

Criminal Finances Act 2017

AN INTRODUCTION TO UK LEGISLATION | JULY 2020 | SECOND EDITION

The **Criminal Finances Act 2017** makes it much easier for authorities to prosecute the facilitation of tax evasion.

This guide provides a general overview of the law for those who are new to the subject.



WHAT ARE CRIMINAL FINANCES?

Criminal finances can be broadly defined as the proceeds of crime, including from fraud, money laundering, tax evasion and corruption. Terrorist financing is also included.

OVERVIEW OF THE LAW

The **Criminal Finances Act 2017** (the 'Act') gives law enforcement powers to apply to the High Court to require natural or legal persons to provide information on their lawful ownership of property, including the means by which it was obtained. It also gives law enforcement increased powers to recover the proceeds of crime, and to tackle money laundering, terrorist financing, corruption and the facilitation of tax evasion.

The Act covers:

- corporate liability for the facilitation of UK or foreign tax evasion;
- unexplained wealth orders in respect of property held by politically exposed persons or those suspected of involvement in serious crime;
- seizure and forfeiture of the proceeds of crime including moveable objects and bank accounts;
- time period extensions for the investigation of Suspicious Activity Reports;
- legal protections for companies falling within the purview of the **Money Laundering Regulations 2017** (regulated entities) to share information about suspected money laundering;
- disclosure orders for money laundering investigations; and
- extension of the civil recovery regime in the **Proceeds of Crime Act 2002** to gross human rights abuses or violations overseas.

This guide focuses mainly on the corporate offences of failing to prevent the facilitation of tax evasion.

CORPORATE OFFENCES

The Act creates two criminal offences for corporations failing to prevent 'associated persons' from facilitating the tax evasion of another real person or body corporate:

- the UK offence (s45); and
- the overseas offence (s46).

For the overseas offence there must be dual criminality at both the tax evasion and facilitation offences stages (that is, the acts must be criminal offences both in the UK and the overseas jurisdiction).

The corporate criminal offence of failing to prevent the facilitation of tax evasion renders a company or partnership liable to prosecution if their employees, contractors or other (very widely defined) 'associated persons' dishonestly facilitate the tax evasion of another (for example, a customer, subcontractor or supplier). The corporate is deemed to be guilty if it cannot demonstrate to the civil 'balance of probabilities' standard that it had 'reasonable prevention procedures' in place to address the facilitation alleged.

It is worthy of note that although the corporate need not have any criminal intent, the Crown is still required to establish dishonest evasion and facilitation.

WHO DOES IT APPLY TO?

The legislation (which is modelled on s7 of the Bribery Act 2010) applies to all 'relevant bodies' such as companies (wherever incorporated or formed) and partnerships regardless of size or sector, including non-UK organisations with a UK connection, for example, if they have:

- UK clients; or
- a UK branch; or
- employees who travel to the UK for business.

It applies to charities but not individuals (although they will be liable for the predicate evasion and facilitation in the normal ways).

The legal, taxation and financial services sectors are considered particularly high risk so these businesses need to look closely at how the legislation affects them.

WHEN IS AN OFFENCE COMMITTED?

An offence of corporate facilitation of tax evasion is committed in the following circumstances:

- an individual or corporate taxpayer criminally evades tax; and
- an associated person, be they an employee or someone acting for or on behalf of the relevant body, is guilty of knowingly and dishonestly facilitating that evasion (this could include conspiring with, aiding, abetting, counselling or procuring the conduct); and
- the relevant body did not have 'reasonable prevention procedures' in place to prevent the associated person from committing the criminal facilitation.

If you are ever in doubt about whether conduct falls within the scope of the legislation, always seek appropriate legal advice.

REASONABLE PROCEDURES TO PREVENT TAX EVASION

HMRC has published **guidance** to help organisations design reasonable procedures to prevent the facilitation of tax evasion. The guidance sets out six guiding principles which mirror the principles set out in s7(2) of the Bribery Act 2010, namely:

1. proportionality
2. top-level commitment
3. risk assessment
4. due diligence

5. communication and training
6. monitoring and review.

