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Introduction

The UK Criminal Finances Act 2017 ("CFA") enacted criminal corporate offences of failing to prevent the facilitation of tax evasion. It is a criminal offence if

– an associated person of a business
– facilitates tax evasion by a third party
– …and the business does not have in place "reasonable procedures" to prevent it

The offences are deliberately international in scope and cover evasion of UK and non-UK taxes, although detailed conditions apply to evasion of non-UK taxes. In practice any business with a connection to the UK should take reasonable preventative procedures in respect of its UK activities, whether the risk relates to evasion of UK or non UK taxes.

The offences are ones of strict liability, that is to say if all the conditions are satisfied then the business is criminally liable even if management did not know anything.

The only defence available is for the organisation to demonstrate that it had reasonable procedures in place to prevent the facilitation of tax evasion.

In order to implement reasonable prevention procedures an organisation needs first to conduct an objective and comprehensive risk assessment to identify any CFA risks that it may face.

The risk assessment should assess the nature and extent of an organisation’s exposure to the risk of those who act for or on behalf of the organisation ("Associated Persons") – which includes employees but also anyone acting for or on behalf of the organisation – engaging in activity during the course of business to criminally facilitate tax evasion. The risk assessment is therefore primarily concerned with looking at risk that Associated Persons have the motive, opportunity and means to criminally facilitate tax evasion, and what reasonable prevention procedures can be introduced to prevent that occurring.

The risk assessment should not be viewed as a one off exercise, but should be repeated at regular intervals, including whenever there are significant changes in the business, for example acquiring a new business or changes to systems to ensure the procedures remain adequate.

Set out below is a ‘road map’ of questions designed to identify information, which will be relevant to the assessment of the CFA risks a business may face.

Having answered these questions, an assessment can then be made of the extent to which a commercial organisation’s policies and procedures need to be updated to adequately address those risks.
1. Assessing your external CFA risk

1.1 Identification of Associated Persons

- Aside from employees do you know who your Associated Persons are (any person or entity that performs services for or on behalf of the organisation)?
- Have your Associated Persons carried out risk assessments and implemented reasonable prevention procedures?
- Do you have controls and/or operational oversight as to what they do on your behalf?

- Which other countries do you do business in? (do you have suppliers, agents or customers in those countries?)
- Do you obtain tax advice from reputable advisers in the countries you operate in?
- Are any of the countries you operate in regarded as having high levels of tax secrecy and/or are considered a tax haven (such countries are unlikely to subscribe to the Common Reporting Standard and/or have a low transparency score according to the OECD)?
- Do UK based employees or other Associated Persons have any dealings with non UK activities (non UK based operations, customers or suppliers)?

1.2 Sector/business risk

How would your sector generally be perceived in terms of CFA risk:
- Highest
- High
- Medium
- Low
- Lowest

For example, financial services, recruitment and construction would be high risk industries.

Do any of your Associated Persons operate in a high risk sector? (for example a staffing agency)

Do you adopt aggressive tax avoidance/mitigation strategies?

1.3 Country risk

In which countries do you have a presence and what is the nature of that operation (for example does it involve subsidiaries or joint ventures)?

Which other countries do you transact/undertake business in? (do you have suppliers, agents or customers in those countries?)

Do you obtain tax advice from reputable advisers in the countries you operate in?

Are any of the countries you operate in regarded as having high levels of tax secrecy and/or are considered a tax haven (such countries are unlikely to subscribe to the Common Reporting Standard and/or have a low transparency score according to the OECD)?

Do UK based employees or other Associated Persons have any dealings with non UK activities (non UK based operations, customers or suppliers)?

1.4 Transactional risk

Does your organisation engage in transactions that involve complex tax strategies, complex supply chains or opaque corporate structures?

1.5 Business opportunity risk

Do you use agents, consultants, off-payroll workers or other third parties to help you win, retain or undertake business?

Does your organisation pay commission or make unusual or high risk payments to third parties (e.g. cash payments, pre-paid credit cards or benefits in kind (e.g. holidays).

Does your organisation engage in high value projects or projects involving many parties jurisdictions or intermediaries?

Could it be perceived that your organisation has a culture that encourages and rewards risk taking?

1.6 Business partnership risk

Do you undertake due diligence on any prospective business partner or supplier before entering into a business relationship with them?

