

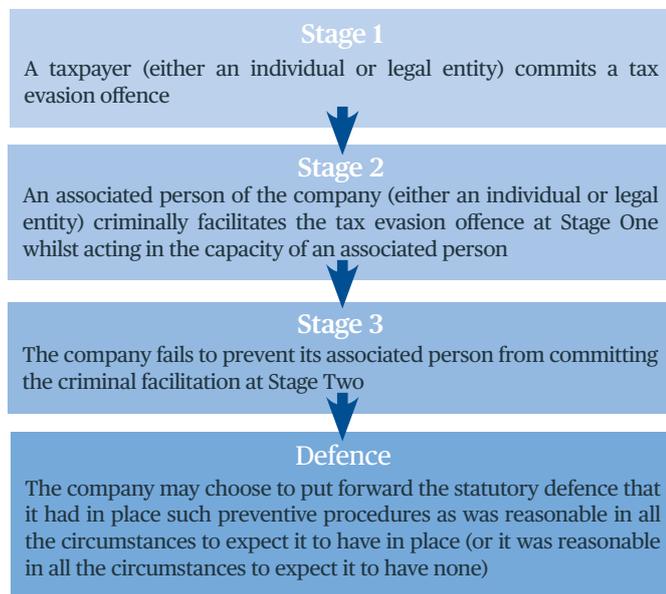
Failure to prevent the facilitation of tax evasion - reasonable procedures

From 30 September 2017, a company may be criminally liable where it fails to prevent its employees or other associated persons from criminally facilitating tax evasion. This guide outlines the steps that companies need to take to demonstrate that they have 'reasonable procedures' in place.

The offence

Part 3 of the Criminal Finances Act 2017 contains two new criminal offences which create strict liability for companies if any of their associated persons (employees, agents or any other person who performs services for or on their behalf) criminally facilitate the evasion of either UK or foreign tax respectively. The only defence is for a company to demonstrate that it had put in place reasonable procedures to prevent its associated persons from facilitating tax evasion or it was reasonable in the circumstances for it to have no such procedures. All businesses therefore need to consider the impact of these offences and what steps they need take to ensure that the defence is available to them.

How might your organisation become liable?



The defence

Your organisation will have a defence if it can demonstrate that it had put in place (at the time of the alleged criminal facilitation) reasonable procedures to prevent the facilitation of tax evasion by its associated persons or that it was reasonable in the circumstances for it to have no such procedures in place.

On 1 September 2017, HMRC published guidance on what may constitute 'reasonable preventive procedures':

1. the company will carry out a **risk assessment** to identify the nature and extent of the risks that its associated persons are criminally facilitating tax evasion
2. preventive procedures will be **proportionate** to the risk the company faces (as identified in the risk assessment)
3. there will be **top-level commitment** within the company to the prevention of the facilitation of tax evasion
4. the company will apply a risk based approach to **due diligence** (on its associated persons) in order to mitigate the identified risks
5. the preventive procedures will be **communicated**, embedded and understood throughout the company, including through training
6. the company will **monitor and review** its preventive procedures and make improvements where necessary.

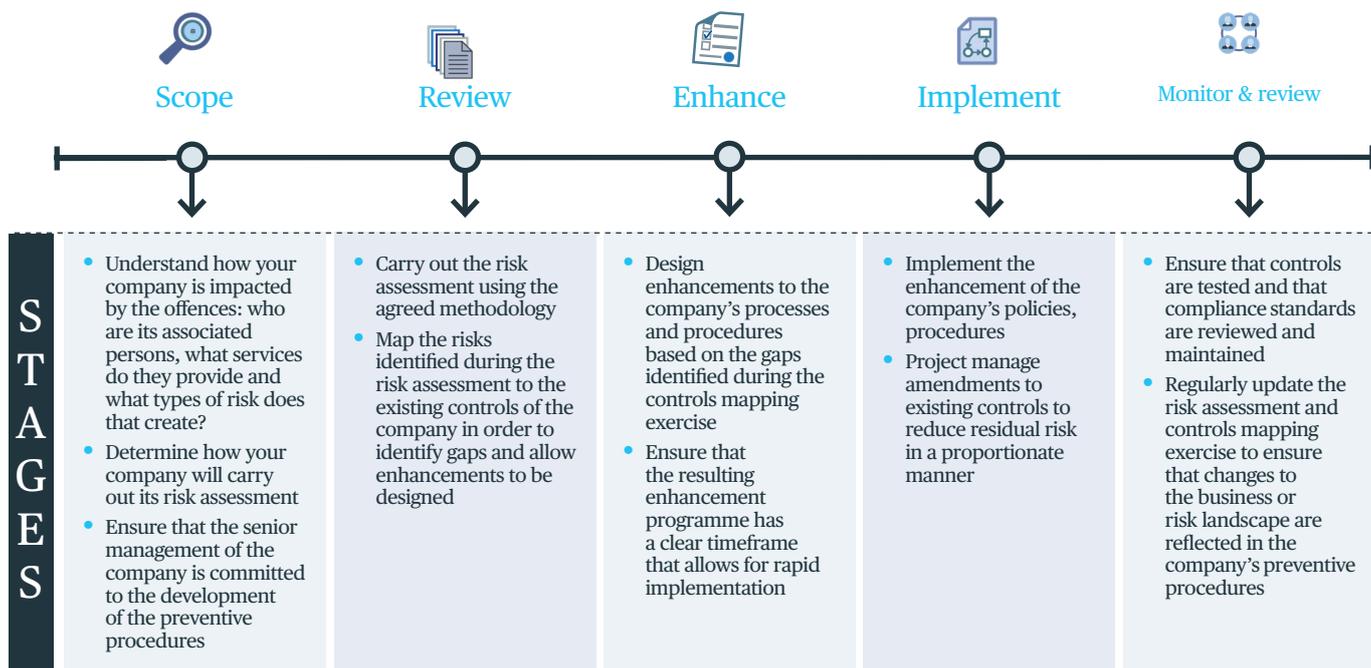
Does it matter where your organisation is formed or operates?

The two offences created by the legislation (one for UK and foreign tax respectively) are intended to have wide extra-territorial reach.

Where UK tax is involved, your organisation may be liable wherever it is formed or operates.

Where foreign tax is concerned, your organisation will only be liable if it is formed under UK law, carries on a business or part of a business in the UK (which will include a representative office, for example) or any part of the criminal facilitation of tax evasion takes place in the UK. Both the foreign tax evasion and the criminal facilitation of that tax evasion must be capable of constituting a criminal offence in both the foreign jurisdiction and the UK.

What are the practical steps that your organisation needs to take to develop ‘reasonable preventive procedures’?



What are the implications if your organisation fails to act?

There are a number of serious consequences should your organisation be unable to evidence ‘reasonable preventive procedures’:

- an intrusive criminal investigation
- criminal prosecution
- brand and reputational damage
- regulatory implications
- unlimited fine and remedial orders
- confiscation proceedings.
- businesses therefore need to consider the impact of these offences and what steps they need take to ensure that the defence is available to them.

How can Bird & Bird help?

We combine the experience of designing and delivering financial crime compliance programmes and defending clients who are being prosecuted for tax evasion. We understand how these new offences are likely to be detected and investigated, how a trial by indictment might be avoided (through the agreement of a Deferred Prosecution Agreement) and how any trial might play out in front of a jury composed of ordinary members of the public. We consider those lessons invaluable when designing a set of preventive procedures which will not just look good on paper but actually work in practice.

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