations make and receive referrals, both to partner organisations and to independent organisations domestically or overseas.
- 3.27 A number of key questions emerged during these meetings, namely:
- The extent to which a corporation can be liable for the actions of a person who they make a referral to
 - The extent to which a corporation can be liable for the actions of a person who refers a client to them, for example an independent financial advisor
 - The extent to which a corporation can be liable for criminal acts committed by an representative of a subsidiary
 - The extent to which a corporation can be liable for criminal acts committed by an employee of a different corporation

⁴ S.8 Bribery Act 2010.

⁵ Para 37, The Bribery Act guidance.

- 3.28 Feedback has consistently stressed that a corporation should not be held liable for the actions of an individual over whom they cannot exercise control. For example, one stakeholder stressed the importance of excluding “*any intermediary which acts independently*” from the relevant corporation. They cited the specific example of an Independent Financial Adviser (IFA) who may recommend a given corporation’s product but does not act on behalf of the corporation whose product it recommends.
- 3.29 A number of respondents cited control as a key element over the determination of whether an individual can be considered an “agent” for the purposes of the offence.
- 3.30 One respondent recommended that for the purposes of the offence “agent” should:
- “focus on employees and the work of contractors for the corporation, or at the corporation’s express or implied instruction for the corporation’s customer, or be restricted to its legal definition, i.e. a person having the authority or capacity to create legal relations between the corporation and the customer.”*
- 3.31 One respondent made a similar suggestion, recommending that “agent” be limited to cases where an agency exists as a matter of law, i.e. where there is a legal relationship involving an element of control.
- 3.32 A number of respondents recommended that “agent” should be defined more narrowly so as to only include employees of the corporation, thus excluding those providing services on behalf of the corporation, but not necessarily directly employed by them.
- 3.33 One respondent felt that an “agent” should be limited to natural persons, i.e. a corporation should not be able to act as a representative for another corporation, with another expressing a similar view that “representative” should not encompass ‘third party corporates acting in an arm’s length business relationship’. This view was also expressed in a number of meetings with stakeholders who expressed concerns about the level of control they could operate over overseas subsidiaries, and therefore felt that they would have difficulties putting in place monitoring and control mechanisms.

Government response

- 3.34 The Government recognises the concerns expressed by some stakeholders in relation to the use of the word “agent” and how this may interact with existing law on what constitutes an agency relationship. The response document will now refer to the class of persons that a corporation can be liable for failing to

prevent from criminally facilitating tax evasion as “representatives” rather than “agents”, unless referring to the July 2015 consultation document.

- 3.35 The Government believes that in the context of the criminal facilitation of tax evasion, a corporation should be liable for all persons who provide services on their behalf. This would exclude those acting entirely independently from the corporation. This would bring into scope third parties providing services to a client of the entity where that entity has an element of control in the provision of those services. For example where the entity agrees that someone not ordinarily employed by the entity will provide services to its customers on its behalf.
- 3.36 Under this definition, a corporation would not be liable for the actions of a professional who they make a referral to, unless the person they refer to provides services on their behalf (as opposed to providing them independently). Similarly, a corporation would not be liable for the actions of an individual who makes a referral to them unless the individual making that referral is also providing services on that corporation’s behalf (rather than independently from it).
- 3.37 Within the draft legislation provided at Annex B, the class of person a corporation can be liable for is expressed as an “associated person”, which is defined as a person who provides services for or on behalf of the corporation. Under the definition of associated person above, an associated person can be a legal or natural person. This means that a corporation can be a representative of another corporation. For example, where corporation A delivers services to its customers by way of subcontracting with corporation Z and a member of corporation Z’s staff criminally facilitates the customer’s tax evasion, the member of staff would also be an representative of corporation A, but one over whom corporation A had limited control. We would expect corporation A to be able to successfully advance the reasonable procedures defence where it had conducted adequate checks on corporation Z when subcontracting its work (in such a case, any failure to control Z’s staff is probably a failure of corporation Z rather than corporation A).
- 3.38 The Government recognises that the corporation will be able to operate greater levels of control and supervision over some categories of representatives (for example those directly employed by the corporation) than over others (for example those ordinarily employed by another entity but providing services on a temporary basis). We recognise that the reasonableness of procedures should take account of the level of control and supervision the entity is able to exercise over a particular person acting on its behalf.

Requirement to benefit

We do not envisage that under the new offence it would have to be shown that the agent who is facilitating the evasion of taxes was acting for the benefit of the corporation, for example, to obtain or retain business for the corporation, as under s.7(1) of the Bribery Act 2010, do you agree with this approach?

3.39 The consultation document highlighted that under the s.7(1) of the Bribery Act 2010 it must be shown that the individual is committing the criminal act (of paying a bribe) for the benefit of the company, i.e. to obtain or retain business for the corporation, in order for the corporation to be criminally liable for failing to prevent this act. The consultation posed the question of whether a representative should have to be proved to be acting for the benefit of the corporation before the corporation can be liable for failing to prevent the representative's actions under the new offence. The views of respondents on this issue was mixed.

3.40 A number of respondents agreed with the position set out in the consultation document that such a test should not be included. Some respondents felt this departure from the Bribery Act was appropriate because:

“the offences of corruption and bribery are distinct from the facilitation of tax evasion for multiple reasons. The question of the agent’s motivation is not pertinent to the latter offence, nor is it related to the social ill [the offence] intends to correct.”

3.41 Other respondents saw a practical benefit in excluding this test, for example they felt it would:

“increase corporate accountability and encourage procedures to be put in place to prevent this from occurring at the outset.”

3.42 A number of respondents expressed the view that the test should be included in the new offence. This was broadly due to a belief that a nexus should be shown between the actions of the representative and the corporation, so as to exclude:

- those representatives acting, for example, in a personal capacity, i.e. by providing a service to someone privately outside of the scope of their work for the corporation
- those representatives providing services expressly against the wishes of the corporation

Government response

3.43 The Government agrees that corporations should only be liable in relation to services done for or on their behalf. Corporations would not be liable for failing

to prevent acts that were not done on their behalf, for example, corporations could not be liable for failing to prevent acts of a staff member carried out in their private capacity and outside of their employment with the corporation.

