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# Alert

## Facilitating Tax Evasion

Corporate offence of failing to prevent Tax Evasion: Accelerated Implementation Plans

### Corporate offence of failing to prevent Tax Evasion: Accelerated Implementation Plans

#### Introduction

Following the recent disclosure of the Panama Papers, the UK has accelerated its ground-breaking plan to introduce a new corporate criminal offence of failing to prevent facilitation of tax evasion. On 11 April 2016, Prime Minister David Cameron announced in advance of London's forthcoming Anti-Corruption Summit that the UK *"...will legislate this year to hold companies who fail to stop their employees [or associated parties] facilitating tax evasion criminally liable"*.

On 17 April 2016, these statements were followed-up with the release of the consultation paper (including draft guidance) and revised draft legislation.<sup>1</sup> This proposed legislation is just one of a number of measures, including the introduction of an obligation on corporates to disclose their tax strategy ([click here](#)), designed to increase tax transparency and end safe havens.

As predicted in our December 2015 Alert on the new corporate offence of failing to prevent tax evasion ([click here](#)), the new draft legislation modifies certain elements of the previous proposals; however, all major points of principle remain unchanged.

The main elements of the proposed offence for corporates are summarised below.

#### Domestic and Foreign tax evasion

For the sake of clarity, the revised draft legislation separates the domestic and foreign elements of the corporate offences into the following:

- (i) failure to prevent facilitation of UK tax evasion offences; and
- (ii) failure to prevent facilitation of foreign tax evasion offences.

The corporate offences set out in the draft legislation apply to any **"relevant body"**. A relevant body is a company, partnership, or other similar entity, wherever formed. Extra-territoriality, considered further below, is central to this legislation.

As with the previous draft, there will be a defence available to corporates who can demonstrate that they had in place **'reasonable prevention procedures'**. A new defence has also been added, allowing for a corporate to be acquitted if it can demonstrate that it was **'unreasonable to expect the corporate to have any prevention procedures at all.'**

### **Domestic tax evasion:**

Section 2 of the draft legislation provides that a relevant body will be guilty of an offence if an associated person commits a UK tax evasion facilitation offence when acting in their capacity as an associated person.

An associated person may facilitate such an offence by, for example, aiding, abetting, counselling or procuring the commission of an offence by another person.

### **Foreign tax evasion:**

Section 3 of the draft legislation provides that a relevant body will be guilty of an offence if an associated person facilitates a foreign tax evasion offence when acting in their capacity as an associated person.

For a person to facilitate commission of a foreign tax evasion offence, it must be considered such by the foreign country concerned, and would be considered such if the foreign tax evasion offence were a UK tax evasion offence; that is, it must satisfy a dual-criminality test.

### **Associated parties**

As previously noted, corporates should be aware that an offence would be triggered by actions of an “associated person” who performs services for or on behalf of the corporate (whether for reward or not).

The draft legislation expressly states that the capacity in which the associated person performs services for or on behalf of the corporate is not relevant. For example, an associated person may be an employee, agent or subsidiary. Furthermore, whether or not the person performs services will be determined by all the relevant circumstances and not merely by reference to the relationship. The current draft expressly states that it is presumed that an employee will perform services on behalf of the corporate.

### **Extra territoriality**

For domestic UK taxes, the corporate offence of failure to prevent facilitation of UK tax evasion offences will apply to any corporate wherever it is formed or created, **immaterial** of whether any relevant acts or omissions of the corporate (or relevant acts or omissions which form part of the offence committed by an associated person) take place in the UK or elsewhere.

In the case of failure to prevent facilitation of foreign tax evasion, the territorial reach is also broad;

however, instead of applying to corporates wherever they are formed, it will apply to corporates which are either:

- formed or incorporated in the UK; or
- carrying on business or other undertaking from an establishment in the UK.

Notably, corporates which are neither formed in the UK nor have a UK footprint will be exposed to liability under these proposals where act/omissions take place in the UK, for example, where funds are transmitted from or via the UK, or where communications take place in or via the UK.

### **Reasonable prevention procedures**

The draft legislation released in April 2016 seeks to clarify the earlier draft regarding the corporate defence of ‘reasonable procedures’ and now refers to “reasonable prevention procedures”.

The new proposal states that it is a defence to the offence of failing to prevent facilitation of UK/foreign tax evasion if it can be shown that the relevant body had in place “*such prevention procedures as it was reasonable in all the circumstances to expect [the relevant body] to have in place*” or “*that in all the circumstances, it was not reasonable to expect [the relevant body] to have any prevention procedures in place.*”

‘Prevention procedures’ are defined as procedures designed to prevent persons associated with the body from committing UK tax evasion facilitation offences.

The consultation released in April 2016 contains draft guidance on the corporate criminal offence and some commentary on what constitutes reasonable procedures. When finalised, the guidance will serve as an important factor in giving practical effect as to what constitutes ‘reasonable prevention procedures’.

As expected, the draft guidance states that what constitutes reasonable procedures “*will be proportionate to the risk of criminal facilitation faced by the corporation [and] will depend on the nature, scale and complexity of the corporation’s activities.*” The guidance states that the new offences “*do not require the corporations to undertake excessive due diligence but does demand more than mere lip-service to preventing the facilitation of tax evasion.*”

The guidance acknowledges that while precise procedures which would be considered reasonable will differ across corporations, there are certain common elements.

The guidance also addresses the following principles:

- Ensuring that top top-level management of corporations are committed to prevent associated persons from engaging in criminal facilitation of tax evasion. This can be achieved by management *“foster[ing] a culture within the corporation in which activity to facilitate tax evasion is never acceptable”* through the creation and implementation of preventative measures.
- Ensuring that the corporation assesses the nature and extent of its exposure to the risk of its agents engaging in activity during the course of business to criminally facilitate tax evasion. The risk assessment should be documented and kept under review.
- Ensuring that the corporation applies due diligence procedures, taking an appropriate and risk-based approach, in respect of persons who perform or will perform services on behalf of the organisation, or if appropriate to their clients, in order to mitigate identified risks.
- Ensuring that the organisation’s prevention policies and procedures are embedded and understood throughout the organisation, including training.
- Ensuring that the organisation monitors and reviews its preventative procedures and makes improvements where necessary.

## Impact

Due to the accelerated timetable to introduce the corporate criminal offence of failing to prevent the facilitation of tax evasion by the end of the year, as we previously set out in our December 2015 Alert, corporates need to similarly accelerate their efforts around how and the extent to which the proposed legislation will impact them.

Furthermore, due to the release of the Panama Papers and the increased focus on tax evasion, it is clear that corporates must be ready for the implementation of the legislation at the end of the year. It is important to note in this context that the UK government has announced together with these measures, that there will be a cross-agency taskforce investigating evidence of illegality from the Panama Papers.

Based on the current draft guidance, corporates will need to make significant adjustments to their existing compliance procedures. If not already doing so, they will need to identify associated persons and risk exposure channels, review contractual terms of associated persons, and conduct a thorough risk assessment/risk mitigation strategy.

1. [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/517020/Tackling\\_tax\\_evasion-legislation\\_guidance\\_corporate\\_offence\\_of\\_failure\\_to\\_prevent\\_criminal\\_facilitation\\_tax\\_evasion.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/517020/Tackling_tax_evasion-legislation_guidance_corporate_offence_of_failure_to_prevent_criminal_facilitation_tax_evasion.pdf)

If you have questions concerning the contents of this Alert, or would like more information about facilitating tax evasion, please speak to your regular contact at Weil, or to:

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