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Non-U.K. Companies to be Prosecuted for Failing to Prevent the Facilitation of Tax Evasion Anywhere in the World

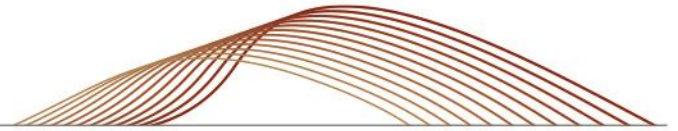
By [Simon Airey](#)

Overview

- The U.K. *Criminal Finances Act 2017* introduces new criminal offences where a company fails to prevent its "associated persons" from facilitating tax evasion by a third party.
- "Associated Persons" defined broadly as any person or entity that provides services "for or on behalf of" the company, can include a company's employees, agents, intermediaries, subsidiaries, JV partners etc.
- The Act applies to the evasion of both U.K. and non-U.K. tax and duties.
- The offences will apply to any company that is incorporated in the U.K. or is carrying on a business—or part of a business—in the U.K. It will also apply to companies that have no connection to the U.K. where their associated persons facilitate the evasion of U.K. tax or duty.
- The legislation will come into force on 30 September 2017.
- The legislation resembles the U.K. Bribery Act 2010 ("Bribery Act") by (i) holding corporations liable for acts of their "associated persons" and (ii) having extensive extra-territorial application.
- The only defence is for a company to show that it had "reasonable procedures" in place to prevent the facilitation of tax evasion (as opposed to "adequate" procedures under the Bribery Act).
- Companies will need to design and implement appropriate policies and procedures without delay.

Background

In April 2016, former Prime Minister David Cameron announced that the U.K. Government would "legislate to hold companies who fail to stop their employees facilitating tax evasion criminally liable". The announcement followed intense pressure on the government to take steps to combat tax evasion following the leak of the so-called "Panama Papers" from law firm Mossack Fonseca. The legislation has now been enacted via the U.K. Criminal Finances Act 2017 and comes into force on 30th September 2017.



The Offences

The new offences are similar to section 7 of the Bribery Act. Section 7 created a corporate offence of failing to prevent bribery by associated persons, subject to an absolute defense where the company could show that it had in place, at the time the offence took place, "adequate procedures" that were designed to prevent such bribery. As with the Bribery Act the new offences will attract substantial financial penalties upon conviction. The likelihood of significant reputational harm for an institution is obvious, as well as the prospect of separate action by the regulator of any regulated entity which is found to be in breach.

The legislation provides for two separate corporate offences:

- The first offence is a failure, by a company or partnership (a "relevant body") incorporated anywhere in the world, to prevent the criminal facilitation, by one of its associated persons (see further below), of the criminal evasion of a U.K. tax or duty, payable by another person or entity. There is no need for the company to have any presence in or relationship with the U.K. for it to be caught by the legislation.
- The second offence is a failure, by a relevant body, to prevent the criminal facilitation, by one of its associated persons, of the criminal evasion of a non-U.K. tax or duty payable by another person or entity. This offence applies to a relevant body incorporated in the U.K. or carrying on a business—or part of a business—in the U.K. (for example via a subsidiary or sales operation in the U.K., or even via a listing on the London Stock Exchange). A company will also be caught where it does not have a U.K. presence of this type but any part of the criminal facilitation takes place in the U.K.

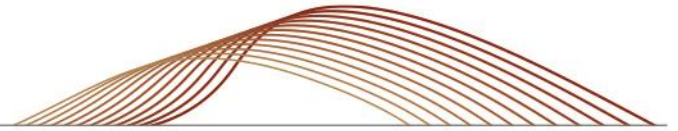
In either case, in order to be guilty it is not necessary for the corporation to know about, or participate in, the facilitation of tax evasion by its associated persons. It is sufficient merely that it has failed to prevent it. The only available defense is for the corporation to show that it had 'reasonable procedures' in place to prevent its associated persons from criminally facilitating tax evasion.

The Defense of 'Reasonable Procedures'

The defense of 'reasonable procedures', rather than 'adequate' procedures, suggests a slightly less onerous standard than that which applies under the Bribery Act. As with the Bribery Act, the Draft Government Guidance ("Draft Guidance") does not seek to define 'reasonable procedures'. Instead, the Draft Guidance specifies that reasonable procedures should be based upon the following six key principles:

1. a risk assessment;
2. procedures that are proportionate to risk;
3. top (board) level commitment;
4. communication and training;
5. due diligence; and
6. monitoring and review.

