HMRC Consultation Document  
Tackling offshore tax evasion: a new corporate criminal offence of failure to prevent the facilitation of evasion  
Response by the Chartered Institute of Taxation

1 Introduction

1.1 This consultation is inviting comments on proposals 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. HM Revenue and Customs (HMRC) are asking for views on how best to achieve this and the defence(s) that will be 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.

2 Executive summary

2.1 These proposals represent a very significant change with extremely wide-ranging implications. The Chartered Institute of Taxation’s (CIOT) view is that there needs to be a very clear policy reason for such a profound change. We do not believe that the case has been made as clearly as it ought to be. However, if it is felt that criminal sanctions need to be strengthened in this way then the new offence must be subject to appropriate defences being available.

2.2 The consultation document notes how difficult it currently is to hold a company responsible for individuals facilitating offshore evasion and goes on to say (in paragraph 2.16) that ‘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 corporate criminal offence of failure to prevent economic
crime’. We understand, however, that there was a ministerial statement\(^1\) on 28 September 2015 that proposals to create a new offence of ‘failure to prevent economic crime’ would not be taken forward, with the minister saying that there is ‘little evidence of corporate economic wrongdoing going unpunished’. As it appears that the two proposed offences were being considered together, we would ask therefore whether or not it is still the Government and HMRC’s intention to introduce the corporate criminal offence of failure to prevent the facilitation of evasion.

2.3 If the proposals are to go ahead, appropriate and clear communication will be critical. In particular, and reflecting on our concerns about the reasons for such a significant change, the Government and HMRC need to make it clear what the public policy rationale is for the offence, because the clearer this is the more likely it is that corporations can do in practice what is required of them. We would be pleased to assist HMRC in considering how to approach both publicity for these measures amongst our members and the drafting of any guidance.

2.4 The timing of implementation of the measures is also critical. We would welcome a gradual approach which give businesses time to familiarise themselves with HMRC’s guidance and, with HMRC’s support, implement appropriate systems.

2.5 We note that the consultation is taking place during Stage 2 of the consultation process (‘Determining the best option and developing a framework for implementation including detailed policy design’) - see Chapter 7 of the consultation document. The Government appears to have bypassed Stage 1 of the consultation process (‘Setting out objectives and identifying options’). It would have been helpful if the reasons for doing this were spelled out in the consultation document. The Tax Consultation Framework specifically states that, ‘There will be times when it will be necessary to deviate from this Framework. In these circumstances the Government will be as open as possible about the reasons for such deviations’\(^2\). In our view, this is not the position in this case.

2.6 We note that Stage 1 of the consultation process has been omitted in other recent consultations; for example on the introduction of Direct Recovery of Debts (DRD) and the strict liability offence for offshore tax evasion. We are concerned that this is starting to become a regular occurrence which will undermine the consultation process; a process which was carefully developed over several years and had up to now been generally working well.

3 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?

3.1 We believe that there is already plenty of law in this area. If a bank employee, for example, has knowledge of or suspects (or has reasonable grounds for knowing or suspecting) money laundering, which can include tax evasion, they can already be

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\(^1\) See the answer given by Justice Minister, Andrew Selous, to a written question by Byron Davies MP http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2015-09-09/9735

liable to a criminal offence under the Proceeds of Crime Act (POCA) 2002\(^3\). Additionally, they commit an offence if they are involved in any arrangements which they know or suspect facilitate money laundering by another person\(^4\).

3.2 If, however, the Government believes that criminal sanctions need to be strengthened then it seems logical for the new offence to cover all taxes.

4 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?

4.1 See paragraph 5.1 below.

5 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?

5.1 If this offence is introduced then we think that there is no logical reason why it should not apply to other tax offences, which would include:

- Fraudulent evasion of VAT, Value Added Tax Act 1994 section 72;
- Fraud and conspiracy to defraud, Fraud Act 2006 section 1;
- False accounting, Theft Act 1968 section 17;

6 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?

6.1 Yes, although we do not see how an agent who is facilitating the evasion of taxes can be ever acting for the benefit of the corporation.

7 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?

7.1 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.

\(^3\) POCA 2002 section 330
\(^4\) POCA 2002 section 328
7.2 A corporation, in the ordinary sense of the word, is ‘a group of people authorised to act as an individual and recognised in law as a single entity’. We are not sure this would include an unincorporated partnership or a trust.

7.3 We foresee that smaller entities could be disproportionately affected by the additional compliance burdens that these obligations will introduce. We wonder whether there could be a threshold size with different obligations for different sized organisations to help make the compliance burden more manageable for smaller entities.

7.4 Given the worldwide reach of the proposals, we also foresee that they could impose a significant compliance burden on ‘corporations’ based in the UK, which operate within an international network which they may find it very difficult, even impossible, to monitor.

