

Corporate criminal responsibility under the spotlight as UK Government moves to change the law

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Earlier this year David Cameron hosted a major international anti-corruption summit in London in a coordinated, ambitious global effort to defeat corruption. The aim was to provide an *"unprecedented, courageous commitment from world leaders to stand united, to speak into the silence, and to demand change."*

Later, the Queen's Speech to both houses of Parliament put forward new legislation in the form of the Criminal Finances Bill to tackle corruption, money laundering and tax evasion. The aim was to *"cement the UK's leading role in the fight against international corruption and crack down on money laundering and people profiting from crime, so that we root out corruption."*

More recently on 5th September 2016, the Attorney General, in a speech at the Cambridge Symposium announced the Government would soon consult on plans to expand corporate criminal liability. The aim was to *"promote a culture of corporate responsibility so that we are addressing the threat earlier on."*

The intentions are strong, the statements are tough and the rhetoric is powerful. In practical terms though, what changes have been made and what changes are proposed to be made?

New measures

Criminal Finance Bill

The Criminal Finance Bill intends to reform the law by including provisions to strengthen enforcement powers. The main benefits of the Bill include:

- The introduction of a criminal offence for corporations who fail to stop their staff facilitating tax evasion.
- Improving the operation of the Suspicious Activity Reports (SARs) regime to encourage better use of public and private sector resources against the highest threats; to target entities that carry out money laundering instead of individual transactions; and to provide the National Crime Agency (NCA) with new powers.
- Improving the ability of law enforcement agencies and courts to recover criminal assets more effectively, particularly in cases such as those linked to grand corruption.

This legislation has been put forward in a strong move to crackdown on white collar criminal activity and proposals in relation to a new tax evasion offence are already underway.

Corporate failure to prevent tax evasion

The Finance Bill 2016 introduced new offences in relation to tax evasion, however no offence for a failure to prevent the facilitation of tax evasion was introduced although it was included in the consultation.

Further, HM Revenue and Customs published a consultation document entitled "Tackling tax evasion" which set forward draft legislation introducing a new corporate offence of failure to prevent the criminal facilitation of tax evasion.

Further details of these proposals will be emerge in due course, however at present under the proposed draft legislation, a corporation would be liable for failing to take reasonable steps to prevent those who acted on its behalf from committing tax evasion, including its employees, agents and subsidiaries. The consultation also states that any relevant body would be found liable if it was incorporated or formed under the law of any part of the UK, or if it carries on business or other undertaking in the UK.

However the proposed legislation allows a corporation to put forward a defence, whereby it must prove that reasonable prevention procedures were in place at the time of the UK tax evasion facilitation offence, or alternatively that it was not reasonable to expect the corporation to have any prevention procedures in place. The Guidance from HM Revenue and Customs states this includes having formal policies in place, taking practical steps to implement these, enforcing their compliance and monitoring their effectiveness and to be reasonable the procedures ought to be proportionate to the risks that the organisation faces.

This regime echoes the Bribery Act 2010 legislation, which also allows a company to defend itself from the "failure to prevent" bribery offence, if it can show that "adequate procedures" designed to prevent criminal conduct were in place. The new tax offence legislation appears to have been drafted in the same way with the same intention in mind. Similar to the

Bribery Act 2010, the legislation makes a definitive attempt to crackdown on white collar crime by holding corporations to account directly, while also offering a 'way-out' - corporations will not be liable if they self-monitor for criminal activity internally and establish tax evasion policies where reasonable.

These changes have been prompted by a growing feeling of dissatisfaction on the current state of the law in the UK which requires knowledge at the highest echelon of the company to be established before criminal culpability can be ascribed to the company. This is out of kilter with the position in the US and, at present, it means the criminal prosecuting authorities are reluctant to launch into proceedings against major corporates. This leads to an unsatisfactory situation where individuals are prosecuted and held liable but the company walks away from any culpability under the criminal law.

This unsatisfactory situation has already played out in relation to the recent banking scandals (Libor, F/X) where only the UK regulatory authorities (FCA) took action against the banks and the SFO has prosecuted individuals, whereas in the US, the Department of Justice has led the charge against the banks as well as against individuals.

Changes

In a serious attempt to crackdown on white collar crime in the UK, we have seen proposed changes to legislation to tackle corruption which are already being put in motion at early stages.

Although these are still developments are still in their infancy, changes are on their way and already appear to have serious consequences for commercial organisations operating in the UK.

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