



HM Revenue
& Customs

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

Consultation document

Publication date: 16 July 2015

Closing date for comments: 8 October 2015

Scope of this consultation:	The purpose of this consultation is to find an appropriate and proportionate means of ensuring corporations can be held accountable under the criminal law for failing to prevent their agents from criminally facilitating tax evasion. We welcome views on how best to achieve this and the defence(s) required to ensure that corporations are not held criminally liable where they have taken reasonable steps to try to prevent their agents from criminally facilitating tax evasion.
Subject of this consultation:	The Government wants to ensure that corporations can be held criminally responsible for failing to prevent their agents from facilitating tax evasion.
Who should read this:	We would like to hear from any interested party, including those corporations who provide services which, where used inappropriately, may be seen to facilitate tax evasion.
Duration:	This consultation runs from 16 July to 8 October 2015.
Lead official:	Jennifer Haslett, HMRC Centre for Offshore Evasion Strategy
How to respond or enquire about this consultation:	Responses can be submitted via email to: consult.nosafehavens@hmrc.gsi.gov.uk Or via post to: Jennifer Haslett HMRC Centre for Offshore Evasion Strategy Room 1C/26 100 Parliament Street London SW1A 2BQ
Additional ways to be involved:	Please contact the lead official if you are interested in meeting to discuss this paper.
After the consultation:	We aim to publish a response document and draft legislation for further consultation at Autumn Statement 2015.
Getting to this stage:	This consultation takes forward HMRC's strategy for tackling offshore evasion, <i>No Safe Havens</i> . An update on this strategy was published in April 2014.
Previous engagement:	None.

Contents

	Foreword	4
1	Executive Summary	5
2	Introduction	6
3	Scope of the new offence	11
4	Defences to the new offence	21
5	Assessment of impacts	23
6	Summary of consultation questions	24
7	The consultation process: how to respond	25
Annex A	Relevant legislation	27

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

Foreword

Tax evasion is a crime which deprives the Government of much needed funds to run our public services, unfairly placing a greater burden on the vast majority of people who pay their fair share of tax. This Government is committed to cracking down on tax evasion and will be relentless in its pursuit of evaders.

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 among 94 countries, to exchange information on financial accounts automatically every year. Under these agreements, starting in 2016 for our Crown Dependencies and Overseas Territories, HMRC will receive a wide range of information on offshore accounts held by UK tax residents, including names, addresses, account numbers, interest and balances. This will be an unprecedented step change in HMRC's ability to tackle offshore tax evasion.

HMRC has given people ample opportunity to regularise their affairs. In advance of HMRC receiving this new data there will be one last chance for evaders to come forward and put their affairs in order. If they choose not to, it is right and fair that we make sure that the penalties they 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.

HMRC are today publishing four consultations on new tougher penalties before they are introduced. These cover:

- A new criminal offence for corporations that fail to take adequate steps to prevent the facilitation of tax evasion by their agents;
- Tougher financial penalties for offshore evaders, including the possibility of 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 tax they have helped taxpayers to evade and naming of enablers;
- A new simpler criminal offence to make prosecution of offshore evaders easier.

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 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. Executive Summary

The structure of this consultation document

- 1.1 This consultation document sets out the Government's plans to introduce a new criminal offence which is committed when a corporation fails to prevent their agent(s) from criminally facilitating tax evasion and the corporation cannot show they took reasonable steps to prevent this.
- 1.2 We have structured this document as follows:
 - Chapter 2 sets out the background to this consultation and the reasons for introducing a new offence to apply to corporations.
 - Chapter 3 sets out the proposed scope of the new offence: the taxes to which it will apply and the criminal conduct that corporations can be held criminally responsible for failing to prevent.
 - Chapter 4 discusses the measures necessary to ensure the new offence is applied proportionately, including a defence of having taken reasonable care to prevent the criminal facilitation of tax evasion by an agent of the corporation.
- 1.3 For the purpose of this consultation, "corporation" is used in a broad sense to include commercial organisations, e.g. companies and partnerships as well as not for profit companies that are not engaged in a business, profession or trade (and therefore do not fall within the definition of commercial organisations).
- 1.4 For the purpose of this consultation, "agent" is used to mean a person who acts on behalf of the corporation.
- 1.5 For the purpose of this consultation, "facilitation" and "criminal facilitation" are used to mean an act to facilitate tax evasion that is already considered criminal under existing law, for example an act that would fall within Section 8 of the Accessories and Abettors Act 1861 or Section 45 of the Serious Crime Act 2007.

