

Principle 1 Ensure tax offences are criminalised

Jurisdictions should have the legal framework in place to ensure that violations of tax law are included as a criminal offence, and that effective sanctions apply in practice.

Introduction

1. Most taxpayers voluntarily comply with their tax obligations. However, some taxpayers persevere in being non-compliant and use any means to evade their tax obligations. It is in respect of those taxpayers, for whom support and monitoring does not improve compliance, that criminal law plays an important role. Moreover, it enhances the general preventive effect that criminal law enforcement can have and reduces non-compliance.
2. Jurisdictions draw different conclusions as to precisely when the application of the criminal law is warranted. The provisions of the criminal law define the actions that are designated as tax crimes as well as the type of criminal sanctions that are considered appropriate. These defined actions and criminal sanctions will not be the same in all jurisdictions.
3. Wherever dividing lines between non-compliant behaviour and criminal behaviour are drawn, it is important that jurisdictions have the possibility of applying criminal sanctions in respect of violations of the tax law. From a preventive point of view, this is for several reasons:
 - i. to send a message about the integrity, neutrality and fairness of the law (that is, that nobody is above the law)
 - ii. to act as a general deterrent for those people that could be tempted to evade their tax obligations if the opportunity arose, by providing serious reputational and punitive consequences of such activity;

- iii. to act as a specific deterrent for an individual that has been convicted and sanctioned in the past, so that they might be discouraged from doing so again. Actual enforcement of penal provisions for the purposes of punishment for those that have decided not to comply is essential for both doing justice and strengthening the credibility of the penal provisions and the legal system itself.
4. The criminalisation of violations of tax law also ensures the availability of criminal investigative and enforcement powers that are necessary to find the truth regardless of the co-operation of the accused. In some jurisdictions this also provides for a basis for domestic co-operation with other law enforcement agencies under criminal law and international co-operation, for example, under an MLAT.
5. The precise way of criminalising violations of tax law will vary from one jurisdiction to another. Each jurisdiction has a different legal system, which reflects and interacts with the particular culture, policy and legislative environment.
6. Whatever the particular details of the legal framework are, it will be most effective if:
- The law clearly defines the tax offences that are criminalised;
 - A criminal sanction applies if the offence is proven;
 - More serious offences are punishable by more serious criminal sanctions; and
 - Criminal sanctions are applied in practice.

The law clearly defines the tax offences that are criminalised

7. The offences within the tax crime category may be defined in a general manner to capture a wide range of activities such as criminal actions that intend to defraud the government. A different approach is where the law sets out the specific offences in more detail, each with individual requirements as to the precise actions that constitute a crime.
8. Whichever definitional approach is taken, jurisdictions may also take different approaches to the threshold at which an act is classified as an offence. For instance, jurisdictions may criminalise actions starting from non-compliance, such as any deliberate failure to correctly file a tax return. Some other jurisdictions may apply the criminal law starting from a higher threshold, where the deliberate failure to comply with a tax obligation is accompanied by aggravating factors such as if the amount of tax evaded exceeds a certain monetary threshold, if the offence is committed repeatedly, when taxable income is actively concealed, or when records or evidence are deliberately falsified. Alternatively, jurisdictions may have set a very high threshold to classify tax crime, such as organised crime for profit, or tax evasion accompanied by particularly aggravating circumstances. Common examples are included below:

Category	Examples
Non-compliance offences (may apply irrespective of intent or result)	<ul style="list-style-type: none"> • Failure to provide required information, documents or returns • Failure to register for tax purposes • Failure to keep records • Keeping incorrect records • Making a false statement • Non-payment
Intentional tax offences	<ul style="list-style-type: none"> • Destroying records • Deliberate failure to comply with tax law to obtain financial advantage • Evading tax or receiving refunds by fraud or illegal practices • Intentional reduction of tax using false documents or fictitious invoices • Counterfeit or forged documents to reduce tax • Intentionally or by gross negligence providing misleading information in a tax return to obtain a tax advantage

	<ul style="list-style-type: none"> • Fraudulently obtaining refunds or credit • Tax evasion in aggravated circumstances such as cases involving considerable financial benefit or conducted in a methodical manner • Theft from, or defrauding of the government • Obstructing an official of the tax authority • Accessory offences
Specific offences	<ul style="list-style-type: none"> • Entering an arrangement that would make person unable to pay tax • Committing tax evasion as member of an organised criminal group • Commercial commission of tax evasion • Illegal use of “zappers” or other automated sale suppression software or devices • Identity theft

