Client Update
UK Criminal Finances Act 2017

LONDON
Karolos Seeger
kseeger@debevoise.com

Alex Parker
aparker@debevoise.com

Andrew Lee
ahwlee@debevoise.com

Ceri Chave
cchave@debevoise.com

Ed Pearson
epearson@debevoise.com

OVERVIEW

On 27 April 2017, the Criminal Finances Act 2017 (the "Act") received Royal Assent. The Act has not yet come into force, but it is expected that this will take place by September 2017. It includes several provisions that will significantly affect the investigation and enforcement of corporate crime in the United Kingdom. The key features of the Act are:

- the creation of a new corporate offence of failing to prevent the facilitation of tax evasion, either in the UK or abroad, by an associated person – like section 7 of the Bribery Act 2010, companies will have a defence if they can demonstrate they had 'reasonable procedures' in place to prevent the underlying criminal conduct;
- a substantial extension to the timeframe within which UK authorities can investigate and respond to reports submitted in respect of money laundering suspicions – this could have a major impact on corporate transactions if consent is not deemed to have been granted within seven days of a notification to the UK authorities; and
- the introduction of 'unexplained wealth orders' ("UWOs") as a means of requiring individuals suspected of holding criminal property to provide a detailed explanation to the authorities regarding that property – a failure to satisfy the terms of a UWO will lead to the presumption that the property is criminal property that is liable to recovery by the authorities.

CORPORATE OFFENCE OF FAILURE TO PREVENT FACILITATION OF TAX EVASION

The Act introduces a new strict liability corporate offence of failing to prevent the facilitation of tax evasion, occurring either in the UK or overseas, with wide extraterritorial application.

The main elements of the offence of failure to prevent facilitation of UK tax evasion are:

- criminal tax evasion by a taxpayer;
- criminal facilitation of tax evasion by an 'associated person' of a "*relevant body*" (i.e. a company or partnership) – an associated person can be an employee or agent or "*any other person who performs services for or on behalf of*" the company; and
- failure by the relevant body to prevent its associated person from committing the criminal facilitation.

Prosecutors will be required to prove (beyond reasonable doubt) that two underlying offences have been committed. First, there must be criminal tax evasion, which is defined as either: (a) cheating the public revenue; or (b) being knowingly involved in, or taking steps with a view to, the fraudulent evasion of tax. Secondly, there must be criminal facilitation of tax evasion by an associated person of the relevant body. Facilitation is widely defined to include aiding, abetting, counselling or procuring tax evasion, as well as being knowingly concerned in, or taking steps with a view to, the fraudulent evasion of a tax by another person. In practice, this could include providing financial assistance, acting as a broker, providing planning advice, and delivering or maintaining relevant financial infrastructure.

In addition to the above requirements, the following additional elements must be established for the offence of failure to prevent the facilitation of overseas tax evasion:

- the company must have a sufficient nexus to the UK (e.g., it is incorporated or conducts business in the UK, or its associated person carried out the criminal facilitation in the UK); and
- the conduct of both the taxpayer and the associated person must be recognised as criminal both in the UK and in the jurisdiction to which the foreign tax evasion relates.

A company will have a defence if it can demonstrate that: (a) it had "*such prevention procedures as it was reasonable in all the circumstances to expect*" to prevent its associated persons from committing a facilitation offence; or (b) it was "*not reasonable in all the circumstances to expect*" the company to have any prevention procedures in place.

Analysis

As with the Bribery Act, there are concerns about the broad scope of the offence of failure to prevent facilitation of tax evasion and the corresponding burden on companies to implement 'reasonable procedures'. Companies which have some connection with the provision of tax services will need to review and enhance their compliance controls to ensure that they adequately address the risk of involvement in tax evasion. Draft guidance published by HM Revenue & Customs in October 2016 indicates that a similar set of principles to those formulated by the Ministry of Justice regarding Bribery Act compliance will apply, namely: (a) risk assessment; (b) proportionality of risk-based prevention procedures; (c) top-level commitment; (d) due diligence; (e) communication (including training); and (f) monitoring and review.

The 'reasonable procedures' defence is notably different to the 'adequate procedures' language used in the Bribery Act and is arguably a less stringent standard which will rely more heavily on context. Whilst this could result in a less restrictive approach, it could also be applied more arbitrarily, potentially allowing a more hard-line approach. However, the Government has stated that the offence will not create a 'zero failure' regime; the key is that, to mitigate its risk of facilitating tax evasion, a company must implement procedures that are proportionate to the risk it faces.

The extent to which companies will be pursued for facilitating foreign tax evasion remains to be seen. Not only will a prosecutor need to overcome the difficulties of proving both overseas tax evasion and facilitation to the criminal standard, but it will also have to prove dual criminality in respect of both offences. This will be no easy task given the varying and complex nature of criminal tax legislation, and it will require expert evidence on foreign tax regimes. This in turn raises questions regarding the public interest in any such prosecution.

The Act expressly amends the Crime and Courts Act 2013 to allow a deferred prosecution agreement ("DPA") to be entered into in relation to the corporate offence. A DPA is likely to be a far more attractive route for dealing with companies which facilitate foreign, or indeed domestic, tax evasion. Following a consultation earlier this year, the UK Government's next step is likely to be the creation of a similar offence of failing to prevent economic crime, including fraud, money laundering and false accounting, which may also be resolved by a DPA.