2. Introduction

HMRC's offshore evasion strategy

- 2.1 Offshore evasion is illegal and harmful. It reduces revenue available for funding public services and increases the burden on honest taxpayers. A small minority of taxpayers fall short of meeting their obligations to society by taking advantage of offshore jurisdictions and exploiting complex structures to evade tax.
- 2.2 HMRC's strategy for tackling offshore evasion [*No Safe Havens*](#), 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.
- 2.3 Our ability to achieve these objectives and tackle offshore tax evasion will be significantly enhanced by the Common Reporting Standard (CRS). More than 90 countries have committed to the CRS and will automatically exchange taxpayer information from 2017. HMRC will have access to greater levels of information about offshore accounts, trusts and shell companies held offshore by UK resident taxpayers than ever before. In addition to CRS, we will also be receiving data under the central register of beneficial ownership.¹ These are game changers – HMRC will be able to detect offshore tax evasion much more easily than in the past. The days of hiding money offshore are coming to an end.
- 2.4 In preparation for the CRS, we are toughening our approach to tackling offshore tax evasion. Evaders are on notice that our existing disclosure facilities will close at the end of 2015 and be replaced by a final, tougher worldwide disclosure facility in advance of the first data exchange under CRS in September 2017. Those who do not take these opportunities to come forward will be caught and will face tougher sanctions, both criminal and civil. As well as tougher sanctions for evaders, we are also toughening our approach to those who enable or facilitate evasion with the introduction of new civil sanctions to

¹ From January 2016, the Small Business, Enterprise and Employment Act 2015 will require UK companies to create and maintain a register of people who have "significant control" over the company. For more information, [click here](#).

tackle enablers and a new corporate criminal offence of failure to prevent the facilitation of evasion. These actions shift the balance of risk against evaders and those who enable them and ensure HMRC can tackle offshore tax evasion much more effectively.

2.5 Accordingly, at Budget 2015 and in its publication “*Tackling Evasion and Avoidance*”, the Government announced a further package of measures to tackle offshore tax evasion. These will ensure that those who do not come forward face rigorous sanctions and will confirm that there is no place for facilitators, or enablers, of offshore evasion. That package includes four consultations:

- Tackling offshore tax evasion: Strengthening civil deterrents for offshore evaders
- Tackling offshore tax evasion: Civil sanctions for enablers of offshore evasion
- Tackling offshore tax evasion: A new corporate criminal offence of failure to prevent the facilitation of evasion
- Tackling offshore tax evasion: A new criminal offence for offshore evaders

This consultation

2.6 In the past, obtaining evidence against those who hide their money offshore in order to evade tax has been extremely difficult, particularly where this activity is carried out in the least transparent jurisdictions.

2.7 With the commitment from over 90 countries and jurisdictions to automatically exchange taxpayer information with one another to tackle offshore tax evasion, HMRC will have access to greater levels of taxpayer information than ever before. Information under these agreements will begin to be exchanged in 2016. However, many of those who evade tax do not act alone but have assistance from individuals and corporations. We have seen with previous tax transparency agreements, for example, exchange of information between European Union members under the EU Savings Directive that a small minority of taxpayers will go to extreme lengths in an attempt to circumvent such agreements and continue to hide their taxable income. To achieve this they may seek the services of a range of professionals to enable their tax evasion, which in some cases will amount to criminal aiding and abetting by those professionals.

2.8 Ensuring that corporations foster a positive corporate culture of compliance and put in place systems to prevent, detect and report criminal facilitation of tax evasion by their agents is a key element in tackling offshore tax evasion. Under the existing law it can be extremely difficult to hold the corporations to account for the criminal actions of their agents, because of the need under the existing law to prove the involvement of the most senior members of the corporation. In the case of large corporations where decision making is not necessarily centralised or where steps have been taken to deliberately obscure the involvement of senior members of the corporation, gathering evidence of such involvement can be particularly difficult.

- 2.9 As set out in No Safe Havens, we believe that the time is right to focus attention on those who facilitate tax evasion, including corporations who fail to prevent their agents from criminally facilitating tax evasion.² In advance of information beginning to flow under international tax transparency agreements the Government intends to introduce a new criminal offence to apply to corporations who fail to take reasonable steps to prevent their agents from criminally facilitating offshore tax evasion and who seek to facilitate the circumvention of tax transparency agreements.

Attributing criminal liability to corporations

- 2.10 In English law, a corporation has long been recognised as a legal person capable of committing a criminal offence (albeit subject to certain limited exceptions). Corporations can, however, only act through its employees, representatives and agents, and as such, liability accrues to a corporation based on the acts or omissions by them. Holding corporations to account for the acts or omissions of its agents plays an important role in ensuring corporate responsibility, through criminal or civil sanctions.
- 2.11 In the absence of a specific offence applying to corporations, liability for corporations has primarily been attributed in one of two ways: through vicarious liability or through the ‘identification doctrine’.
- 2.12 Under vicarious liability a corporation would be liable for the conduct of its agent. Whilst there are instances of companies being held vicariously liable for the acts of their agents (typically for regulatory offences), English criminal law has not tended to favour this approach.³
- 2.13 The identification doctrine, sometimes referred to as the “directing mind theory”, attributes to the company the acts or omissions of its agents, so that the criminal act of the agent becomes the act of the corporation. No issue of vicarious liability arises. The question of which agent’s acts will be attributed to the corporation has been answered by the English common law by what is often referred to as the “Directing mind and will test”. Under this test, those employees who can be shown to be the directing mind and will of the company will have their acts attributed to the corporation.
- 2.14 The employees who can be said to fall into the directing mind category include, *‘the board of directors, the managing directors and perhaps the senior officers of a company who carry out functions of management and speak and act as the company’*.⁴ In other words, the directing mind will be *‘a person in control of the operations of a company or of part of them and which is not responsible to*

