

New Corporate Criminal Offence: Failure to Prevent the Facilitation of Tax Evasion



The Criminal Finances Bill 2016 - 17 was presented to Parliament and had its first reading on 13 October. According to the Home Office the purpose of the legislation is to "tackle money laundering and corruption, recover the proceeds of crime and counter terrorism financing". The Bill is divided into four parts. This short briefing focuses on one of the Bill's most significant innovations found at Part 3 which makes provision for two new corporate criminal offences of "failure to prevent facilitation of tax evasion".

What are the terms of the new offences?

Under the new offence, which is loosely modelled on section 7 of the Bribery Act 2010, a "relevant body" is guilty of a criminal offence where a person associated with it commits a "UK tax evasion facilitation offence" or a "foreign tax facilitation offence" and the "relevant body" did not have reasonable procedures in place to prevent such facilitation. The "relevant body" has strict liability under either offence – no criminal intent, knowledge, collusion or coordination by senior management is required. In addition, unlike the Bribery Act, there is no requirement that any person intended to obtain or retain business for the relevant body.

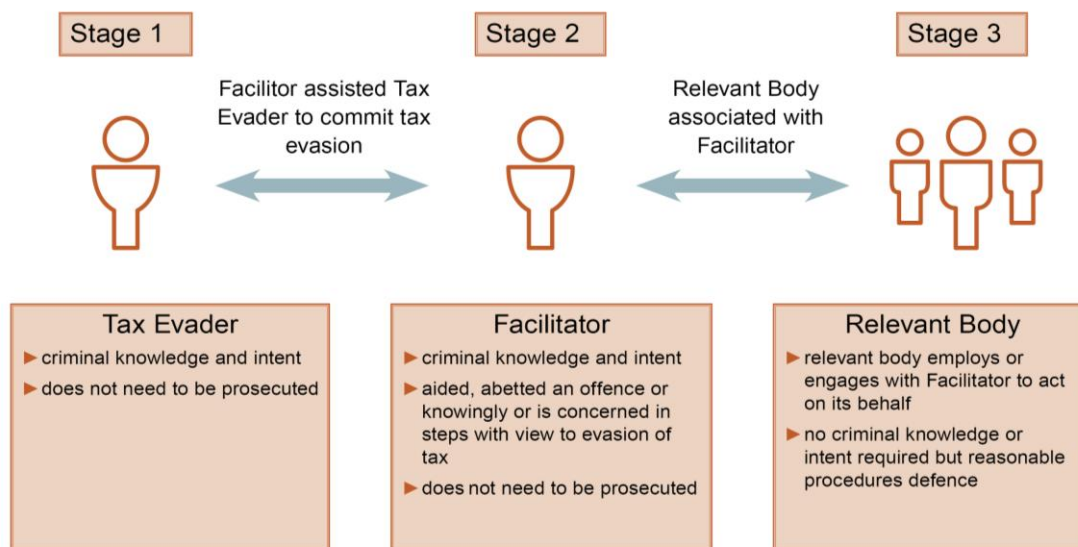
Which entities will the new offences apply to?

A "relevant body" can be a body corporate or a partnership, whether commercially motivated or not. Where there is facilitation of UK tax evasion, any "relevant body" wherever based is in scope and it does not matter whether the acts or omissions leading to the facilitation took place in the UK or not.

Where there is a facilitation of foreign tax evasion, a "relevant body" is in scope if it is incorporated or formed in the UK; it carries on its business or undertaking from an establishment in the UK (although this UK presence does not need to be linked to the facilitation); or any act or omission constituting part of the tax evasion facilitation offence takes place in the UK. But it is clear this offence requires there to be "dual criminality" – the acts of the tax evader and the facilitator must be an offence in both the UK and the relevant foreign jurisdiction.

Given the role the UK has in so much of global commerce, these rules could be far reaching.

What does the offence look like?



Case Study

The lines are uncertain.

What would be the situation where a restaurant operator employs a manager to run one of its restaurants. There is a leak in the kitchen which needs fixing before a busy Saturday night. The Manager is put under pressure to rectify the situation and calls up a plumber he knows to work on short notice. However, the plumber asks to be paid in cash. It transpires this is then not declared to HMRC – an offence of tax evasion. Has the restaurant operator fallen foul of this new offence? Did the manager know what the plumber was going to do? A potential area of evidential nightmare. What was the knowledge of the manager? There is a need for the restaurant operator to provide clear guidelines for dealing with service providers.

When is a facilitator associated with the relevant body?

The concept of "associated" is very wide and catches anyone acting for or on a relevant person's behalf. Employees, agents and subsidiaries will be caught but the term could also catch, for example, contractors, sub-contractors and counterparties in joint ventures or commercial arrangements. As with the Bribery Act 2010 corporate offence, the test is not dependent on the formal nature of the relationship between the facilitator and corporate but on all relevant circumstances.

Ultimately many relevant bodies will need to consider the identity of suppliers and customers, payment methods and supply lines, paying close attention to offshore movements of money.

What is a defence to the offence?

If it can be demonstrated that despite the criminal facilitation having occurred, reasonable prevention procedures are in place to prevent the criminal facilitation of tax evasion by an associated person, the relevant person will not be guilty of a criminal offence.

HMRC's guidance is currently based on six principles which essentially mirror those accompanying the Bribery Act and which should inform the relevant bodies prevention procedure:

- ▶ Top level commitment
- ▶ Proportionally risk based prevention procedures
- ▶ Risk assessment – assessment of exposure by reference to sector, locations and business activities
- ▶ Due diligence

- Communication (including training)
- Monitoring and reviewing

In practice, a corporation will have to demonstrate a risk based approach, and document the steps it takes to comply and implement preventions procedures, and the methods it employs to test their suitability.

To a large degree this is familiar territory from the Bribery Act but a corporate cannot simply rely on existing procedures. Tax evasion is wider and potentially more complex area. HMRC has emphasised that relying on existing procedures may not be sufficient and what is sufficient now will not necessarily continue to be sufficient in the future.

Sanctions

The penalties for this offence will include unlimited financial penalties and ancillary orders such as confiscation orders or serious crime prevention orders. The mere fact of a criminal conviction will also have consequence for a relevant body; it may require disclosure to professional regulations; or prevent the body being awarded public contracts.

When will it come into force?

There is speculation that the Bill may come into force in early 2017.

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