




TAX PERFORMANCE AND RISK MANAGEMENT

# CORPORATE CRIMINAL OFFENCES

FACILITATION OF TAX EVASION  
REASONABLE PREVENTION PROCEDURES





## **A FORMAL REQUIREMENT TO PREVENT THE FACILITATION OF TAX EVASION**

The Corporate Criminal Offence (CCO) of failure to prevent the facilitation of tax evasion is part of the continued, global focus on the prevention of tax evasion and other financial crimes. It is one of a raft of measures in the UK that was introduced in the Criminal Finances Act and takes effect from September 2017.

## **RECENT DEVELOPMENTS FROM HMRC**

Our conversations with HMRC have highlighted that they see this legislation as bringing about a “cultural change” in how prevention procedures over tax evasion are “embedded in the organisation”. HMRC said this cultural change should “track through from top level commitment into procurement where the decisions that are made matter.”

In our recent conversations with HMRC in 2018, we are also hearing that HMRC is looking to focus heavily in the coming years on the ‘facilitators and enablers’ of ‘non-compliance’ (a blanket term which encompasses both avoidance and evasion). The CCO legislation is seen as a key element of this wider response. Moreover, it is no mere ‘paper tiger’ and is expected to have real teeth. Significant additional resource is being focussed on this area by HMRC, with anticipated additional revenues generated of some £650m by April 2023.



# THE LEGISLATION AT A GLANCE

Royal Assent of the Criminal Finances Bill at the end of April confirmed that the new CCO legislation will affect all organisations from 30 September 2017.

## WHO IS AN 'ASSOCIATED PERSON'?

It is a very broad term, and includes any person (individual or corporate) who provides services for or on behalf of a corporate. For example employees, contractors, agents or those that provide services for or on a corporate's behalf.

## BACKGROUND

Based on the UK Bribery Act 2010, the aim of the legislation is to overcome the difficulties in attributing criminal liability to corporates when its employees, contractors and other 'associated persons' are seen to be facilitating tax evasion by a taxpayer who could include a customer or supplier.

Under this legislation, it is the corporate that is subject to prosecution without the need for prosecution of any individual.

## WHO AND WHAT IS AFFECTED?

It applies to all taxes, and is relevant to all businesses (namely, corporate bodies and partnerships) whatever their size or industry sector.

This UK tax evasion offence applies to businesses worldwide and is applicable to any business with certain UK connections.

## SANCTIONS

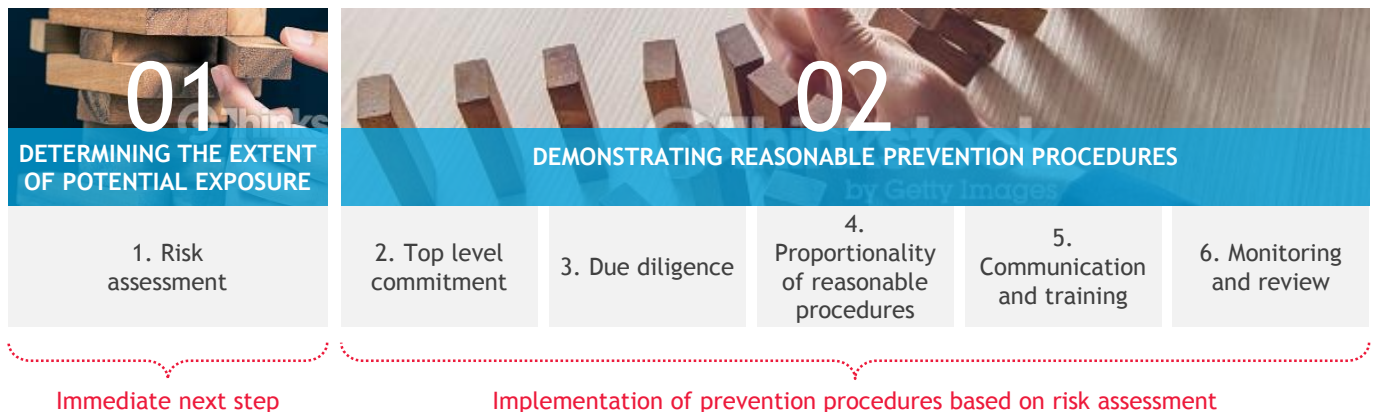
A successful prosecution could lead to:

- ▶ An unlimited fine
- ▶ Public record of the conviction
- ▶ Significant reputational damage and adverse publicity
- ▶ Severe regulatory impact.