² HMRC is currently also conducting a separate consultation which considers the appropriate civil sanctions that should be put in place for those individuals who enable offshore tax evasion.

³ See *Meridian Global Funds Management Asia Ltd v Securities Commission Respondent* [1995] 2 AC 500, 506.

⁴ Lord Reid, *Tesco Supermarkets Ltd v Natrass* [1972] AC 153, 171.

another person in the company for the manner in which he discharges his duties'.⁵ However, the precise rule of attribution applicable to a statutory offence is a question of statutory interpretation, which will be considered with regards to the purpose of the statute and all other circumstances.

2.15 Where offshore tax evasion has been facilitated by individuals, they may be based in a number of different jurisdictions, operating at various levels within the structure of a corporation where management decisions are not centralised. These individuals may be operating in a number of ways for which, under the current method of attribution, the company cannot easily be held responsible. For example:

- The individual(s) may be operating without the knowledge of the senior members of the company and due to a lack of supervisory controls and culture of compliance their criminal acts are undetected and unreported. For example, individuals may be deliberately turning a blind eye or falsifying documents when conducting tax due diligence requirements and the corporation's supervisory controls do not pick this up.
- The individual(s) may be operating with the knowledge and implied approval of senior members of the company and steps are deliberately taken to conceal this knowledge and approval. For example, individuals may be privately marketing structures designed to circumvent tax transparency agreements to clients in order to retain business, and this is wilfully overlooked or tacitly approved by senior management.
- The facilitation may be solely directed by senior members of the company and be a deliberate part of the corporation's business model, but individuals at the lower levels of the company are used to disguise the involvement of senior members of the company. For example, the creation and marketing of complex structures to circumvent tax reporting requirements may be actively marketed to existing and potential clients, and senior management encourage this activity to be undertaken by staff at the lower levels of the organisation, but deliberately distance themselves from these activities.

2.16 These difficulties have been particularly apparent where corporations have been involved in the facilitation of offshore tax evasion, but they are not unique to tax evasion. The Government has separately committed to consider the case for a new criminal offence of failure to prevent economic crime.⁶ This is a complex issue, particularly where the same conduct may be addressed by criminal sanctions or civil sanctions under a regulatory regime.

2.17 In the context of the facilitation of tax evasion there is already strong evidence to support the case for a new offence to be introduced in advance of taxpayer

⁵ Above, 187.

⁶ UK Anti-Corruption Plan (2014), available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/388894/UKantiCorruptionPlan.pdf

information being exchanged under new international tax transparency agreements. We have seen from previous tax transparency agreements, for example the EU Savings Directive, that some professionals will seek to provide services to enable tax evasion through the circumvention of these agreements, for example by providing advice on, and services to create structures to attempt to disguise the owner of an income generating asset to the agreements. The first information under the UK's automatic tax information exchange agreements will be received in 2016. In advance of this, it is important that the Government ensures that corporations whose agents are seeking to criminally facilitate tax evasion and circumvent tax transparency agreements are held criminally liable for failing to prevent such behaviour and corporations are incentivised to take reasonable steps to prevent the facilitation of tax evasion.

An offence for failure to prevent

- 2.18 The difficulty in holding commercial organisations to account for the criminal acts or omissions of their agents has been addressed in the area of bribery by criminalising the commercial organisation for failing to prevent bribery on its behalf. The introduction of s.7 of the Bribery Act 2010 made it a criminal offence for a commercial organisation to fail to prevent bribery by a person associated with the commercial organisation. The s.7 model has been recognised as an effective response to corporate commercial bribery. It incentivises companies to put in place adequate procedures and promotes corporate good governance.
- 2.19 In the context of the facilitation of tax evasion, the Government believes that it is right for corporations to take reasonable steps to prevent its agents from facilitating tax evasion. In the same way that a professional who dishonestly assists a customer to evade tax is guilty of the tax offence in which he or she becomes complicit, the Government believes that the corporation which employs this professional and fails to take reasonable steps to prevent their offending should also face prosecution. Many of the corporations that will be affected by this new legal requirement will be familiar with the Bribery Act. We believe that the Bribery Act s.7 offence offers the best model for a new failure to prevent the facilitation of tax evasion offence, and it will help to ensure consistency and minimise the burdens on corporations.

