

# Combating tax evasion and bribery in the new normal

You are an online retail business. In some parts of the country, you use local logistics firms to deliver goods to your customers. One of those firms has asked your sales team to call your account handler on their mobile over the next few weeks rather than using their usual office number. They explain that the employee has been placed on furlough, but that an arrangement has been reached whereby they will continue to service your account remotely on a 'self-employed' or 'consultancy' basis until business gets back to normal.

## **What do you do?**

You are a manufacturer who uses agents in various foreign territories to market your products to local businesses. Part of their job is to assist with goods clearing the local customs authorities. Following the pandemic, these authorities' controls have tightened and delays in importing have increased substantially. Your agent understands that clearance might be obtained more quickly if certain facilitation payments are made.

**How confident are you that your agent understands your policy of zero tolerance towards bribery and corruption?**

## 1. COVID-19 and the increased fraud risk

The COVID-19 pandemic has increased the fraud risk to which many businesses are exposed.

HMRC has received several thousands of reports of misuse of the Coronavirus Job Retention Scheme. Arrests have already been made. The Crown Prosecution Service has made clear that prosecuting COVID-19 fraud offences is an immediate priority.

The OECD Working Group on Bribery has also recently warned specifically of increased bribery risk during the pandemic in areas such as public procurement, for example.

Many businesses will have taken preventative steps to guard against the risk of fraudulent or other criminal activity taking place within their own organisations, for example by considering the issues flagged in our [Fraud Checklist](#).

But firms should also be aware they can face criminal liability where the offences in question are committed by others, such as agents or other “associated” persons acting on their behalf. In the current climate, businesses will want to be even more vigilant than usual in mitigating this risk.

## 2. The risks posed by employees, agents, and “associated” persons: the Criminal Finances Act 2017 and Bribery Act 2010

### 2.1. The Criminal Finances Act 2017 (“the CFA”)

Broadly, the CFA provides that a UK corporation or partnership is guilty of an offence if a person “associated” with it commits a “UK tax evasion facilitation offence” for or on behalf of that body.

An “associated” person for these purposes is anyone who performs services on behalf of the business – a term which is deliberately wide and which HMRC’s guidance makes clear could include an employee, introducer, agent or even a contractor.

A “UK tax evasion facilitation offence” is committed by being knowingly concerned in another person’s fraudulent evasion of tax, or aiding or abetting such an offence.

The CFA also creates the offence of facilitation of foreign tax evasion, which applies not only to UK businesses but also to non-UK companies that carry on business in the UK, or where any conduct constituting part of the foreign tax evasion facilitation offence takes place in the UK.

As shown by the furlough scheme example above, the CFA means that a business which is not itself engaged in tax evasion can nonetheless find itself criminally liable as a result of tax evasion carried out by another.



## 2.2. The Bribery Act 2010 ("the BA")

The BA contains similar provisions with respect to the offence of bribery.

Here, a business is guilty of an offence if a person associated with it bribes another person intending to obtain or retain business for that firm, or to obtain or retain an advantage in the conduct of business by that firm.

Again, an associated person in this context is defined as including an employee or agent of the business, or any other person who performs services for or on its behalf.

## 3. Defences

Both of the offences just discussed are ones of strict liability. It is irrelevant whether the business intended for its associated persons to carry out the relevant offences.

However, in both cases it is a defence for the business to prove that it had in place adequate procedures designed to prevent persons associated with it from engaging in such conduct.

## 4. Protecting your business from criminal liability

According to Government guidance, the preventative procedures should be informed by six principles:

**Risk assessment:** Businesses should assess the nature and extent of the risk posed by their associated persons. Critically, the risk assessment should be documented and kept under review.

**Proportionality:** Firms are not expected to eradicate all risk by adopting burdensome and expensive procedures. But they should put in place reasonable, risk-based and proportionate procedures that do more than pay mere lip-service to the prevention of the relevant offences.

**Culture:** The top-level management of a business should be committed to preventing associated persons from engaging in the relevant offences.

**Due diligence:** Businesses should apply due diligence procedures to those who will perform services on their behalf in order to mitigate identified risks.





**Communication (including training):**

Businesses should ensure that prevention policies and procedures are communicated and understood throughout the organisation, including through training.

**Monitoring and review:** Businesses should monitor and review their procedures regularly, making appropriate improvements where necessary.

**5. How Dentons can help**

Dentons has extensive experience of advising clients on all aspects of compliance with the CFA and BA. We have developed a range of fixed-price products designed to allow your business to implement its own preventative procedures and guard against the current increased fraud risk whilst controlling costs. For example:

**Risk assessment workshop:** Our team can talk you through how to create or refine your written risk assessments with reference to key existing and emerging risk factors.

**Due diligence procedures:** We can help you structure and document your due diligence processes relating to associated persons,

for example by assisting with the drafting of pro forma questionnaires for completion by new business partners.

**Contract audit / sample clauses:** We can provide you with standard form clauses to bolster any adequate procedures defence by obliging your partners to comply with their legal obligations, granting you audit rights to verify that compliance, and providing you with the ability to terminate the relationship where necessary. We can also audit your existing contracts, or help train your team to do so, in order to identify and plug any existing gaps.

**Policies:** We can help you develop or refine policies to combat bribery, tax evasion and other forms of fraud or financial crime.

**Training:** We can provide cost-effective training for senior management and staff, including 'train the trainer' sessions to allow your business to develop and implement its own regular training programme without the need for significant further external spend.

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