7.5 An international accountancy network, for example, may operate as a series of separate independent firms but under a common umbrella. ‘Example 1: Sarah’ would indicate that if a UK firm referred a client to an overseas firm in the same network and the overseas firm then facilitated tax evasion and the UK had not taken reasonable steps to prevent the overseas firm from facilitating the evasion, the UK firm would be guilty of the new offence. This suggests that a UK firm would have to monitor any member firm wherever located after they refer a client to it.

7.6 The term ‘agent’ is very widely defined as ‘a person who acts on behalf of an organisation’, so would appear not just to include employees of the organisation but other advisers over whom the organisation would in practice be able to exercise little control. Some of the agents will be located overseas making control and monitoring that much more difficult. The examples in the consultation document indicate that an organisation would be guilty of the new offence in a wide range of circumstances.

7.7 It is clear that the definition of agent is key to how workable these proposals will be in practice. We think that further consultation is necessary to establish who would be considered to be an agent of the corporation.

8 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?

8.1 We agree that this is logical, but we suspect that it will be difficult for HMRC effectively to monitor or prosecute non-UK based corporations for non-compliance with this proposed legislation unless they have the full cooperation of the overseas jurisdiction’s revenue authorities.

9 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?

9.1 The example given (Example 7) to illustrate this shows very active participation in offshore tax evasion by the UK firm. Whilst we would expect a reputable UK company to operate on a full disclosure basis and never agree to hide any transactions from tax authorities, they would not necessarily undertake exhaustive
due diligence on all transactions to ensure no tax evasion is being undertaken by another party, particularly where it involved overseas taxes. In practice we would think that UK corporations would generally take the view that other parties to a transaction are primarily responsible for their taxes.

9.2 If the offence is to be extended to cover evasion of non-UK taxes, our concern would be what a UK based corporation would need to do to protect itself from the risk of a criminal prosecution.

10 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?

10.1 We think that the defences to this offence are absolutely key, because there does not seem to be any requirement for the corporation to have deliberately intended to facilitate tax evasion even though this is a proposed criminal offence.

10.2 The burden of proof should be on HMRC to show that the corporation did not take reasonable care, rather than it to be for the corporation to prove that it did take reasonable care. This is a stronger safeguard for the organisation. We assume that the test of reasonable care will be on the balance of probabilities.

10.3 Our concern is that the proposed due diligence defence will impose significant extra costs and burdens on corporations.

10.4 We think that where corporations already have in place policies and procedures under existing legislation such as the Proceeds of Crime Act 2002 and Money Laundering Regulations 2007, this should be sufficient to satisfy the defence of taking reasonable steps to prevent the facilitation of tax evasion by their agents.

10.5 Whatever model is chosen, corporations will need sufficient time to put due diligence systems and risk management processes in place before the legislation takes effect. We would urge HMRC to take time to understand how the provisions could be implemented with the minimum disruption (particularly for businesses outside the current regulated sector).

11 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.

11.1 Guidance will be essential to help corporations identify how they can demonstrate that they have followed due diligence procedures and have a reasonable care defence in the event that one of their agents has aided and abetted tax evasion. Corporations need to know what they must do to comply.

11.2 CIOT would be happy to assist with the formulation of guidance. In particular, it would be helpful if HMRC could run some workshops with stakeholders as the offence is developed.

11.3 We would also urge HMRC to expose any proposed guidance for comment as soon as possible, and in any event well before the proposed offence becomes operative.
is critical that businesses have sufficient time to understand their obligations and to put appropriate systems in place.

12 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.

12.1 No comments.

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

13.1 Unless corporations can use current policies and procedures already in place under other legislative requirements to show that they have a defence to this offence, the compliance costs will be significant. Even where current policies are acceptable, there will still be costs involved in training staff and in certification and reporting processes. There is therefore clearly a need to ensure that if the measures are to go ahead, they are implemented in a way which mitigates additional costs as far as possible.

14 The Chartered Institute of Taxation

14.1 The Chartered Institute of Taxation (CIOT) is the leading professional body in the United Kingdom concerned solely with taxation. The CIOT is an educational charity, promoting education and study of the administration and practice of taxation. One of our key aims is to work for a better, more efficient, tax system for all affected by it – taxpayers, their advisers and the authorities. The CIOT’s work covers all aspects of taxation, including direct and indirect taxes and duties. Through our Low Incomes Tax Reform Group (LITRG), the CIOT has a particular focus on improving the tax system, including tax credits and benefits, for the unrepresented taxpayer.

The CIOT draws on our members’ experience in private practice, commerce and industry, government and academia to improve tax administration and propose and explain how tax policy objectives can most effectively be achieved. We also link to, and draw on, similar leading professional tax bodies in other countries. The CIOT’s comments and recommendations on tax issues are made in line with our charitable objectives: we are politically neutral in our work.

The CIOT’s 17,000 members have the practising title of ‘Chartered Tax Adviser’ and the designatory letters ‘CTA’, to represent the leading tax qualification.

The Chartered Institute of Taxation
9 October 2015