Analysis

The corporate criminal offences: two years on

Speed read

Two years after the introduction of the corporate offences of failure to prevent facilitation of tax evasion, awareness and preventative action continues to be low. All companies are within scope, regardless of their size or sector and potentially face unlimited financial penalties, so it would be prudent to ensure reasonable prevention procedures are in place. Many businesses appear to have been slow to act, perhaps because the legislation does not specify a deadline or filing requirement; the lack of clarity within the business over where responsibility rests; uncertainty over how best to engage advisers; or over-confidence that they are low risk. However, it may be that some businesses are overestimating the work involved. HMRC expects businesses to take reasonable prevention procedures that are proportionate to the risk, so the steps expected need not be unduly burdensome.

Oliver Pumfrey
FTI Consulting
Oliver Pumfrey is a managing director in the European tax advisory practice of FTI Consulting in London. He advises companies on a range of general corporate tax matters and leads on advising clients in respect of the corporate criminal offence.
Email: oliver.pumfrey@fticonsulting.com; tel: 020 3727 1260.

It is two years since the introduction of the corporate offences of failure to prevent facilitation of tax evasion (CCO).

Before the offences were introduced, attributing criminal liability to a company required prosecutors to show that the senior management were aware of and involved in the illegal activity. It was consequently difficult to hold companies to account, and there was no incentive for senior management to ensure there was robust governance. These new corporate offences aim to overcome that difficulty by attributing criminal liability to businesses for the criminal acts of employees, agents or those that provide services for them or on their behalf.

However, awareness of the offences appears to be low. According to an HMRC commissioned Ipsos MORI survey published earlier this year (see bit.ly/2Fnxt3o), three quarters of respondent companies and partnerships had still not heard of CFA 2017. Furthermore, two thirds of large businesses thought it relevant to them; this is concerning in light of HMRC's new approach to business risk reviews (BRR+), where a failure to address the rules will be considered an indicator of higher risk for tax governance. On average, only a third of respondents felt the CFA 2017 was relevant to their business – despite the fact that the rules apply to all businesses, both companies and partnerships, regardless of their size or sector. There is little evidence to suggest that awareness would have shifted significantly since the survey was carried out.

With businesses potentially facing unlimited financial fines, confiscation orders and reputational damage, why is awareness and preventative action so low? Before we consider this question further, it is worth recapping the rules.

The offences

Under the rules in the Criminal Finances Act (CFA) 2017, two offences were introduced with effect from 30 September 2017:

- the failure to prevent facilitation of UK tax evasion offences (s 45), and
- the failure to prevent facilitation of foreign tax evasion offences (s 46).

Covering just four pages, CFA 2017 Part 3 is a relatively concise piece of legislation. HMRC's 48 pages of guidance (published on 1 September 2017, see bit.ly/2mkrIMH) provides more practical insight and application.

An offence is committed where a 'relevant body', typically a company or a partnership, fails to prevent an 'associated person' criminally facilitating the evasion of tax under either UK law or foreign law. All UK taxes are in scope, including national insurance contributions.

The offences have three requirements:

- Stage one: the criminal tax evasion by a taxpayer (either an individual or a legal entity) under existing law;
- Stage two: the facilitation of the tax evasion by an 'associated person' of the 'relevant body'; and
- Stage three: the 'relevant body' failed to prevent its representative from committing the criminal facilitation act.

Where an associated person (for example, an employee), commits a criminal facilitation offence (stage two), the relevant body will be liable unless it has put in place 'reasonable prevention procedures' to prevent the facilitation, or where it is unreasonable to expect such procedures.

The UK tax evasion facilitation offence applies to both UK-based entities and entities established under the law of another country, regardless of where the associated person who commits the criminal act of facilitation is based.

The foreign tax evasion facilitation offence applies to relevant bodies which have a UK nexus (e.g. the company is a UK company) where a foreign company carries on its business in the UK or where the associated person is in the UK at the time of the criminal act that facilitates the evasion of the overseas tax. There must also be 'dual criminality', namely:

- the overseas jurisdiction must have an equivalent tax evasion offence at the taxpayer level, and the actions would be considered a crime if they took place in the UK; and
- the overseas jurisdiction must have an equivalent offence covering the associated person's criminal act of facilitation, and the actions of the associated person would be a crime if they took place in the UK.

What should be done?

There is a defence to the UK offence if, when the offence is committed, 'it was not reasonable in all the circumstances to expect [the company] to have any prevention procedures in place' (s 45(2)).

HMRC's guidance sets out six 'guiding principles' to ensure reasonable prevention procedures are in place. Central to this is the completion of a risk assessment, so that a given relevant body has a clearer understanding of the risks apropos any associated person criminally facilitating either of the tax evasion offences. So why is it that, according to the Ipsos MORI survey, fewer than a quarter of businesses have carried out a risk assessment?