3. Scope of the new offence

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

- Which taxes and duties the offence should cover;
- Which aspects of non-compliance in relation to these taxes the offence should cover;
- The geographical reach of the new offence.

Which taxes and duties should the offence cover?

3.2 The common law offence of cheating the public revenue outlined below applies to all taxes. It should be noted that tax evasion by individuals primarily involves the following taxes:

- Income tax
- Capital gains tax
- Inheritance tax
- VAT

3.3 The first three taxes are the taxes to which the UK's civil penalties regime for offshore evasion applies⁷ and the taxes on which the consultation on applying civil sanctions to enablers of evasion is focussing.

Q1. We believe that that a corporation should be held accountable where it fails to prevent its agents 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 agents from criminal facilitation of evasion of all taxes?

Which aspects of non-compliance should the offence cover?

3.4 There is no single criminal offence of committing offshore tax evasion. Prosecutions for tax evasion are usually brought under:

- 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

3.5 The principal offence for evading tax is cheating the public revenue, a common law offence. Typically this offence is only charged in the most serious cases of evasion. The offence is defined as:

⁷ This penalty regime was created, in relation to income tax and capital gains tax, by Schedule 24 to the Finance Act 2010 and was extended to inheritance tax by Schedule 20 to the Finance Act 2015.

The offence of making a false statement tending to prejudice the Queen and the Public Revenue with the intent to defraud the Queen is, and always has been, a common law misdemeanour, and includes the offence of causing to be delivered to an inspector of taxes accounts relating to the profits of a business which falsely and fraudulently state the profits to be less than they actually were.⁸

- 3.6 Those who aid, abet, counsel or procure the above offences are also guilty of them.⁹ It is also an offence to attempt the above offences, conspire to commit them, or to perform an act capable of encouraging or assisting the commission of one of these offences, intending to encourage or assist in the offence, or believing that the offence will be committed and that the act will encourage or assist its commission.¹⁰

What kind of acts may constitute facilitation of the above offences?

- 3.7 It is a long established, well-understood, and uncontroversial principle that those who facilitate (or encourage) a criminal offence with the required guilty state of mind can be convicted of the offence, just like the person who perpetrated it. The proposed new offence simply seeks to make corporations criminally responsible where they fail to take reasonable steps to prevent their agents from taking action to criminally facilitate another's offence of tax evasion.
- 3.8 There are a number of key ways in which an agent of a commercial organisation might criminally facilitate the evasion of taxes through the provision of services. These may include, but are not limited to the actions described in the following illustrative examples, when these are done with the necessary Mens Rea.¹¹

⁸ *R v Hudson* [1956] 2 QB 252, 40 Cr App R 55, cited with approval in *R v Mavji* [1987] 1 WLR 1388, 1391; (1987) 84 Cr App R 34.

⁹ Section 8 of the Accessories and Abettors Act 1861: Whoever shall aid, abet, counsel, or procure the commission of any indictable offence, whether the same be an offence at common law or by virtue of any Act passed or to be passed, shall be liable to be tried, indicted, and punished as a principal offender.

¹⁰ Section 45 of the Serious Crime Act 2007.

¹¹ The agent must:

- intend to do the act of facilitation
- believe that his act is capable of assisting the perpetrator to commit the offence; and
- know the essential matters that constitute the perpetrator's offence.

1) **Acting as a broker/conduit** – arranging access to others in the “supply” chain and providing introductions. An example of this is below in Box 1.

Example 1: Sarah

In 2003, Sarah was introduced to Malus GmbH, a Swiss adviser, to create a tax efficient structure for potential future investment into UK property. Malus was an approved intermediary of a UK high street bank (after they carried out appropriate due diligence on Malus with a view to forming that relationship), and Sarah planned to put her post-tax employment earnings into this structure.

Sarah had a relative, Maisie, who was neither resident nor domiciled in the UK. Malus advised Sarah that she should set up a Swiss trust using Maisie as the settlor. This happened, 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 that she retained beneficial ownership of all the assets despite the trust arrangement.

The trust had bank accounts with Lunar Bank in the Monaco.

Sarah admitted her actions following initial contact with Malus were deliberate.

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

There is no evidence that the *UK high-street bank* knew that Malus would help Sarah to evade tax. However, Malus as the bank’s approved intermediary has facilitated Sarah’s tax evasion. If the UK High Street Bank had not taken reasonable steps to prevent Malus from doing so, the bank would be guilty of the new corporate failure to prevent offence. The UK High Street Bank’s compliance with any applicable published guidance, its contractual terms for its staff, the training it provides, and any steps taken to monitor and ensure compliance would all be relevant to the assessment of whether it had taken reasonable steps to prevent tax evasion.

