

Corporate failure to prevent the facilitation of tax evasion

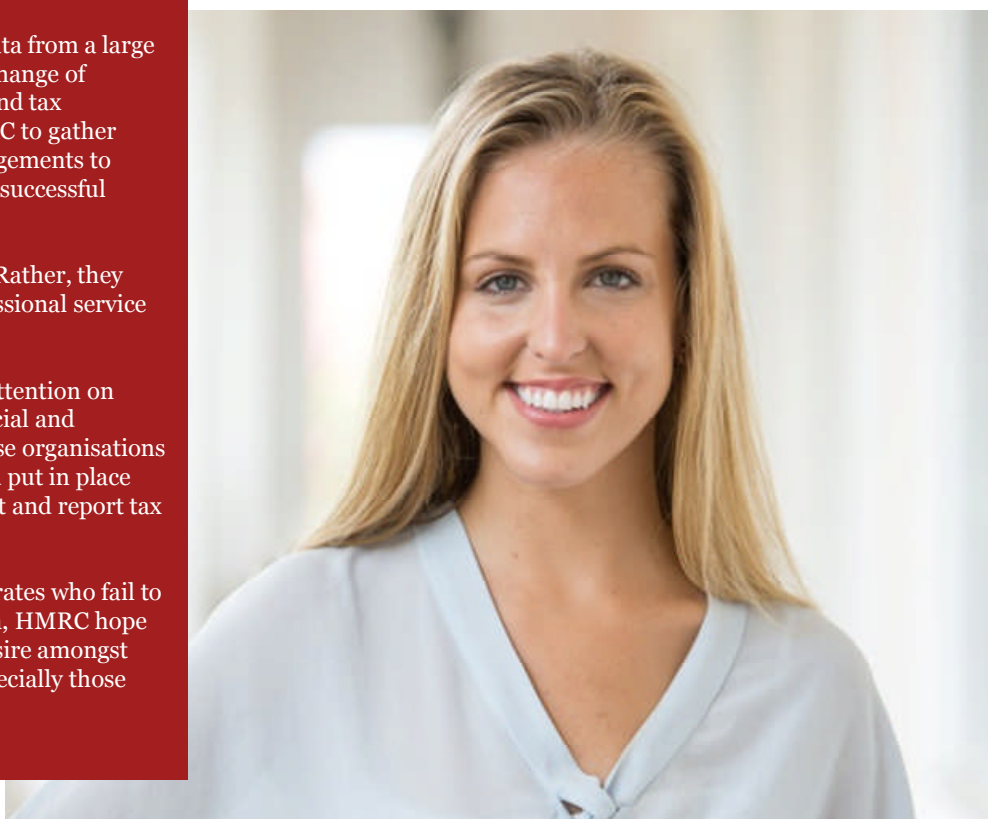
Forcing financial and professional service industries to self-govern tax evasion

In 2016, HMRC will begin to receive taxpayer data from a large number of countries as a result of automatic exchange of customer information by financial institutions and tax authorities. It will become much easier for HMRC to gather evidence from taxpayers who use offshore arrangements to evade tax, whilst also making the likelihood of a successful criminal prosecution far more likely.

HMRC know that tax evaders do not act alone. Rather, they often rely on a wide range of financial and professional service providers to enable their tax evasion.

HMRC believe that the time has come to focus attention on those who facilitate tax evasion, including financial and professional service providers. HMRC want these organisations to foster a positive culture of tax compliance and put in place processes and cultures that will prevent or detect and report tax evasion.

By introducing a new criminal offence for corporates who fail to prevent their agents from facilitating tax evasion, HMRC hope to push through the behavioural change they desire amongst financial and professional service providers, especially those 'offshore'.



The new offence is designed to make a corporate accountable for their agents' criminal actions of facilitating tax evasion. 'Agent' is defined very widely to mean a person who acts on behalf of the corporate, which it considers will include staff, intermediaries, trustees and professional advisors such as accountants and lawyers.

The offence will apply to non-UK corporates whose agents criminally facilitate the evasion of UK taxes and UK corporates whose agents facilitate tax evasion in other countries. The legislation will have extra-territorial reach.

What kind of acts might constitute facilitation of tax evasion under the new offence?

HMRC provide the following broad examples of facilitation:

1. Acting as a broker/conduit – arranging access to service providers / advisors and providing introductions
2. Providing planning and advice – on the jurisdictions, investments and structures which will enable the tax evader to hide their money
3. Delivery of infrastructure – 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
4. Maintenance of infrastructure – 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
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.

HMRC note that facilitators will generally exhibit three possible behaviours – those that are unaware that they have enabled tax evasion, those who have acted carelessly in doing so and those that have acted dishonestly. The proposed new offence requires the agent of the corporate to have acted dishonestly.

Designing the corporate's "adequate compliance procedures"

Top level commitment

HMRC are likely to want to see concrete evidence that the 'adequate compliance procedures' have endorsement from the highest levels within the company

Risk assessment

A comprehensive risk assessment is key as it will inform the scope and nature of the procedures considered proportionate

Proportionate procedures

HMRC are likely to expect corporates to have considered and implemented 'adequate compliance procedures' that deal with the specific risks the company faces in a proportionate way

Due diligence

HMRC are likely to expect the company to carry out sufficiently thorough due diligence on both its agents and the clients with whom those agents engage

Communication

HMRC are likely to want the company to demonstrate that its policies and procedures did not just exist on paper, but were embedded and understood throughout the organisation

Monitoring and review

HMRC are likely to expect corporates to review and monitor their procedures, policies and training so that they adapt to changes in the business and the risks it faces over time

How can PwC help?

Gap Analysis – to determine the extent to which the corporate's existing procedures (i.e. client take-on, anti-money laundering and tax related training) already establish a partial defence to the proposed offence.

This gap analysis involves first identifying the generic and specific risks relevant to tax evasion. Generic risks will apply to all corporates based on HMRC's expectations of what a corporate's 'adequate compliance procedures' looks like. Identification of specific risks requires a detailed review of the corporate's business activities – also identifying the 'agents' that perform those activities and the tax evasion risks inherent in those activities

Secondly, corporates will already have in place much of the compliance framework that would form the basis of its 'adequate compliance procedures' but the design of the existing procedures will not have been informed by the risk assessment undertaken for the purpose of the proposed new offence. We would therefore undertake an analysis of the current compliance procedures in order to determine the extent to which they address the risks identified. Finally, we benchmark the analysis of the existing procedures against the level of 'adequate compliance procedures' which we consider would be found by a jury in any prosecution of the offence to be 'reasonable measures' to prevent facilitation and also based upon our understanding of what other clients in the corporate's particular industry are implementing. We also benchmark against the approach taken by others.

Enhancement of Procedures – the gap analysis will highlight a number of areas where the business needs to enhance its compliance procedures in order to achieve the minimum level of 'adequate compliance' for the purpose of the defence. We can assist a client to fill those gaps.

Ongoing Monitoring and Review – one of the requirements of 'adequate compliance procedures' is the concept of ongoing monitoring and review to ensure that they are being properly implemented and that any changes in the nature of the business or the risks the corporate faces are used to update the procedures. We can assist in designing audit and review programmes.

Who to contact

If you would like to know more about this subject and how PwC can help your organisation meet its future compliance obligations under this proposed legislation, please contact:



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