

## A note of caution

### Failure to prevent facilitation of tax evasion



#### What are the offences?

The Criminal Finances Act 2017 (the "Act") introduces two corporate criminal 'failure to prevent' offences:

- failure to prevent the facilitation of UK tax evasion (section 45)
- failure to prevent the facilitation of foreign tax evasion (section 46)

The offences are comparable to the offence of failure to prevent bribery under Section 7 of the Bribery Act 2010: they are structured in a way which allows a corporate to be found criminally liable without the prosecution of any individual and without having to prove that senior management were involved in or aware of any illegal activity.

#### Who does the law apply to?

The offences can be committed by a corporate (including any legal entity or partnership) if:

- a person who provides services for or on behalf of the corporate criminally facilitates tax evasion by another
- the corporate did not have reasonable procedures in place to prevent such facilitation (or reasonable grounds for not having in place such procedures)

Importantly, a corporate can be guilty of the new offence if a person associated with it commits a UK or foreign tax evasion facilitation offence.

The concept of the "associated person" is broad and can include any person who performs services for or on its behalf. This could – on the face of it – include suppliers, contractors, sub-contractors, employees, secondees, agents, counterparties or other commercial associations. For example, a distributor under a sub-contract with a manufacturer, a relationship manager employed by a bank, or a tax advisor approved by a financial

institution to assist with a customer's tax matters could be associated persons for the purposes of the Act.

#### What is "criminal facilitation" of tax evasion?

Criminal facilitation of tax evasion for the purposes of the Act occurs where an associated person deliberately and dishonestly takes action to facilitate tax evasion by a taxpayer.

#### What is "tax evasion"?

Broadly, tax evasion for the purposes of the Act means fraudulent evasion of any tax – where a person knows he has a tax liability and acts dishonestly in not declaring that liability. Tax evasion is distinct from tax planning or mitigation, even where that planning does not work and a tax liability arises, provided the person honestly believed the planning was effective when filing tax returns. However, the dividing line between tax planning/mitigation and tax evasion can be unclear, and a taxpayer's intentions are often difficult to ascertain.

#### What is the territorial scope of the offence?

The offence has very wide territorial scope. Failure to prevent the facilitation of UK tax evasion can be committed by a corporate operating anywhere in the world, no matter where it is incorporated or has operations.

Failure to prevent the facilitation of foreign tax evasion can be committed by any corporate with a UK nexus, which is also defined widely. For instance, where an associated person of an entity headquartered in the US commits a facilitation offence by way of conduct outside the UK, the company can be caught by the Act if it has a branch in the UK.

## What are the consequences of committing an offence under the Act?

The main consequences include:

- unlimited financial penalties
- confiscation orders or serious crime prevention orders
- exclusion from public procurement processes
- disclosures to professional regulators

The exclusion from public procurement processes and disclosure obligations often apply even where there is only an ongoing investigation but no determined liability, making the establishment of a robust, pre-emptive defence that can avoid any investigation in the first place even more important.

## How can you defend against an offence under the Act?

The key defence is to demonstrate that the corporate has both:

- reasonable prevention procedures in place to avert any such tax evasion offences from being committed
- reasonable grounds for not having in place such procedures

Although “reasonable prevention procedures” are not defined in the legislation, Her Majesty’s Revenue & Customs (“HMRC”), which has the primary responsibility for investigating the offence together with the Crown Prosecution Service and Serious Fraud Office, has published guidance on how corporates can demonstrate that reasonable prevention procedures have been put in place. This guidance largely follows the Bribery Act procedures and contains six underpinning principles:

- risk assessment
- proportionality of risk based procedures
- top level commitment
- due diligence
- communication
- monitoring and review

In order for a corporate to be able to defend against prosecution under the Act, it is critical that it can demonstrate compliance with these principles. Since the same principles are used in relation to compliance with the Bribery Act, useful guidance on reasonable prevention procedures can be gained by looking at the Deferred Prosecution Agreements approved by the court in respect of bribery investigations. HMRC has made clear, however, that “adequate procedures” put in place in compliance with the Bribery Act will not be equivalent to “reasonable prevention procedures” under the Act, meaning that corporates must conduct bespoke risk assessments and implement specific procedures to prevent facilitation of tax evasion.

## What should you be doing now?

The relevant sections of the Act came into force on 30 September 2017. HMRC has recognised that it will take a reasonable period of time for corporates to put in place measures to ensure compliance with the Act, and that what is reasonable for a company to do on day one will not be the same as what is reasonable once the Act has been in force for a few years. However, it has also made clear that all businesses should be able to demonstrate, at the least, a clear commitment to compliance, top level buy-in, an initial communication plan and a plan for implementation.

The key first step for all corporates in England and Wales is to undertake – and thoroughly document – a bespoke risk assessment. This risk assessment will determine what procedures (if any) are required to be implemented and is essential to any claim to a statutory defence.

## How can we help?

Eversheds Sutherland’s experienced Corporate Crime and Investigations team has advised many corporate entities, both in the UK and abroad, on their obligations in relation to the equivalent failure to prevent bribery offence since the Bribery Act 2010 came into force in 2012. The team has designed and implemented compliance programmes, advising on and conducting internal investigations and supporting corporations subject to enforcement action. Leveraging off this extensive experience, and working with our highly-rated and award-winning Tax team, Eversheds Sutherland is perfectly positioned to advise you on an appropriate and proportionate response to these offences and the implementation of any necessary compliance framework.

## What happens next?

For more information please contact:



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