Malus’s staff provided structuring advice which Sarah knew was not legal, as well as professional trustee services to Sarah’s trust which they knew was not properly constituted and would be used by Sarah to hide her assets. If Malus had not taken reasonable steps to prevent their staff from facilitating Sarah’s tax evasion in the course of their work then Malus would be guilty of the new offence. The compliance with any applicable published guidance, its contractual terms for its staff, the training it provides, and any steps taken to monitor and ensure compliance would all be relevant to the assessment of whether it had taken reasonable steps.

Lunar Bank’s staff have performed acts that facilitated Sarah’s tax evasion. However, they did so without being aware of any tax evasion. They may have been negligent and failed to comply with their anti-money laundering obligations, but they lack the requisite guilty state of mind to commit an offence relating to facilitating Sarah’s tax evasion. Therefore, there is no criminal conduct that Lunar Bank has failed to prevent.

2) **Providing planning and advice** on the jurisdictions, investments and structures which will enable the taxpayer to hide their money. An example of this is below.

Example 2: John

John ran a UK business. John opened a Channel Islands bank account in which he could hide untaxed business income from HMRC.

John took his untaxed funds on a regular basis to a business contact, Michael, who travels regularly to the Channel Islands. Michael would take the money in a suitcase to the Channel Islands and deposit it in John's bank account.

In 2004, following unsolicited advice from the Channel Island bank, John transferred the bank accounts to a nominee Foundation in Panama to avoid reporting under the EU Savings Directive and retain secrecy over his funds. The Foundation was operated by Channel Island professionals.

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

Michael was knowingly helping John to physically move funds offshore for tax evasion purposes. Michael was happy to do this because it fostered good continued business relations with John. Michael may be guilty of a tax evasion offence by virtue of his facilitating John's actions but, as he is an individual and not an agent of a corporation, no question of his committing the new offence arises.

The Channel Island bank's staff initially opened the account for John knowing that he wanted his activities to remain hidden from HMRC. Many years later The Channel Island bank staff actively advised John on how he could continue to hide his money. This conduct amounts to the criminal facilitation of tax evasion. The Channel Island bank would be guilty of the new offence unless it had taken reasonable steps to prevent its staff facilitating John's tax evasion. Its compliance with any applicable published guidance, its contractual terms for its staff, the training it provides, and any steps taken to monitor and ensure compliance would all be relevant to the assessment of whether it had taken reasonable steps.

The Channel Island bank professionals helped John to maintain a structure which facilitated his evasion activities. These professionals were asked by the bank to assist others in John's position and knew they were assisting people evading UK tax. This conduct amounts to the criminal facilitation of tax evasion. The partnership therefore failed to prevent this conduct occurring and would be guilty of the new offence if it could not show that it had not taken reasonable steps to prevent its agents from facilitating John's tax evasion.

3) **Delivery of infrastructure** – e.g. setting up companies, trusts and other vehicles which are used to hide beneficial ownership; opening bank accounts; providing legal services and documentation which underpin the structures used in the evasion such as notary services and powers of attorney. An example of this is below in Box 3.

Example 3: Manjit

Manjit was the owner and Director of a UK-based interior design business. He generated false invoices and drew cheques with fictitious payee details logged in the company records, in order to divert proceeds offshore and reduce taxable profits in the UK. These cheques were in fact made payable to an extensive network of offshore discretionary trusts and corporate vehicles in Gibraltar, Belize, Seychelles, and the British Virgin Islands (“BVI”).

In particular, the trustees invested the funds in a portfolio of bank accounts and investment properties held in the name of “off the shelf” corporate vehicles in the Seychelles and BVI. The properties, acquired with the proceeds of tax evasion, were then rented out commercially with UK taxes paid on the rental income under the non-resident landlord scheme (“NRLS”) to give the appearance of a genuine offshore ownership arrangement. The NRLS arrangement had been accepted by HMRC, being the only contemporaneous information that was available at the time.

Following an HMRC investigation, Manjit accepted that these transactions were fraudulent.

Manjit admitted he deliberately committed offshore tax evasion.

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

The trustees claimed that they believed everything they were doing was “above board” - but they also stated that “the affairs of their clients were none of their business”. HMRC believes the trustees turned a blind eye to the true beneficial ownership of the structure in order to retain Manjit’s business. If the trustees had knowledge of, but decided to ignore, Manjit’s tax evasion, their conduct would amount to the facilitation of Manjit’s tax evasion and any trust company or partnership for which they worked would be guilty of the new offence if it had not taken reasonable steps to prevent the facilitation of Manjit’s tax evasion. Its compliance with any applicable published guidance, its contractual terms for its staff, the training it provides, and any steps taken to monitor and ensure compliance would all be relevant to the assessment of whether it had taken reasonable steps.

4) **Maintenance of infrastructure** e.g. providing professional trustee or company director services including nominee services; providing virtual offices, IT structures, legal services and documentation which obscures the true nature of the arrangements such as audit certificates. An example of this is below in Box 4.