- 3.44 Where a representative provides advice or services to a friend or family member outside of the course of his employment, and as such the advice given is given in a private capacity, and none of his employer's business, the employer could face no liability. The Government therefore agrees that the new offence ought to include a provision to make it clear that liability occurs only where the representative is providing services for or on behalf of the corporation.
- 3.45 However, where a corporation fosters a culture under which it is acceptable for staff to criminally facilitate tax evasion, and such practices are part of how the corporation does business, the corporation will not be able to say that its employee was not its representative when carrying out this tacitly approved act just because it had a formal policy forbidding the facilitation of tax evasion.
- 3.46 In assessing whether someone was acting on the corporation's behalf, it is the true substance of what was actually in fact permitted, not the existence of formal statements that matters. The existence of a formal policy would be a factor to be considered when deciding whether the corporation had taken reasonable steps, but so would the extent that compliance with that policy was monitored and enforced.

The taxes and duties covered by the offence

We believe that that a corporation should be held accountable where it fails to prevent its representatives from facilitating tax evasion, regardless of the type of tax involved. Do you agree that the new corporate criminal offence should cover failure to prevent its representatives from criminal facilitation of evasion of all taxes?

- 3.47 The consultation asked which taxes a corporation should be liable for failing to prevent its representatives from facilitating. The consultation document outlined that there are a number of civil and criminal sanctions for failing to pay tax on offshore income and gains. Unlike the civil penalties regime, the criminal law makes no distinction in terms of liability for onshore and offshore tax evasion. There are overarching criminal offences relating to all categories of taxation, for example the common law offence of cheating the public revenue, and there are

also offences relating to specific categories of taxation, for example section 72 of the Value Added Tax Act 1994.

- 3.48 The majority of respondents were broadly supportive of the new offence covering the evasion of all categories of taxation⁶, much in the way the common law offence of cheating the public revenue applies to all categories of tax. Many respondents thought that there should be equal criminal liability under the new offence for different categories of taxation as criminal facilitation is no more or less egregious in relation to any particular category of tax. Some respondents advocated this position on the basis that a corporation's representatives should not be criminally facilitating the evasion of any taxes and it was therefore appropriate that the offence applied to all taxes, others advocated this position on the basis of maintaining consistency.
- 3.49 A number of respondents expressed the view that the offence should be limited to certain categories of taxation. There was no consensus on the categories of taxation that should be included, though it was broadly agreed amongst the minority that indirect taxes should not come within the scope of the new offence.
- 3.50 For example, one respondent recommended that the offence be limited to income tax and capital gains tax. They accepted that "*there may be good reasons to extend the scope of the corporate offence to include inheritance tax and VAT*" but felt that calls for such an extension should be approached with care, and re-assessed in time. Another respondent felt that the offence could apply to personal taxes, but should not cover indirect taxes, because fraud in relation to these taxes "*occurs in a different context, usually as part of complex supply chains*".
- 3.51 Another respondent felt that the corporate criminal offence should apply to those taxes covered by the proposed civil penalties regime for enablers of offshore tax evasion, namely income tax, capital gains tax and inheritance tax. A different respondent felt that the new offence should be aligned not to the proposed civil penalties regime for enablers, but to the proposed new criminal offence for individuals failing to declare their offshore income and gains⁷, which would apply to income tax and capital gains tax. This respondent stated that "*there is no justification for clashing approaches and there may be difficulties caused by a lack of parity*".

⁶ Some of these respondents prefaced this view by stating that they did not believe the new offence was necessary to combat that facilitation of tax evasion, but should the new offence proceed it should cover all taxes.

⁷ The consultation on the proposed civil penalties for the enablers of offshore tax evasion can be found at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/445536/Tackling_offshore_tax_evasion_-_civil_sanctions_for_enablers_of_offshore_evasion.pdf

Government response

- 3.52 The Government believes that corporations should be liable for failing to prevent the criminal facilitation of tax evasion by its representatives in relation to all taxes. The consultation document invited views on whether there was a justification for holding corporations liable in relation to only certain categories of taxation, i.e. personal taxes.
- 3.53 The Government agrees that it is important that the new offence is consistent with existing law, and departs from it only in so far as this can be justified to achieve the policy objective. As stated above, in order for a corporation to be liable under the proposed new offence not only would a tax crime (under the existing law) have to have been committed by the taxpayer, but a representative of the corporation would have to have been criminally facilitating that offence.
- 3.54 The offences that the corporation will be alleged to have failed to prevent relate to the evasion of all taxes. *Mens rea* would be required of both the taxpayer and the corporation's representative. A (legal or natural) person cannot be guilty of these criminal offences (or criminally facilitate its commission) by mistake, i.e. because of a misunderstanding as to the tax due or by innocently providing a service which is abused by a taxpayer. It is therefore unnecessary to exclude certain categories of taxation on the basis that they are "too complex". There is no prospect of a corporation committing the new offence where its client is accidentally or innocently non-compliant with their tax obligations, or where its representative is unaware that a fraud is being committed. The new offence is only committed where both the taxpayer *and* the representative are involved in a fraud.
- 3.55 The Government believes that there is not sufficient justification for differentiating corporate criminal liability under the new offence in relation to different categories of taxation. The offence is intended to drive good corporate governance and responsibility. We do however recognise that what constitutes reasonable procedures in terms of preventing the criminal facilitation of tax evasion by a representative may differ depending on the nature of tax at stake and the risks associated with evasion of that category of taxation.

The aspects of non-compliance which constitute criminal facilitation of tax evasion

If a new corporate failure to prevent offence is created, should the offence be limited to corporate failure to prevent criminal facilitation in the offences of cheating the public revenue and the fraudulent evasion of income tax outlined above?