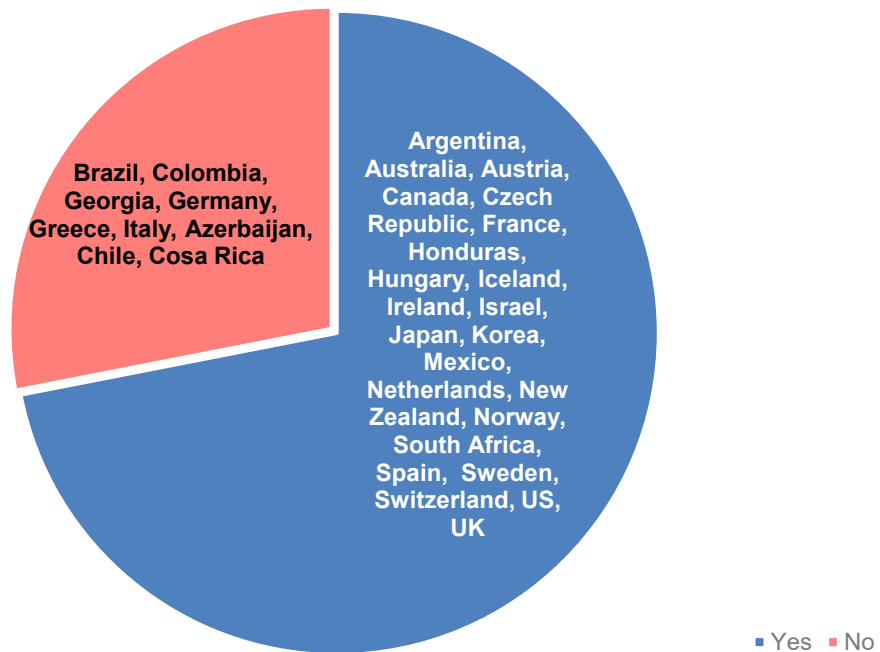
9. Jurisdictions should also criminalise the act of aiding, abetting, facilitating or enabling the commission of a tax offence by others, or conspiracy to commit a tax offence, (“accessories”), such as actions taken by professional enablers (see below).

10. Jurisdictions may, for example, include these criminal offences within a statute or code covering all criminal activities, in a general tax act, in their income tax or VAT statutes, or other specific statutes. Whichever approaches are used, the legal provisions should state the elements that constitute the crime. This includes articulating the specific conduct or activity that constitutes the criminal act, as well as the required mental state of the person in committing the activity (such as intention, recklessness or gross negligence). These offences should be laid down in statutes by using clear terms, which would prevent potential disagreements and misunderstandings regarding terminology by both taxpayers and the criminal justice system.

11. In addition to prosecuting individuals, jurisdictions should be able to prosecute legal persons and legal arrangements for committing a tax crime. For example, where tax evasion has been conducted by a company, there may not be an identifiable individual responsible for the crime, but the criminal actions may have occurred because of the combined actions of several persons undertaken in their capacity as representatives of the company. The law may hold the legal person or arrangement criminally liable for the crime, and also impose punishment on key actors such as directors, officers, agents or key employees of the legal person / arrangement criminally liable. The ability to hold entities criminally responsible amongst survey respondents is as follows:

Figure 1.1. The ability to hold entities criminally responsible

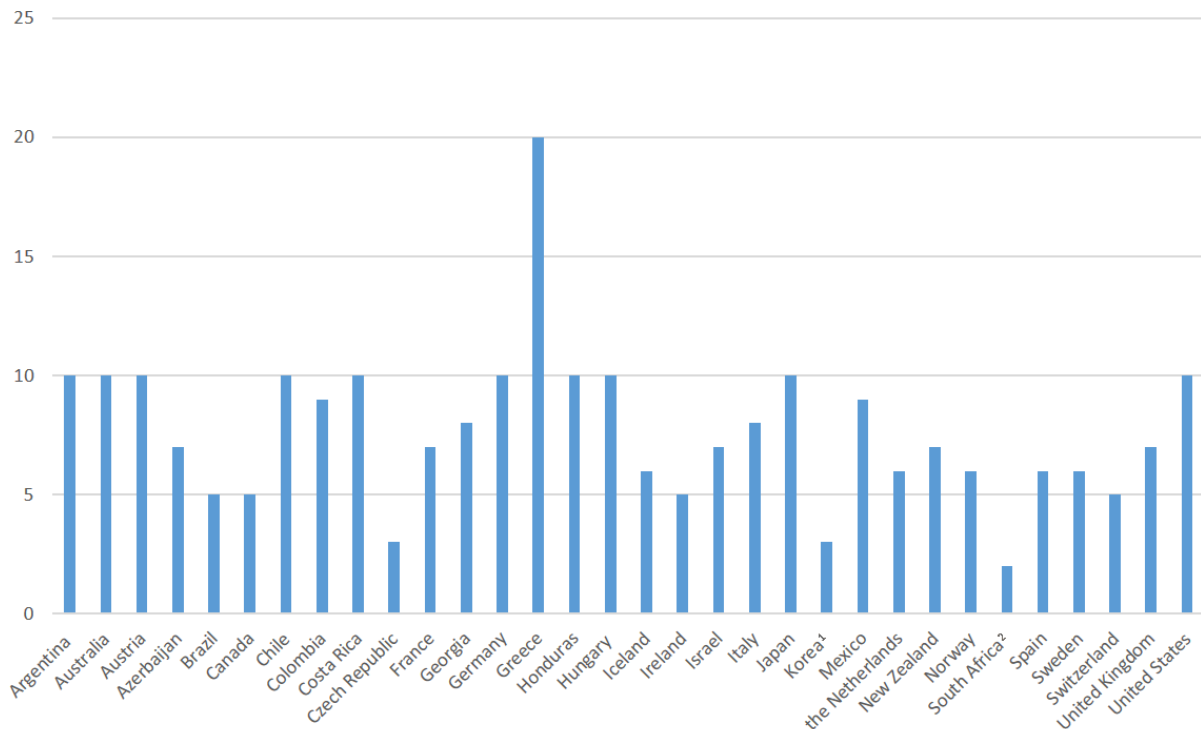
Is it possible to hold legal entities criminally liable for criminal tax offences?



A criminal sanction applies if the offence is proven

12. The legal provision should include a penalty if the elements of the crime are proven. Penalties should be designed to encourage compliance and prevent non-compliance by providing a credible threat. Any statute of limitations on imposing a criminal penalty should reflect the seriousness of the crime and the prescribed punishment. A practical consequence of having a sufficiently long statute of limitations for serious crimes is that it provides agencies with sufficient time to identify and prosecute criminal acts. This is especially important in respect of complex cases which can take a long time to successfully investigate and prosecute.

Figure 1.2. Maximum prison sentence for a tax offence (years) – income tax and VAT



1. Korean law provides that cases of aggravated tax evasion, where the amount of evaded tax is over KRW 500 million in a year, can be sentenced to imprisonment for an indefinite term.

2. South Africa notes that it is able to secure significantly longer sentences where there are multiple offences and the sum of the sentences run consecutively or, where it is successful, under the common law offence of fraud.

More serious offences are punishable by more serious criminal sanctions

13. There is a range of behaviour that can constitute a tax crime. In order to achieve the objectives of criminalising tax offences stated above, more serious behaviour or crimes committed in graver circumstances should be punishable by more serious criminal sanctions, proportionate to the nature of the offence.

14. As discussed above, each jurisdiction will have its own approach to categorising the types of offences and their seriousness. Whatever the approach is, the seriousness of the offence should be reflected in the seriousness of the consequences for the offender.

A penalty regime is in place for prosecuting professional enablers

15. Even though the majority of professionals are law-abiding and play an important role in assisting businesses and individuals to understand and comply with the law, jurisdictions should have a penalty regime in place to tackle the small sub-set of professionals who use their skills and knowledge to facilitate the commission of tax and other financial crimes by their clients. Such professionals, which may include lawyers, accountants and tax advisors, play an integral role in making it easier for taxpayers to defraud the government and evade tax obligations, including by designing non-transparent structures and schemes to conceal the true identity of the individuals behind the illegal activities undertaken.

16. Governments have increasingly recognised the need to actively pursue these professional enablers. Several jurisdictions responded that accessories, including professional enablers, are criminally responsible, and in most cases can be held liable for the same offence and the same criminal sanction. In some cases, the person can be liable for an increased penalty, such as where they are a tax professional and their facilitation of the offence is considered to be an aggravating factor. There are also jurisdictions which also apply significant civil penalties for professional enablers or promoters. A breakdown of this, based on survey data, is shown below:

Table 1.1. Types of regimes in places for prosecuting professional enablers

May be prosecuted under general rules for primary or secondary offenders	Special penalty regime in place	Non-criminal sanction
Austria	Argentina ¹	Australia
Azerbaijan	Chile ²	France ³
Brazil	Israel	Netherlands ⁴
Canada	Italy	Ireland ⁵
Colombia	Korea	
Costa Rica	Mexico	
Czech Republic ⁶	Sweden	
France	United Kingdom	
Georgia	United States	
Germany		
Greece		
Honduras		
Hungary		
Japan		
Netherlands		
New Zealand		
Norway		
South Africa		
Spain		
Switzerland		

1. Special sanction for professional enablers on the Tax Crimes Law.

2. Special offence in the Tax Code.

3. France may apply both the general rules of primary/secondary criminal participation and an administrative sanction.

4. The Netherlands may apply both the general rules of primary/secondary criminal participation and an administrative sanction.