Example 4: Paula

Paula was domiciled in Australia, but had been resident in the UK since the 1970s. In 2017, Paula wanted to regularise her affairs and disclosed to HMRC that she had been hiding substantial UK taxable income for a prolonged period. She had been using companies in Bermuda and the Bahamas to shelter both business and private assets and to facilitate the movement of funds through a variety of jurisdictions.

The network of companies had been set up by Paula's lawyer, a partner in a Guernsey-based legal partnership, in total secrecy, meaning that Paula had never contributed to UK taxes for more than 30 years of UK residency.

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

The lawyer actively assisted Paula in evading UK taxes, knowing that the structures would enable her to evade UK tax. Any company or partnership for which the lawyer was an agent would be guilty of the new offence if it had not taken reasonable steps to prevent them from facilitating Paula's tax evasion. Its compliance with any applicable published guidance, its contractual terms for its staff, the training it provides, and any steps taken to monitor and ensure compliance would all be relevant to the assessment of whether it had taken reasonable steps.

5) **Financial assistance** – helping the evader to move their money out of the UK, and/or keep it hidden by providing ongoing banking services and platforms; providing client accounts and escrow services; moving money through financial instruments, currency conversions etc. An example of this is below in Box 5.

Example 5: Christoph

Christoph was a wealthy non-domiciled individual who was a long-term UK resident. His job entitled him to significant bonus payments, related to duties performed wholly in the UK, on which he did not want to suffer UK tax. His UK accountant put him in touch with an adviser in Israel. The Israeli adviser set up a number of bank accounts in Singapore in the names of BVI-registered companies, under the control of a discretionary trust. Christoph arranged for his bonus payments to be lodged in the accounts operated in Singapore. As well as evading income tax on his employment income over a number of years, Christoph's settlements also attracted significant Inheritance Tax liabilities.

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

The *UK accountant* understood what Christoph was trying to achieve, and for many years acted as a conduit through which Christoph contacted the Israeli adviser. This act facilitated Christoph's tax evasion. The company or partnership that the accountant worked for would be guilty of the new offence if it had not taken reasonable steps to prevent the accountant working for it facilitating the tax evasion. Its compliance with any applicable published guidance, its contractual terms for its staff, the training it provides, and any steps taken to monitor and ensure compliance would all be relevant to the assessment of whether it had taken reasonable steps.

The *Israeli adviser* also understood Christoph's aims, and knew that secrecy was key to achieving those aims. He provided advice, and also set up and maintained the structure. This conduct facilitated Christoph's tax evasion. The company or partnership that the adviser worked for would be guilty of the new offence if it had not taken reasonable steps to prevent the accountant working for it facilitating the tax evasion. Its compliance with any applicable published guidance, its contractual terms for its staff, the training it provides, and any steps taken to monitor and ensure compliance would all be relevant to the assessment of whether it had taken reasonable steps.

Whether or not the *Singapore bank's* staff knew that the structure was being used to evade UK tax is unclear but it seems likely that they were unaware. As such they would not have the requisite state of mind to be guilty of facilitating Christoph's tax evasion. It follows therefore that the Singapore bank could not be guilty of failing to prevent its staff from facilitating tax evasion.

3.9 In all the previous examples, the agent of the corporate organisation (for example, the lawyer, advisor, or member of banking staff) would currently be guilty of the same offence of tax evasion as the taxpayer, by virtue of facilitating the offence.¹² Currently, their employer (for example, the bank, law firm, or trust company) may not be guilty of an offence, as the criminal act of their agent is not attributed to the commercial organisation unless the agent is the organisation's directing mind. The new offence will enable the organisation to be held criminally responsible where it has failed to take reasonable steps to prevent its agent criminally facilitating the tax evasion.

Q2. If a corporate failure to prevent offence is created, should it 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?

Q3. Alternatively, should the new offence also be committed where a corporation fails to prevent its agents from criminally facilitating other tax offences? Which additional tax offences do you believe should be included in any corporate failure to prevent offence?

Q4. 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?

To which entities should the offence apply?

3.10 In the context of this consultation, corporation has been used in a broad sense to include commercial organisations, not for profit companies that are not engaged in a business, profession or trade (and therefore do not fall within the definition of commercial organisations), and partnerships.

Q5. Do you agree that the offence should cover all the above entities? Do you have comments on the entities to which you believe the offence should apply?

The Geographical reach of the new offence

3.11 The intention behind a new criminal offence is to ensure that corporations have the necessary procedures in place to prevent their agents from criminally facilitating tax evasion, and that where they fail to do so they are themselves held criminally liable.

3.12 In the context of offshore evasion, the facilitation of tax evasion can involve individuals and corporations based and operating in other jurisdictions. In order to capture this behaviour we intend the new offence to apply as broadly as possible to ensure that corporations who are failing to prevent their agents from acting unlawfully are held accountable, whether these agents are operating in the UK or overseas.

