

## Criminal Finances Act 2017 – a refresher

The Criminal Finances Act 2017 (“the Act”) came into force in the UK on 30 September 2017 and was borne out of governmental desire to hold relevant bodies criminally liable where they fail to prevent those who act for them, or on their behalf, from criminally facilitating tax evasion. It was believed that the existing law made it difficult to attribute criminal liability to a relevant body and that there was no incentive for senior management to invest in preventative procedures.

As with the money laundering regulations and Bribery Act 2010, there is an increasing onus on senior management to be aware of the risks and to implement policies and procedures as a result, including ensuring that employees are aware of and trained on said policies and procedures. However, companies that are already subject to the legal and regulatory obligations for anti-money laundering (“AML”) and terrorist financing (“CTF”) will already be under an obligation to identify risks related to handling the proceeds of tax evasion on a risk-based approach; these therefore may provide a starting point for procedures under the Act.

The Act also has international reach and offences will be committed where a relevant body fails to prevent an employee, agent or others that provide services for them, or on their behalf, criminally facilitating the evasion of a tax, whether in the UK or in a foreign country. Interestingly, with tax evasion already an offence, the focus of the Act is on *who* was responsible for the failure to prevent the crime rather than trying to attribute the criminal acts to the relevant body. The tax evasion does not have to be successful; merely taking steps with a view to or being knowingly concerned in the evasion of tax is sufficient.

### The UK Offence

There are three stages to a UK tax evasion facilitation offence:

1. There must be a criminal offence at the taxpayer level. There are a range of statutory offences – for example, fraudulently evading VAT – and there is the common law offence of cheating the public revenue. In order for a criminal offence at the taxpayer level to be committed, it is not necessary that any tax actually be successfully evaded. Taking steps with a view to or being knowingly concerned in the evasion of tax is sufficient. If there is no attempt to evade tax or if there is no actual evasion of tax at the taxpayer level, a relevant body cannot be criminally liable.
2. Where there has been an attempt to evade tax or there has been tax evasion (stage one), stage two requires that there be criminal facilitation of tax evasion by a person acting in the capacity of a person associated with the relevant body. As can be seen above, the associated person can be an employee, an agent or other individual or incorporated body performing services on behalf of the relevant body. It must be a deliberate and dishonest action by the associated person to facilitate the evasion. If the action is accidental, ignorant or negligent, an offence under the Act will not be committed by the relevant body.
3. Where there is an attempt to evade tax or there has been tax evasion (stage one) and a deliberate or dishonest action by an associated person (stage two), as the Act has created a strict liability offence, an offence will have been committed by the relevant body unless it can show that it has in place reasonable preventative procedures – this is the relevant body’s defence.

The defence is similar to that available under the Bribery Act 2010. However, what is apparent in respect of the defence under the Act is that it is not sufficient for a relevant body to merely incorporate the word “tax” into existing procedures such as those prepared for bribery and money laundering compliance. There must be, particularly in high risk sectors, a thorough risk assessment of the processes and procedures needed to mitigate the risks.

## The Foreign Offence

The foreign offence contains the same three stage test as the UK offence but with additional elements to satisfy: a UK nexus and dual criminality.

A UK nexus (or connection) is established where:

- The relevant body is incorporated under UK law;
- The relevant body conducts part of its business in the UK – for example, a Spanish incorporated company operating from an office in Bristol; and
- Any aspect of the facilitation offence occurs in the UK – for example, the associated person of a French incorporated company facilitates a foreign tax evasion offence whilst based in Manchester.

Where a UK nexus has been established, a foreign offence will only be committed where dual criminality applies. Dual criminality is a two stage test:

- The overseas jurisdiction must have an equivalent tax evasion offence and the offence would be regarded as an offence in the UK; and
- The overseas jurisdiction must have an equivalent facilitation offence and the offence would be regarded as an offence in the UK.

Therefore, a failure to prevent facilitation of tax evasion offence under the Act cannot be committed by a relevant body if it would not be criminal in the UK, irrespective of the law in the foreign jurisdiction. Similarly, if there is no offence of tax evasion, attempted tax evasion or failure to prevent facilitation of tax evasion in the foreign jurisdiction, an offence under the Act cannot be committed by a relevant body. This concept is not new and exists under AML and CTF regulations.

## Penalties

As a corporate offence custodial sentences cannot be imposed on the relevant body. The penalties for this offence therefore are:

- Unlimited financial penalties; and
- Ancillary orders such as confiscation orders or serious crime prevention orders.

There are in addition subsequent consequences as a result of a criminal conviction – not least the reputational damage, but also disclosure to regulators both in the UK and overseas may be required, which may in turn prevent the award of public contracts to the relevant body.

### *Deferred Prosecution Agreement*

Deferred Prosecution Agreements (“DPAs”) are available for offences under the Act. DPAs were introduced by the Crime and Courts Act 2013 and were initially used in respect of offences of fraud, bribery and other economic crimes. They are available to organisations only.

## Defence

The defence available to relevant bodies in response to allegations that it has facilitated UK or foreign tax evasion is that it has put in place reasonable prevention procedures to prevent the criminal facilitation of tax evasion by an associated person, or where it is unreasonable to expect such procedures. This is similar to the defence under the Bribery Act 2010.

When establishing reasonable prevention procedures, relevant bodies wishing to prevent the criminal facilitation of tax evasion by associated persons should consider six key principles identified by HMRC:

- Risk assessment;
- Proportionality of risk-based prevention procedures;
- Top level commitment;
- Due diligence;
- Communication; and
- Monitoring and review.



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