Alternatively, should the new offence also be committed where a corporation fails to prevent its representatives from criminally facilitating other tax offences? Which additional tax offences do you believe should be included in any corporate failure to prevent offence?

3.56 The consultation put forward an offence with three elements. For the corporation to be liable under the new offence, there must have been:

- Stage one: criminal tax evasion by a UK taxpayer (either a legal or natural person) under the existing law;
- Stage two: criminal facilitation of this offence by a representative of the corporation, as defined by the Accessories and Abettors Act 1861;
- Stage three: the corporation failed to take reasonable steps to prevent its representative from committing the criminal act outlined at stage two.

3.57 The offence does not criminalise any new behaviour at the individual level, either that of the taxpayer or of the representative. The offence is rather one of the corporation failing to take reasonable steps to prevent its representative from committing acts which are already criminalised under the existing law.

Stage one: criminal evasion by a taxpayer under the existing law

3.58 The consultation document listed the following offences as examples of predicate offences at the taxpayer level:

- the common law offence of cheating the public revenue (or conspiring to cheat the public revenue);
- section 106A of the Taxes Management Act 1970 (TMA), which introduced an offence of fraudulent evasion of income tax;
- section 72 of the Value Added Tax Act 1994; and
- sections 2-7 of the Fraud Act 2006 in so far as they relate to tax evasion.

3.59 The consultation document did not include as a predicate offence the new criminal offence for individuals failing to declare their offshore income and gains, which does not require a deliberate intent to defraud the revenue. Feedback from respondents stated the importance of having dishonest intent by the taxpayer in order to ensure that only the most serious cases of tax evasion attract liability for the corporation.

3.60 A number of stakeholders suggested similar related statutory offences, in so far as they related to tax evasion, for example False Accounting, contrary to s.7(1) of the Theft Act 1968, as well as the equivalent offences for Northern Ireland, Scotland and Wales.

3.61 A number of respondents stated that they felt it important that the behaviour of the taxpayer was sufficiently serious as to constitute a criminal act to warrant prosecution of a corporation. Some respondents went further and expressed a view that before a prosecution is brought against a corporation a successful conviction should be secured against the tax payer.

Government response

3.62 The Government agrees that existing offences with dishonest intent should be included within the list of predicate offences. The Government intends for the new corporate offence to encompass all dishonest criminal tax non-compliance. The Government recognises concerns by stakeholders that the new criminal offence for failing to declare offshore income and gains has not been tested and is not yet well understood by business. However, the Government notes that it is possible to criminally aid and abet a strict liability crime, and this would still require dishonest intent on behalf of the corporation's representative and so the corporation's agent. The consultation on draft legislation for the new corporate offence will consider the inclusion of the new criminal offence for failure to declare offshore income and gains further with stakeholders.

3.63 The Government agrees that the non-compliance by the tax payer should meet the standards of criminal conduct. However, it is not intended that a successful prosecution at the taxpayer level will be a pre-requisite for bringing a prosecution against a corporation, though a successful prosecution at the taxpayer level would have practical benefits. Should a successful prosecution not have been brought at the time of the prosecution of the corporation, the prosecution would have to prove to the criminal standard during the prosecution of the corporate that the predicate offence had been committed.

3.64 There are a number of instances where it may be appropriate to undertake a prosecution of a corporation under the new offence without the prior conviction at the taxpayer level. For example, the taxpayer may have died, or a decision may have been made that it is not in the public interest to prosecute the taxpayer, though their conduct amounts to criminal conduct. For example, the taxpayer may have made a full and voluntary disclosure to HMRC about their non-compliance and provided details of the criminal conduct of those professionals who aided and abetted their tax evasion and so a civil rather than criminal sanction is more appropriate.

Stage two: criminal facilitation by the representative

3.65 For a representative to be liable for criminally aiding and abetting tax evasion they must commit an act that facilitates the individual to evade tax, and does so with the necessary *Mens Rea*.

- 3.66 A consistent theme from consultation meetings with corporations, representing a broad range of sectors, was that there is little awareness of what acts can be considered criminal aiding and abetting under the existing law. It is not something corporations are mindful of, or seeking to monitor. The simplified examples within the consultation document sought to demonstrate the ways in which a professional can perform activities, which when done with the necessary intent can amount to criminal aiding and abetting of tax evasion. Feedback received during the consultation process was that stakeholders would find it beneficial to see an example from the consultation document repeated in the responses document, with further details, to aid their understanding of liability under the offence and what actions and intent can attract liability.

Example 1: Sarah

In 2003, Sarah was introduced to Malus GmbH, a Swiss advisory company, by a member of staff of a UK High Street Bank. Sarah had told the UK High Street Bank's member of staff that she wanted to create a tax efficient structure for potential future investment into UK property. Sarah planned to put her post-tax employment earnings into this structure.

Malus GmbH was an approved intermediary of a UK high street bank. The UK High Street Bank had satisfied itself that Malus GmbH was an honest and reputable company which had the relevant expertise to meet Sarah's request for a tax efficient structure that allowed her to invest in UK property.

Sarah had a relative, Maisie, who was neither resident nor domiciled in the UK. Staff of Malus GmbH advised Sarah that she should set up a Swiss trust using Maisie as the settlor, in order to hide her income from HMRC and evade paying any UK tax. Sarah understood that she should be declaring income to HMRC, but chose not to.

Sarah agreed to the creation of the trust in Maisie's name, although Maisie was never asked to sign anything and was not aware that a trust was being set up with her named as the settlor. Sarah was advised by staff of Malus GmbH that she retained beneficial ownership of all the assets despite the trust arrangement.

The trust had bank accounts with Lunar Bank in Monaco which were set up by staff of Malus GmbH.

During the course of an inquiry Sarah admitted that her actions following initial contact with Malus GmbH were done with the intention of hiding her income from HMRC so as to evade the taxes due.