5. Sanctions, including disqualification, may be applied by the professional governing bodies.

6. May be considered an aggravating circumstance.

Criminal sanctions are applied in practice

17. The law that criminalises tax offences should be enforced. Where the offence is proven in a court proceeding, the criminal sanction that is most likely to be effective and is appropriate to the facts and circumstances should be applied. Penalties should be applied fairly and consistently.

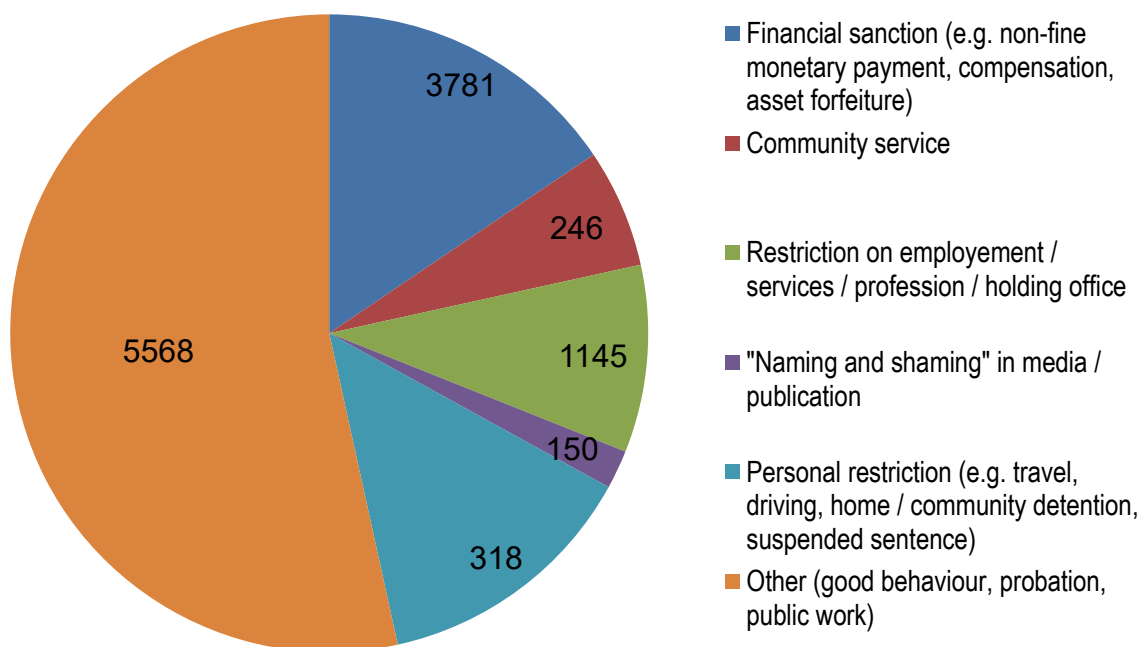
18. Depending on the case, imposing a monetary penalty may be appropriate. For example, in respect of surveyed jurisdictions where data was available, fines were imposed by the competent authorities in respect of violations of the tax law for over EUR 1.4 billion in 2017.

19. It may be appropriate for alternative types of criminal sanctions to apply, depending on the relevant case. These can include community service, “naming and shaming” offenders or enablers, disqualification

from holding certain offices, suspension of licence or other privileges, specific orders to forfeit or return assets, or a combination of the above.

20. 9 of the 31 surveyed jurisdictions responded that they have used sanctions other than imprisonment or a fine between 2015 and 2018.¹

Figure 1.3. Alternative sanctions imposed between 2015 and 2018 in respect of tax offences



References

OECD (2021), *Ending the Shell Game: Cracking down on the Professionals who enable Tax and White Collar Crimes*, OECD, <https://www.oecd.org/tax/crime/ending-the-shell-game-cracking-down-on-the-professionals-who-enable-tax-and-white-collar-crimes.htm>.

Note

¹ Australia, Azerbaijan, Canada, Czech Republic, France, Georgia, Mexico, New Zealand, United States.



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