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# The Criminal Finances Act 2017

Helping you to understand and mitigate the risks





# What is the Criminal Finances Act 2017?

The new Criminal Finances Act 2017 targets corruption, money laundering and tax evasion. It aims to recoup more criminal assets and is part of the government's strategic approach to reducing financial crime.

The Act builds on the existing legislation to offer greater enforcement powers and additional measures to protect the public purse. The Act itself improves reporting procedures and data sharing, and makes it easier to seize funds obtained through criminal means.

The Act makes the following key changes:

- 1 Improved ability to investigate the proceeds of crime:** This includes unexplained wealth orders, further information orders and application to Politically Exposed Persons (PEPs).
- 2 Reform of the Suspicious Activity Reports (SARs) regime:** Including greater information sharing and the introduction of Super SARs, submitted as a joint report from multiple regulated sources. This includes the right to extend the moratorium period over suspicious transactions for up to seven months.
- 3 Improved civil powers to recover proceeds of crime:** Where money is stored in bank accounts and items of personal property, there are civil powers to recover assets gained through criminality.
- 4 Measures to combat terrorist financing:** The Act extends anti-money laundering laws to include potential terrorism funding.
- 5 New corporate tax offences to prevent the facilitation of tax evasion:**

Previously, if an individual evaded tax and was facilitated by the advice or actions of those in a corporation, although the individual will have committed a crime and those directly facilitating it could be prosecuted, the corporate entity would not hold any liability.

The act creates two new offences so a corporation in this situation may be prosecuted under the following:

- a Failure to prevent facilitation of UK tax evasion – aimed at catching corporations facilitating the evasion of UK taxes
- b Failure to prevent facilitation of foreign tax evasion – covering the evasion of foreign taxes facilitated by an entity that has some nexus with the UK (such as a UK-based office), and where there is dual criminality with the UK.

“Ultimately, relevant bodies need to ‘sit at the desk’ of their employees, agents and those who provide services for them or on their behalf and ask whether they have a motive, the opportunity and the means to criminally facilitate tax evasion offences, and if so how this risk might be managed.”

**HMRC, ‘Tackling tax evasion: Government guidance for the corporate offences of failure to prevent the criminal facilitation of tax evasion’, September 2017**

# New corporate tax offences

One of the most significant elements of the Criminal Finances Act is the introduction of the two new corporate tax offences. These offences extend liability for tax evasion from the individual and any facilitators, to the corporation / partnership with the risk of criminal prosecution and unlimited fines.

Preventing tax fraud is a priority for tax collection agencies around the world. Over the last ten years HMRC has increased the number of successful prosecutions for tax fraud, from around 258 convictions in 2006/07 to 1,135 in 2015/16. Reducing revenue lost through tax fraud remains a top priority and HMRC has pledged significant funds to this area.

## How do the new offences work?

Corporate failure to prevent criminal facilitation of tax evasion applies to companies, partnerships and limited liability partnerships. It does not apply to individuals, as they can be prosecuted under existing laws.

The criteria for failure to prevent criminal facilitation of tax evasion are as follows:

- There must be criminal tax evasion under either UK law or foreign law
- It must be enabled by the organisation's employee, agent or those performing services for, or on behalf of, the organisation
- The organisation must have failed to prevent that person from enabling the facilitation

## How do prosecutions under the new offences work?



### What does the corporate offence mean for you

Companies and partnerships must demonstrate that they have taken reasonable measures to prevent the facilitation of tax evasion by its associated persons, or demonstrate why it is unreasonable to have such procedures in place.

Failure to prevent the facilitation of tax evasion in the UK or overseas are strict liability offences. Therefore unless firms can show that they had reasonable procedures in place, they are guilty of an offence.

### What does this mean in practice?

- A business will be liable for the actions of an individual acting on its behalf, irrespective of whether it gains any benefit from the employee's actions.
- The offence will apply to UK businesses who fail to prevent those acting on their behalf from criminally facilitating a tax loss in the UK; or an overseas jurisdiction which has equivalent laws of tax evasion in place.
- The Act criminalises non-UK tax evasion by a UK company. It applies where the relevant body has a nexus with the UK, the conduct concerned amounts to an offence where the tax is levied and a dual criminality test is satisfied.
- If an individual or entity evades tax and a representative of a corporation facilitates them, the corporation is liable – regardless of whether they were involved or aware of it. Successful prosecutions could lead to unlimited fines, similar to that of the UK Bribery Act 2010 not to mention reputational damage.