¹² By virtue of the Accessories and Abettors Act 1861.

3.13 The illustrative examples below show the types of situations this offence will apply to:

Example 6: Facilitation of evasion of UK taxes

This example revisits example 2 for the purposes of demonstrating issues around the geographical scope of the offence.

John ran a UK business. He opened a Channel Islands bank account in which he could hide untaxed business income from HMRC.

John took his untaxed funds on a regular basis to a business contact, Michael, who travels regularly to the Channel Islands. Michael would take the money in a suitcase to the Channel Islands and deposit it in John's bank account.

In 2004, following unsolicited advice from the Channel Islands bank, John transferred the bank accounts to a nominee Foundation in Panama to avoid reporting under the EU Savings Directive and retain secrecy over his funds. The Foundation was operated by Channel Islands professionals.

In this example John's criminal tax evasion of UK taxes has been facilitated by the actions of various professionals. These professionals knew that John was committing a crime but nonetheless intentionally assisted him in successfully committing his offence and have therefore criminally facilitated his evasion. The **Channel Islands bank**, and **Foundation** would be guilty of the new offence unless they could show that they had taken reasonable steps to prevent their agents from criminally facilitating John's tax evasion.

Example 7: Facilitation of evasion of non-UK taxes by the agent of a UK based commercial organisation

Alan is a Nigerian national with tax liability in Nigeria. He seeks advice from tax advisers in Nigeria work for **Nigerian Accounting Firm A**.

Nigerian Accounting Firm A advise Alan on a trust structure designed to hide Alan's income from the Nigerian revenue authorities. They put Alan in contact with **UK Firm B**, who set up the necessary corporate structure for Alan and arrange for the creation of the necessary accounts to be opened so as to disguise the trust source of the income, resulting in a tax loss to the Nigerian revenue authorities.

In this example there is no tax loss to the UK exchequer, the tax loss lies with the Nigerian revenue authority. The evasion of Nigerian taxes was facilitated by both **Nigerian Accounting Firm A**, which has no UK presence, and **UK Firm B** which is operating in the UK. Whilst the preference is for a prosecution to take place where the loss occurred, we recognise that in some circumstances this may not be possible. In such circumstances it is not appropriate that a corporation in the UK, whose agents are criminally facilitating tax evasion overseas is not held to the same standard as a UK corporation whose agents are criminally facilitating evasion of UK taxes.

3.14 Mirroring the approach to jurisdiction adopted by the inchoate offences created by the Serious Crime Act 2007, we believe that corporations with a presence in the UK should be obliged to take reasonable steps to prevent their agents being complicit in criminal tax evasion, wherever that tax is evaded. We do not consider that corporations should escape criminal liability just because the tax evaded is levied abroad. If the evasion of tax is a crime in the foreign jurisdiction then corporations should take reasonable steps to prevent their agents becoming complicit in the criminal evasion of those taxes. The new offence would therefore criminalise UK Firm B for failing to prevent its agents from facilitating the evasion, though we recognise that the preference will remain for a prosecution to be brought in the jurisdiction where the tax loss occurred.

Q6. Do you agree that the offence should apply to both corporations with a presence in the UK and non-UK based corporations whose agents criminally facilitate the evasion of UK taxes?

Q7. Do you agree that the offence should apply to UK based commercial organisations whose agents criminally facilitate the evasion of taxes in other jurisdictions, provided tax evasion is a recognised crime in those jurisdictions?

4. Defences to the new offence

- 4.1 We recognise that some well-run corporations, with strong compliance cultures, might nevertheless have an agent who disregards the firm's policies and actively seeks to circumvent compliance procedures in order to facilitate tax evasion. The new corporate 'failure to prevent' offence is not intended to criminalise corporations that take reasonable steps to prevent facilitation of tax evasion by their agents. We recognise that a defence may be necessary to ensure that such companies are not held liable for such isolated incidents that do not reflect the corporation's culture of compliance and could not have been prevented by reasonable due diligence and supervisory procedures.
- 4.2 We propose including a due diligence defence to ensure that corporations who have taken reasonable steps to put in place adequate compliance procedures to prevent the criminal facilitation of tax evasion by their agents do not face prosecution. We are mindful that without such a defence some corporations might be concerned by the prospect of self-incrimination under existing reporting obligations, for example under s.330 Proceeds of Crime Act 2002.
- 4.3 Whether or not the corporation has taken reasonable steps to prevent the criminal facilitation of tax evasion by its agent(s) will be a question of fact to be determined on a case-by-case basis. However, where a corporation's procedures have failed to prevent the criminal facilitation of tax evasion by their agent(s), but the procedures have identified the agents' offending and the corporation has ensured it is reported to the relevant authorities in a timely manner, this may be a situation in which a disposal other than a criminal conviction would be appropriate (e.g. a Deferred Prosecution Agreement).

