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NEW UK CRIMINAL OFFENCES OF FAILURE TO PREVENT FACILITATION OF TAX EVASION

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Legal Briefings

In our October 2016 briefing, we reported on the publication of the Criminal Finances Bill 2016–17. The Bill introduces a range of new measures to fight financial crime, of which one of the most important and far-reaching is the introduction of new offences of failure to prevent the facilitation of tax evasion. The offences are modelled on the so-called "corporate offence" of "failure to prevent bribery" in the Bribery Act 2010 and renders corporate bodies liable, in certain circumstances, for the acts of their "associated persons", subject only to a defence relating to having in place reasonable prevention procedures designed to prevent them from facilitating tax evasion.

The offences will be of importance to companies in a range of sectors, including in particular the financial sector and professional services firms. They will significantly impact companies' risk profile in relation to tax evasion issues and their compliance programmes. Whilst the Bill may see some amendment during the course of the legislative process, the offences have been subject to quite extensive consultation and appear unlikely to be subject to further radical change.

The offences form part of the government's broader strategy to reduce the level of UK tax evasion, but also have significant extra-territorial scope. In this briefing, we consider the background to the introduction of the offences, the components of the offences, the "reasonable prevention procedures" defence and enforcement mechanics.

BACKGROUND

Eliminating tax evasion has been a major focus of the UK Government in recent years. The Government's stated intention is that there should be "no place to hide" for tax evaders, and it is seeking to achieve this by a combination of:

1. increasing the severity of sanctions for tax evaders (including by the introduction of new strict liability offences for offshore evasion);

2. increasing the automatic flow of information (most recently, through the adoption and implementation of the OECD Common Reporting Standard);

3. encouraging evaders to come forward (or discouraging them from staying silent). The new global facility for disclosure of all past non-disclosures replaces all existing facilities for past non-disclosures, and is intended to be operative in the first year of the operation of the Common Reporting Standard. The terms of the new disclosure facility are tough: no penalty reductions are on offer, nor is there any promise of immunity from prosecution. Those who do not make use of the new facility (and are subsequently found out) are likely to face even higher financial penalties; and

4. punishing those who facilitate people in evading tax. It is this limb of the UK Government's strategy with which the new corporate criminal offences are concerned.

There are already a number of criminal offences which may be used, at least in theory, to punish bodies corporate whose employees or agents facilitate others with the evasion of UK tax. However, it is difficult to secure conviction since it must be shown that the "directing mind and will" of the corporate was involved in the facilitation or that the corporate can otherwise be held vicariously liable for the relevant acts of its employee/agent. The new offences will dispense with such requirements. A body corporate will be guilty of an offence if an "associate" is guilty of an offence of facilitation.

THE COMPONENTS OF THE OFFENCES

The Bill introduces two new offences: an offence of failure to prevent the facilitation of UK tax evasion (the "Domestic Offence") and an offence of failure to prevent facilitation of foreign tax evasion (the "Foreign Offence"). In relation to both the Domestic Offence and the Foreign Offence, a body corporate or a partnership (referred to as a "relevant body"), whether established for business or non-business purposes, may be prosecuted for failure to prevent the facilitation of tax evasion if:

1. a person ("T") evades tax;

2. an associate ("A") of the relevant body criminally facilitates that evasion while acting in the capacity of an associate of the relevant body; and

3. the relevant body is unable to show they had in place "reasonable prevention procedures" (or that it wasn't reasonable for prevention procedures to be in place).

Liability can arise whether or not the relevant body had knowledge of or the intention to commit any offence. It is not necessary for T to have been prosecuted for evasion, or for A to have been prosecuted for criminal facilitation. T (or A) may in fact have made a disclosure of the evasion (or criminal facilitation) in order to secure immunity from prosecution. A person is an "associate" of the relevant body if the person "performs services for or on behalf of" that body (for example, as an employee, agent or subcontractor). The substance of the relationship will be considered, not just the form. A relevant body will not, however, commit the offence if the associate commits the offence of facilitation on a frolic of their own – that is, not in their capacity of an associate of the relevant body. For example, if an employee assists a sibling to evade tax at the weekend, the relevant body who is the employer will not be liable for the offence. UK tax is any tax in any part of the United Kingdom including National Insurance Contributions.

