

Criminal Finances Act 2017 (Part 3) & Universities

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1. What is the Criminal Finances Act & how does it affect universities?

When?

The Criminal Finances Act (CFA) 2017 comes into force on **30 September 2017**.

What?

Part 3 of the Act introduces a new 'corporate criminal offence of failure to prevent the facilitation of tax evasion'.

The legislation applies to all business (corporates and partnerships) and all taxes.

It is important to bear in mind that this particular offence is not about the university itself avoiding, evading or underpaying tax, but about the university failing to prevent its employees/agents/associates from facilitating the evasion of tax by *another party*.

Who?

All UK corporates (including universities) and partnerships are affected and can be subject to prosecution for the facilitation of tax evasion by 'associated persons'.

Associated persons can include employees, agents or those that provide services for or on the university's/company's behalf.

Where?

There are two corporate offences – a domestic tax fraud offence and an overseas fraud offence. A UK incorporated body can be prosecuted for either offence. While the overseas offence is slightly narrower in scope, it still essentially means that universities need to consider potential risks for overseas tax evasion as well as UK tax evasion.

Why?

The Government believes that relevant bodies should be criminally liable where they fail to prevent those who act for, or on their behalf, from criminally facilitating tax evasion. The new corporate offence aims to overcome the difficulties in attributing criminal liability to 'relevant bodies' for the criminal acts of employees, agents or those that provide services for or on their behalf.

Importantly, there should be a top level commitment within the organisation to embedding processes which will help eliminate opportunities for facilitating tax fraud and this should be followed through to the areas of the business where decisions are made and actions are taken.

How?

Successful prosecution could lead to:

- An unlimited fine;
- A public record of conviction; and
- Significant reputational damage and adverse publicity.

There is a defence of having reasonable prevention procedures in place, and this is what universities need to work on before the legislation comes into force.

More Detail

The UK offence:

This requires three stages -

1. The criminal tax evasion by a taxpayer (either an individual or a legal entity) under existing law
2. The criminal facilitation of the tax evasion by an 'associated person' of the relevant body who is acting in that capacity (as defined by the Accessories and Abettors Act 1861)
3. **The relevant body failed to prevent its representative from committing the criminal facilitation act.** (This is what the new legislation from 30 September 2017 brings in).

The overseas offence:

This requires the same three stages, but there are additional questions to consider to determine whether it is an offence under CFA -

1. The criminal tax evasion by a taxpayer (either an individual or a legal entity) under existing law
2. The criminal facilitation of the tax evasion by an 'associated person' of the relevant body who is acting in that capacity (as defined by the Accessories and Abettors Act 1861)

Stage A: *Would this be a crime if carried out entirely in the UK?*

Stage B: *Does the overseas jurisdiction have the equivalent laws at Stage 1 and 2?*

3. The relevant body failed to prevent its representative from committing the criminal facilitation act.

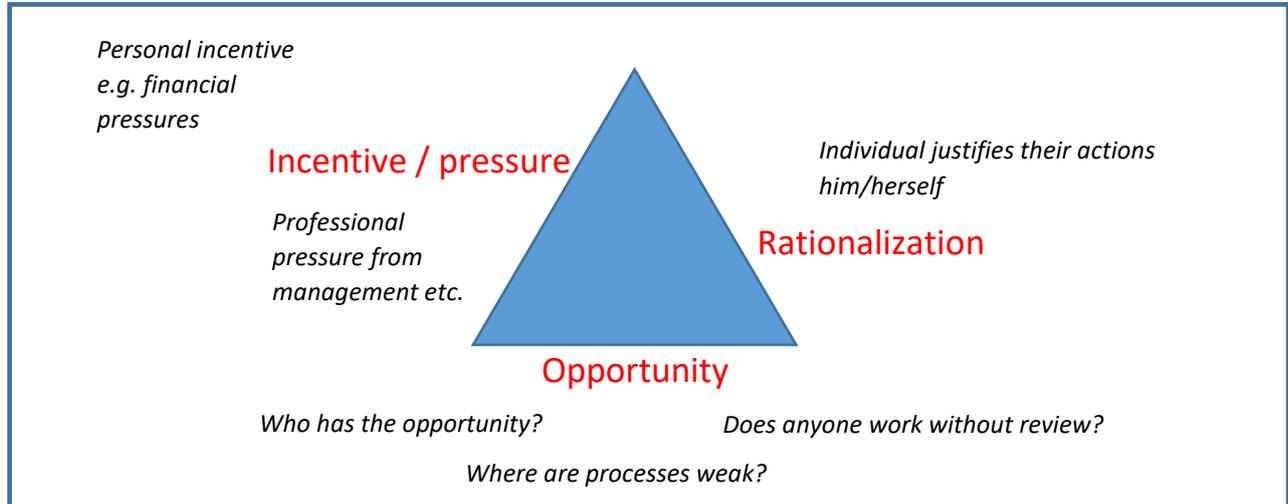
Defence: Where the relevant body has put in place 'reasonable prevention procedures' to prevent its associated persons from committing tax evasion facilitation offences (stage two), or where it is unreasonable to expect such procedures, it shall have a defence.

