

December 2015

# Alert

## Facilitating Tax Evasion

### New Corporate Offence Modelled on The Bribery Act

#### Summary

In the March 2015 Budget the Chancellor announced tough new sanctions for tax evasion, intended to have a deterrent effect. After a period of consultation, the intention to proceed with these measures was confirmed in the 2015 Autumn Statement.

In summary, the measures to be implemented are:

- A new criminal offence for corporates who fail to prevent the facilitation of tax evasion by persons associated with them;
- A new criminal offence removing the requirement to prove 'intent' where large amounts of tax has not been paid on offshore income or gains;
- Tough new penalties for offshore tax evaders, including a penalty linked to the value of any asset on which tax was evaded and the public "naming and shaming" of offshore tax evaders; and
- A new penalty regime for enablers of tax evasion, including public "naming and shaming".

On 9 December 2015 the Government published its response to the initial consultation together with a draft offence for corporates of "**Failure to Prevent the Facilitation of Tax Evasion**". A further period of consultation for these proposed new measures will commence in early 2016 and they are expected to be come into force prior to the UK commencing the exchange of information with other territories under the Common Reporting Standard, which is currently set for September 2017.

The essential elements of this New Offence are:

- Companies will be criminally liable if their associated persons facilitate the evasion of tax by others;
  - Associated person will mean any person providing services to the corporate without jurisdictional limit;
- This offence will be in force by September 2017 latest – to coincide with the UK's commitment to share tax information under the Common Reporting Standard;

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- It will apply to evasion of all UK tax and evasion of all similar overseas taxes;
  - In respect of the evasion of UK taxes, it will apply to UK and non-UK corporations/partnerships whether they carry on business in the UK or not;
  - In respect of the evasion of overseas taxes, it will apply to UK and non-UK corporations/partnerships but they must carry on some part of their business in the UK;
- A defence of reasonable procedures will be available, like the Bribery Act 2010 (“Bribery Act”), permitting release from liability if the corporate can prove it had reasonable procedures (cf. adequate procedures under the Bribery Act);
- Guidance will be published following further consultation. It is likely to follow elements of the Bribery Act guidance (e.g. tone from the top, training, policies, procedures, monitoring etc); and
- The degree of control over the associated party is key to assessing reasonableness of procedures.

## Context of the New Offence

It is well-known that the UK is committed to the eradication of offshore tax evasion and so-called safe havens, and has pursued and supported a number of initiatives including at the G20 and through presidency of the G8. This draft offence and the measures accompanying it are a key part of the Government’s strategy to lead the way in ensuring international tax transparency and eliminating safe havens for untaxed income or gains.

The offence of ‘**Failing to Prevent the Facilitation of Tax Evasion**’ was also one of four important proposed modernisations of corporate criminal law under consideration following the latest financial crisis. The others reforms were:

- A change to the law on corporate criminal liability - moving away from the identification or directing mind principle;

- The (rebuttal) presumption of fault for regulatory breaches in the new Senior Manager’s Regime; and
- Creating a new corporate criminal offence of failing to prevent financial crime.

Of these, all, bar the corporate tax evasion offence, have been abandoned.

## Detailed Elements of the draft offence

Although the Government noted in the first consultation that there were only a minority of corporations who were deliberately involved in tax evasion (or who encouraged the provision of services from others to facilitate criminal tax evasion), it was striking (at least to the eyes of the Government) that few corporates systematically monitor associated parties for evidence of involvement in illegal tax evasion. It is clear that the strategy underpinning this proposed legislation is to “incentivise” (with a stick not a carrot) corporates to put in place better systems for the monitoring of representatives.

The Government is at pains to point out that this does not mean there is an obligation for corporates to monitor their clients’ tax compliance - although some may feel that this is the practical effect – but to simply put in place **reasonable procedures** to prevent the facilitation of tax evasion by others.

Given the detail in the response to the consultation and the provision of draft legislation, it is probably the case that the offence itself will remain largely as it is<sup>1</sup>. The most fertile ground for further consultation will be in the Guidance that HMRC must publish on ‘reasonable procedures’ before the offence comes into force. As with the Bribery Act guidance<sup>2</sup> this will be the most important document for corporates – particularly those in the regulated financial sector – in handling this new piece of law.