TERRITORIAL SCOPE OF THE OFFENCES

The Domestic Offence (failing to prevent the facilitation of UK tax evasion) can be committed by a relevant body irrespective of where they are established or carry on business, and whether or not any part of the criminal facilitation took place in the UK. In other words, wholly non-UK conduct by an non-UK entity can be covered, if it is directed at the evasion of UK tax.

The Foreign Offence (failing to prevent the facilitation of foreign tax evasion) can only be committed where:

1. the relevant body is established in the UK, or carries on any part of their business in the UK (for example, through a branch); or

2. any part of the criminal facilitation took place in the UK.

Like the Bribery Act 2010, this gives the law a broad extra-territorial scope: a body corporate may fall within scope and be capable of committing the Foreign Offence merely by virtue of having a UK branch, even if that branch is not itself involved in the facilitation or the evasion. Of course, there would be public interest factors to consider in assessing whether to investigate or prosecute conduct which is wholly extra-territorial and relates to foreign tax, but the theoretical breadth of the offence is striking.

THE DOMESTIC OFFENCE: WHAT CONSTITUTES TAX EVASION BY "T"?

For this purpose, a UK tax evasion offence means:

1. the common law offence of cheating the public revenue (which, broadly speaking, includes any form of fraudulent conduct which results in depriving the Exchequer of the money to which it is entitled), and

2. an offence in any part of the United Kingdom consisting of being knowingly involved in, or taking steps with a view to, the fraudulent evasion of tax.

THE DOMESTIC OFFENCE: WHAT CONDUCT CONSTITUTES CRIMINAL FACILITATION BY "A"?

A person will commit a UK tax facilitation offence if that person:

1. is involved in or knowingly concerned in, or takes steps with a view to; or

2. aids, abets, counsels or procures,

the fraudulent evasion of UK tax by another person.

In very broad terms, the person must do an act anticipating that it will assist another person to evade UK tax. Examples of activities, discussed in the relevant draft guidance as potentially amounting to facilitation (if conducted with the necessary intention to assist the evader), include:

- Delivery and maintenance of infrastructure - for example, trust and company formation and setting up and maintaining bank accounts.

- Financial assistance – helping an evader move money around, providing banking services.

- Acting as a broker or conduit – i.e. arranging access to others in the supply chain.

- Providing planning advice.

THE FOREIGN OFFENCE: WHAT CONSTITUTES EVASION AND CRIMINAL FACILITATION?

As with the offence of failure to prevent the facilitation of UK tax, a foreign tax evasion offence must have been committed by "T", and a foreign tax facilitation offence must have been committed by "A" in order for liability to arise.

For an offence to constitute a foreign tax evasion offence it must be:

1. a criminal offence under the law of the foreign territory relating to tax imposed under the law of that country, and

2. conduct which would be regarded by the UK Courts as an offence of being knowingly concerned in, or taking steps with a view to, the fraudulent evasion of tax (if it had occurred in the UK).

Such "double criminality" is also required in relation to the facilitation by "A".

THE "REASONABLE PREVENTION PROCEDURES" DEFENCE

is a complete defence to both of the offences if the relevant body can prove that, when the tax evasion facilitation offence was committed, either (a) the relevant body had in place reasonable prevention procedures; or (b) in all the circumstances it was not reasonable to expect the relevant body to have any prevention procedures in place.

Prevention procedures are those designed to prevent associates from committing tax evasion facilitation offences. Guidance about measures to prevent facilitation will be published by the Chancellor of the Exchequer, and is expected to be given effect to by Statutory Instrument. The Bill also provides an ability for the Chancellor to approve guidance issued by others (for example, by industry bodies – a mechanism which will be familiar to those working in the anti-money laundering space, where the Treasury-approved JMLSG guidance has a formal status).