## DEFENCE

Similar to the Bribery Act 2010, there is a defence of having reasonable prevention procedures in place.

In formulating a robust defence, the guidance issued by HMRC focusses on the following six key principles of defence as set out below.



## DEFINING THE SCOPE OF THE OFFENCES

The CCO has a wide geographic scope and applies to the failure to prevent the facilitation of UK and overseas tax evasion.

### THE DOMESTIC OFFENCE



#### STAGE 1

Criminal tax evasion by a taxpayer (either an individual or an entity) under the existing UK law.



#### STAGE 2 \*

Criminal facilitation of this offence by an 'associated person' - in other words, a person acting on behalf of the corporation and knowingly aiding, abetting, counselling or procuring the tax evasion by a taxpayer.



#### STAGE 3\*

The corporation failed to put in place reasonable procedures to prevent an associated person from committing a tax evasion facilitation offence as defined in Stage 2.

\* Note: Where there is a UK tax evasion facilitation offence it does not matter whether the relevant body is UK-based or established under the law of another country, or whether the associated person who performs the criminal act of facilitation is in the UK or overseas.

### THE OVERSEAS OFFENCE



#### STAGE 1

Criminal tax evasion by a taxpayer (either an individual or an entity) under the existing law of the overseas jurisdiction that would amount to a criminal offence in the UK. The category of tax does not have to be equivalent, but the criminal offence does.



#### STAGE 2

Criminal facilitation of this offence by an 'associated person' of the corporation. This offence, if carried out in the UK would amount to a criminal offence and constitutes a criminal offence in the jurisdiction suffering a tax loss.



#### STAGE 3\*

The corporation failed to put in place reasonable procedures to prevent an 'associated person' from committing a tax evasion facilitation offence as defined in Stage 2.

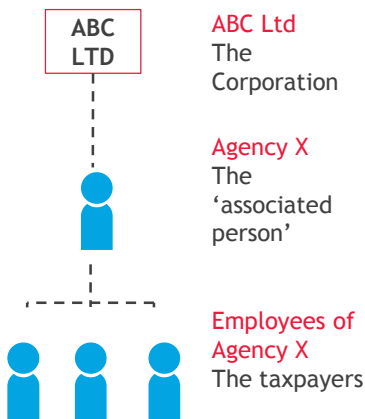
\*Note: Only relevant bodies with a 'UK nexus' can commit the overseas offence. In overview, this means the overseas offence can only be committed by a relevant body:

- incorporated under UK law
- carrying on a business or other undertaking from a permanent establishment within the UK, or
- whose associated person is located within the UK at the time of the criminal act that facilitates the evasion of the overseas tax

# DEFINING THE SCOPE OF THE OFFENCES

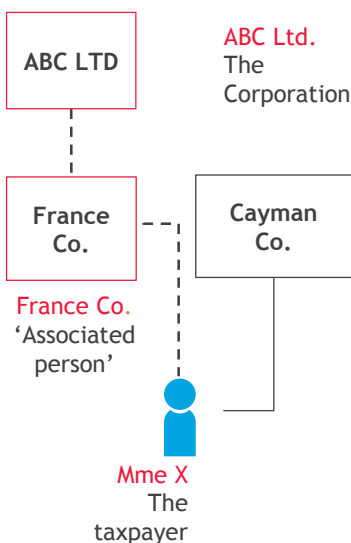
All industries could be affected by potential CCO offences - here are two examples of how an offence could arise (more are included in our FAQ's). In both cases, a key consideration should be whether the services provided for or on behalf of the associated person are ancillary to the business.

## THE DOMESTIC OFFENCE



- ▶ A corporation contracts for UK services from Agency X. For example, this could include a contract for key services to the business that may exist within the corporation's supply chain. It is important to state that the agency will not be an associated person where they are carrying out activities which are not 'for or on behalf of' the corporation. This is typically a question of function rather than form.
- ▶ Considering all relevant factors, Agency X is determined to be an "associated person" of ABC Ltd
- ▶ Employees of Agency X deliberately fail to declare all of their income for UK tax purposes. This constitutes tax evasion under Stage 1
- ▶ Agency X is aware that his employees are not declaring their income and does not put the payments through the payroll. As such, the agency is deliberately facilitating their tax evasion. This satisfies the requirements of Stage 2
- ▶ Unless ABC Ltd can demonstrate reasonable procedures to prevent Agency X from committing the tax evasion facilitation offence, there may be a successful prosecution of ABC Ltd. This is Stage 3
- ▶ Reasonable prevention procedures may include ABC Ltd having carried out a risk assessment, specific contract terms in the engagement with Agency X, good contractor and supplier due diligence procedures and ongoing monitoring and review.<sup>1</sup>