## Extra Territoriality

The offence as drafted will apply to relevant bodies (defined as all corporate entities or partnerships (or the like) wherever incorporated or formed). Despite

representations from the non-profit sector, there is no 'carve out' for them.

The offence will apply to the evasion of any UK tax, and controversially, it will also attach to the evasion of any overseas tax so long as it satisfies a 'dual' criminality test. It is this element that is likely to pose significant challenges for financial institutions with global operations

One limit on this global reach is that to commit the proposed offence through overseas tax evasion the relevant body must be formed or incorporated in the UK or carry on part of its business in the UK.

### Associated Persons

Corporates, under this proposed offence, will be exposed to criminal liability from the actions of any **associated person** - being any person who performs services on behalf of the corporate – and it will be immaterial where the associated person is based or carries on business.

There are similarities here to the Bribery Act and which will at least mean that those corporates who have already identified their **associated persons** for the purposes of Bribery Act compliance will be one step ahead when this provision comes into force.

Despite some similarities, one key difference between the Bribery Act approach to corporate offending and the stance in the new tax evasion offence relates to the connection between the services performed and resulting benefit to the corporate. In section 7 of the Bribery Act, the corrupt act must be intended to benefit to the corporate; under the new tax evasion offence this connection is not replicated, therefore making the corporate tax evasion offence broader in scope.

Broadening the scope of this new corporate offence is consistent with the Government's response to the first consultation that a corporate ought properly to be made liable in relation for the actions of anybody who performs services on its behalf, irrespective of whether that conduct was intended to benefit the corporate.

### Reasonable Procedures

The departure from the Bribery Act's formulation of **adequate procedures** as the safety valve, to a test of **reasonable procedures**, is interesting and critically important to corporates in deciding where to '*set the dial*' of their compliance programmes; arguably, **reasonable** is less stringent a test than adequate. Ultimately, the guidance will be the most important factor in giving practical effect to the required approach.

However, what procedures will be **reasonable** will be almost entirely dependent on context and the surrounding circumstances. A key factor, already flagged in the response to consultation, is the level of control or supervision that the corporate has over a person acting on its behalf. For example, where a company engages other companies to provide services to its customers and an employee of one of the other companies facilitates a customer's evasion of tax, the company in question ought to be able to satisfy the **reasonable procedures** test by pointing to the due diligence checks on the subcontracted companies and appropriate contractual terms. However, the sub-contracted company who directly employed and therefore had control and supervision of the employee, will have to provide more compelling evidence of its **reasonable procedures** – including policies, training, risk assessments and supervision of employees' working files.

### Facilitation

As expected, the acts that will count as facilitation of tax evasion range from 'knowing involvement' at one end of the spectrum through to 'giving encouragement' at the other, and include familiar concepts such as assisting, aiding, abetting, counselling and procuring.

### Impact

The offence will have a significant impact on FCA-regulated companies in the financial sector where the provision of tax advice, operating offshore banking

facilities, company formation, and trust services are particularly prevalent. For international financial institutions with a UK footprint, the impact will be even more acute as the range of gateways through which it could be exposed to criminal sanction in the UK for evasion of taxes by an **associated person** in any other territory are set to widen considerably.

Whilst guidance on the new offence is unlikely to be available for some time, the Government's response to the first consultation and the guidance produced in the Bribery Act context suggest that the scale of the issue and necessary adjustments to compliance procedures of large international financial institutions (whether UK-based or not), is such that steps need to be taken now in preparation. As a first step, we would

recommend companies identify **associated persons** and risk exposure channels, review contractual terms of **associated persons**, and conduct a thorough risk assessment (from which early de-risking strategies can be developed and implemented). Implementing such measures will impact companies' assessments, which will be essential in understanding exposure and engaging senior management to appropriately resource the response.

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- 1 Subject to the correction of what appear to be errors – omitting s.3(5) which is referred to in s.3(3) and including (if not contained in the missing s.3(5), a definition of person C – identified in s.3(3) but not defined).
  - 2 [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/181762/bribery-act-2010-guidance.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/181762/bribery-act-2010-guidance.pdf)

If you have questions concerning the contents of this Alert, or would like more information about facilitating tax evasion, please speak to your regular contact at Weil, or to:

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