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The UK Criminal Finances Act: "The Times They Are A-Changin'"

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As a potent array of new financial crime powers is written into statute - the Criminal Finances Act received royal assent on 27 April - Quinton Newcomb of Fulcrum Chambers Ltd surveys the way ahead for compliance professionals.



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Setting out: "Walk This Way"

The UK Bribery Act 2010 marked the beginning of a corporate governance revolution by radically altering the anti-corruption landscape with the introduction of new corporate liability offences for commercial organisations.

("the Act") seeks to strengthen the available legislative tools in the fight against financial crime still further.

In line with the government's April 2016 action plan on anti-money laundering [1], when first published, the Home Office declared that the Criminal Finances Bill would "significantly" improve the capability of recovering proceeds of crime and international corruption.

The new enforcement tools: "The Long and Winding Road"

Various criminal offences already exist that can theoretically place liability on corporate bodies for the economic crimes of their employees. However, there is an inherent difficulty in establishing liability due to the current prerequisite of showing that the "directing mind and will" of the corporate entity was involved in the offence.

Failure to prevent tax evasion

The new far-reaching and extra-territorial "failure to prevent" tax evasion offences are modelled on the so-called "corporate offence" of the Bribery Act 2010 and will render corporate entities liable for the actions of "associated persons" in certain circumstances.

Unexplained Wealth Orders

The Act also introduces unexplained wealth orders (UWOs) by amendment to the Proceeds of Crime Act 2002. HM Revenue & Customs (HMRC), the Serious Fraud Office (SFO) and other agencies will be able to apply for an order that compels individuals to explain how they were able to obtain an interest in specified assets and properties which appear disproportionate to their known legitimate income.

(a) the respondent is a politically exposed person; or

(b) there are reasonable grounds for suspecting that the respondent or a connected person has been involved in serious crime (which could have taken place in the UK or overseas).

Where an UWO is not complied with, the asset will be deemed "recoverable property" for the purposes of the civil recovery provisions. [8]

Enhanced SAR regime

In addition, the Act brings forward SARs reform. This will extend the scope and powers of the National Crime Agency (NCA) when obtaining information from a regulated business, following receipt of a SAR. [9]

Impact on corporate compliance procedures: "Under Pressure"

The defence to the new failure to prevent tax evasion offences is described in the Act as follows:

"45 (2) It is a defence for B [a relevant body] to prove that, when the UK tax evasion facilitation offence was committed -

(a) B had in place such prevention procedures as it was reasonable in all the circumstances to expect B to have in place, or

(b) it was not reasonable in all the circumstances to expect B to have any prevention procedures in place.

(3) In subsection (2) "prevention procedures" means designed to prevent persons acting in the capacity of a person associated with B from committing UK tax evasion facilitation offences...[or] foreign tax evasion facilitation offences under the law of the foreign country concerned." [12]

The Act requires the Chancellor of the Exchequer to publish guidance about the procedures that relevant bodies can put in place to prevent persons from committing UK tax evasion facilitation offences or foreign tax evasion facilitation offences, similar to the equivalent requirements in the Bribery Act 2010, which led to the Ministry of Justice Guidance on Adequate Procedures. [12]

What is clear is that the new measures will place additional compliance burdens on corporate bodies carrying on any business dealings in the UK, especially in the higher risk sectors. Guilty companies under the new regime will be at risk of unlimited fines as well as other legal and regulatory sanctions. [13] Early planning is therefore essential in order to ensure minimal business disruption.

Accordingly, if they have not done so already, potentially affected organisations should consider undertaking a risk review and compliance 'gap analysis' in order to guide and/or enhance their development of adequate internal preventative procedures. Through the accumulated learning now available from the enforcement action that has taken place pursuant to the Bribery Act 2010, it is possible to identify certain priorities in the development of those procedures.

Experience dictates that effective procedures will include the effective use of audit rights in third party contracts - in order to ensure that the risk of an associate being engaged in economic crimes is managed; the formulation of an effective whistleblowing policy and of course robust education and training programmes. In addition to assessing internal compliance systems, affected entities should be reviewing all business transactions conducted on their behalf as a matter of urgency. Emphasis should be placed not only on domestic commerce but also on international dealings in order to ensure that the highest ethical standards are always adhered to. [14]

Moreover, all companies, and particularly those in the regulated sector, should have relevant systems that will enable them to react expeditiously to the receipt of an NCA notice because these notices will contain strict deadlines for compliance. [15] Money Laundering Reporting Officers ("MLROs"), Compliance Officers and equivalent employees should familiarise themselves with the amendments to the SAR regime in order to ensure that they are able to act efficiently upon the receipt of a notice. For example, the Act allows for regulated entities to share relevant information with each other further to a notification from the NCA, and systems should be in place to accommodate this.