## THE OVERSEAS OFFENCE



- ▶ ABC Ltd has a contract with a third party supplier, France Co, to provide services on behalf of ABC Ltd<sup>2</sup>
- ▶ Having considered all relevant factors, it is determined that France Co is an 'associated person' of ABC Ltd
- ▶ France Co engages with Mme X as a contractor. She is a French resident and provides these services as a supplier to France Co
- ▶ Mme X asks to be paid for these services via a company in the Cayman Islands
- ▶ Mme X deliberately fails to declare her income in France. This satisfies the requirements of Stage 1
- ▶ France Co is aware that Mme X is not declaring her income and is deliberately facilitating the tax evasion by invoicing the company based in the Cayman Islands. This satisfies Stage 2
- ▶ Unless ABC Ltd can demonstrate reasonable procedures to prevent France Co from committing the tax evasion facilitation offence, there may be a successful prosecution of ABC Ltd. This is Stage 3
- ▶ Reasonable prevention procedures may include ABC Ltd having carried out a risk assessment in relation to their contractors, reviewing the specific terms in their engagement terms with France Co, adequate due diligence procedures and ongoing monitoring and review.<sup>1</sup>

<sup>1</sup> It is worth noting here that the rules are applied proportionately, so no procedures could be the right answer.

<sup>2</sup> It should be noted here that the overseas offence can be committed by any relevant body which is incorporated under UK law and has nexus in the UK. This means an overseas company with a UK branch could be liable for facilitation of tax evasion.

# DEMONSTRATING REASONABLE PROCEDURES

## What do you need to do - first steps

### A RISK ASSESSMENT: A FUNDAMENTAL STEP

Your first step is to undertake 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 any business.

Analysis of the inherent risks can only be carried out with a comprehensive understanding of your business operations.

### TAX EVASION CCO RISK ASSESSMENT (TECRA)

We have developed a scoring methodology that is aligned to guidance provided by HMRC. TECRA is a fundamental element of our phased approach and will provide a level of assurance that your prevention procedures meet the requirements of the legislation.

Our methodology:

- Determines areas of vulnerability and assesses existing controls for identified risk areas in your business connected to your 'associated persons'
- Identifies vulnerability factors which have been defined by HMRC as commonly encountered risks (originally articulated in the Bribery Act guidance) that organisations could consider when responding to the CCO legislation and undertaking a risk assessment exercise

- Considers the strength of mitigating controls using the defence categories as described
- Where gaps are identified, we provide a supporting traffic light system of recommendations to prioritise where a deficiency must be addressed.

The risk assessment plays a fundamental role in evidencing that you have reasonable prevention procedures in place. HMRC states: "everything hangs off this. You need an assessment of how your associated persons could criminally facilitate tax evasion." In addition, we were informed that you "must document your risk assessment - I cannot tell you how many businesses fail to do this in respect of the Bribery Act".

### Example risk outputs -TECRA and standard CCO Risk Register

SUMMARY OVERVIEW							
Risk area		Threat likelihood 'A'	Level of vulnerability 'B'	Total risk score 'A' x 'B'	Total control score 'C'	Mitigated risk score 'A' x 'B' - 'C'	Overall risk rating
UK only	1. Product X supply chain	2	10	20	8	12	LOW
	2. HR and recruitment	3	13	39	9	30	MEDIUM
	3. Use of agents and contractors	3	9	27	9	18	LOW
Overseas	4. Africa						
	5. Use						
	Type of Transaction	Potential Risks	Impact (ie £, how big a part of the business)	Risks Identified	Recommended Remedial Action	Risk Rating	
1.	Purchasing - Supplier Take On	Supplier not disclosing all income  The risk is heightened in high risk overseas jurisdictions	The Group engage with 3,500 suppliers in a number of countries, including some situated in higher risk countries.	The current processes and controls in place with regards to supplier take on are not considered to be robust.  As there are a large number of suppliers with a large geographical spread, the potential risk from a CCO perspective is considered high.	We recommend that increased due diligence is carried out for Supplier Take On, for example:  - Checking that payments are only made to bank accounts in the name of the business to whom they are transacting with - The bank account is located in the same jurisdiction as the supplier	High	

