Briefing

Fraud and White Collar Crime

May 2016

New corporate offences for failure to prevent facilitation of tax evasion

In light of recent events, the Government has accelerated plans to introduce a new strict liability corporate offence (or, rather, two offences) for failure to prevent the facilitation of tax evasion in the UK and overseas. It has now published a consultation paper on the draft offences and accompanying guidance. The offences are expected to come into force later this year.

This briefing looks at the new offences, how they are likely to operate and what action our clients should start considering in order to minimise the risk of committing them when they come into force.

Existing offences

The concept of corporates assisting others to evade tax is already recognised in criminal law. Corporates can be found to have aided and abetted tax evasion. However, under the existing criminal law, in order for a Judge to find a corporate guilty of a criminal offence, the prosecution must be able to satisfy the "identification principle", also known as the "directing mind and will test". Here, the prosecution must be able to show, beyond reasonable doubt, that the person (or persons) in the corporate that committed the offence was (or were) sufficiently senior to constitute its directing mind and will. This can prove extremely difficult.

The new "corporate offences"

The consultation paper proposes two new offences: (1) failure to prevent facilitation of a UK tax evasion offence; and (2) failure to prevent facilitation of a foreign tax evasion offence.

Together, the two offences criminalise three types of behaviour:

- A UK based body failing to prevent those who act on its behalf from criminally facilitating UK tax evasion;
- A non-UK based body failing to prevent those who act on its behalf from criminally facilitating UK tax evasion; and
- A UK based body failing to prevent those who act on its behalf from criminally facilitating tax evasion overseas where such evasion is criminal under local law.

The offences are modelled on the corporate offence of failure to prevent bribery, which can be found in Section 7 of the Bribery Act 2010. This model has already proven highly effective in obtaining results against a number of corporates in the bribery sphere. Crucially, the Courts will be able to circumvent the difficulties of the identification principle in finding corporates guilty of failure to prevent tax evasion.

Moreover, both offences are strict liability. That is to say, there need be no intention, knowledge or participation on the part of the relevant body in respect of the facilitation of tax evasion.

We summarise the two offences and the defence of "reasonable procedures" below.

Failure to prevent facilitation of UK tax evasion offences

A relevant body will commit an offence if an associated person facilitates a tax evasion offence in the UK, when acting in the capacity of that association.

The terminology of this offence can be broken down as follows:

- A "relevant body" means a corporate or partnership, whether incorporated or formed in the UK or overseas. The offence cannot be committed by individuals.
- An "associated person" means a person that provides services for or on behalf of the relevant body. This can include, for example, employees (who are presumed to be providing services), subsidiaries, agents, sub-contractors and representatives. It does not matter whether the associated person is in the UK or overseas.
- "Facilitation" in the UK is drafted very widely and includes where the associated person intentionally aids, abets, counsels or procures a UK tax evasion offence by another person.
- A "UK tax evasion offence" means the offence of intentionally cheating the public revenue or being knowingly concerned in, or taking steps with a view to, the fraudulent evasion of a tax.

In order for criminal liability to pass up the chain to the relevant body, then both the associated person and the taxpayer must

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be criminally culpable. No offence will be committed if either the associated person has no knowledge of the tax evasion or, alternatively, the taxpayer's failure to pay is innocent or accidental.

Failure to prevent facilitation of foreign tax evasion offences

This offence effectively works in the same way as its domestic equivalent, explained above. The principal differences are:

- A "relevant body" must be either:
  - incorporated or formed in the UK, or
  - carrying on business from an establishment in the UK, or
  - must have an associated person located in the UK at the time that the act of facilitation of overseas tax evasion occurs.
- "Facilitation" and also the "foreign tax evasion offence" must be criminal offences both in the foreign country in question and in the UK if the conduct happened there, i.e. there is "dual criminality".

In summary, in order to convict the relevant body of either of the offences, the prosecution will need to be able to prove that:

- an associated person
- deliberately helped a third party
- deliberately to evade UK or overseas taxes.

The defence of "reasonable procedures"

However, the offences will be subject to a defence of reasonable procedures. The corporate must be able to prove that:

- It had in place such "prevention procedures", meaning procedures designed to prevent associated persons from facilitating tax evasion offences, as it was reasonable in all the circumstances to expect it to have in place; or
- In all the circumstances, it was not reasonable to expect it to have any prevention procedures in place.

Usefully, the defence of proving "reasonable procedures" appears similar to, but broader than, the "adequate procedures" defence in the Bribery Act.

Guidance

The government has published draft guidance for relevant bodies on the design and implementation of "reasonable procedures." In summary, the guidance is not prescriptive but should be applied in a risk based, proportionate manner.

It follows a similar format to that published in respect of the adequate procedures defence to the Bribery Act 2010 corporate offence. It's formulated around six principles:

1. **Proportionality** – procedures, both in their design and implementation, must be proportionate to the risks faced by the corporation. This will depend upon the nature, scale and complexity of its activities.
2. **Top level commitment** – communication and endorsement of the corporation's stance on preventing facilitation of tax evasion and involvement in the development and review of procedures.
3. **Risk assessment** – documented and periodically reviewed assessment of the nature and extent of exposure to risk of associated persons facilitating tax evasion. Risks include country, sectoral, transaction and business opportunity.
4. **Due diligence** – a risk based approach to due diligence of persons who will perform services for or on behalf of the organisation.
5. **Communication (including training)** – ensuring that policies are communicated, embedded and understood throughout the organisation.
6. **Monitoring and review** – periodic review and updating of risk analysis and procedures.

Recommendations

We recommend that our clients keep monitoring the progress of the new offence into law, which is expected at some stage over the summer, and also look out for the publication of final guidance on "reasonable procedures."

In preparation for the coming into force of the offence, we recommend that our clients start considering the following actions, all of which should be documented:

- Have senior management issue a memo outlining the new offences, what it means for people in the business, indicating that the business takes a "zero-tolerance" approach to the commission and facilitation of tax evasion.
- Appoint a sufficiently senior person (e.g. the compliance officer or member of in-house legal), with support and input from senior management, to conduct an internal review of the business. This should review relationships with staff, suppliers, agents and contractors to identify: (a) the specific risks the business faces; (b) whether these risks are dealt with by "reasonable procedures"; and (c) whether there are any gaps in the procedures.
- Ensure existing policies (e.g. business codes of conduct, ethics, anti-money laundering, supply chain management and subcontracting of work) are updated to refer to the new offence. Outline the necessary due diligence and monitoring required for relationships with associated persons and customers, and add safeguards enabling the termination of those relationships in the event that tax evasion is identified.

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- Introduce training for senior management, in-house financial crime capabilities, and also customer facing operational staff, in order to further advance a culture of “zero tolerance” on tax evasion. The training should assist staff to learn how to identify tax evasion, how to ask questions of customers and other colleagues, and to encourage whistleblowing when such activity is discovered.
- Businesses with overseas associated parties or subsidiaries should ensure that those located in other jurisdictions are made aware of the new offence and that the business requires them to ensure that they will not in any way facilitate tax evasion, whether of UK or local taxes.

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