KPMG

Corporate Criminal Offences

UK Companies and Partnerships

Criminal Finances Act 2017

Background

The UK Government has repeatedly stated its aim of closing down tax evasion. Tax evasion and its facilitation are already criminal offences but in March 2015 the Government announced it would also be a criminal offence if a company or partnership failed to prevent their agents from facilitating tax evasion. It covers UK tax evasion but also, in some circumstances, evasion of non UK tax.

The Criminal Finance Act 2017 contains the relevant legislation and it is effective from 30 September 2017.

The legislation is relevant to all UK companies/partnerships regardless of size and so will be a further complication that Irish companies investing in the UK will face.

The Criminal Finances Bill was introduced in October 2016 and received Royal Assent on 27 April 2017. HMRC issued revised guidance for the legislation on 1 September 2017.

Part 3 of the Act introduces the Corporate Offences, comprising the failure of a business's agent(s) to prevent the facilitation of UK tax evasion and the failure to prevent the facilitation of foreign tax evasion offences.

The Corporate Offences take effect from 30 September 2017.

Who does this apply to?

The legislation applies to all businesses irrespective of their size and the business sector.

The Corporate Offences

There are three stages to the offences:

Stage 1: criminal tax evasion by a taxpayer under the existing law;

Stage 2: criminal facilitation of this offence by an "associated person" of the corporation i.e. anyone who performs services for or on behalf of the business; and

Stage 3: the corporation failed to prevent its representative from committing the criminal act at Stage 2.

Widely applicable and only one defence

There does not need to be a conviction in either Stage 1 or Stage 2 for the third stage to be present.

In addition to a criminal conviction for the corporation, there are unlimited financial penalties associated with the Corporate Offences. There will be a public record of the conviction and significant reputational damage and adverse publicity.

The legislation applies to evasion of both UK taxes and non-UK taxes where there is a UK aspect, it is an offence in the country where it is committed and both offences would have been criminal offences if the activities took place in the UK.

Similar to the Bribery Act, the only defence the business has is that it had reasonable procedures in place to prevent the Stage 2 action, or that it was not reasonable for that business to have procedures.

Reasonable procedures

The failure of the business to take steps which are considered to be "reasonable in all circumstances" to prevent its agents from committing the criminal act would render the business liable under either of the Corporate Offences.

HMRC's draft guidance issued in September 2017 includes examples of such reasonable procedures informed by the six principles of:

- Risk assessment
- Proportionality of risk-based prevention procedures
- Top-level commitment
- Due diligence
- Communication (including training)
- Monitoring and review

Commonly encountered risks

In undertaking a risk assessment, businesses should be mindful of HMRC's identified common risk factors.
These include:

- Country risk: consider the interaction with high risk tax jurisdictions
- Sectoral risk: some sectors pose a higher risk of facilitating tax evasion than others, such as financial services, tax advisory and legal sectors
- Transaction risk: the nature of the transaction may lend itself to a higher risk of tax evasion e.g. where advice is provided to clients
- Business opportunity risk: high value projects or projects involving many parties, jurisdictions, or intermediaries may carry more risk
- Business partnership risk: risks linked to associated persons
- Product risk: certain products and services may have a higher risk of misuse
- Customer risk: certain customers may have a higher risk of misuse, e.g. non-resident customers.

How can KPMG help?

The nature and extent of the work that is required to put in place reasonable procedures will depend on your precise circumstances.

KPMG has developed a staged methodology for establishing 'reasonable procedures' that comply with the guiding principles. The four stages are:

1. Risk Assessment
    - Identify the inherent risks of a tax evasion facilitation offence occurring within your business.
2. Gap Analysis
    - Assess the adequacy of the existing procedures and controls in place to address those risks;
    - Identify gaps where existing procedures and controls are insufficient to manage the inherent risks;
    - Create a plan to implement any enhancements to existing procedures and/or develop new procedures that are proportionate to the risks.
3. Implementation
    - Implement a "tone from the top" message on the business's attitude towards tax evasion and its facilitation;
    - Update policies and procedures, controls and systems as required;
    - Communicate changes that have been implemented;
    - Provide training to staff on the Corporate Offences, including role-specific training where required.
4. Monitoring & Review
    - Monitor the "reasonable procedures" that have been implemented to ensure they are mitigating the risks; and
    - Create a plan to review your risk assessment on a periodic basis (every 1 to 2 years or where there are significant changes to the business).

KPMG has a cross disciplinary team comprising specialists in risk consulting and tax processes and controls who are ideally placed to help clients produce a robust and proportionate response to the challenges that this legislation presents.

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