# DEMONSTRATING REASONABLE PROCEDURES

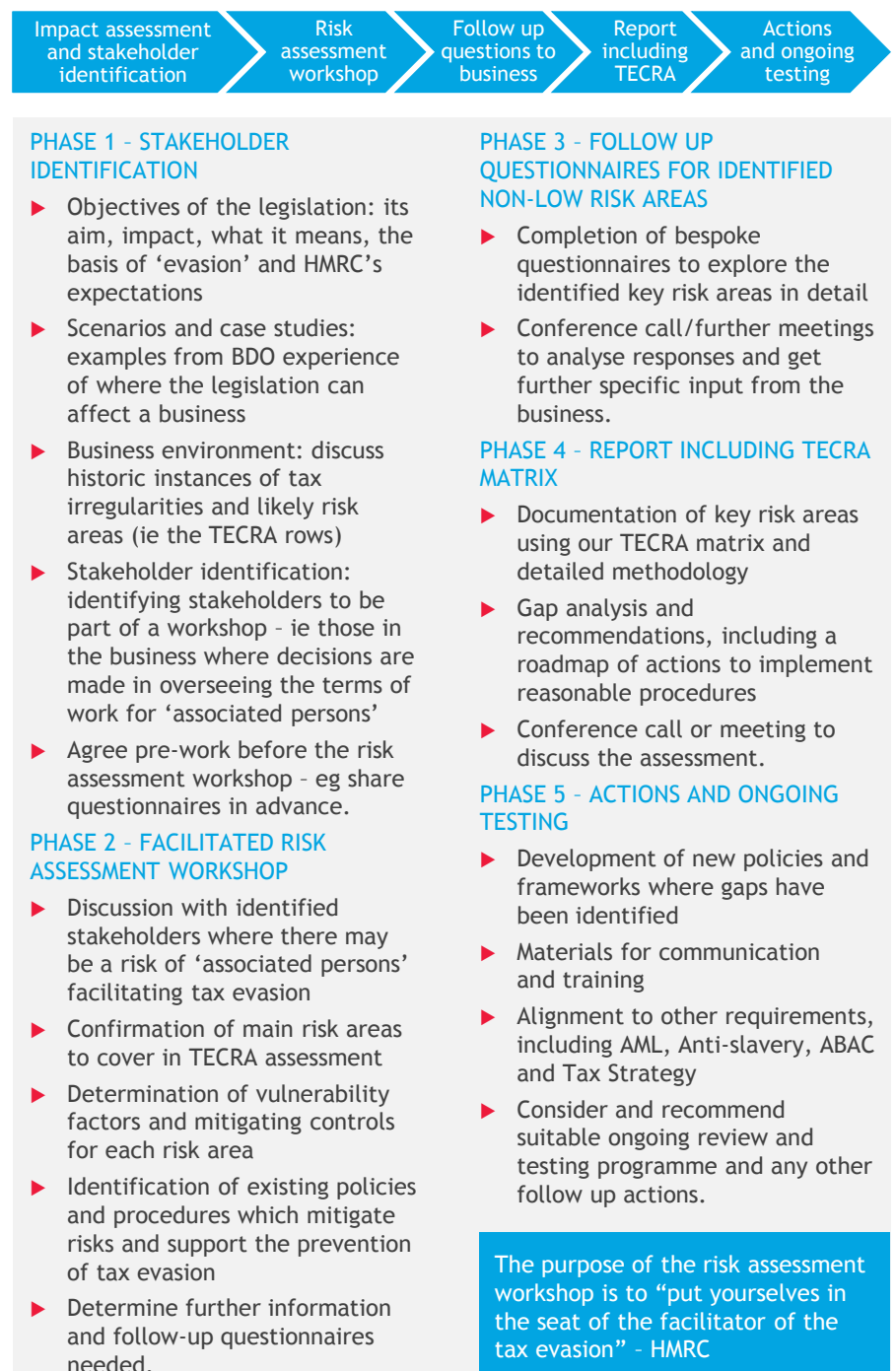
What do you need to do - first steps?

HMRC appreciate that what are accepted as reasonable procedures will develop over time. Nevertheless, it is important that organisations meet the existing six principles outlined in the guidance before the legislation comes into force. We have developed a phased approach that you should be progressing during 2018 and have outlined the immediate steps below.