HMRC's understanding of this case in relation to the proposed offence is that:

1. The UK High Street Bank's liability for the acts of its employee who referred Sarah to Malus GmbH

Actus Reas:

A representative of the UK High Street Bank referred Sarah to Malus GmbH, believing that they could provide services which would meet Sarah's request for a tax efficient structure in which she could put her income and invest in UK property.

Mens Rea:

If the representative within the UK High Street Bank making this referral did so knowing of Sarah's intent to evade UK taxes and made the referral to help her achieve this then the UK High Street Bank could be found guilty of failing to prevent their representative from facilitating tax evasion (by way of making this referral), subject to the defence of having put in place reasonable procedures to prevent this.

If the representative within the UK High Street Bank making the referral did so in good faith, i.e. they did not know that Sarah wanted to set up the structure to evade tax, but rather held the honest belief that Sarah was seeking a lawful tax efficient structure to invest her income into, then they have not criminally facilitated Sarah's tax evasion and therefore there is no question of the UK High Street Bank failing to prevent its representative from criminally facilitating tax evasion.

2. Malus GmbH's liability for the acts of its employees

Actus Reas:

Malus GmbH's staff provided structuring advice to Sarah, as well as professional trustee services to Sarah's trust.

Mens Rea:

Malus GmbH's staff knew that Sarah's trust was not properly constituted, i.e. they were aware that although Maisie was named as the settlor she had no knowledge of or involvement with the trust. Having advised Sarah that she could use the trust to hide her income from HMRC, they knew that it was her intention to evade UK tax. Malus GmbH's staff aided and abetted Sarah's tax evasion and Malus GmbH could be liable for failing to prevent its representative's criminal facilitation of Sarah's tax evasion. This would be subject to a potential defence of having put in place reasonable procedures to prevent this.

3. The UK High Street Bank's liability for the actions of Malus's employees

The UK High Street Bank could only be liable for failing to prevent Malus GmbH's staff criminally facilitating Sarah's tax evasion if Malus GmbH's staff could be said to be acting on behalf of the UK High Street Bank. This may occur if, for example, the representatives were providing services to Sarah on behalf of the UK High Street Bank, for example, where the bank is offering services as a package and subcontracted the provision of some services to Malus GmbH. In the example given, this was the case.

However, the UK High Street Bank has made the referral in good faith, i.e. without any intention of facilitating illegal activity, having made adequate checks and conducted due diligence. They have thus taken reasonable steps to ensure their representative does not criminally facilitate tax evasion. That staff of Malus GmbH have criminally facilitated Sarah's tax evasion appears to be a result of Malus GmbH's failure to control their staff, not a failing of the UK bank.

4. The liability of Luna Bank for the actions of its employees

Actus Reas:

Lunar Bank's staff opened a bank account for the trust set up by Malus GmbH, which helped Sarah to hide her income from HMRC.

Mens Rea:

If this was done without the knowledge of Sarah's intent to hide her income, i.e. the account was opened in good faith with the required checks conducted, Lunar's employees would not have criminally facilitated Sarah's tax evasion and so Lunar could not be liable for failing to prevent the criminal facilitation of tax evasion by its employees.

If Lunar's employees had deliberately not performed the required due diligence when opening the account for Sarah's trust, or had performed the due diligence fraudulently in order to enable the account to be opened in Maisie's name to mask Sarah's identity to allow her to evade taxes, then the employees would have criminally aided and abetted Sarah's tax evasion and Lunar Bank would be liable for having failed to prevent this, subject to the reasonable steps defence.

- 3.67 As with the conduct of the taxpayer, a number of respondents stated that they felt it important that the behaviour of the representative was sufficiently serious as to constitute a criminal act to warrant prosecution of a corporation, i.e. the act of the representative should be committed with the necessary intent to constitute a criminal act. One respondent expressed concern that without this requirement

“there is a real risk that a course of action that may arise unwittingly, from a misunderstanding or tenable view of the law that is ultimately held to be erroneous, could form the basis for retrospectively attributing criminal liability to a corporation”.

- 3.68 Some respondents expressed a view that before a prosecution is brought against a corporation a successful conviction should be secured against the corporation’s representative.

Government response

- 3.69 The Government agrees that the acts of the representative must constitute a criminal act in order for the corporation to be liable under the new offence. This would exclude a situation where, for example, the representative had acted in good faith in providing a service to a taxpayer, and this service was ultimately abused by the taxpayer to commit tax fraud without the knowledge of the service provider.
- 3.70 The Government notes the views on the needs for a conviction against the corporation’s representative before a prosecution is brought at the corporate level. The Government does not agree that a conviction should be a pre-requisite to a corporate prosecution. As with the offence at the taxpayer level, the successful prosecution of the representative will not be a pre-requisite for bringing a prosecution against a corporation. It will however be necessary to prove (beyond reasonable doubt) that the representative had criminally facilitated the taxpayer’s tax crime.
- 3.71 There are a number of instances where it may be appropriate to undertake a prosecution of a corporation under the new offence without the prior conviction of the representative. For example, a decision may have been made that it is not in the public interest to prosecute the representative, though their conduct amounts to criminal conduct. This may occur when the representative acted as a whistle-blower and may have made a full and voluntary disclosure to the relevant authorities about their criminal activity in aiding and abetting tax evasion, and provided evidence in relation to these crimes, and so a civil rather than criminal sanction may be more appropriate. Alternatively, the representative may have died.

Stage three: failure by the corporation to prevent the criminal acts of its representative(s)

- 3.72 The criminal offence requires that the corporation must fail to prevent its representative(s) from committing a criminal act. No intent of facilitating a crime is required on behalf of the body corporate. This is the model operated under the Bribery Act, which requires no criminal intent on behalf of the body corporate for a corporation to be found criminally liable.
- 3.73 Respondents broadly welcomed the use of the Bribery Act model as the basis of the new offence, commenting that it offered consistency and was a model understood by corporations. Some respondents articulated a preference for a departure from the Bribery Act model. For example, one respondent suggested the following alternative:

Actus Reas:

- There is criminal facilitation of tax evasion by an representative of the corporation
- This criminal facilitation was able to occur due to a “systemic failure to implement and follow adequate procedures” or due to a “culture of wilful blindness to obvious risks of facilitating tax evasion”.

