

# Corporate Criminal Offence - Left out in the cold



Harold Wilson coined the phrase: “a week in politics is a long time”. Imagine, the change in the political landscape that can unfold over a number of months. 2018’s budget will understandably be a distant memory for most of us.

The Chancellor’s theme was, “productivity” and included within that message, was the commitment to the Cambridge–Milton Keynes–Oxford Arc (CAMKOX) which will be of vital importance for the country’s future economic growth. As part of the Government’s vision in delivering this infrastructure, it is estimated that a further 1 million homes will be built in the CAMKOX Arc by 2050.

There will be an unprecedented **public procurement** process, where companies will be expected to pitch for construction projects to help build and deliver the Government’s ambitious new housing plans. As part of any public tender process, the Government is likely to scrutinise your organisation’s affairs to ensure that not only are you commercially able to deliver your chosen project, but also that you have the correct levels of **corporate governance** and that your financial affairs are in order.

One such area that is still relatively new and has not received the attention it deserves is the new Corporate Criminal Offence (“CCO”). This article explores the new offence, the implications for your business, the impact on the Government’s procurement process and what you should be doing to ensure you are well placed to take full advantage of this opportunity.

## Criminal Finance Act 2017

The Criminal Finance Act 2017 introduced the legal concept of a CCO. Due to lack of publicity, there continues to be limited awareness of these rules,

however, failing to take appropriate actions can have serious consequences for your business. This legislation **formally criminalises** the facilitation of domestic and foreign tax evasion and holds businesses accountable for the actions of their employees and agents.

Following requests under the Freedom of Information Act, it has been confirmed that there are currently up to five investigations underway by HM Revenue & Customs (“HMRC”) which could lead to cases being brought before the courts through the Criminal Prosecution Service (“CPS”). HMRC are responsible for investigating cases of domestic tax evasion while the National Crime Agency (“NCA”) and Serious Fraud Office (“SFO”) will be responsible for investigating cases of foreign tax evasion. The SFO have so far refused to comment on the number of cases it is currently investigating.

## How does an offence occur?

In order for an offence to occur there are three stages:

1. Criminal tax evasion must have taken place by a taxpayer (which could be in respect of UK or foreign taxes);
2. An associated person (e.g. an employee or agent acting on behalf of the organisation), whilst acting in that capacity has criminally facilitated the tax evasion; and
3. The organisation failed to prevent the associated person from committing the facilitation.

## Who is caught by this legislation?

The legislation is aimed at organisations that have been established as companies or partnerships including LLPs. This also includes charities that have been set up as companies limited by guarantee including community interest companies, charities established either by Royal Charter or as a charitable incorporated organisation.

## Associated Persons

Associated persons has a deliberately wide definition which captures any individual that provides services for or on behalf of the organisation. It therefore could include: staff, sub-contractors, group companies, agents, JV partners or corporate trustees.

## A Criminal Record

If your organisation is found guilty under these new powers there would be a **public record of the conviction** and the **potential reputational damage** could be devastating. Additionally, your organisation may be subject to any or all of the following:

- unlimited financial penalties;
- confiscation orders or serious crime prevention orders;
- exclusion from public procurement processes; and
- disclosure to professional regulators.

## Prevention really is the best cure

For HMRC to bring criminal charges against an organisation under the CCO; the organisation must have failed to prevent the associated person from facilitating the tax evasion. Implementing suitable prevention measures will become an essential aspect of an organisation's defence against prosecution under these rules.

HMRC have outlined the following steps that organisations need to implement in order to comply with this legislation:

- Undertake a **Risk Assessment** of the organisation to understand where the exposures to tax evasion could occur;

- Introduce controls that are **Proportional** to the risks identified;
- Ensure **Top Level Commitment** from the management to ensure the organisation adopts a culture where tax evasion is not acceptable;
- Conduct **Due Diligence** procedures as required on persons acting on behalf of the organisation;
- Once policies and procedures are implemented there should be **Communication and Training** to ensure all individuals have a full understanding of the new rules; and
- Organisations should continue to **Monitor and Review** the risks they face and update their policies and procedures as required.

## Property developers

The public procurement opportunities for property developers is anticipated to be significant so being disinvited from the party; for a small lapse in corporate governance by failing to implement policies to comply with these rules will be extremely costly. Taking action now, should ensure that your tendering process remains unaffected. The actual process is not clear, but a simple question about whether you have carried out a CCO risk assessment and having a suitable policy in place could mean your tender is rejected.

## How we can help

Undertaking and documenting a comprehensive risk assessment will form the basis of any defence against prosecution under CCO. This should be complimented with the implementation of policies and procedures which demonstrate an organisation's commitment to preventing the facilitation of tax evasion. PEM are able to undertake a bespoke risk assessment and provide clear written policy documentation to ensure compliance with this legislation.

If you have any further questions regarding any of the issues raised above, please do not hesitate to contact Anil Arora (aarora@pem.co.uk).



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