A relevant body is: an incorporated body or partnership

An associated person is: an employee, agent or *other person who performs services for or on behalf of* the relevant body. The offence is committed where the facilitation offences are committed by someone acting in the capacity of an associated person. The associated person can be an individual or an incorporated body.

The question as to whether a person is performing services for or on behalf of an organisation is to be determined by reference to all the relevant circumstances and not merely by reference to the nature of the relationship between that person and the organisation. The contractual status or label of a person performing services for or on behalf of the organisation does not matter, so, for example, employees, agents and sub-contractors can be associated persons.

The fraud triangle:



When considering the proportionality of reasonable prevention procedures, some suggested risk factors to consider may include the following:

- **Opportunity** – could someone facilitate tax evasion?
 - Do any associated persons have the opportunity to facilitate client tax evasion?
 - Is their work subject to monitoring or scrutiny, for example a second pair of eyes?
 - How likely is detection of any facilitation?
- **Motive** – why could it happen?
 - Does the reward and recognition system and corporate culture (including sanctions and penalties) incentivise or dissuade potential criminal facilitation of tax evasion, or whistle-blowing when tax evasion is uncovered?
 - What are the consequences of wrong-doing?
- **Means** – how could it be done?
 - What means of criminally facilitating tax fraud do your associated persons have?
 - Are there particular products, services or systems that could be open to abuse and used to criminally facilitate tax evasion?
 - Do those in high risk roles receive regular fraud training and how vigorously is compliance with training evaluated or monitored?

2. What does HMRC expect of you?

[HMRC's \(draft\) guidance](#) focuses on six key principles of defence:

1. Risk assessment

And then implementation of prevention procedures based on that risk assessment:

2. Top level commitment
3. Due diligence
4. Proportionality of reasonable procedures
5. Communication and training
6. Monitoring and review

3. What do universities need to do before 30 September?

The immediate next step for universities is:

Risk Assessment

Carry out (and document) a risk assessment. (This must be documented or it would be extremely difficult to use it in any defence against the new offences).

This should be an assessment of the nature and extent of your exposure to the risk of any of your 'associated persons' engaging in activity during the course of business to criminally facilitate tax evasion. Reasonable prevention procedures must be proportionate to the size, complexity and risk profile of your business. A proper analysis of the risks can only be carried out with a comprehensive understanding of how the university operates.

Similar risk assessments may have been carried out for anti-money laundering and anti-bribery regulations, and, although you need to consider the specific risks relating to employees/agents etc. facilitating tax evasion, these may be a useful place to start in terms of looking for risk areas.

NB: This is NOT an analysis of tax risks in relation to the university's own tax obligations, whether through error, omission, avoidance or evasion. (However, if you do not already have such a register for the university's own tax obligations, it is a good idea to undertake such a review, as a separate exercise, although there is no legal obligation to have one).

Additionally, by 30 September, you need to have:

Identified the internal stakeholders with accountability and responsibilities for the legislation in your university. Does this include the FD, the head of tax, the head of legal services, the procurement director, the HR director?

Implemented some quick wins, especially in relation to demonstrating **top level commitment** – for example, this may be in the form of a statement of commitment to the CFS principles published on your website and communicated to all staff.

Put in place **a plan to implement further prevention procedures** on a prioritised basis including due diligence procedures, introducing monitoring and review processes etc.

