Cooley

Failure to Prevent Criminal Facilitation of Tax Evasion

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The new UK “failure to prevent criminal facilitation of tax evasion” domestic and overseas offences will almost certainly become effective in or before September 2017. What does this mean for companies and firms? The offences threaten criminal liability in connection with policing the acts of others. Strict liability is imposed on firms and companies worldwide for the criminal acts of their “Associated Persons”. The offence incorporates a reverse burden of proof, meaning that to defend itself, the firm or company must show that it put “reasonable prevention” procedures in place.

European and UK financial services firms, accountants, and lawyers have been here before. When they were brought into the anti-money laundering regulatory world they were transformed into “gatekeepers”. A big cultural shift had to follow, as organisations and professionals, (some under protest), eventually subscribed fully to the notion of being responsible stakeholders with government in the international fight against terrorism and organised crime. This time though, the net is wider. This offence is not just for regulated firms in the EU/UK. All corporates and firms in all sectors, and potentially anywhere in the world, will be affected.

Section 7 of the UK Bribery Act (“UKBA”), upon which this new offence is modelled, brought in strict liability for UK and international corporates, making them responsible for the acts of their “Associated Persons”, so this concept is familiar. Compliance procedures are in place, with the UKBA being perceived as the new post “FCPA “gold standard”. International firms and partnerships must in the same way pay attention to this new law. Both the UK and the foreign tax evasion offences could affect them.

The law first creates a corporate offence of failure to prevent UK tax evasion by an entity’s “Associated Persons”. The one available statutory defence is that reasonable procedures were in place to prevent the facilitation, or at the time it was reasonable not to establish additional procedures. A second offence, the “foreign tax offence” is also created, effective as long as the “foreign tax” and facilitation crimes would be recognised as offences in the UK. The UK Government ostensibly plans to prosecute, or encourage overseas governments to prosecute foreign tax evasion by international companies which have a link to the UK. Potentially this offence has enormous scope. It could cover foreign tax evasion facilitation by an employee of an overseas company, which has no links at all with the UK but which sends an employee on a flying UK visit, if such visit plays a part in foreign tax evasion. Will this actually happen, and will foreign governments support the UK in this initiative?

Is this new law a positive step in the right direction, to discourage “professional enablers” from aiding and abetting criminals, or does it go too far in imposing yet further regulatory and criminal risk burdens on UK and international entities which are already incurring substantial costs for regulatory compliance?

Whatever the pros and cons of this legislation, it is crucial for firms and corporates to undertake a risk assessment for this offence now. How will you draft your procedures after your risk assessment? The UK Government draft guidance (incorporating core principles as in the Bribery Act), is now being scrutinised by the various sectors, who will want to assist their members with some specific guidance. Such guidance can be submitted to Government for approval.

For the UK legal profession, Louise Delahunty is chairing the group that is assisting the Law Society of England and Wales to draft such guidance. The group includes Natasha Kaye and other Cooley lawyers.

Contributors