Mens Rea:

- The risk of facilitating tax evasion was so obvious that no other reasonable explanation could be given for the failure to prevent it other than tacit endorsement on the part of the company.

- 3.74 A small number of respondents also suggested that there should be no defence for the corporation, but instead the burden should be on the prosecution to show that the corporation had not put in place reasonable procedures to prevent its representatives from criminally facilitating tax evasion, essentially making it a component of the *Actus Reas* of the offence.
- 3.75 Comments were also received that there should be some level of knowledge or gross negligence within the corporation. For example, one respondent suggested that a corporation should only be liable where it knew, or ought to have known, that its representative was committing a criminal act, though the respondent did not suggest who within the company, e.g. a member of the Board of Directors, should have this knowledge. This test would introduce the sort of problems that affect the identification doctrine for corporate criminal liability, the very type of problems that this offence is meant to address.
- 3.76 Under the existing law, to attribute criminal liability to a corporation, the acts and state of mind required for the offence must be found in a representative of the corporation capable of being described as the corporation’s directing mind and will, typically a person at the Board of Director level. As outlined in the

consultation document, there are a number of ways in which corporations can escape liability under this model of attribution⁸. This model fails to encourage corporate good governance and can act as an incentive for those at the most senior levels of the corporation to remain actively unaware of any criminal activity at the lower levels of the organisation.

Government response

3.77 The Government believes that requiring knowledge on behalf of the corporation would not incentivise the desired behaviour change, but instead could encourage the corporate body to turn a blind eye to criminal conduct within the corporation. The Government appreciates that it is not reasonable to expect corporations to be able to uncover all criminal acts conducted by its representatives, especially where the representative has taken steps to hide their criminal conduct from the corporation, i.e. the representative has committed a fraud against the company and this could not be detected by the corporation's reasonable procedures. As such, the desire by some respondents for a test that the corporation knew or ought to have known of the representative's criminal conduct is understood. However, the Government believes that this element is best incorporated into the determination of what constitutes 'reasonable procedures' by the corporation, rather than as an element of *mens rea* for the offence, which must be attributed to senior levels of the corporation.

⁸ See page 9 of the consultation document, available at: https://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

The geographical scope of the new offence

Do you agree that the offence should apply to both corporations with a presence in the UK and non-UK based corporations whose representatives criminally facilitate the evasion of UK taxes?

Do you agree that the offence should apply to UK based commercial organisations whose representatives criminally facilitate the evasion of taxes in other jurisdictions, provided tax evasion is a recognised crime in those jurisdictions?

3.78 The consultation document proposed the new offence applied in the following three situations:

- Where a UK based corporation fails to prevent its representative(s) from criminally facilitating a UK tax loss;
- Where a non-UK based corporation fails to prevent its representative(s) from criminally facilitating a UK tax loss;
- Where a UK based corporation fails to prevent its representative(s) from criminally facilitating a tax loss overseas, where the jurisdiction suffering the tax loss has the equivalent laws in place, i.e. where there is dual criminality.

Facilitation of a UK tax loss

3.79 The consultation document asked if stakeholders agreed that the new offence should apply to both UK based corporations and non-UK based corporations who fail to prevent their representatives criminally facilitating a UK tax loss.

3.80 Respondents broadly agreed that *“it is not unfair and is appropriate that non-UK based corporation should be liable for the acts of their representatives if taxes are evaded in the UK, where a UK corporation would be equally liable”*. However, one respondent felt that to expect a non-UK corporation to put in place reasonable procedures to ensure their representatives were not facilitating UK tax crime was *“unworkable and unduly burdensome”*.

3.81 Respondents in favour of the offence applying to both UK and non-UK corporations felt that failing to apply the offence in such a way would create a competitive disadvantage for those UK based corporations striving for good corporate governance. They also cited concerns that applying the offence to only UK based corporations would allow the offence to be easily circumvented by a corporation offshoring services provided in pursuit of facilitating tax evasion. For example, one respondent expressed the view that

“it is not difficult to anticipate that UK based organisations engaged in such activities might seek to limit their risk of criminal sanctions by relocating overseas”.

3.82 A number of respondents and those corporations, individuals and representative groups spoken to during the consultation period raised concerns about the practicalities of investigating and bringing a prosecution against a non-UK corporation. They identified issues in relation to evidence gathering and information sharing across borders, as well as a lack of powers to compel a legal person (as opposed to a natural person) to appear to stand trial. As with any investigation and prosecution across borders, investigations and prosecutions under the new offence will require international co-operation and will be more complex than one that is purely domestic.

Government response

3.83 The Government notes the practical difficulties in relation to investigations and prosecutions of foreign corporations under the new offence, but does not believe that the potential for practical difficulties should preclude the possibility of holding a foreign corporation to the same standards as a UK corporation, where their representative has committed an offence under UK law.

3.84 As evidenced by the agreement of over 90 jurisdictions to automatically exchange taxpayer information with one another, there is unprecedented international co-operation to share information to tackle offshore tax evasion. There is also an increasing focus and collaboration internationally on tackling those professionals who enable tax evasion. It is against this backdrop that the Government considers it both appropriate and practical that the offence should apply to both UK corporations and non-UK corporations.

Facilitation of a tax loss overseas by a representative of a UK corporation

3.85 The consultation document asked whether the offence should apply to UK based corporations who fail to prevent their representatives criminally facilitating the evasion of taxes in another jurisdiction, providing that there was dual criminality.

3.86 The consultation document outlined that the Government does not consider that it becomes acceptable for UK companies to unreasonably fail to prevent its representatives from intentionally assisting the corporation's clients in their dishonest evasion of tax just because the tax loss happens to be suffered by an overseas authority.