## YOU SHOULD NOW:

1. Identify the internal stakeholders with accountability and responsibilities for the legislation in your business. Is this head of tax, head of legal, risk teams or even supply chain?
2. Undertake a risk assessment to establish the extent of potential exposure
3. Implement some quick wins, especially in relation to demonstrating top level commitment
4. Put in place a plan to implement further prevention procedures on a prioritised basis including due diligence procedures, introducing monitoring and review processes etc.

## OUR PHASED APPROACH: AN ESTABLISHED METHODOLOGY



## Potential steps following the risk assessment

Working with you we can:

- ## DUE DILIGENCE

- ▶ It is a vitally important aspect of your prevention programme that you know who your ‘associated persons’ are and you are aware of any risks that may facilitate tax evasion. Prevention procedures would include clearly articulated due diligence policies.

## MONITORING AND REVIEW

- ▶ Monitoring and review is focused on evaluating the extent to which internal controls are operating as intended.
- ▶ We provide on-going assurance relating to the extent to which arrangements and controls are effective on an annual basis
- ▶ Assist in developing work programmes with your in-house team or deliver an effective audit of anti-tax evasion facilitation procedures.

**“Communication and Training** is one of the key Six Guiding Principles in establishing a defence from prosecution as set out in HMRC’s CCO guidance. BDO’s CCO eLearning course is designed to educate members of your staff on the legislation, contributing to your defence of preventing the facilitation of tax evasion. The training is designed to support your procedures in preventing the facilitation of tax evasion.”

**ARE YOU DOING ENOUGH TO PREVENT THE FACILITATION OF TAX EVASION IN YOUR ORGANISATION?**

**@LEARNING**

The Criminal Finances Act 2017 took effect from 30 September 2017. It introduced new corporate criminal offences (CCO) that apply to organisations that fail to prevent associated persons from criminally facilitating tax evasion. The legislation aims to overcome the difficulties in attributing criminal liability to corporations for the criminal acts of those who act for or on their behalf.

The CCO is part of an ever increasing focus by the UK government on the prevention of financial crime and tax evasion in particular. In responding to this legislation it is vital to be able to demonstrate the way your organisation manages the risk of tax evasion and facilitation of tax evasion by those connected to your

“We partnered with BDO to prepare the business for CCO because they provided a pragmatic and collaborative experience ensuring the training remained relevant to our business. We were very pleased with the content, it looked good and was easy to follow.”

HEAD OF TAX  
MACE GROUP

[illegible]



# FREQUENTLY ASKED QUESTIONS

## Corporate Criminal Offences

We have been working hard with our clients to understand the repercussions of this, and we set out below the top 10 FAQs and learnings based on our work with other companies.

### 1) WHAT IS THE CORPORATE CRIMINAL OFFENCE?

This BDO guide provides an overview on the legislation. Essentially, the new legislation creates two specific corporate offences, one relating to the evasion of UK tax and one relating to the evasion of foreign tax. The legislation is very widely drawn and can apply to the evasion of any tax, including indirect taxes, anywhere in the world. Any UK business, be it a UK corporate or a foreign corporate doing business in the UK, will be within the scope of both offences. The corporate or partnership will have a strict liability under criminal law for failing to prevent the facilitation of tax evasion by one of its associates (employee, contractor or any other person providing services for or on behalf of the corporate). A defence exists of having 'reasonable prevention procedures' in place.

### 2) WHO DOES THIS AFFECT?

All companies and partnerships - there is no de minimis.

### 3) WHAT HAPPENS IF WE DON'T DO ANYTHING? ARE WE AT RISK OF PENALTIES?

Yes, you are. A successful prosecution could lead to:

- ▶ An unlimited fine
- ▶ Public record of the conviction
- ▶ Significant reputational damage and adverse publicity.

### 4) CAN YOU GIVE ME SOME CASE STUDIES OF WHAT THIS LEGISLATION COVERS?

There are two in this CCO guide for the domestic and overseas offence. In addition, here are some others:

- ▶ A member of your HR or payroll team deliberately falsifying information relating to a worker, so that the worker is treated as a contractor rather deducting PAYE at source
- ▶ An employee deliberately and dishonestly collaborates with one of your suppliers to falsify the amount paid on an invoice eg, by reducing the true amount paid so that the supplier evades income/corporate taxes
- ▶ An employee deliberately conspires with a supplier to conceal the true source country of goods to evade Customs duties
- ▶ A US bank has a branch in London and a branch in Singapore. An employee of the Singaporean branch deliberately facilitates Russian tax evasion. The US bank would be culpable.

