

Clients & Friends Memo

UK Criminal Finances Act 2017 Commences with New Tax Evasion Offences, Anti-Money Laundering Rules, and Asset Forfeiture Provisions

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On 30 September 2017, Part 3 of the UK Criminal Finances Act 2017 (the “CF Act”) came into force creating new corporate offences for failing to prevent the facilitation of UK or overseas tax evasion.¹ Similar to the standard set forth for bribery in the UK Bribery Act 2010 (the “Bribery Act”), the new tax offences effectively impose strict liability on a company whose employees are found to have facilitated tax evasion, unless the company can show it had reasonable prevention procedures in place. At the same time, the law creates new measures, which are set to come into effect in the near future, aiming to tackle money laundering and corruption, facilitate the recovery of the proceeds of crime and terrorist financing and provide authorities with new investigative and recovery powers. It is the latest effort in a global trend among UK, US, and other international regulators to aggressively battle tax evasion, money laundering, and other financial crimes worldwide.

I. New Corporate Offences for Failure to Prevent Tax Evasion

With the enactment of the CF Act, two new corporate criminal offences came into effect: (i) the failure to prevent the facilitation of domestic UK tax evasion; and (ii) the failure to prevent the facilitation of foreign tax evasion.² For a corporation, partnership, or other organisation to be convicted of either offence, prosecutors must prove the following three stages:

- Stage one: criminal tax evasion by a taxpayer (whether an individual or a legal entity);
- Stage two: criminal facilitation of the tax evasion, involving deliberate and dishonest behavior by an employee, agent, sub-contractor, or other person acting on the organisation’s behalf (a so-called “associated person”); and

¹ See Criminal Finances Act 2017, available at <http://www.legislation.gov.uk/ukpga/2017/22/contents/enacted>.

² HM Revenue & Customs has issued detailed guidance on the CF Act’s new tax evasion offences, dated 1 September 2017, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/642714/Tackling-tax-evasion-corporate-offences.pdf.

- Stage three: that the organisation failed to prevent its associated person from committing the criminal facilitation offence.

The penalties on conviction for either offence include unlimited fines and a potential bar on competing for future government contracts.

A. Removal of Identification Doctrine

Traditionally, under the “identification doctrine,” organisations can only be liable for criminal behaviour by their employees if senior members of the corporation – typically at board level who are the “directing mind and will of the company” – were aware of the conduct at issue. Not surprisingly, this historically led to a poor conviction rate of organisations for economic crimes.³

However, under the CF Act, organisations may be criminally liable for failing to prevent the facilitation of tax evasion by an associated person regardless of whether senior management had knowledge of the tax evasion or the facilitation thereof. In addition, liability can attach regardless of whether the organisation derived any economic benefit from the underlying tax evasion or facilitation. By imposing a “failing to prevent” standard, consistent with the Bribery Act section 7 standard in the bribery context, the CF Act effectively results in the failure to prevent the facilitation of tax evasion becoming a strict liability offence.

B. Extraterritorial Reach

These two new offences have global implications for organisations both within and outside the UK.

Where there is evasion of UK taxes, any company based anywhere in the world can be liable, regardless of whether it has a business presence in the UK.

The foreign facilitation offence is slightly narrower in scope. Only companies with a UK nexus can be liable for failing to prevent their associated persons from criminally facilitating the evasion of foreign taxes. This applies to companies incorporated under English law, carrying on business or part of a business in the UK, or where their associated person criminally facilitates evasion from within the UK. The offence also requires “dual criminality”, which means that the tax evasion (stage one of the offences) and facilitation of the tax evasion (stage two of the offences) must be a criminal

³ In January 2017, the Ministry of Justice published a call for evidence on corporate liability for economic crime, soliciting opinions on how the identification doctrine impacts the enforcement of the criminal law against large corporate entities. See <https://consult.justice.gov.uk/digital-communications/corporate-liability-for-economic-crime/>. The Bribery Act section 7 offence addressed this issue partially, by making a company criminally liable for failing to prevent bribery committed by a person (employee or agent for example) acting on its behalf. This is a strict liability offence, subject only to the proof of the defence of having implemented adequate anti-bribery procedures.

offence in both the UK and the foreign jurisdiction. So, for example, even if negligent or inadvertent facilitation is an offence under foreign criminal law, the new offence would not apply because English law requires deliberate and dishonest acts of facilitation. A conviction in the foreign jurisdiction (outside the UK) is not necessary for a prosecution to be commenced. Consent of the Director of Public Prosecutions and the Director of the Serious Fraud Office is needed to institute proceedings for the offence of failing to prevent the facilitation of foreign tax evasion.