4. October 2017 and beyond

You will need to continue to work on:

1. Implementing policies and procedures
2. Training staff
3. Continuous monitoring and review

You will need to continually bear in mind HMRC's six guiding principles and take action on them as and when necessary:

1. Risk assessment
2. Top level commitment
3. Due diligence
4. Proportionality of reasonable procedures
5. Communication and training
6. Monitoring and review

5. Suggested list of documents

Universities should consider putting the following documentation in place to provide a defence against the new CFA offences:

1. A Risk Assessment
2. A Public Statement of Commitment to the CFA Principles
3. Procedure Documents relating to different affected processes within the university's operations, or alternatively, where more appropriate, amending existing process/policy documentation
4. A Communication to All Staff: regarding the CFA and any new or amended process/policy/procedure documents
5. Training materials – these should be for training staff, but there may also be a need for training agents and suppliers in some circumstances if they are 'associated persons' and you have identified a relevant tax evasion risk
6. Amending new starter communications/induction material to incorporate information/training about the CFA
7. New contractual clauses with suppliers and customers etc. relating to the new CFA offences and obligations
8. Documentation to record reporting of any offences/suspensions
9. Documentation to record regular review and monitoring of procedures

Appendix A

HMRC guidance on common risks

HMRC's guidance provides the following information about common risks, in general:

'Commonly encountered risks

An assessment of external and internal risks is intended to help inform how these risks can be mitigated by the relevant body's procedures and the level of due diligence a relevant body may deem it reasonable to apply in relation to a given situation.

Stakeholders may wish to consider the commonly encountered risks based on the Bribery Act guidance¹¹, which are considered from a tax fraud perspective.

Country risk: this is evidenced by perceived high levels of secrecy or use as a tax shelter. Such countries are also unlikely to subscribe to the Common Reporting Standard and be given a low tax transparency score by the OECD.

(Tax transparency ratings and lists of high risk tax jurisdiction published by organisations like the OECD¹² may also be relevant for tax purposes).

Sectoral risk: some sectors pose a higher risk of facilitating tax evasion than others, such as financial services, tax advisory and legal sectors.

Transaction risk: certain types of transaction give rise to higher risks, for example, complex tax planning structures involving high levels of secrecy, overly complex supply chains, or transactions involving politically exposed persons.

Business opportunity risk: such risks might arise in high value projects or with projects involving many parties, jurisdictions or intermediaries.

Business partnership risk: certain relationships may involve higher risk, for example, the use of intermediaries in transactions, where those intermediaries are based in jurisdictions operating lower levels of transparency and disclosure. Entering into a business partnership with organisations that have either has no fraud prevention procedures, or has known deficiencies in their fraud procedures may involve higher risk.

In addition, the following risks may also be considered for tax fraud:

Product risk: certain products and services may have a higher risk of misuse by either clients of associated persons.

Customer risk: the identification that a business unit has particular risks related to customers or products is highly likely to indicate that there is a greater risk of the criminal facilitation of tax evasion by an associated person.

In addition, stakeholders may also want to consider the [JMLSG¹ guidance](#) on high and low risk factors, although these will need to be considered specifically from a tax fraud perspective:

JMLSG Guidance – high risk factors (4.34-4.36)

Customer risk factors

- The business relationship is conducted in unusual circumstances
- Non-resident customers
- Legal persons or arrangements that are personal asset holding vehicles
- Companies that have nominee shareholders or shares in bearer form
- Business that are cash intensive
- The ownership structure of the company appears unusual or excessively complex

Country or geographic risk factors

- Countries identified by credible sources as not having adequate Anti-Money Laundering and Counter-Terrorism Financing (AML/CTF) approaches
- Countries subject to sanctions, embargoes, or similar measures issued by, for example, the UN
- Countries identified by credible sources as providing support for terrorist activities, or that have designated terrorist organisations operating within their country

Product, service, transaction or delivery channel risk factors

- Private banking
- Anonymous transactions (which may include cash)
- Non face-to-face business relationships or transactions
- Payment received from unknown or un-associated third parties

Firms should examine, as far as reasonably possible, the background and purpose of all complex, unusual large transactions, and all unusual patterns of transactions which have no apparent economic or lawful purpose.’