### What is an associated person?

An associated person is defined as a firm's employee or agent, or someone who performs services for or on behalf of the business:

- It may include suppliers, contractors, sub-contractors and intermediaries
- A contract is not necessarily required – the legislation makes it clear that association will be defined based on actual events and behaviour
- An associated person can only implicate a firm if they facilitate tax evasion by a third party whilst performing services for the firm
- A business cannot be held liable for failing to prevent the facilitation of tax evasion if the facilitator was acting in a personal capacity



# HMRC guidance

HMRC has produced guidance on how organisations should manage the risks surrounding the new corporate tax offences. It is based around six key principles, outlining what actions are expected from corporations and how they should ensure they are compliant.

The infographic consists of a vertical purple bar on the left with the text 'HMRC's key principles' written vertically. To the right of this bar are six horizontal white boxes with purple borders, each containing a principle. Further to the right is a light beige box with the heading 'Key principles' in green, followed by a bulleted list of three points.

**HMRC's key principles**

- Firms should implement a risk assessment that can identify the nature and extent of their exposure to the risk of facilitating tax evasion
- Implement proportionate risk-based prevention procedures
- Demonstrate an effective commitment from senior managers
- Have effective due diligence of the customer base to ensure customer compliance with UK and foreign tax legislation
- Have an effective training and communications strategy
- Have an effective compliance function which includes monitoring and review to ensure compliance

**Key principles**

- 'Prevention procedures' in the HMRC guidance means both formal policies and practical implementation steps
- 'Risk based' means proportionate to the nature, scale and complexity of a firm's activities, as demonstrated in the risk assessment
- The scope of procedures must consider how best to align a firm with all six of the HMRC's guiding principles

Risk assessments in relation to the new offences must be tax-specific and take into account the nature of the organisation's business. As with any risk, exposure will partly be determined by the complexity of the organisation itself. The risk assessment should include existing tax evasion risks, geographical scope, the number of branches or subsidiaries, and the range or types of associated persons. Tax strategy and transfer pricing policies should also be considered.

While it is tempting to simply rebrand existing Anti Bribery and Corruption (ABC) or Anti Money Laundering (AML) risk assessments, this will not be acceptable in the event of a prosecution. Tax risks need to be properly considered in light of the new legislation. HMRC guidance recommends any risk assessment activities or mitigating controls should be risk based. An effective defence should capture the levels of risks for different aspects of the business and the rationale for assigning those risk scores, including a degree of proportionality.

At the same time, proportionality should not encourage a blanket light touch approach. HMRC has already stated that "it will rarely be sensible to have not conducted a risk assessment".

In practice, any firm which regulators or government agencies would consider to have some high risk exposures should ensure their risk assessment and related processes are sufficiently thorough.

# Preparing for compliance – proportionate procedures

HMRC does not specify the exact nature or content of prevention procedures or what would be considered reasonable measures, but it does highlight some common and potential scope elements as outlined below.

## Likely to include:

- The risk assessment on which procedures are based
- Top level organisational commitments, including a commitment to compliance over profit or bonuses
- Risk mitigation approach specific to the organisation's business
- Strategy and timeframe for implementation and revision of procedures
- Monitoring and enforcement
- Pathway for reporting wrongdoing
- Whistle blower protection

## Could include:

- Information on top level management involvement
- Risk assessment methods
- Due diligence methods for associated persons
- Contractual terms and conditions for associated persons
- Disciplinary and enforcement actions taken
- Communication approach to all associated persons in relation to relevant policies and procedures

**In defence, an organisation must demonstrate reasonable prevention procedures. But what does that mean in practice?**



## Proportionate procedures – HMRC's example

- A mid-size car parts maker operating in the UK and Europe subcontracts to a UK distributor.
- Senior managers of the distributor and a purchaser collaborate to create a false invoicing scheme, allowing the purchaser to avoid UK taxes due.
- The manufacturer undertook a tax evasion focused risk assessment and identified only low and medium level risks to the firm.
- Policies are clear, including terms and conditions in third party contracts, and revised procedures were properly implemented.
- The manufacturer undertook tax evasion focused due diligence on the distributor but not for the full supply chain. Nothing abnormal was detected.