Enforcement uncertainty: "Smoke on the Water"

With the introduction of criminal exposure through companies' "associated persons", each offence has broadened the range of persons capable of attaching criminal liability to a corporate entity. However, the offences may still be difficult to prosecute on a practical level.

It is often problematic to differentiate between aggressive (but legal) tax avoidance and criminal tax evasion. In addition, each offence currently requires the proof of another two underlying criminal offences: both the tax evasion itself and its facilitation. For those other than the principal (taxpayer) offender, there is only a subtle legal distinction between tax evasion and tax evasion facilitation offences.

In the context of a tax evasion offence, non-principals are generally considered for an offence of aiding, abetting, counselling, procuring or conspiring to commit a tax evasion offence. However, a tax evasion facilitation offence will only occur if the taxpayer is actually successful in evading the taxation. [17]

Accordingly, the continuing challenges to prosecuting such cases will mean that the predominant impact of the introduction of the new offences may not be an increase in Deferred Prosecution Agreements (DPAs) or prosecutions in the short term; rather, the consequences will manifest in the development of compliance systems as corporate bodies ensure that their procedures are sufficient to provide the necessary defence if, and when, an issue arises. [18]

The long-term direction: "Another Brick in the Wall"

The Criminal Finances Act embodies the growing governmental agenda to enlarge its arsenal for the detection of illegal activities and the expansion of corporate criminal liability, in addition to preserving the UK's reputation and integrity as a leading global centre of commerce. The de facto reversal of the burden of proof in the reasonable procedures defence understandably continues to prove controversial and poses very real question marks over the current fitness of the UK's law on corporate criminal law.

Further legislation on financial crime and money laundering is anticipated and, indeed, a formal Call for Evidence relating to corporate criminal law recently closed. Whilst more radical changes to the law are explored in the document, such as US-style vicarious liability, it seems overwhelmingly likely that, instead, the failure to prevent offence will be extended to further economic crimes.

Whatever your opinion, what appears uncontroversial is that the Criminal Finances Act brings with it further regulatory encumbrance upon corporate compliance systems. It remains to be seen whether the new regime will result in a substantial increase in corporate prosecutions and DPAs. However, with increasing evidence of the UK enforcement authorities' competence to investigate and prosecute complex multi-jurisdictional cases, now is the time for companies to take steps in order to ensure that they are not at risk of being the next Rolls-Royce.

Notes

- 1. Government Action Plan for Anti-money Laundering and Counter-terrorist Finance
2. Criminal Finances Bill, Home Office Press Release 13 October 2016
3. Other topics covered in the Bill, such as seizure and forfeiture powers and terrorist financing are not considered in this article.
4. For more information, please see Corporate Prosecutions: Legal Guidance: The Crown Prosecution Service
5. Sweet Group PLC sentenced and ordered to pay £2.25 million after Bribery Act conviction, February 2016
6. 536 Criminal Finance Bill
7. Allen & Overy Corporate Criminal Liability Risk Increases for Financial Services, 21 November 2016
8. Criminal Finances Bill Part 1, Chapter 1, ss 362B & 362C Requirements for making of unexplained wealth orders
9. Covington & Burling: Criminal Finances Bill and UK Home Office Response Published, 24 October 2016
10. Herbert Smith Freehills: Publication of the Criminal Finances Bill 2016-17, 18 October 2016
11. Part 3, ss 42 & 43 Criminal Finance Bill
12. Criminal Finances Bill Explanatory Notes, Clause 44
13. 537 Criminal Finance Bill
14. White & Case: Follow the money - the Criminal Finances Bill, 09 November 2016
15. Herbert Smith Freehills: Publication of the Criminal Finances Bill 2016-17, 18 October 2016
16. Criminal Finances Bill Explanatory Notes, Paragraphs 20-22
17. Taylor Wessing: The Criminal Finances Bill, 31 October 2016
18. White & Case: Follow the money - the Criminal Finances Bill, 09 November 2016

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