¹ Joint Money Laundering Steering Group guidance

Appendix B

Examples of possible fraud/evasion in HMRC's guidance

Some of these examples provided by HMRC could be applicable in any business sector, including higher education.

General examples:

- A member of staff deliberately falsifies information in relation to a worker, so that the worker is treated as a contractor rather than deducting PAYE at source.
- A member of staff deliberately and dishonestly collaborates with one of your suppliers to falsify the amount paid on an invoice e.g. by disguising the true amount paid so that the supplier evades income/corporate taxes.
- A member of staff deliberately conspires with a supplier to conceal the true source country of goods to evade Customs duties

In the examples above the tax fraud is committed by a third party but the employee is an associate of the university/company and therefore unless the university/company has procedures and processes in place to try to prevent these actions by the employee, the university/company could be prosecuted for the corporate criminal offence of failure to prevent the facilitation of tax evasion.

- A French branch engages a French resident Mme X as a contractor. Mme X asks to be paid for these services via company in the Cayman Islands, which French branch agrees to facilitate. Mme X fails to declare her income to French tax authorities. Unless UK parent of French branch can demonstrate reasonable procedures to prevent French branch from committing the tax evasion facilitation offence, there can be a successful prosecution of UK parent.

1) Low/Medium risk

- A mid-size car parts maker ("UKCO") operating in the UK and Europe, entered into a sub-contracting arrangement with an UK distributor. The senior managers of the UK distributor created a false invoicing scheme with the assistance of a purchaser, allowing the purchaser to evade UK taxes due on its purchase of the car parts in the UK
- UKCO itself undertook a tax evasion focused risk assessment, identifying only low and medium level risks to the organisation, subsequently implementing a number of prevention policies and procedures to mitigate the identified risks. UKCO had a clear policy against tax evasion, including terms and conditions within contracts with all third parties
- UKCO also carried out a due diligence assessment of its sub-contracting partner, but not for the entire supply chain. Nothing abnormal was detected during the due diligence test and consequently, UKCO had no reason to believe that the staff of the distributor were involved in a fraudulent tax scheme

In these circumstances, UKCO had undertaken a tax evasion facilitation risk assessment, had procedures and processes in place, as well as conducting a due diligence assessment of its sub-contracting partner. It is therefore unlikely that this company would have committed the offence as it has a valid defence of having reasonable procedures in place and articulating and evidencing what it had done, even if it did not conduct due diligence for the entire onward supply chain.

Whilst UKCO could have done more, it would not have been reasonable or proportionate to do so, the steps that it did take were proportionate to the risks it identified and faced.

2) Higher risk

- As part of a large transaction an employee of a UK-based multinational bank knowingly referred a corporate client to an offshore accounting firm with the express intention of assisting the corporate client to set up a structure allowing the client to evade foreign income tax
- The bank, which had rigorous prevention procedures for money laundering and bribery procedures, undertook only a light-touch tax evasion risk assessment, nominally including the word 'tax' into existing procedures and processes, but not effectively implementing or enforcing them or reviewing tax fraud risks
- The bank undertook no tax evasion focussed due diligence assessment of the accounting firm to which the client was referred.

In these circumstances, although the bank could attempt to mount a defence of having reasonable procedures in place on paper for tackling the facilitation of tax evasion, in reality it had relied on unaltered money laundering and bribery procedures. Despite being in a high risk sector, it had also failed to undertake a thorough risk assessment, or follow Government or sector-focused guidance on the types of processes and procedures needed to mitigate risks. It is therefore likely that the bank would be found to have committed the new offence and would be unable to put forward a successful reasonable procedures defence.

Branches and the overseas fraud offence

Gladstone Bank is a bank incorporated and headquartered in Switzerland. The bank has branches in a number of jurisdictions, including the UK and Germany. Whilst the bank has several branches across the world, the branches are not separate legal entities (they are branches not subsidiaries): the bank is a single legal entity, a company incorporated under Swiss law. All the bank's branches comprise a single legal person.

UK Branch

The UK Branch consists of a small number of employees whose functions are restricted to:

- attracting and on-boarding clients for Gladstone Bank;
- providing minor administrative services; and
- acting as a first point of contact for UK based customers.