## Poor procedures – HMRC's example

- A corporate client of a UK-based multinational bank is knowingly referred to an offshore accountant by an employee of the bank, expressly to assist the client in avoiding foreign income tax.
- The bank has rigorous AML/ABC procedures, but undertook only a light touch tax evasion risk assessment, nominally including the word 'tax' into existing procedures and processes.
- The bank has not effectively reviewed tax fraud risks or properly implemented revised procedures and did not carry out any tax evasion focussed due diligence of the offshore accounting firm.

# Reforming Suspicious Activity Reports

The Act also reforms the SARs regime, enhancing the powers for law enforcement to investigate and recover the proceeds of crime.

Investigating potential proceeds of crime:

## Reform of the SARs regime

The reformed SARs regime aims to improve information sharing between agencies. Regulated bodies may now share information regarding money laundering or other suspicious activity and can now make joint reports, or 'Super SARs' to the National Crime Agency.

This is further supported by the extension of the moratorium period on suspicious transactions. The moratorium period was previously 31 days, but it may now be extended by court order for a further 31 days and up to seven months.

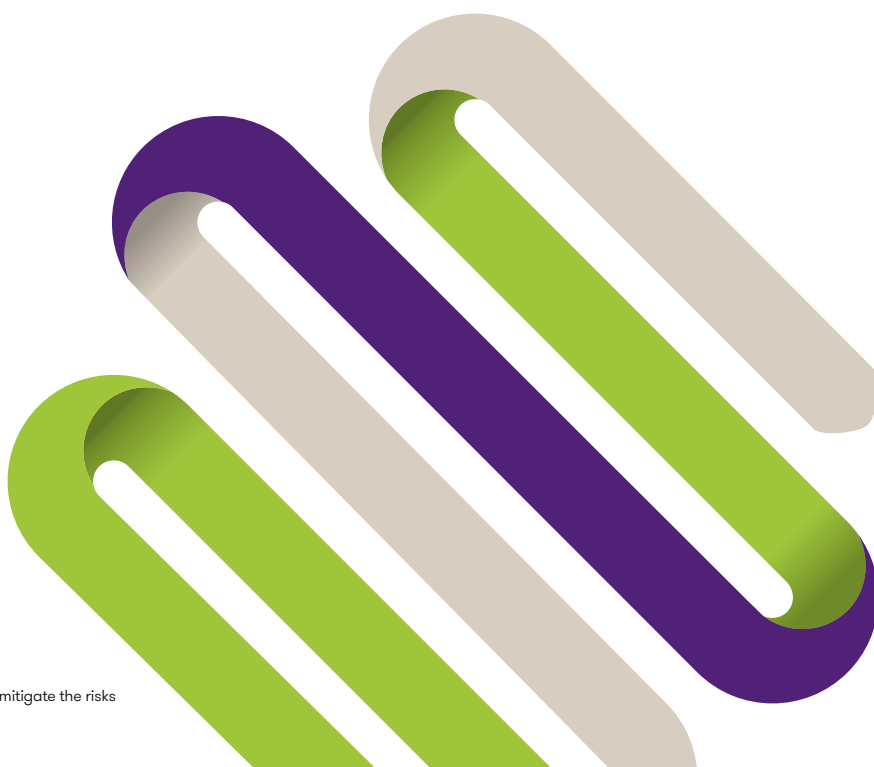
## Further information orders

Following the filing of a SAR, the NCA may apply to courts for further information orders. These are requested of either the SAR reporter or any regulated body.

## Unexplained Wealth Orders

Where an individual or organisation is suspected of any association with financial crime, courts may request an Unexplained Wealth Order (UWO). UWOs relate to specific property and essentially request the origin of those assets to be explained, if they do correspond to known income.

In some instances, UWOs are further supported by interim freezing orders. In this case, while the origins of the assets are being investigated, the property cannot be disposed of.





