

Assessing the effectiveness of corporate failure to prevent tax evasion offences on corporate behaviour

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Corporate Crime analysis: Has legislation to prevent the facilitation of domestic and foreign tax evasion changed corporate behaviour? Rachel Cook, senior associate at Peters & Peters Solicitors LLP and a consultant editor of the Lloyds Law Review: Financial Crime, looks at the findings of Her Majesty's Revenue & Customs' (HMRC) report on the issue and reflects on the likelihood of the creation of a corporate offence of failure to prevent economic crime.

Original news

HMRC publishes report on impact of corporate criminal offences introduced in [Criminal Finances Act 2017, LNB News 14/03/2019 137](#)

HMRC has published a report on the impact of the commencement of the corporate criminal offences introduced in the [Criminal Finances Act 2017 \(CFA 2017\)](#). The report has been prepared based on a quantitative telephone survey, conducted with senior individuals in 1,002 UK companies and partnerships across all sectors of the economy and of all sizes.

What is the background to this report?

In September 2017, the corporate criminal offences under [CFA 2017, ss 45, 46](#), targeting corporates who fail to prevent the facilitation of domestic and foreign tax evasion, came into force. These are strict liability offences, but corporates can protect themselves by demonstrating that they have in place reasonable procedures to prevent the facilitation of tax evasion, including by people associated with them.

In March 2019, HMRC published its policy paper, '[Tackling tax avoidance, evasion and other forms of non-compliance](#)'. The policy paper contains numerous references to the corporate offences of failing to prevent the facilitation of tax evasion, making clear that prosecuting corporates for the offences is part of HMRC's strategy to address tax evasion.

To date, no corporates have been prosecuted under the legislation, however, in March 2019, following a freedom of information act request, HMRC confirmed that a number of corporates are currently being investigated.

The report entitled, '[Corporate behaviour change in response to the corporate criminal offences](#)' (the report) was commissioned by HMRC to examine corporates' awareness of these new corporate criminal offences and the extent to which their enactment has resulted in changes to the corporates' culture and behaviour.

What are the most interesting findings of the report?

The report, which like the policy paper was published in March 2019, found that just over a third of corporates were aware that [CFA 2017](#) made corporates criminally liable for the offences. Large business, multinationals and firms within the finance and insurance sectors were most likely to be aware.

Perhaps—as a consequence of the discrepancy in their awareness of corporate liability—large business were three times more likely than micro businesses to have assessed their risk of committing the offences.

As part of the study, corporates were asked whether they had any of the following procedures in place:

- due diligence
- board level responsibility for managing risk
- disciplinary sanctions for breaches
- oral briefings

- written staff policies

Over half had implemented at least one of these procedures.

However, less than a quarter of those surveyed had assessed the risk of being exposed by those providing services on their behalf. Again, awareness was much higher among larger corporates. This means that over 75% of the corporates had not considered the risk posed by their associated persons.

One of the most significant findings in the report is that 'most businesses did not have risks formally documented'. While a risk assessment is an important first step, a failure to document this assessment prevents corporates from creating the foundation on which to build their procedures and, ultimately, their defence.

What does this report tell us about the effectiveness of these failure to prevent offences?

The offences have been effective in ensuring that a significant number of corporates, especially those that feel that [CFA 2017](#) is relevant to them, have in place at least some procedures to prevent the facilitation of tax evasion.

Perhaps unsurprisingly, the introduction of these offences has been more effective for large and multinational corporates, who are now much more likely than micro businesses to have put procedures in place or improved their existing procedures. As a consequence, small businesses are more vulnerable to prosecution.

What can lawyers advising corporates on these offences learn from the conclusions of the report?

Smaller business should be warned that if they fail to have reasonable procedures in place, they are vulnerable to prosecution.

Corporates must cover as many as possible of the six guiding principles in order to secure the best defence:

- risk assessment
- proportionality of risk-based prevention measures
- top level commitment
- due diligence
- communication and training
- monitoring and review

Corporates should not ignore or minimise the risk of being exposed to the facilitation of tax evasion by associated persons.

To ensure the best defence, corporates should also properly record their assessment of the risks they face.

There has been a lot of debate about the creation of a corporate offence for failure to prevent economic crime, do you think there is a realistic case for the creation of further corporate failure to prevent offences?

Despite some problems, both [section 7](#) of the Bribery Act 2010 and [CFA 2017, ss 45, 46](#) have changed the behaviour of corporates, encouraging them to self-regulate and to self-report.

On 6 March 2019, MPs and House of Lords peers wrote an open letter to Theresa May, reminding her of her government's promise to get 'tough on irresponsible behaviour in big business'. They appealed for new corporate liability offences for failing to prevent economic crimes, including fraud and money laundering, and for the Law Commission to conduct a 12-month review of the UK's corporate criminal liability legal framework. On 8 March 2019, the Treasury Select Committee [published](#) its own recommendations and threw its weight behind these calls for reform.

It seems likely that a corporate offence of failure to prevent economic crime will be legislated for in time.

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