Do you apply any controls on payments to business partners and suppliers?

1.7 Customer/client risk

Do you undertake due diligence to establish whether customers or clients operate through unusual, artificial or suspicious arrangements?

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2. Assessing your current approach to CFA

2.1 Policies and procedures

☐ Do you have:
   (i) A tax policy?
   (ii) A CFA policy?
   (iii) A Code of Ethics?

2.2 Previous risk assessments

☐ Has your organisation undertaken any prior assessment or consideration of the CFA risk it faces and, if so, when was the last undertaken?

☐ If the answer to the above is no, has your organisation undertaken any assessment or consideration of the bribery and corruption risks it faces under the UK Bribery Act 2010 (UKBA)? (The UKBA is similar to the CFA and many bribery and corruption risks overlap with the CFA)

If prevention procedures have previously been adopted, did they comply with HMRC's guidance (see "HMRC guidance")?

If reasonable prevention procedures have previously been adopted, has there been any review of the effectiveness of these procedures?

If reasonable prevention procedures have previously been adopted, have there been any changes since in the business which impact on the adequacy of any original assessment?

Are you aware of any incidents since 30 September 2017 where employees or other Associated Persons may have facilitated tax evasion and, if so, what have you done about it?

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HMRC has issued guidance relating to what may constitute reasonable prevention procedures. It is important to measure any existing or proposed prevention procedures against the six guiding principles set out in the guidance:

### 3.1 Risk assessment
- Are your risk assessment procedures overseen by senior management?
- Does your organisation allocate appropriate resource to risk assessment, proportionate to the scale of your business and the risks that you may face?

### 3.2 Proportionate procedures
- Objectively, would your organisation be viewed as having adopted CFA procedures that are proportionate to the risks that you face?

### 3.3 Tone from the top
- To what extent does your Board/senior management provide leadership to the business on the approach to CFA (for example, consideration of CFA risk assessments and policies, consideration and direction on specific issues, ensuring appropriate resourcing, firm wide communications)?
- Is this message communicated externally, for example via a statement on corporate values?
- Is there a member of senior management or a director who is responsible for CFA compliance (or compliance more generally)?
- Have you assigned CFA support functions clearly (i.e. tax, finance, legal, compliance)?
- How often does the Board/senior management discuss CFA issues?
- What resources has your organisation committed to CFA issues?
- Is the Board/senior management regularly informed of changes in laws related to CFA?

### 3.4 Due diligence
- What processes do you have in place to undertake due diligence (CFA specifically and/or more generally) on, and assess the risk of, new and existing third parties who you do business with?
- Does your due diligence on any party who does, or may, perform services for or on behalf of your organisation, include media and social media screening?
- When appropriate, do you use any independent third party due diligence service providers (entities who perform independent checks on third parties for you, such as TRACE)?
- Does your due diligence on any party who does, or may, perform services for or on behalf of your organisation include, when appropriate, a search against relevant sanctions lists?

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3. HMRC guidance relating to the CFA

3.5 Communications

- Does your organisation provide CFA training to all relevant employees?
  - (i) Is that training tailored so that appropriate staff get specific training relative to their roles?
  - (ii) How often is the training provided/repeated?
  - (iii) Does this differ for personnel who may face the most obvious CFA risks?
  - (iv) Is the training evaluated and/or is a pass mark required to be achieved?
  - (v) Are training records compiled and retained?
  - If so, does it record when the training took place, what form of training was given and who took part?
- Do you require personnel to provide a signed confirmation that they have read and understood your CFA policy?
- Other than through training and, if relevant, the provision of the CFA policy, does your organisation communicate CFA risks to relevant personnel (for example, through compliance reminder emails or discussion at team meetings)?
- Does your organisation have a whistleblowing procedure and, if so, is this overseen by a member of senior management?
- Are all personnel made aware of the whistleblowing policy, if any, and how it may be utilised?

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4. Specific concerns

☐ Have any potential CFA issues (red flags) been identified as part of any internal or external audits conducted within the past 5 years? If so, how were these dealt with?

☐ Have any whistleblower reports referred to a potential CFA issues within the past 5 years? If so, how were these dealt with?

☐ Are you aware of any allegations, inquiries, investigations, prosecutions or other actions by a State regulator or prosecutor which may indicate a CFA issue connected to your organisation or a third party that performs services for or on your behalf?

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