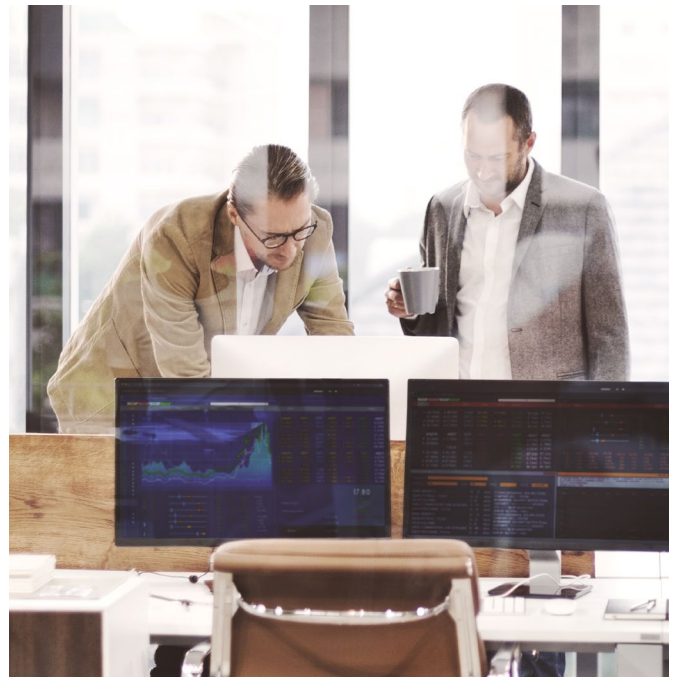
# What should organisations do now?

The Act may have significant consequences for organisations across a range of sectors. Organisations should review how this affects their risk profile and implement the draft guidance provided by HMRC.

In light of the new legislation, financial crime and operational frameworks should be reviewed across the organisation. Where firms are FCA regulated, such as banks, they should consider how suspicious activity information may be shared with another firm whilst still protecting related customer data.

For best practice, organisations should:

- Implement a risk assessment and review of their processes that relate to client tax liability. The review should include offshore and high risk processes, entities and clients (such as PEPs)
- Implement proportionate risk-based prevention procedures
- Demonstrate an effective commitment from senior managers
- Have effective due diligence of the customer base to ensure customer compliance with UK and foreign tax legislation
- Have an effective training and communications strategy
- Have an effective compliance function to monitor and review compliance with the offences of failing to prevent tax evasion



## SMCR and Criminal Finances Act 2017 training

We were engaged by a leading Japanese investment bank to deliver structured training on the Criminal Finances Act 2017. Aimed at senior management and the audit / compliance functions, the workshops covered both the new legislation, and how it relates to the Senior Managers and Certification Regime. Our added value approach included specialist insight from a variety of perspectives which helped to promote knowledge retention across each client department.



## Criminal finances risk assessment

Our client is a real estate capital provider, offering significant long term funding from foreign investors to help developers, operators and institutions. They required a risk assessment to review their policies and procedures against the new corporate offences in the Criminal Finances Act 2017. The scope of the risk assessment considered both the operational control environment and the associated tax risks. Our value adding approach resulted in a robust risk register with a heat map to assist in the implementation of the improved control environment.

# How we can help?

At Grant Thornton, our multi-disciplinary team can help your business to design and implement effective controls around financial crime. Bringing practical insights from industry, combined with significant enforcement and regulatory knowledge, we can help develop robust frameworks in line with business needs.

We have significant expertise in reviewing Anti-Money Laundering and tax compliance frameworks across all sectors. This offers excellent insight into best practice, current hot topics and forward thinking around tackling financial crime.

Our team can support your business in the following areas:

- Risk assessment against the Criminal Finances Act 2017 and other relevant legislation
- Support the automation of due diligence processes for an improved control environment
- Deliver training to embed awareness across the organisation
- Review your financial crime control model using the latest innovative techniques and maturity frameworks
- Offer assurance and advisory services on your existing control framework

**For further information, please contact our team below:**



**Sandy Kumar**

Chair of Financial Services Group  
Head of Business Risk Services UK  
**T** +44 (0)20 7865 2193  
**E** sandy.kumar@uk.gt.com



**Thomas Townson**

Partner  
Head of Financial Crime  
**T** +44 (0)20 7865 2175  
**E** thomas.f.townson@uk.gt.com



**Dana Ward**

Partner  
Head of Financial Services Tax  
**T** +44 (0)20 7728 3316  
**E** dana.ward@uk.gt.com



**Sonia Shah**

Technical Lead  
Financial Crime  
**T** +44 (0)20 7865 2100  
**E** sonia.h.shah@uk.gt.com



**Lucinda Hallan**

Director Financial Crime and Disputes  
Financial Crime  
**T** +44 (0)20 7865 2252  
**E** lucinda.k.hallan@uk.gt.com



**Paula Ruffell**

Tax Investigations and Disputes  
Financial Crime  
**T** +44 (0)20 7728 2623  
**E** paula.a.ruffell@uk.gt.com





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