The UK branch attracts and on-boards a number of clients for Gladstone Bank resident in London, including Freya who has UK tax liabilities and Larry who has German tax liabilities. The employees of the UK branch attract the clients in good faith believing that Gladstone Bank is providing routine

financial services to its clients. Once the clients have been attracted all financial services are provided by either the bank's headquarters in Switzerland or employees in the German Branch.

German Branch

Employees of the German Branch, deliberately and dishonestly help Larry to evade his German tax liabilities. The employees:

- advise Larry on structures that allow him to hide his assets and income from the German tax authorities;
- provide false certification to hide the true owners of accounts; and
- deliberately fail to comply with the applicable Anti Money Laundering Regulations.

Swiss Head Office

Employees of the Swiss headquarters deliberately and dishonestly help Freya to evade her UK tax liabilities. The employees:

- advise Freya on structures to help her hide overseas income from the UK tax authorities;
- deliberately set up a bank account in Switzerland knowing it is going to be used to hide the overseas income from the UK tax authorities.

A. Liability for the UK fraud offence

Stage 1: Taxpayers

Freya has deliberately and dishonestly failed to declare her taxable income and assets to HMRC with the intention of not paying the tax that she legally owes. She has committed the offence of being knowingly concerned in the fraudulent evasion of income tax contrary to section 106A of the Taxes Management Act 1970.

Stage 2: Associated persons of Gladstone Bank and criminal facilitation

Employees of Gladstone's Swiss Head Office have deliberately and dishonestly provided services to Freya to help her to hide her taxable income and assets in order to help her evade her UK tax liability. They are also guilty of being knowingly concerned in the fraudulent evasion of income tax, an offence contrary to section 106A of the Taxes Management Act 1970.

The associated person was providing services (advice to clients) for or on behalf of the bank when they committed the tax evasion facilitation offence.

Stage 3: Liability for Gladstone Bank for failing to prevent the criminal facilitation of tax evasion

Gladstone Bank is not guilty of the section 106A Taxes Management offence. It is not possible to attribute the requisite guilty mind to the bank itself in respect of the criminal act committed, because none of the people considered to be the bank's directing mind and will (typically the Board of Directors) were involved in the offence. However, the bank is liable for having failed to prevent its associated persons operating in its Swiss Head Office from criminally facilitating Freya's UK tax liability (the new UK tax offence) unless it is able to establish the reasonable prevention procedures defence.

Gladstone Bank cannot mount a reasonable prevention procedures defence, its procedures were not reasonable because it had only implemented procedures for a small number of UK-based staff. It is no defence to claim that it should not be expected to put in place prevention procedures designed to prevent its associated persons from being complicit in fraud resulting in a tax loss outside of Switzerland.

B. Liability for the Overseas Fraud Offence

Stage 1: taxpayers

Larry has deliberately and dishonestly failed to declare his taxable income and assets to the German revenue authorities with the intention of not paying the tax that he legally owes. There is 'dual criminality' as there are equivalent offences at the taxpayer level in the UK and Germany.

Stage 2: Associated persons of Gladstone Bank and criminal facilitation

Employees of Gladstone's German branch have deliberately and dishonestly provided services to Larry to help him hide his taxable income and assets in order to help him evade his German tax liability.

The associated person was providing services (advice to clients) for or on behalf of the bank. There is 'dual criminality' at the facilitator level as there equivalent offences in both the UK and Germany.

Stage 3: As Gladstone Bank has a UK branch and the bank is a single legal entity it is within scope of the new foreign tax evasion facilitation offence. Gladstone Bank has also failed to prevent its associated person, i.e. employees of its German Branch, from criminally facilitating the evasion of German tax by Larry.

Gladstone Bank is unable to put forward a defence of having put in place reasonable procedures to prevent the criminal facilitation of tax evasion because its procedures were not reasonable as it decided to only introduce prevention procedures for staff dealing with UK taxpayers. Claiming that it does not believe that it should have to exercise due diligence over employees of its branches in other countries provides no defence to this.

Appendix C

Commitment Statements

Under HMRC's six guiding principles your university will need to demonstrate 'top level commitment' to the principles of CFA 2017 i.e. that the university is committed to ensuring that its employees, agents and any other associated persons acting on the university's behalf, are not facilitating tax evasion by a third party (whether the third party is the employee, agent, associated person or some other third-party individual or corporate body).