The most important of these requirements is arguably the risk assessment, without which it will be difficult to show that any related procedures are proportionate and have been tailored to relevant risks. The absence of a proper risk assessment might therefore make it difficult for a company to



take advantage of the 'reasonable procedures' defense. It must be borne in mind that the first thing a prosecutor is likely to ask for is a copy of the company's risk assessment. It should therefore be carefully constructed and drafted. Whilst the risk assessment should seek to identify key risks, caution must be exercised so that it does not serve as a 'road map' to potentially incriminating issues within an organisation.

The offences are a matter of criminal law, not tax law. Accordingly, legal advice should be sought from suitably qualified professionals with relevant experience. Where appropriate, this can be done in conjunction with tax experts (either within the company or externally). Seeking preliminary advice within a legally privileged environment may also encourage open discussion so that the subsequent risk assessment is more fruitful.

The Draft Guidance also notes that the Government would be prepared to endorse sector specific guidance developed by trade bodies and sector representatives, which may, in due course, be of use to companies seeking to develop appropriate policies and procedures.

The finalized government guidance will likely be published in the coming months. It is not expected to differ in any material respects from the Draft Guidance.

Associated Persons

The new offences extend to criminal facilitation of tax evasion carried out by all 'associated persons' which can include agents or subsidiaries of the company (indeed, any person or entity that provides services "for or on behalf of" the company). The legislation makes it clear that whether or not someone is deemed an associated person will be determined by reference to "all the relevant circumstances", i.e. not just by the formal legal relationship between the company and associated person in question. The Draft Guidance does however make clear that an assessment of whether 'reasonable procedures' were in place will take into account the level of control which a corporation exercised over an associated person.

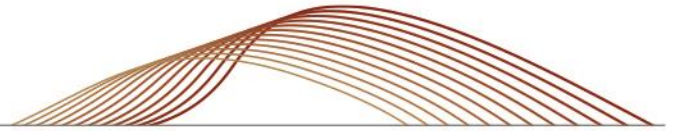
Importantly, for both offences the associated person must be acting in that capacity whilst committing the criminal facilitation. This means that companies cannot be liable for the actions of an associated person who is on a 'frolic of their own' (i.e. a rogue employee who criminally facilitates another persons' criminal tax evasion in circumstances where their actions have nothing to do with the conduct of their job role).

Comment

The offences will be of significant interest to all corporations with a nexus to the U.K. (including, in particular, accountants, banks, financial advisers, law firms, offshore company providers, tax consultancies, trust companies, wealth managers, etc.) whose employees, agents or other 'associated persons' are providing tax advice or related services to clients on behalf of the corporation, or who make referrals to third parties that provide those services.

The legislation is capable of applying to companies operating in any sector around the world and will be of particular relevance to any company that aggressively structures its affairs for tax purposes or otherwise seeks to minimize its tax liabilities. The Act also applies to U.K. and foreign duties so it will have a clear impact in terms of importing and exporting, as well as to land taxes, capital and wealth taxes, sales taxes, VAT, etc.

Whilst it seems likely that a brief period of time will be allowed for those affected to implement reasonable procedures, affected companies should be giving urgent consideration to undertaking an appropriate risk assessment and then designing and implementing suitable policies and procedures.



Such an exercise is unlikely to be wasted effort bearing in mind the global mood in relation to tax evasion, unprecedented levels of inter-governmental co-operation, legislation such as FATCA, the introduction of the global Common Reporting Standard (which provides for automatic exchange of tax information between almost 100 countries), recent EU plans to force the world's biggest multinationals to report their earnings in each EU Member State and international efforts to investigate and prosecute companies accused of wrongdoing.

An interesting question is whether the new offence will revive interest in the adoption of a more general corporate criminal offence of failing to prevent financial or economic crime (as advocated by David Green QC, the director of the U.K. Serious Fraud Office), which the U.K. Government has confirmed is under formal consideration once again but which, following the Brexit vote, may be further down the Government's agenda.



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