The Draft Government Guidance issued in October 2016 indicates that all relevant bodies must plan and implement procedures to ensure they are in place ahead of the Royal Assent to the legislation, but recognises that what is reasonable on "day 1" when the offences come into force will not be the same as what is reasonable in years to come: some procedures will take time to roll out. As with the Bribery Act Guidance, the Draft Guidance states that the formulation of measures to prevent facilitation should be informed by the following six principles:

1. Risk Assessment;
2. Proportionality of risk-based prevention procedures;
3. Top level commitment;
4. Due diligence;
5. Communication (including training); and
6. Monitoring and review.

The Guidance recognises that procedures may leverage existing controls. However, the appropriateness of controls will need to be informed by a considered risk assessment, and simply tagging "and tax evasion" on to a list of prohibited activities under existing ethics policies is not expected to be sufficient.

THE BURDEN OF PROOF AND INVESTIGATION AND PROSECUTING AUTHORITIES

The burden of proof for establishing that the components of the offence have been committed lie with the prosecution authorities to the usual criminal standard. The burden of proof that the due diligence defence is available, i.e. that the procedures were reasonable or it was reasonable for there to be no procedures, lies with the relevant body.

The investigation of the Domestic Offence will be carried out by HMRC but the prosecution of the offence will be undertaken by the Crown Prosecution Service.

The investigation of the Foreign Offence will be undertaken by the Serious Fraud Office or the National Crime Agency and the prosecution of the foreign offence will be prosecuted by either the Crown Prosecution Service or the Serious Fraud Office. It should be noted that the consent of the Director of Public Prosecutions or Director of the Serious Fraud Office is required before a prosecution for the foreign offence can be undertaken and that will only be given where to prosecute is in the public interest. This is a necessary check in the case of the Foreign Offence which, as set out above, can be committed even where there is no real connection between the UK and the tax evasion/facilitation.

PENALTIES FOR CONVICTION AND DEFERRED PROSECUTION AGREEMENTS

Unlimited fines can be imposed upon conviction and orders for confiscation of assets may also be made. In order to encourage self-reporting by relevant bodies, Deferred Prosecution Agreements ("DPAs") will also be an available tool for prosecutors. DPAs, which are a mechanism for resolving certain types of offending by corporate entities, involve charges being laid but the prosecution being suspended for a specified period provided certain agreed conditions are met, such as:

- the payment of a financial penalty (broadly comparable to that available on conviction following an early guilty plea), compensation and disgorgement of benefit arising from offending;
- compliance remediation steps, potentially including the appointment of a monitor; and
- co-operation in any subsequent prosecution of individuals.

DPAs are intended to enable companies to avoid the consequences of conviction (including collateral damage such as adverse reputational impact), and to be a somewhat shorter process than a full investigation and prosecution. DPAs were introduced in 2014 by the Crime and Courts Act 2013. The entry into DPA negotiations can only be initiated by the relevant prosecuting authority (in this case the CPS or SFO). There is a DPA Code of Practice for Prosecutors which was published jointly by the SFO and CPS in February 2014.

The agreement must be concluded under the supervision of a judge who is required to be satisfied that it is in the interests of justice that the agreement should be entered into and that the terms are fair and reasonable and proportionate. Whilst the UK DPA concept was originally inspired by the US, the UK model provides for a significantly greater degree of judicial scrutiny and intervention and transparency.

NEXT STEPS – RISK REVIEW, PROCEDURES AND TRAINING

All relevant bodies that are established or carrying on any business in the UK (particularly in the higher risk sectors) will need to consider undertaking a risk review of their business to inform the development of appropriate procedures, put in train a programme of education and training, audit and review to minimise the risk of an associate being engaged in facilitation and to maximise the prospect that the "reasonable prevention procedures" defence is available to them. Given the extra-territorial scope of the legislation, and in particular the Domestic Offence, similar steps may need to be taken by any relevant bodies (wherever established or carrying on business) who are aware that they (or that there is a risk that they) transact business with persons who may have UK tax liabilities.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

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