Demonstrating this top level commitment could take the form of:

- a specific statement regarding CFA 2017 from the university's governing body, or a member of its senior staff, published on the university website,
- a general statement covering the university's commitments in relation to preventing many different types of fraud under CFA 2017, Money Laundering regulations, Anti-Bribery laws etc. from the university's governing body, or a member of its senior staff, published on the university website,
- a specific statement regarding CFA 2017 in the university's Tax Strategy, with clear sign off from the university's governing body, or a member of its senior staff.

Appendix D

Example CFA Policy

1. The University of X has nominated a key officer responsible for information, training and queries on CFA 2017 within our organisation – the key officer for CFA 2017 is: Mrs A Bloggs, Central Finance
2. The University of X has also nominated divisional/school officers responsible for information, training and queries on CFA 2017 within their relevant divisions/schools – the departmental officers for CFA 2017 are:
 - Central Administration: Mrs A Bloggs, Central Finance
 - Medical Sciences: Mrs P Smith, Biochemistry Dept
 - Humanities: Prof. T Jones, Dept of English Language & Literature
 - Maths & Physical Life Sciences: Dr. J Phillips, Physics Dept
 - Social Sciences: Ms. V Underwood, Dept of Economics
3. The University of X regularly reviews its risks and associated processes and procedures (at least annually) to ensure that all steps are taken to prevent facilitation of tax evasion.
4. The University of X regularly reviews guidance and legislation (at least twice a year) in relation to CFA 2017 to ensure it is maintaining an appropriate CFA 2017 policy.
5. The University of X maintains a register of possible risks of the facilitation of tax evasion by its staff and associates, as well as listing controls to mitigate those risks, and any actions required to improve those controls. This register is regularly reviewed and updated, as and when required in relation to the nature of the specific risks.

Appendix E

Training suggestions

All staff:

Awareness needs to be raised among all staff of the new rules, and the relevant processes (both existing and new) which the university has in place to help prevent the facilitation of tax evasion, to ensure staff are aware of the processes and procedures they need to follow.

New staff:

Awareness of the rules and the relevant prevention processes and procedures should be included in induction training for new staff. If the university uses e-learning for new staff, it may wish to consider including some e-learning on CFA 2017 as part of this.

Key areas/departments of the university:

Some departments of the university such as procurement, legal services, payroll etc. where you have identified specific risks (hopefully having undertaken the risk review in conjunction with these departments) will likely need more in-depth training and assistance than those in other departments who may only need an awareness of the relevant processes.

Key contacts for CFA 2017:

Any overall and/or divisional CFA 2017 'champions' will need in-depth training on the issues and responsibilities. We suggest they review all the additional documents, webinars etc. listed in Appendix G and also consider specific CFA 2017 training in the form of e-learning or classroom based training.

Possible training materials/courses:

[VinciWorks](#) provides an online training package specifically about Part 3, CFA 2017 (i.e. the new corporate offence of failing to prevent tax evasion) with prices based on the number of users. More details and contact information can be [found here](#). There is a 10% discount available for BUFDG members (contact [Sharon Cahn](#) to discuss), however, the training is not aimed at the HE sector and the examples used are not particularly relevant to HE, so you may wish to ask to view samples of the training before purchasing.

Training firm [MBL \(Management, Business, Law\)](#) is running afternoon seminars in London and Manchester on 3 and 18 October (however, these seminars cover all aspects of CFA 2017 and not just Part 3, the new corporate offence of failing to prevent tax evasion). Details, costs and booking can be [found here](#). (Note – we are not aware of what content this course will include so we suggest you check with the organisers as to whether it will be appropriate).

Appendix F Further help

See the links below for further information, help and guidance regarding the new corporate offence under CFA 2017:

[KPMG example CFA2017 risk register for universities](#)

[KPMG sample process re: Corporate Criminal Offence in CFA2017](#)

[KPMG WebEx for universities](#)

[HMRC Guidance](#)

[Criminal Finance Act 2017](#)

[BDO guidance on preparing a defence](#)

[A Deloitte webinar](#) (you will need to register to access the recording)

[Tax Journal article](#)

[Taxation magazine article](#)

[Deloitte webpage on CFA2017](#)