### 5) WHO NEEDS TO TAKE THE LEAD ON CCO WITHIN THE BUSINESS?

What we are seeing from our conversations with other clients (from FTSE100 to smaller inbounds) is that typically the head of legal and/or the head of risk and compliance is accountable to the Board for ensuring compliance with the legislation (and specifically ensuring the right policies/procedures are in place). However, responsibility for ensuring the risks are identified and that policies/procedures are drawn up which reflect these risks will fall on the tax or finance function.

# FREQUENTLY ASKED QUESTIONS

## Corporate Criminal Offences

### 6) WHAT DOES HMRC EXPECT?

Firstly, it is clear that the risk assessment plays a fundamental role in evidencing that you have reasonable prevention procedures in place. According to HMRC “everything hangs off this. You need an assessment of how your associated persons could criminally facilitate tax evasion.” In addition, we were informed that you “must document your risk assessment - I cannot tell you how many businesses fail to do this in respect of the Bribery Act”.

All procedures must be proportionate to those risks. We were told “how can you prove that your procedures are reasonable if you have never formally identified your risks? The key point is that if you are ever prosecuted how can you prove anything if it is not written down!”

### 7) WE ALREADY HAVE AML/KYC PROCEDURES IN PLACE. WHAT MORE DO WE NEED TO DO?

You may already have AML/KYC procedures in place (as well as any other financial crime procedures). These existing procedures are relevant but it is essential that a CCO risk assessment is carried out and then mapped to the existing procedures. You need to bridge any gaps.

### 8) WHAT SHOULD THE MESSAGE BE FROM THE BOARD?

You need top level commitment. The Board is typically best placed to champion this. From here, your staff will need training so that they know what they need to do. It is imperative that there are no blocks to compliance (ie middle management blocking whistle-blowing from more junior staff).

To be compliant with the legislation, the clear message needs to be zero tolerance for tax evasion, and specifically, the facilitation of it.

### 9) WHAT ARE THE IMMEDIATE NEXT STEPS?

We are being asked to:

Facilitate workshops/interview questionnaires to enable the risk assessment. This typically includes stakeholders such as heads of legal, tax, supply chain, procurement etc.

Share our training materials to incorporate within our clients’ online training procedures

Support in the development of a ‘tone at the top’ policy document on CCO

Prioritise next steps (if any) in terms of enhancing prevention procedures such as due diligence, monitoring and contractual terms.

### 10) WHAT DOES A RISK ASSESSMENT WORKSHOP LOOK LIKE?

The purpose of the risk assessment workshop is to “put yourselves in the seat of the tax evader” - using the words of HMRC.

We facilitate workshops to:

- ▶ Set the scene and provide background to the legislation
- ▶ Run through example scenarios and case studies relevant to your business
- ▶ Determine who are your associated persons
- ▶ Identify potential areas of the business where there is a higher risk of associated persons facilitating tax evasion
- ▶ Determine where in the business decisions are made in overseeing the terms of work for associated persons
- ▶ Document and prioritise key risk areas
- ▶ Determine prioritised risk areas and develop a roadmap.

## BDO TYPICAL APPROACH TO CCO RISK ASSESSMENT

PHASE 1	Understanding impact of legislation: Initial call or initial meeting and stakeholder identification
PHASE 2	Workshop(s) to identify potential areas where associated persons could be facilitating tax evasion
PHASE 3	Development and distribution of follow up questionnaires
PHASE 4	Analysis of responses, development of report including Risk Assessment / Risk Register. Closing call/meeting. Includes roadmap and prioritised action plan.
PHASE 5	Deliver recommendations as appropriate.



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### Our expertise

As one of the world's largest accountancy networks, we offer the full range of service offerings you would expect of a firm of our calibre and quality.

We operate in areas that are important to you now and in areas where you will want to be in the future. Ours is not an alliance of disparate independent firms, but a single network of member firms all bound by the same dedication to client service.

Our expertise includes tax, forensics and legal specialists who have worked for clients across all industries and sizes.

BDO UK

88  
17  
Offices

260 Partners  
3,600 Staff

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**MORE CLIENTS 95%**

**WOULD RECOMMEND US THAN ANY OTHER FIRM**

**2016/2017 RESULTS:**

**REVENUES<sup>2</sup> UP 4.8% TO £456m**

1. Independent research (Mid Market Monitor 2013-2017) by Meridian West shows that BDO, for the third year running, have the highest proportion of clients who would recommend their advisers among its peer group

2. Gross Revenues

### MATCHING YOUR GLOBAL FOOTPRINT





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