

Bird & Bird & Failure to Prevent the Facilitation of Tax Evasion Day One Compliance





Will your organisation find itself committing a crime for failure to prevent the facilitation of tax evasion?

From September 2017, two new offences within the Criminal Finances Bill 2016-17 are expected to criminalise a relevant body which fails to prevent its associated persons from facilitating tax evasion.

The first offence relates to the evasion of UK tax and the second to the evasion of foreign tax. For the UK tax offence, it does not matter where the organisation is located, the evasion of UK tax provides sufficient nexus to create potential criminal liability. For the foreign offence, a greater degree of nexus with the UK is required. Sufficient connection includes the relevant body being incorporated in the UK, carrying on all or part of a business there or if its associated persons carry out all or part of the facilitation of tax evasion in the UK. Organisations within the scope of the foreign offence will be required to prevent the facilitation of any tax evasion worldwide.

Your organisation's journey towards protecting itself from criminal sanction begins with designing and implementing the statutory defence of having in place reasonable procedures to prevent the facilitation of tax evasion by its associated persons.

It is important to act now in readiness for Day One Compliance. We can help you prepare, protect and manage your project.

How will the offence work?

Stage 1

UK or foreign tax evasion by a natural or legal person (A) - each element of the offence must be present (i.e. the objective and mental elements of the crime) but it does not need to have been proved before prosecuting a relevant body.

Stage 2

Criminal facilitation of the tax evaded by (A) by an associated person (B) of a relevant body - again, this requires the associated person to have committed each element of the facilitation offence but does not need to have been proved before prosecuting a relevant body.

Stage 3

A failure by the relevant body to have in place reasonable procedures to prevent the act of criminal facilitation by (B) - this is a strict liability offence so there is no need to prove criminal intent or knowledge on the part of the corporate.

Key Terminology

- ‘UK tax evasion’ is the common law offence of cheating the public revenue or any of the numerous statutory tax evasion offences.
- ‘Foreign tax evasion’ is an offence in foreign law related to a breach of duty relating to a tax under that law and which would also be deemed a tax evasion offence in the UK.
- A ‘relevant body’ is any body corporate or partnership, wherever formed or incorporated including companies, trusts and not for profit organisations.
- An ‘associated person’ is an employee, agent or any other person who performs services for or on behalf of the relevant body and in all cases acts in that capacity (and who can be either natural or legal persons).
- ‘Criminal facilitation’ means being knowingly concerned in, or taking steps with a view to the fraudulent evasion of tax by another, or aiding, abetting, counselling or procuring the commission of that offence.

What is the scope of the new offences?



The UK offence applies to all relevant bodies whether they are established in the UK or under the law of another country and irrespective of where the conduct occurs



The foreign offence applies where:

- The relevant body is incorporated under UK law; or
- The relevant body is carrying on a business or part of a business in the UK; or
- Any conduct forming part of the foreign tax evasion facilitation takes place in the UK.

In respect of the foreign offence, dual criminality is required. This means that both the tax evasion and tax evasion facilitation conduct must be criminal offences under the law of the foreign country and the UK.

What are the consequences of non-compliance?

- A criminal investigation by HMRC (for the UK offence) or the Serious Fraud Office (for the foreign offence), utilising their criminal investigatory powers.
- Brand and reputational damage suffered by the investigation and prosecution leading to adverse press and media coverage.
- An unlimited fine and the prospect of an order requiring the organisation to remediate its reasonable procedures.
- Ancillary orders such as confiscation orders or serious crime prevention orders

