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Facilitating Tax Evasion—Enforcement of the U.K.'s Corporate Criminal Offence

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Introduction

Figures published by the Government show that contraventions of the Criminal Finances Act 2017 are being actively investigated and that financial institutions are most at risk of prosecution. This means that firms should ensure that policies addressing risks of facilitating tax evasion are up to date and have been implemented effectively.

The Criminal Finances Act is part of a trend towards holding businesses criminally liable. The Bribery Act 2010 introduced the offence of failing to prevent bribery. A broader offence of failure to prevent economic crime is now also under consideration.

Corporate Offence – Criminal Finances Act 2017

In 2017, the U.K. Government made it an offence for businesses to fail to put in place reasonable procedures to prevent employees and other associated persons from facilitating tax evasion. The new offences were set out in Part 3 of the Criminal Finances Act 2017.

Under this, it is an offence to fail to prevent the facilitation of the evasion of UK or foreign taxes. Tax evasion itself has always been a crime in the U.K. The intention of the Criminal Finances Act 2017 was to impose criminal liability on businesses whose employees, for example, helped clients evade taxes. The type of conduct highlighted by the Panama Papers would potentially have resulted in criminal prosecution of institutions whose clients had set up offshore structures to dishonestly evade taxes.

Imposing criminal liability on businesses in the U.K. has traditionally been difficult, given that prosecutors have had to prove that senior personnel who comprise the "governing mind" (generally the Board) were aware of or involved in the relevant criminal activity. This has resulted in enforcement action focusing on the individuals more directly involved in any wrongdoing. This has usually meant that junior staff have been the focus of attention, whereas institutions and senior management have avoided criminal prosecution.

The Criminal Finances Act has sought to short circuit this by imposing criminal liability on corporations where an employee has facilitated tax evasion. A business can only escape liability if it can demonstrate that it has put in place reasonable preventative procedures.

The Criminal Finances Act has caused businesses in the U.K. to introduce internal procedures to address the risk of facilitating tax evasion. To an extent, therefore, the Act has been successful in bringing about a change in behaviour. However, the best driver of change and the greatest deterrent will be prosecutions under the Act.

So far, no prosecutions have been brought. This does not mean, however, that law enforcement authorities have been inactive in investigating potential contraventions.

On 25 August 2020, the U.K. Government published details of enforcement activity for breaches of the corporate offence of facilitating tax evasion.

The Government announced that HMRC has around 30 cases under way. In particular:

- Ten live investigations are being conducted. No charging decisions have yet been made.
- The Government states that a further 22 live opportunities are under review.
- The investigations and opportunities cover ten different business sectors including financial services, the oil industry, construction, labour provision, and software development.

It is interesting that 12 of the investigations or "opportunities" relate to businesses in the financial sector.

Based on these figures, it does appear that there are genuine enforcement risks involved for contravention of the Criminal Finances Act's corporate offence. Financial institutions are at particular risk of enforcement with a disproportionate number of financial institutions coming under investigation. It will be interesting to see how the live investigations and opportunities develop and what emerges in the Courts.

Corporate Liability in the U.K. – Bribery and Financial Crime

The corporate liability offence under the Criminal Finances Act 2017 closely follows the model provided by the Bribery Act 2010. The Bribery Act 2010 makes it an offence for commercial organisations to fail to prevent bribery. The offence is committed where the business concerned did not have adequate procedures in place to prevent bribery occurring.

The Criminal Finances Act 2017 and the Bribery Act 2010 target relatively narrow types of conduct. The facilitation of tax evasion in the case of the Criminal Finances Act and bribery in the case of the Bribery Act. The U.K. Government has also been considering introducing a broader corporate offence of "failure to prevent economic crime". This would make it easier to impose criminal liability on corporates and other business for criminal activities that are facilitated by their employees (for example, fraud or money laundering). This initiative, of course, has the support of bodies such as the U.K.'s Serious Fraud Office but has been long in gestation.

The Government conducted a Call for Evidence on proposals for the new economic crime offence, and the matter was also considered in the Treasury Committee's March 2019 Report on "Economic Crime – Anti-Money Laundering Supervision and Sanctions Implementation".

Introducing a broad corporate offence of failure to prevent financial crime would criminalise what are presently regulatory systems and controls breaches for financial institutions. The combined effect of the existing and proposed legislation is to significantly increase criminal prosecution risks for institutions.

Although little progress has been made since, the direction of travel in the U.K. is towards imposing increased corporate liability, which will increase the risk of enforcement.

The EU's Sixth Money Laundering Directive

Trends in the U.K. are mirrored in some respects at the EU level.

The EU's Sixth Money Laundering Directive (the Directive on Combatting Money Laundering by Criminal Law) (6MLD) is due to be implemented across the EU by 3 December 2020. The U.K. has of course left the EU (subject to the current transitional period) and in any event had to opt into EU criminal legislation, which the U.K. chose not to be in the case of 6MLD.

Under Article 7 of the 6MLD Member States are required to introduce legislation that ensures that businesses can be held liable where the lack of supervision or control has made possible the commission of a money laundering offence by an employee or agent for that business' benefit. This introduces a failure to prevent style criminal offence under EU laws.

While the U.K. and EU have not quite leapt to establishing U.S. style vicarious liability for criminal offences, businesses operating in these jurisdictions or with customers here will come under an increased threat of criminal prosecution for the actions of their employees.

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If you have any questions concerning these developing issues, please do not hesitate to contact the following Paul Hastings London lawyer:

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