

## Corporate criminal liability in the UK for failure to prevent tax evasion – a further step towards a broad corporate “failure to prevent financial crime” offence?

There has been much debate recently about the challenges faced by UK prosecutors in attributing criminal liability to large corporations for the criminal acts of those who act on their behalf. For most financial crime in the United Kingdom, to attribute criminal liability to corporations, prosecutors are required to show that senior employees (most usually directors or senior managers) were involved in the criminal activity. The Government argues that this may act to advantage corporates that turn a blind eye to wrongdoing and discourage good corporate governance and strong reporting procedures.

Although there is still no broad corporate offence in the UK of failure to prevent financial crime despite continued calls from some quarters, not least the Serious Fraud Office, for one to be introduced, some well known exceptions exist to the requirement for prosecutors to prove the involvement of a company’s “directing mind”. Most notably there is the corporate offence under section 7 of the Bribery Act 2010 (failure of commercial organisations to prevent bribery) and various corporate offences in relation to money laundering (under the Proceeds of Crime Act 2002 and the Money Laundering Regulations 2007).

To this list of exceptions it is likely that there will soon be added a new corporate offence of failure to prevent the criminal facilitation of tax evasion. Although there are some obvious targets for this offence, it is likely to apply to all business sectors.

### The proposed new offence

In April 2016 HMRC published a consultation<sup>1</sup> setting out draft legislation and guidance for a proposed new corporate offence of failure to prevent the criminal facilitation of tax evasion. This followed the publication on 9

<sup>1</sup> "Tackling tax evasion: legislation and guidance for a corporate offence of failure to prevent the criminal facilitation of tax evasion", available [here](#).

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December 2015 of the Government's response to the previous consultation on this proposal. The consultation period runs until 10 July 2016.

At a high level, the proposed new offence will be committed, in relation to the evasion of UK taxes, where there is:

- i. criminal tax evasion by a taxpayer (either a legal or natural person) under the existing criminal law (for example, a common law offence of cheating the public revenue or a statutory offence of fraudulently evading a particular form of UK tax);
- ii. criminal facilitation of this offence by a person (an "associated person", who may be an individual or an incorporated body) acting on behalf of a "relevant body" (which, for these purposes, means bodies corporate and partnerships, as well as foreign equivalents anywhere in the world), whether by taking steps with a view to, or being knowingly concerned in, or aiding, abetting, counselling or procuring, tax evasion by the taxpayer; and
- iii. no available reasonable "prevention procedures" defence (as to which see below).

If the evasion is of a foreign tax, the proposed new offence can only be committed if a dual criminality requirement is satisfied and there is a UK nexus, whether because the corporate or partnership is incorporated or formed in the United Kingdom, or carries on business from an establishment in the United Kingdom, or at least part of the criminal facilitation takes place in the United Kingdom.

## **The reasonable "prevention procedures" defence**

In an echo of the "adequate procedures" defence under section 7 of the Bribery Act 2010, it is a defence to the proposed new offence if:

- the relevant body had in place procedures designed to prevent associated persons acting on its behalf from committing the criminal facilitation of tax evasion, and such procedures were reasonable in all the circumstances to expect it to have in place; or
- in all the circumstances it was not reasonable to expect the relevant body to have any prevention procedures in place.

HMRC has published and is consulting on draft guidance that "*is intended to help relevant bodies of all sizes and in all sectors understand what sorts of procedures they can put in place to prevent persons associated with them from criminally facilitating tax evasion.*" The guidance follows the principles-based approach adopted in the Bribery Act guidance published by the Ministry of Justice<sup>2</sup>. In fact the same six principles are used: proportionality of reasonable procedures; top level commitment; risk assessment; due diligence; communication (including training); and monitoring and review. The guidance emphasises that "procedures" is intended to cover both formal

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<sup>2</sup> "The Bribery Act 2010: Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing", available [here](#).

policies and practical steps taken to implement those policies, the enforcing of compliance with those policies and the monitoring of the effectiveness of policies.

## **Practical considerations for businesses**

Businesses will be concerned to assess the implications of the proposed new offence. They will want to understand whether they are caught by its scope and, if so, they will want to ensure that the reasonable “prevention procedures” defence will be available to them.

High level questions for consideration in this regard will include:

- What is the dividing line between acceptable (and legal) tax planning on the one hand and criminal tax evasion on the other hand?
- Who is an “associated person”? This will not be limited to employees but will extend to any person that performs services for or on behalf of the “relevant body” in any capacity, which may include a contractor, agent or subsidiary. Lawyers, accountants and other professional advisers will likely be caught.
- For international businesses, do any such persons act in the UK?
- What is the risk posed across the organisation that such persons may criminally facilitate tax evasion?
- What procedures are proportionate to this assessment of the risk and to what extent do the organisation’s current procedures address that risk? This may involve a consideration of any tailored, industry-specific guidance which is produced and benchmarking against other organisations.
- What manner and form of senior management involvement is appropriate for the creation and implementation of the prevention procedures?
- How should due diligence procedures in different parts of the business be designed to reflect varying levels of risk across different activities? This will be of particular concern where the organisation operates in multiple jurisdictions, with potentially different tax laws and requirements in each.
- What communication and training is required sufficiently to embed prevention procedures? How should that be carried out in a multi-jurisdictional organisation?
- How will the prevention procedures effectively be monitored, reviewed and improved over time?

Many organisations will already have implemented policies and procedures to address the risk of exposure to liability under section 7 of the Bribery Act 2010 and it is likely that those policies will go some way to addressing exposure for facilitating tax evasion also. However, while many of the issues are similar, at a granular level, this proposed new offence will also raise different concerns which are likely to require separate and detailed consideration.

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This publication is intended merely to highlight issues and not to be comprehensive, nor to provide legal advice. Should you have any questions on issues reported here or on other areas of law, please contact one of your regular contacts, or contact the editors.

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