But to prove this, a company should consider what supporting evidence it would need. HMRC's guidance dictates that this must start with a risk assessment, which would inform what further actions are necessary. In our view, there will be few instances where s 45(2) may be successfully relied upon in practice.

Why more is not being done

We believe that the reasons for inaction are as follows:

- the fact that the legislation does not specify a deadline or filing requirement;
- the lack of clarity within the business over where responsibility rests;
- uncertainty over how best to engage advisers; and
- over-confidence from businesses which think they are low risk.

No filing requirement

As the adage goes, 'what gets measured gets done' – and under the rules, there is no deadline or filing requirement. In the absence of any absolute requirement, many companies are simply not finding the bandwidth to properly address these issues. Notwithstanding that timely self-reporting will be viewed as a measure of having reasonable prevention procedures, it is all too common for a risk assessment to be pushed down the to-do list while more urgent filing deadlines and month-end processes take priority.

Responsibility within a business

For smaller companies, responsibility will likely rest with the finance director. For larger companies, the position may be less obvious; depending on the company, responsibility could rest with the CFO, general counsel or head of tax. While it may be appropriate for any of these roles to take on the responsibility, often in practice the work may fall between these roles.

Engaging an adviser

There is inherent difficulty for advisers to set an appropriate scope to carry out a risk assessment or advise on these rules, given their breadth and potential application across all operations of a business. The adviser needs to understand the operations in some detail (which takes time that the company is asked to pay for). From the company's perspective, however, there is understandable reluctance to pay a third party to understand a business they know perfectly well themselves. A division of responsibilities may help, but it is important that the adviser knows the full position in order to properly give advice.

Self-assessment of a low risk status

Whilst the offences apply to all companies, it is inevitable that a large international financial services group will have greater inherent risk than a singleton UK manufacturing company. HMRC's guidance acknowledges this and provides specific guidance for 'lower risk SMEs'. Nonetheless, there is work to be done, even for the smallest and lowest risk companies.

Section 4 of HMRC's guidance makes it clear that HMRC expects a risk assessment to be carried out and existing procedures to be updated. HMRC gives eight specific examples of actions to be taken, including adding specific terms in employment and supplier contracts requiring them not to engage in tax facilitation; providing regular training; clear reporting procedures; ensuring pay is not connected to profit to the extent where tax evasion might be encouraged; and ongoing monitoring of procedures. It may not, therefore, be enough for SMEs simply to complete a desktop self-assessment of their risks and conclude they are low-risk without then going on to document their revised processes and procedures.

The tribunal decision of *K Thathiah v HMRC* [2017] UKFTT 601 (TC), which was the first decided case on the senior accounting officer rules, illustrates the lengths that HMRC expects businesses to take when taking reasonable preventative steps (although HMRC lost that case).

Where does this leave us?

Most companies are simply not taking the necessary actions to ensure they have reasonable prevention procedures in place. Businesses should consider how HMRC's guiding principles can be met. Many companies may think the rules are not relevant to them or believe they are low risk. Even where a business believes itself to be low risk, it should, as a minimum, document that fact in the form of a robust risk assessment and take any further actions resulting from that assessment.

The 'proportionality' principle should not be overlooked. Many businesses may be overestimating the work involved. HMRC's guiding principle 2 – 'proportionality of risk-based prevention procedures' – should help persuade many businesses that the prevention procedures need not be unduly burdensome.

> Most companies are simply not taking the necessary actions to ensure they have reasonable prevention procedures in place

In the immediate future, we know that the foreign tax offence is to be investigated by the Serious Fraud Office or National Crime Agency, and prosecutions will be brought by either the SFO or CPS – although it is not clear what investigative activities are currently being undertaken. However, it has been confirmed that HMRC, which is responsible for the UK tax offence, began its first investigations in November 2018, with prosecutions to be brought by the local public prosecutor – so it is a matter of when, not if.

Looking further ahead, it is entirely possible that with a change in government these rules could gain even greater prominence. The shadow chancellor of the exchequer, John McDonnell, was recently quoted in *The Times* as wanting to see 'bigger fines' for 'people who devise and promote and sell' tax avoidance schemes, but also 'toughening the existing criminal offence of facilitating tax evasion'. He clarified that he meant imprisonment before adding: 'You can already take criminal sanctions against them, but we want to review that because people think they are not severe enough.'

Irrespective of which political party is in power, the rules are here to stay. ■

For related reading visit www.taxjournal.com

- Employment tax issues and the corporate criminal offences (Ian Hyde & Chris Thomas, 4.4.18)
- Dishonesty and the failure to prevent evasion (Charles Yorke, 15.11.17)
- New corporate criminal offence: what will an investigation look like? (Jason Collins, 25.5.17)
- The proposed corporate offence of failing to prevent tax evasion (Helen Buchanan, 4.5.16)