3.87 The response from respondents and those spoken to throughout the consultation process was mixed. All respondents understood the policy rationale behind holding UK corporations liable and supported the objective of tackling the facilitation of tax evasion, whether that resulted in a tax loss in the UK or overseas.

- 3.88 Some respondents were strongly supportive of the new offence being used in pursuit of this objective and felt that it would be particularly beneficial in relation to combatting the facilitation of tax evasion in developing countries. In contrast, other respondents felt that criminal liability under UK law was not the most effective means of holding corporations to account, and the UK should instead focus on providing intelligence, evidence and assistance to overseas tax authorities.
- 3.89 Those supporting the offence applying to UK corporations who fail to prevent their representatives criminally facilitating an overseas tax loss agreed that there should be a requirement for dual criminality. For example, one respondent noted that *“tax evasion in any jurisdiction should not be tolerated so to that extent we agree with the principle. This should apply to conduct carried out in relation to overseas tax which would have been evasion had it been carried out in the UK and should be consistent with non-UK criminal conduct under the Proceeds of Crime Act 2002”*.
- 3.90 Of those respondents who did not favour the offence applying in relation to a non-UK tax loss, the majority felt that their concerns were addressed to an extent by the requirement for dual criminality, and that corporations should be able to apply the same ‘reasonable procedures’ in relation to all tax loss. For example, one respondent noted that due to the complexity of tax in different jurisdictions and the differing legal tests for what constitutes tax evasion, it will be important that *“the corporate can rely on generic procedures and practices established to prevent the facilitation of evasion judged by reference to those appropriate for UK taxes”*. In support of this, another respondent expressed the view that *“it is not reasonable to expect that an organisation could maintain information about the characteristics of each domestic tax regime around the world”*.
- 3.91 One respondent suggested that should the offence include the failure to prevent the facilitation of an overseas tax loss, this should require the involvement of the directing mind and will of the company (as is the case under the existing law). They argue that this is a *“more realistic approach to dealing with this issue [facilitation of non UK tax evasion] as this requires that the organisation possesses sufficient understanding of a foreign tax regime as to be in a position to formulate a means of avoiding it”*. However, we do not agree that this is necessary, as stage two of the offence (criminal aiding and abetting by a representative of the corporation) requires knowledge and intent on behalf of the representative. The offence would not be committed where the representative inadvertently helped a client evade a non-UK tax.
- 3.92 In arguing against the offence applying to failure to prevent the criminal facilitation of a non-UK tax loss, one respondent stated that *“there are many jurisdictions where the decisions of courts are unreliable, being influenced by*

corruption and incompetence". The Government believes however that this adds weight to the argument that the UK should not solely rely on other jurisdictions to hold to account UK based corporations for criminal wrongdoing and emphasises the importance of the "dual criminality" concept.

Government response

- 3.93 The Government recognises stakeholder concerns and agrees that given the requirement for dual criminality, it would be appropriate in most cases for corporations to apply the same or similar procedures in relation to the facilitation of a non-UK tax loss as the facilitation of a UK tax loss. However, more broadly, a corporation may identify different levels of risk across its operations which dictates differing levels of due diligence and oversight.
- 3.94 Whilst the preference will always be for the jurisdiction suffering the tax loss to take the criminal or civil response that it feels most appropriate, if this is not possible due to, for example, corruption in that jurisdiction, the Government believes that it should be open to the UK to hold the UK based corporation to account, should it be in the public interest to do so. It would be wrong for a UK based corporation to escape liability for acts which, if conducted in the UK would be criminal, because the country suffering the tax loss was unable to bring an action against that corporation due to corruption within that jurisdiction's legal system. The prosecution in the UK would of course still need to show to the criminal standard that the predicate offences had been committed and that there was dual criminality.

Defences to the new offence

A defence of having put in place reasonable procedures

- 3.95 The consultation document proposed a defence to the new corporate offence of having put in place reasonable procedures to prevent the criminal facilitation of tax evasion by the corporation's representatives. The consultation asked whether stakeholders felt this defence was appropriate and whether there were any other defences the Government should consider including.
- 3.96 Respondents were supportive of a defence that mirrored the "adequate procedures" defence contained within section 7(2) of the Bribery Act 2010. Some respondents expressed concerns that where their procedures do not prevent a representative from criminally facilitating tax evasion they may be automatically deemed to be inadequate.
- 3.97 During discussions held as part of the consultation process there was extensive discussion as what would constitute "reasonable procedures". Some respondents expressed a desire for something akin to a list of measures that the corporation had to undertake, after which it would be excluded from liability

under the offence. Other respondents expressed a desire for maximum flexibility which would take account of the differences between the corporations affected.

- 3.98 As noted by one respondent “*compliance procedures to prevent will differ hugely depending on each corporation’s circumstances*”. For example, what would constitute “reasonable procedures” for a small advisory firm will be different to those of a large multinational financial institution.
- 3.99 A small number of respondents expressed concern that it was overly burdensome for a corporation to demonstrate that it had in place reasonable procedures to prevent its representative from committing criminal acts during the course of business. For example, one respondent expressed concern that “*the inherent complexities in the field of taxation and the proposed offence mean that corporations face an onerous burden in order to discharge the requirements of ‘reasonableness’*”. Another respondent felt that it was “*difficult to imagine how effective procedures could be put in place to prevent an offence of tax evasion in any event*”.

Government response

- 3.100 The Government is mindful of stakeholders’ concerns around the use of “adequate procedures” and accepts respondents’ request that the defence be one of “reasonable procedures” rather than “adequate procedures” to reflect that it would not be reasonable to expect a corporation to be able to stop every instance of non-compliance by their representatives
- 3.101 The Government is mindful of the need not to overburden corporations by requiring them to put in place procedures that are not proportionate to the risk posed by their operations. We do not believe that it is unreasonable to expect corporations to put in place procedures intended to prevent those representing them from committing criminal acts in pursuit of aiding another person to commit tax evasion. These procedures must however be reasonable, for example, they must be proportionate to the risk faced and not excessively burdensome. The Government intends to consult to ensure that the right balance is struck between ensuring corporations can effectively prevent and detect criminal wrong doing by their representatives whilst not requiring overly burdensome supervision that unduly hinders their activities.
- 3.102 The criteria of what constitutes “reasonable procedures” will be discussed further below in relation to guidance on the new offence.