C. Reasonable Prevention Defence

Each of the domestic and foreign offences is subject to a defence of having in place “reasonable” prevention procedures to prevent associated persons from committing tax evasion offences.⁴ As guidance on what would meet this standard, HM Revenue & Customs (“HMRC”) calls for “bespoke prevention procedures” that are carefully considered and applied in a risk-based and proportionate way. This may include, for example, representations and warranties in employment contracts agreeing not to facilitate tax evasion, providing training to associated persons on how to identify tax evasion and other financial crimes, and establishing an internal whistleblower procedure to allow associated persons to raise concerns without retaliation. The Law Society of England and Wales have also published a practice note on the CF Act for legal practitioners, amplifying HMRC’s own guidance.⁵

II. Unexplained Wealth Orders

The CF Act also creates a process by which law enforcement authorities can seek an Unexplained Wealth Order (“UWO”) against persons suspected of being involved in or associated with serious financial crimes.⁶ Upon obtaining an order from the High Court, authorities can require individuals to explain the origin of assets which appear to be disproportionate to their income, or risk the assets being seized. The UWO provisions have not yet come into force.

Obtaining a UWO from the High Court will require a showing that:

- there is reasonable cause to believe that the individual holds the property in question, and the value of that property is greater than £50,000; and

⁴ Although modelled on the Bribery Act, this defence does not go as far as the “adequate procedures” defence, requiring only that organisations have “reasonable” procedures in place, notwithstanding that these may not prevent every instance of non-compliance by an organisation’s associated persons.

⁵ See <https://www.lawsociety.org.uk/Support-services/Advice/Practice-notes/criminal-finances-act-2017/>.

⁶ Agencies who can obtain a UWO include the National Crime Agency, HM Revenue & Customs, the Financial Conduct Authority, the Serious Fraud Office, the Director of Public Prosecutions (in relation to England and Wales), or the Director of Public Prosecutions for Northern Ireland (in relation to Northern Ireland).

- the individual is a “politically exposed person”; or
- there are reasonable grounds for suspecting that the individual is or has been involved in serious crime, or a person connected with the individual is.

If a person subject to a UWO fails to comply with the order without reasonable excuse, their interest in the property will be presumed to be recoverable for the purpose of any proceedings taken in respect of the property (e.g. a freezing order). In addition, a person found guilty of making a false statement in response to a UWO will be liable to a term of imprisonment not exceeding two years, a fine or both.

III. Anti-Money Laundering Provisions

The CF Act also introduces a number of provisions to be rolled out in the future that are designed to further implement the Action Plan for anti-money laundering and counter-terrorist finance, published by the Home Office and HM Treasury in April 2016.⁷ This includes improved sharing of suspicious activity reports (“SARs”) among regulated entities, and streamlining the SAR preparation process. The SAR provisions have not yet come into force.

These provisions in the CF Act follow on the heels of a suite of changes being made to the regulation of financial crime in the UK, including:

- In April 2017, Part 8 of the Policing and Crime Act 2017 came into force, giving new powers to the Office of Financial Sanctions Implementation to impose financial penalties for breaches of financial sanctions, and making it simpler for HM Treasury to impose penalties for suspected breaches through civil enforcement. In addition, penalties for criminal violations of sanctions were increased from two years to seven years, and the deferred prosecution regime first used under the Bribery Act was extended to companies who have breached financial sanctions.
- Also in April 2017, the UK Department for Business, Energy & Industrial Strategy issued a call for evidence for a public register which would contain information about the beneficial ownership of foreign companies or foreign entities that own or buy UK property, or that participate in certain UK central government procurement activities. The proposal, if implemented, would enhance the transparency of foreign property investment by

⁷ See Action Plan for anti-money laundering and counter-terrorist finance (April 2016), available at <https://www.gov.uk/government/publications/action-plan-for-anti-money-laundering-and-counter-terrorist-finance>.

preventing corporate entities from being used to conceal money laundering and other corrupt activities.⁸

IV. Conclusion

The CF Act is the latest in a number of aggressive measures to fight tax evasion, money laundering, and terrorist financing, shifting the UK to the forefront in the fight against global financial crimes. The new legislation makes clear that failing to prevent the facilitation of foreign (non-UK) tax evasion is a criminal offence in the UK; a legal question to which no clear answer had been provided for in the UK's anti-money laundering legislation existing before the enactment of the CF Act. While there are a number of takeaways from this latest effort, the most imminent for companies both within and outside the UK, is to ensure their compliance programs are up to date and account for the two new tax evasion offences including by extending the application of these policies to agents, sub-contractors, and other third parties in addition to employees. Banks, financial institutions, law and accounting firms, and other professional service firms may likely be most heavily impacted by these new offences. A strict liability standard and unlimited fines means that the consequences any non-compliance could be severe.

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⁸ See Cadwalader Clients & Friends Memo, *UK Proposal for Register of Foreign Beneficial Ownership of Real Estate Continues Global Trend Toward Transparency* (Apr. 20, 2017), available at <http://www.cadwalader.com/resources/clients-friends-memos/uk-proposal-for-register-of-foreign-beneficial-ownership-of-real-estate-continues-global-trend-toward-transparency->.