Q8. Do you believe that a defence of having taken reasonable steps to prevent the facilitation of tax evasion by an agent is appropriate? Are there any other defences you feel should be considered for the new offence?

Guidance

- 4.4 We understand that existing legislation already requires corporations to have and to enforce robust policies and procedures, flowing from, but not limited to, obligations under the Proceeds of Crime Act 2002 and Money Laundering Regulations 2007. We also recognise that certain sectors must comply with other strict regulatory requirements. Consequently, we believe that many corporations that provide services which may, when abused, facilitate tax evasion, will already have put in place policies and procedures which would satisfy this defence of taking reasonable steps to prevent the facilitation of tax evasion by their agents.

4.5 Where similar due diligence defences exist, for example under s.7(2) of the Bribery Act 2010¹³ or under Money Laundering Regulations 2007, guidance is produced to enable commercial organisations and prosecutors to better understand the obligations that corporations need to meet.

Q9. We welcome views on the nature of guidance that corporations would find helpful to enable them to identify the best way for them to prevent criminal facilitation of tax evasion by their agents.

Q10. We also welcome any relevant observations about experiences with existing guidance, either domestic or overseas, that may help inform guidance for the new offence.

¹³ “But it is a defence for C to prove that C had in place adequate procedures to prevent persons associated with C from undertaking such conduct.”

5. Assessment of impacts

Exchequer impact (£m)	2015-16	2016-17	2017-18	2018-19	2019-20
	The final costing of this measure will depend on the outcome of the consultation and will be subject to scrutiny by the Office for Budget Responsibility.				
Economic impact	This measure is not expected to have any significant economic impacts.				
Impact on individuals and households	The offence will apply to corporations, not individuals, we therefore do not expect an impact on individuals or households.				
Equalities impacts	Not applicable as this criminal offence applies to non-natural persons only.				
Impact on businesses and Civil Society Organisations	The impact on corporations affected by the new offence will depend on the scope of the offence and the nature of any due diligence defence.				
Impact on HMRC or other public sector delivery organisations	The operational impact of investigating and bringing prosecutions under the new criminal offence will depend on its final design and work will be undertaken to assess these impacts following the consultation.				
Other impacts	None.				

The policy will be monitored and assessed alongside other measures in the Government's package for tackling offshore evasion.

Q11. Do you have any views, comments or evidence which may help inform our understanding of likely impacts?

6. Summary of consultation questions

Scope of the new offence

Q1. We believe that that a corporation should be held accountable where it fails to prevent its agents 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 agents from criminal facilitation of evasion of all taxes?

Q2. 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?

Q3. Alternatively, should the new offence also be committed where a corporation fails to prevent its agents from criminally facilitating other tax offences? Which additional tax offences do you believe should be included in any corporate failure to prevent offence?

Q4. 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?

Q5. 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?

Q6. Do you agree that the offence should apply to both corporations with a presence in the UK and non-UK based corporations whose agents criminally facilitate the evasion of UK taxes?

Q7. Do you agree that the offence should apply to UK based commercial organisations whose agents criminally facilitate the evasion of taxes in other jurisdictions, provided tax evasion is a recognised crime in those jurisdictions?

Defences to the new offence

Q8. Do you believe that a defence of having taken reasonable steps to prevent the facilitation of tax evasion by an agent is appropriate? Are there any other defences you feel should be considered for the new offence?

Q9. We welcome views on the nature of guidance that corporations would find helpful to enable them to identify the best way for them to prevent criminal facilitation of tax evasion by their agents.

Q10. We also welcome any relevant observations about experiences with existing guidance, either domestic or overseas, that may help inform guidance for the new offence.

Assessment of impacts

Q11. Do you have any views, comments or evidence which may help inform our understanding of likely impacts?

7. The consultation process: how to respond

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

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

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

How to respond

A summary of the main questions in this consultation is included at Chapter 6.

Responses should be sent by 8 October 2015, by e-mail to consult.nosafehavens@hmrc.gsi.gov.uk or by post to:

Jennifer Haslett
HMRC Centre for Offshore Evasion Strategy
Room 1C/26
100 Parliament Street
London SW1A 2BQ

Telephone enquiries can be addressed on 03000 557864 (from a text phone prefix this number with 18001)

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

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

Confidentiality

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes. These are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004.

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

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

Consultation Principles

This consultation is being run in accordance with the Government's Consultation Principles.

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

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

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

Email: hmrc-consultation.co-ordinator@hmrc.gsi.gov.uk

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

Annex A: Relevant legislation

Section 8 of the Accessories and Abettors Act 1861

Section 45 of the Serious Crime Act 2007

Section 7 of the Bribery Act 2010

Section 106A of the Taxes Management Act 1970

Section 72 of the Value Added Tax Act 1994

Sections 2-7 of the Fraud Act 2006

Section 330 Proceeds of Crime Act 2002

Money Laundering Regulations 2007