MONEY LAUNDERING

Three provisions of the Act modify the money laundering reporting regime in the Proceeds of Crime Act 2002 ("POCA"). Currently, 'regulated sector' entities, namely the financial and professional services sectors, are required to disclose knowledge or suspicion of money laundering to the National Crime Agency (the "NCA") in a Suspicious Activity Report ("SAR"). Furthermore, submitting a SAR can also provide a defence to any entity (whether in or outside the regulated sector) in respect of the substantive money laundering offences set out in POCA. Presently, a company submitting a SAR is deemed to have received the NCA's consent if: (a) after seven working days, the NCA does not notify the company that consent is refused; or (b) the NCA notifies the company within seven working days that consent is refused, but it has taken no further action after a further 31 calendar days (referred to as the 'moratorium period'). This has led to entities in and outside of the regulated sector regularly filing SARs as a means of obtaining deemed consent to any transaction which might potentially involve criminal property, particularly as the threshold for suspicion of criminality is very low.

Most significantly, the Act enables the NCA and other authorities (including the Serious Fraud Office and the Financial Conduct Authority) to apply to the Crown Court for an order to extend the moratorium period for 31 days on up to six occasions, thereby extending the moratorium period for a maximum of 186 days in total. To grant each application, the Court needs to be satisfied that the authority's investigation is being carried out "*diligently and expeditiously*", additional time is needed to complete the investigation, and an extension of the moratorium period would be reasonable in the circumstances.

Further, the Act now enables regulated sector entities voluntarily to share information with each other when deciding whether to file a SAR. Either the NCA or a regulated sector entity (Company B) may request that another company in the regulated sector (Company A) discloses information to Company B, if it may assist Company B in determining whether it suspects money laundering has occurred. Subsequently, Company A and Company B are also able to submit a 'joint disclosure report' (or joint SAR) to the NCA in order to fulfil their obligations under POCA. Further, the Act protects the exchanges of information between Company A and Company B from breaching any confidentiality obligations or other restrictions on the disclosure of information.

The Act also allows the NCA to apply to a magistrates' court for a 'further information order' following the filing of a SAR. The Court may make such an order if it would assist the NCA in investigating money laundering, it is

reasonable in the circumstances, and the respondent either filed the SAR or is a company in the regulated sector. There is a similar provision for the NCA to obtain a further information order where a foreign authority, having received a money laundering notification, requests information from the NCA.

Analysis

The ability of a court to extend the moratorium period from the current 31 days for an additional 186 days means that companies should consider very carefully whether any suspicion of money laundering meets the threshold in POCA and must therefore be reported to the NCA. This is particularly important in marginal cases and where the timing of the transaction is critical. A delay of six months while a SAR is investigated could cause a major deal to collapse. This would see a shift away from 'defensive reporting' by companies to protect themselves, in the knowledge that the NCA usually gives consent to proceed and may not have time to investigate a SAR fully within 31 days. It will be interesting to see whether the provisions for voluntary information sharing between companies in the regulated sector and joint SARs will be used in practice.

UNEXPLAINED WEALTH ORDERS

The introduction of UWOs requires individual respondents (namely suspected money launderers or Politically Exposed Persons ("PEPs")) to provide detailed information in respect of assets which appear to be disproportionate to the respondent's known income. UWOs may be made by the High Court following an application by the NCA or other enforcement authorities.

The Government has stated that UWOs will primarily be used as an investigative tool, complementing the existing mechanisms available to the authorities. Presently, there are two principal routes to recover criminal assets: (a) criminal confiscation orders requires a person found criminally liable to pay to the Treasury a sum equivalent to the benefit they received from the criminal conduct; and (b) civil recovery orders enable the recovery of property suspected to have been "*obtained through unlawful conduct*" without the need for a prior criminal conviction.

To grant a UWO, the High Court must be satisfied that there is reasonable cause to believe that:

- the value of the property held by the respondent is greater than £50,000;

- there are reasonable grounds for suspecting that the known sources of the respondent's lawfully-obtained income would have been insufficient to enable them to obtain the property; and
- either:
  - there are reasonable grounds to suspect that the respondent, or a person connected with the respondent, is or has been involved in serious crime (including money laundering, drug trafficking and arms trafficking), either in the UK or elsewhere; or
  - the respondent is a PEP.

A UWO requires the respondent to provide a statement:

- setting out the nature and extent of the respondent's interest in the property;
- explaining how the respondent obtained the property (including, in particular, how any costs incurred in obtaining it were met);
- where the property is held by the trustees of a settlement, setting out such details of the settlement; and
- setting out any other specified information.

Notably, a failure to respond to a UWO within the period set by the Court, or to provide a satisfactory explanation, will create a presumption that the property is criminal and thereby recoverable under the civil recovery provisions in Part 5 of POCA. If the respondent replies within that period, the authority has 30 days to consider the evidence put forward. During that time, it must decide whether to take no further action, begin a civil recovery investigation, or apply for a civil recovery order.

Analysis

Any statement provided by the respondent to a UWO may be used in evidence, but not in the course of any criminal proceedings against them. As a result, the right of individuals not to incriminate themselves should remain protected. Nevertheless, caution will need to be exercised when responding to a UWO. Given the presumption of guilt arising from a refusal to comply with a UWO, respondents will likely seek to comply whilst not disclosing more information than is strictly necessary. At the same time, however, care will need to be taken not to mislead the Court and fall afoul of the provisions of the Act which proscribe the making of false or misleading statements in responding to a UWO. In practice, this may be a difficult balancing act to achieve.

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Please do not hesitate to contact us with any questions.