Corporations in heavily regulated sectors may well feel they already have sufficient risk and compliance processes in place. However, HMRC has made it clear that reliance on existing processes will not be sufficient to provide a robust defence against this offence. The risks of tax evasion facilitation must be considered separately.

INTERNATIONAL CONSIDERATIONS

Corporations with branches in the UK and other jurisdictions need to be aware that this offence is extra-territorial. For example, a US bank with a branch in the UK and a branch in the Far East may be liable for prosecution in the UK if a facilitation offence takes place in the Far East branch, even without the knowledge or involvement of anyone in the US or UK.

REPORTING CONCERNS

An authorised person can self-report online to **HMRC** on behalf of a company or partnership if it has failed to prevent the facilitation of tax evasion. HMRC has confirmed that 'timely self-reporting will be seen as an indicator of reasonable prevention procedures'.

THE RISKS OF NON-COMPLIANCE

The key risks arising from non-compliance with the legislation may include one or more of the following.

- Criminal prosecution of the relevant body.
- Unlimited financial penalties.
- Predicate conduct (evasion and facilitation) is liable to be prosecuted in accordance with the existing criminal law. Regulatory action or criminal proceedings for the associated money laundering is also possible.
- Ancillary orders such as confiscation orders, serious crime prevention orders or Director's Disqualification Orders.
- Public record of the conviction.
- Significant reputational damage and adverse publicity.
- Severe regulatory impact including potential loss of licence or the imposition of restrictions.
- Possible debarment from tendering for public contracts.

OTHER PROVISIONS

Unexplained wealth orders

Unexplained Wealth Orders require individuals whose specified property is believed to be disproportionate to their known (or reasonably ascertainable) income to explain how the property was obtained and how the costs were met. UWOs are High Court orders following an application from enforcement authorities such as the Financial Conduct Authority, National Crime Agency, Serious Fraud Office or HMRC and may be accompanied by an interim freezing order. The respondent is required to set out the nature of interest in the specified property and how it was obtained. Non-responses without reasonable excuse are met with a presumption that property is recoverable. It is a criminal offence to make reckless or false statements and there is a maximum two-year prison sentence and fine.

In order for a UWO to be issued, the value of the property that is the subject of the order must be greater than £50,000 and the High Court must be satisfied that there are reasonable grounds for suspecting that the known sources of the respondent's lawfully obtained income would have been insufficient for the purposes of enabling them to obtain the property.

Information sharing and super SARs

Regulated entities can pool intelligence and submit a super Suspicious Activity Report. If a regulated entity is satisfied that it has information which may assist another regulated entity in determining any suspicion of money laundering, they can notify the NCA of their intention to send out disclosures, potentially to multiple regulated parties. Anyone party to the resulting joint disclosure is treated as satisfying the requirement to submit a SAR.

Further information requests from NCA

In response to a SAR, an NCA-authorized officer may apply to a Magistrate/Sheriff for a 'further information order' to the person who made the disclosure, or any other person carrying on a business in the regulated sector, directing the person to provide further specified information likely to be of substantial value to the investigation of the matter.

Failure to comply with the order renders the subject liable for a fine.

Extension of moratorium period for consent SARs

Section 10 allows for the extension of the moratorium period beyond 31 days by application to the Crown/Sheriff Court. The Court will need to be satisfied of a number of factors including that the investigation in respect of the disclosure is being carried out diligently and expeditiously and that more time is needed to conclude it.

If law enforcement agencies have taken no restraining action by the time the moratorium has expired then the activity in question may be continued.

The court can approve further extensions, in 31-day increments, up to a maximum of 186 days after the initial 31-day period – if they remain satisfied of the necessity.

FURTHER INFORMATION

See the **resources** section of our website.

This helpsheet was kindly reviewed and updated by Andrew Sackey at Pinsent Masons LLP.

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