

HM Revenue & Customs Consultation: A Potential New Corporate Criminal Offence of Failing to Prevent the Facilitation of Tax Evasion

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White Collar

The UK government recently announced its intention to introduce a new criminal offence aimed at holding commercial organisations accountable for failing to take reasonable steps to prevent their agents from facilitating tax evasion. In that connection, HM Revenue & Customs (“HMRC”) has published a consultation paper seeking views on the appropriate and proportionate means of implementing the legislation.¹ Businesses have until October 8, 2015 to respond to the consultation.

Impact

The proposed new criminal offence of failing to prevent the facilitation of tax evasion (“the new offence”), as currently envisaged in the consultation paper, would apply to “corporations” whose agents facilitate the evasion of UK taxes. The consultation paper makes clear that the term “corporation” is given a much broader meaning than normal and would include commercial organisations, e.g. companies and partnerships, and not for profit companies that are not engaged in a business, profession or trade. In addition, the government proposed that the new offence shall apply to UK corporations whose agents facilitate the evasion of taxes solely in other jurisdictions, provided tax evasion is a crime in those jurisdictions. HMRC has argued that UK corporations whose agents are facilitating tax evasion outside of the UK should be held to the same standard as those whose agents are facilitating evasion of UK taxes.

The consultation paper suggests that section 7 of the Bribery Act 2010 will be used as the model for the new offence, as it “*has been recognised as an effective response to corporate commercial bribery*” which “*incentivises companies to put in place adequate procedures and promotes corporate good governance*” and that adopting the section 7 model will “*help to ensure consistency and minimise the burdens on corporations.*” Section 7 of the Bribery Act criminalises a commercial organisation for failing to prevent employees, agents and other associated persons from engaging in bribery for or on behalf of the commercial organisation, but provides commercial organisations with a defence if they had in place, at the time of the bribery, adequate procedures to prevent bribery.

¹ See https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/445534/Tackling_offshore_tax_evasion_a_new_corporate_criminal_offence_of_failure_to_prevent_facilitation_of_tax_evasion.pdf

HMRC has stated that the new offence is not intended to criminalise corporations that take reasonable steps to prevent facilitation of tax evasion by their agents. It has proposed a defence, similar to that contained in section 7, to ensure that corporations that have taken reasonable steps to put in place adequate compliance procedures do not face prosecution. HMRC has invited those responding to the consultation paper to suggest further defences that may be appropriate.

Comment

The proposed use of the ‘failing to prevent’ model, first introduced in the Bribery Act, to tackle tax evasion appears to be an advancement of the efforts currently underway by the government to expand the laws on corporate criminal responsibility.

In December 2014, the UK government announced in its Anti-Corruption Plan that it would examine the case for introducing a new corporate offence of failing to prevent economic crime, and the rules on establishing corporate criminal liability more widely. The government also indicated that it would use section 7 of the Bribery Act as the model, and suggested that *“there are likely to be other forms of economic crime for which it is appropriate to ensure that senior corporate actors are sufficiently accountable.”* Covington’s alert on the UK’s Anti-Corruption Plan can be found [here](#).

The concept of introducing a broader corporate offence of failing to prevent economic crime was first proposed by David Green QC, the Director of the Serious Fraud Office (“SFO”). If such an offence were to be created, and were it to adopt the scope of the section 7 offence, it would mean that a commercial organisation could (subject to the adequate procedures defence) be held criminally liable for a range of economic crimes committed on its behalf by its employees, agents or other associated persons, even in circumstances in which its board or senior officers had no knowledge of the wrongdoing. This move would represent a significant extension of the law on corporate criminal liability.

Currently, under English law, in order to hold a company criminally liable for offences requiring *mens rea*, a UK prosecutor must prove the involvement in wrongdoing of a person that represents the “directing mind and will” of the company. The UK courts have restricted the application of this principle to the actions of ‘controlling officers’ of the company, boards of directors, and senior officers who carry out functions of management and speak and act as the company. This requirement has imposed a high barrier to bringing charges against companies, and as a result many cases do not proceed as sufficient evidence cannot be amassed by the Prosecutor to implicate a directing mind of the company. It is no surprise then that the government and prosecutors, including the SFO’s Director Green, are strong advocates of the extension of the law on corporate criminal liability.

In the context of tax evasion, the HMRC consultation paper discusses the difficulties posed by the current law on corporate criminal liability, and suggests that the new offence would allow more prosecutions to be brought. It also states, however, that in a case in which an agent has engaged in tax evasion (in spite of the corporation’s best efforts) which has been uncovered by the corporation, and reported to the relevant authorities in a timely manner, a disposal other than a criminal conviction may be appropriate, for example a Deferred Prosecution Agreement. Covington’s alert on Deferred Prosecution Agreements can be found [here](#).

Timing

Businesses that wish to take part in the consultation process underway in the UK should note that the closing date for the submission of responses to HMRC is October 8, 2015. HMRC intends to publish its feedback on the consultation and draft legislation for further consultation at the Autumn Statement 2015.

The consultation paper suggests that the government is considering issuing guidance on the new offence, and invites comments on the nature of such guidance.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our firm:

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