The position of self-reporting

3.103 A number of respondents and those spoken to during the consultation process stressed it was important that a new offence should not discourage self-reporting by corporations. Stakeholders expressed concerns that a corporation may not wish to report criminal wrong doing by its representatives because of concerns around attracting criminal liability for the body corporate.

Government response

3.104 In order to ensure that corporations are not unduly discouraged from reporting criminal activity within their organisation, the Government intends to include specific provisions stating a process that successfully detects and discloses wrongdoing is likely to be found reasonable.

Guidance on the new offence and the reasonable procedures defence

3.105 The consultation document asked stakeholders for their views on the nature of guidance that would be most useful to them for the purposes of the new offence and their experiences with any relevant guidance for existing legislation.

3.106 Many respondents cited the guidance produced for the Bribery Act as a helpful starting point for the purposes of the new offence. The Bribery Act Guidance does not dictate what 'adequate procedures' a commercial organisation must put in place to prevent its representatives from committing a bribery offence, but rather sets out six principles which should inform how a commercial organisation goes about crafting its procedures.

3.107 For the ease of reference these guiding principles are reproduced below.

Principle 1

A commercial organisation's procedures to prevent bribery by persons associated with it are proportionate to the bribery risks it faces and to the nature, scale and complexity of the commercial organisation's activities. They are also clear, practical, accessible, effectively implemented and enforced.

Principle 2

The top-level management of a commercial organisation (be it a board of directors, the owners or any other equivalent body or person) are committed to preventing bribery by persons associated with it. They foster a culture within the organisation in which bribery is never acceptable.

Principle 3

The commercial organisation assesses the nature and extent of its exposure to potential external and internal risks of bribery on its behalf by persons associated with it. The assessment is periodic, informed and documented.

Principle 4

The commercial organisation applies due diligence procedures, taking a proportionate and risk based approach, in respect of persons who perform or will perform services for or on behalf of the organisation, in order to mitigate identified bribery risks.

Principle 5

The commercial organisation seeks to ensure that its bribery prevention policies and procedures are embedded and understood throughout the organisation through internal and external communication, including training that is proportionate to the risks it faces.

Principle 6

The commercial organisation monitors and reviews procedures designed to prevent bribery by persons associated with it and makes improvements where necessary.

3.108 All of those consulted expressed a desire for collaboration and further consultation on the drafting of guidance for the new offence, once draft legislation had been published. Respondents strongly favoured guidance for the new offence being consulted on alongside draft legislation so they could be discussed as a package.

3.109 During the consultation process the potential for both government produced guidance akin to the Bribery Act guidance and supplementary sector specific guidance produced by, for example, representative bodies and authorised by the government was discussed. Many stakeholders, particularly those whose commercial activities present a higher risk of being misused to facilitate tax evasion, favoured supplementary sector specific guidance that could accommodate the nuances of their business area, whilst being consistent with the overarching government guidance. They felt that this twin approach allowed

flexibility by providing overarching government guidance which applied to all affected entities, but while those sectors who desired more detailed tailored guidance could rely on the specifics of business produced guidance that is consistent with the overarching government guidance.

Government response

3.110 The Government is open to this approach and willing to explore with interested parties the creation of overarching government produced guidance and sector specific supplementary guidance. Further details of this can be found in the section below on next steps.

4. Next steps

- 4.1 Based on the responses received to the consultation document, and feedback from stakeholders received during the consultation period, draft legislation has been drafted for the purposes of informing further consultation on the new corporate criminal offence. This draft legislation is at Annex A.
- 4.2 HMRC will publish a further consultation document in early 2016 seeking views on the draft legislation. The consultation will also seek views on draft guidance for the new offence and the merit and content of industry drafted guidance.
- 4.3 The Government intends for legislation to be introduced prior to information exchange beginning under the Common Reporting Standard.

Annex A: List of consultation respondents

The following representative bodies and firms responded to the consultation either in writing or through meetings. In addition one individual also responded to the consultation.

- Association of Accounting Technicians
- Association of British Insurers
- Association of Chartered Certified Accountants
- Association for Financial Markets in Europe
- Baker and McKenzie
- Baker Tilly
- Barclays PLC
- BDO
- Bond
- British Bankers Association
- Chartered Institute of Taxation
- Christian Aid
- City of London Law Society
- Compliance Reform Forum
- The Confederation of British Industry
- Criminal Bar Association
- Crown Prosecution Service
- Department for International Development
- Ernst and Young LLP
- Forensic Risk Alliance
- Fraud Lawyers Association
- Grant Thornton
- Institute of Chartered Accountants of England & Wales
- Institute of Chartered Accountants Scotland
- Investment Association
- Kingsley Napley
- KPMG LLP
- Law Society of England Wales
- Law Society Scotland
- Legal and General
- London Criminal Courts Solicitors Association (LCCSA)
- Mazars LLP
- Moore Stephens LLP
- Oxfam GB

- Peters and Peters Solicitors LLP
- Pinsent Masons
- PwC LLP
- Schroders
- Simmons and Simmons
- Slater and Gordon
- Tax Investigations Practitioners Group

Annex B: Draft legislation

The draft legislation follows on the next page. It is provided to demonstrate how the policies outlined in this response document can be reflected in legislation. The draft legislation should not be viewed as final. The Government will publish a consultation document on the draft legislation along with draft guidance in early 2016 and seek stakeholder views on both. If in the meantime you have any comments, please contact consult.nosafehavens@hmrc.gsi.gov.uk

PART 1

FAILURE TO PREVENT FACILITATION OF TAX EVASION

1 Failure by corporations etc to prevent facilitation of tax evasion offences by associated persons

- (1) A relevant body ("B") is guilty of an offence if a person associated with B ("A") commits a tax evasion facilitation offence when acting in the capacity of a person associated with B.
- (2) It is a defence for B to show that –
 - (a) it had in place procedures designed to prevent persons associated with it from committing tax evasion facilitation offences, and
 - (b) its procedures were reasonable in all the circumstances.
- (3) A person guilty of an offence under this section is liable, on summary conviction or on conviction on indictment, to a fine.