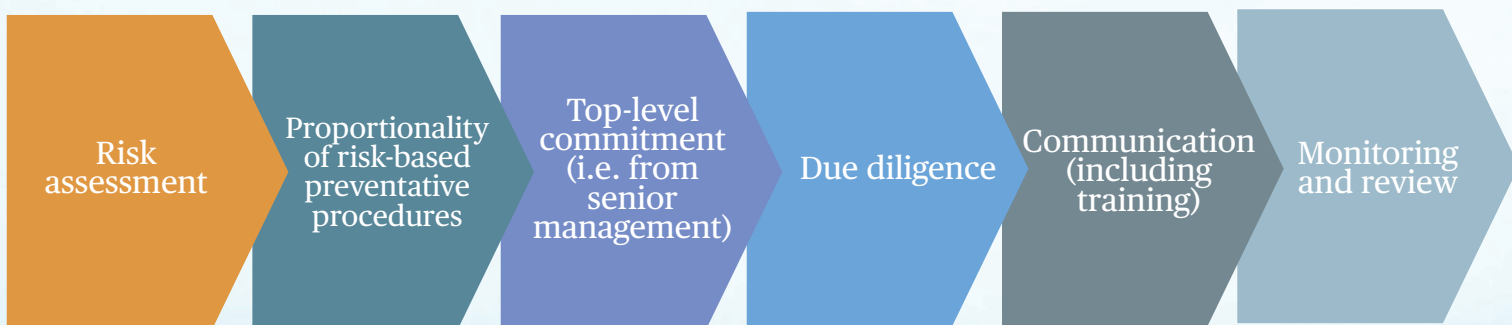
The defence

At the time the tax evasion facilitation offence took place, a relevant body can avail itself of two lines of defence:

- That it has in place such preventative procedures as it was reasonable in all the circumstances to expect it to have; or
- It was not reasonable in all the circumstances to expect it to have any prevention procedures in place.

Reasonable Procedures

As the offence is modelled on the section 7, Bribery Act 2010 offence of corporate failure to prevent bribery, the statutory defence has a familiar feel to that of the equivalent defence of adequate procedures to prevent bribery. The reasonable procedures should be formulated using six guiding principles, which are set out in HMRC's guidance:



Day One Compliance

Many organisations will need specialist experience and additional resources to plan and implement their project to ensure reasonable procedures are in place.

Our view is that larger and more complex organisations will take a number of years to embed the required compliance processes and behavioural changes into their business. As a result, we consider that a standalone exercise should be undertaken in 2017, with the outcome from that project later incorporated into an organisation's wider financial crime controls. But what will your organisation need to do to ensure protection from September 2017?

What must your organisation do as a minimum?

- Gain top level commitment and a plan to communicate your position;
- Conduct an initial risk assessment;
- Put in place a programme to implement the proportionate risk-based procedures in a timely manner.

It is important to note that what constitutes reasonable procedures would be ultimately determined by a Court, rather than HMRC.

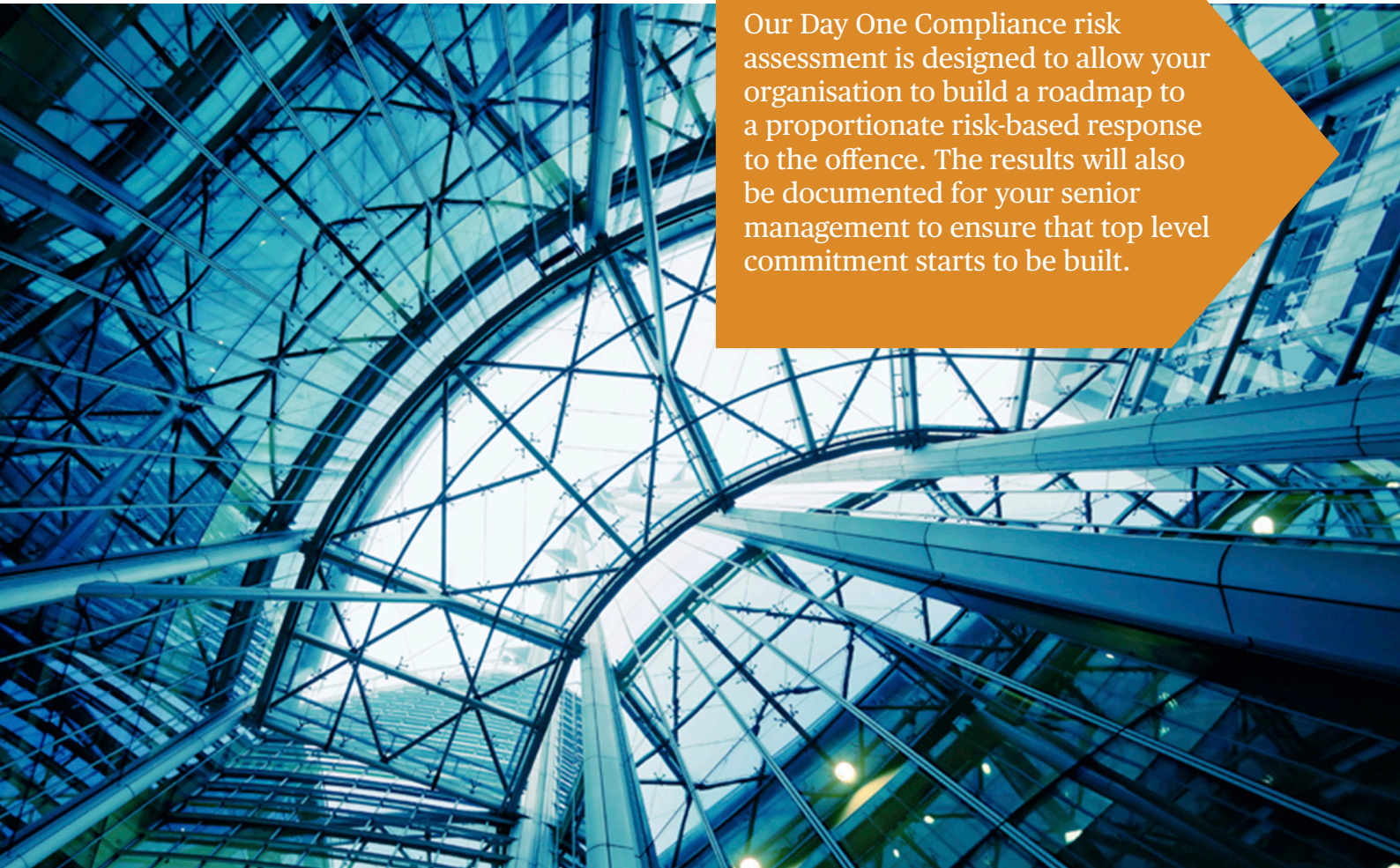
How we help you achieve Day One Compliance

Risk Assessment

We would begin the journey towards Day One Compliance by identifying and collating the relevant information and documents held by your organisation. We find this works best by organising a facilitated workshop to map out the key touch points for the offences.

This will include:

- Highlighting the relevant stakeholders in the business that will form the working group leading the implementation of the reasonable procedures defence;
- Ensuring that the key stakeholders are up to speed with the technical aspects of the offence and how it will work in practice;
- Identifying all of the relevant bodies and deciding whether a global or country by country response is appropriate;
- Defining your associated persons by exploring relationships with agents, contractors, subsidiaries, referrers and third party service providers;
- Understanding the high level inherent tax evasion facilitation risks based on areas of risk; by country, sector, transaction, business opportunity, product, customer, etc.;
- Drawing together your current policies and procedures to understand the extent to which they may already deal with any risks of tax evasion facilitation.



Our Day One Compliance risk assessment is designed to allow your organisation to build a roadmap to a proportionate risk-based response to the offence. The results will also be documented for your senior management to ensure that top level commitment starts to be built.

Putting in place your wider programme to implement the reasonable procedures defence

Completion of a risk assessment is likely to identify further work that your organisation will be expected to have thought through and planned ahead of September 2017. This is likely to involve:

Designing or refining controls, policies and procedures to manage any current gaps based on the risks identified within your risk assessment.

Designing or enhancing relevant due diligence procedures for your associated persons.

Training for your employees and associated persons.

Designing monitoring and review programmes and building these into current financial crime operating models.

Considering the wider effect of the civil enablers sanctions in conjunction with the criminal offence.

Assessing the use of technology to allow you to streamline procedures in the future.

Scoping out the required behavioural change within the organisation and working with change management consultants to ensure this is effective.

Ensuring that you have in place a crisis response strategy should HMRC or the SFO challenge your position in the future.

Why use Bird & Bird?

Our team have been working with organisations of varying size preparing for this offence since the initial consultation was announced. We have met with HMRC regularly throughout the consultation process and because of our experience in resolving criminal tax crime matters, we really understand the offence, how it might play out in front of a jury and the holistic approach that is required for organisations to prepare for day one compliance. Our team brings together tax crime lawyers, financial crime specialists and change and behavioural management consultants from our global law firm.

Our approach to Day One Compliance is not a one size fits all approach - all relevant bodies need to consider their defence position proportionately and some may require less work to implement than others. Doing nothing is unlikely to protect you.

Bird & Bird can help you minimise your risk exposure. Contact us to understand more.

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