2 Meaning of "tax evasion facilitation offence" and related terms

- (1) This section and section 3 define terms used in this Part.
- (2) "Tax evasion facilitation offence" means –
 - (a) a UK tax evasion facilitation offence, or
 - (b) an overseas tax evasion facilitation offence.
- (3) A "UK tax evasion facilitation offence" is an offence under the law of any part of the United Kingdom which is committed by facilitating the commission of a UK tax evasion offence.
- (4) "UK tax evasion offence" means –
 - (a) an offence of cheating the public revenue, or
 - (b) an offence consisting of being knowingly involved in, or in taking steps with a view to, the fraudulent evasion of a tax,
 - (c) any other offence under an enactment which may be indicted as an offence of cheating the public revenue.
- (5) A person facilitates the commission of a UK tax evasion offence by –
 - (a) encouraging or assisting the commission of the offence,
 - (b) aiding and abetting, counselling or procuring the commission of the offence, or
 - (c) doing anything that constitutes the commission of a UK tax evasion offence by virtue of being knowingly involved in, or taking steps with a view to, the fraudulent evasion of tax by another person.
- (6) An "overseas tax evasion facilitation offence" is an offence under the law of a country or territory outside the United Kingdom which is committed by facilitating the commission by another person of an overseas tax evasion offence.

-
- (7) “Overseas tax evasion offence” means an offence under the law of a country or territory outside the United Kingdom which corresponds to any UK tax evasion offence and would if committed in the United Kingdom (assuming the tax law in that country or territory operated in the United Kingdom) constitute an offence under the law of a part of the United Kingdom.
 - (8) A person facilitates the commission of an overseas tax evasion offence by engaging in conduct which corresponds to any conduct mentioned in subsection (5) in connection with, or in committing, an overseas tax evasion offence.

3 Other definitions

- (1) “Relevant body” means a body corporate or partnership (wherever incorporated or formed).
- (2) “Partnership” means –
 - (a) a partnership within the meaning of the Partnerships 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.
- (3) A person (“A”) is associated with B if A is a person who 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 is a person who 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 C.
- (4) If A is an employee of B it is to be presumed, unless the contrary is shown that A is a person who performs services for or on behalf of B.

4 Guidance about preventing the facilitation of tax evasion offences

- (1) HMRC must publish guidance about procedures that relevant bodies can put in place to prevent persons associated with them from committing facilitating tax evasion offences.
- (2) HMRC may from time to time publish –
 - (a) revisions to guidance published under this section, or
 - (b) new or revised guidance to supersede guidance previously published.
- (3) HMRC must consult the Secretary of State, Scottish Ministers and the Department for Justice in Northern Ireland before publishing anything under this section.
- (4) Publication under this section is to be in such manner as HMRC consider appropriate.
- (5) HMRC may approve guidance prepared and published by another person or body on matters relating to the procedures referred to in subsection (1) (and the

HMRC guidance published under subsection (1) need not cover the matters covered by any guidance so approved).

5 Offences: supplementary

- (1) No proceedings for an offence under section 1 consisting of an overseas tax evasion facilitation offence may be instituted in England and Wales or Northern Ireland except by or with the consent of the Director of Public Prosecutions or the Director of the Serious Fraud Office.
- (2) Proceedings for an offence under section 1 alleged to have been committed by a partnership must be brought in the name of the partnership (and not in the name of any of the partners).
- (3) For the purposes of such proceedings –
 - (a) rules of court relating to the service of documents have effect as if the partnership were a body corporate, and
 - (b) the following provisions apply as they apply to a body corporate –
 - (i) section 33 of the Criminal Justice Act 1925 and Schedule 3 to the Magistrates' Courts Act 1980,
 - (ii) section 18 of the Criminal Justice Act (Northern Ireland) 1945 (c. 15 (N.I.)),
 - (iii) section 70 of the Criminal Procedure (Scotland) Act 1995.
- (4) A fine imposed on a partnership on its conviction for an offence under section 1 is to be paid out of the partnership assets.

6 Offences: territorial application and jurisdiction

- (1) A relevant body cannot be guilty of an offence under this section relating to an overseas tax evasion facilitation offence unless it –
 - (a) is incorporated or formed under the law of any part of the United Kingdom, or
 - (b) it is carrying on a business or other undertaking (or part of a business or other undertaking) in the United Kingdom.
- (2) It is immaterial for the purposes of section 1 whether –
 - (a) any relevant act or omission of the relevant body,
 - (b) the tax evasion facilitation offence committed by A, or
 - (c) the tax evasion offence facilitated by A,takes place in the United Kingdom or elsewhere.
- (3) If no relevant act or omission of the relevant body has taken place in the United Kingdom, proceedings for an offence under section 1 may be taken in any place in the United Kingdom.
- (4) If by virtue of subsection (2) proceedings for an offence are to be taken in Scotland against a person, they may be taken in such sheriff court district as the Lord Advocate may determine.
- (5) In subsection (3) “sheriff court district” is to be read in accordance with section 307(1) of the Criminal Procedure (Scotland) Act 1995.

7 Commencement of Part

- (1) This Part (apart from this section) comes into force on such day as the Treasury may appoint by regulations made by statutory instrument.
- (2) Regulations under this section may –
 - (a) appoint different days for different purposes, and
 - (b) make such transitional provision as the Treasury considers appropriate in connection with the coming into force of any provision of this Part.