The White Collar
Crime Centre

The Corporate Offence of Failure to Prevent Facilitation of Tax Evasion: thoughts on scope and effect in the UK

Briefing Papers

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FOREWORD

The proposed introduction of a corporate offence of failing to prevent facilitation of tax evasion in Part 3 of the Criminal Finances Bill presents several challenges to businesses operating in the corporate sector. Although the criminal offence is modelled on the architecture in section 7 of the Bribery Act 2010 which established the corporate offence of failing to prevent bribery, there are some key differences. Whereas the offence of bribery is carefully defined in the earlier sections of the Bribery Act 2010, the meaning of tax evasion is more difficult to discern. Part 3 of the Criminal Finances Bill provides that tax evasion will include conduct which constitutes the offence of cheating the revenue at common law, and in recent times questions have arisen as to where the boundary between tax evasion and tax avoidance falls to be drawn. As the late Denis Healey once reputedly said, the difference between tax evasion and tax avoidance is the thickness of the prison wall.

This is not the only difficulty which arises with the establishment of this new offence. There are several aspects which require further thought and these are explored in the five papers included in this compendium. The legislative intent to maximise the amount of tax collected and punish tax evasion may be laudable, but if the criminal law is to be deployed in this way, some fundamental questions need to be addressed. The Law Commission has indicated that it wishes to launch a full-scale project on the corporate liability, and certainly it would be better to adopt a holistic view of the criminal law's role in this area rather than expand it by accretion.

In the first paper, **Anita Clifford** picks up this baton and explores whether the failure to prevent model at the heart of the proposed new offence contains a due process deficit. The paper articulates the concern that the "associated person" whose conduct fixes a company with criminal liability is effectively condemned in his absence in a situation where he has not been charged with the commission of a criminal offence, whether standing trial independently or alongside the company. The provisions of the European Convention on Human Rights may be engaged where a person's good name is besmirched in circumstances where he is not a participant in the criminal proceedings. The paper suggests some practical solutions which could offer an associated person some protection until the Law Commission has had an opportunity to give the matters its consideration.

Freya Dinshaw approaches the topic more broadly and sees the new corporate facilitation offence as part of trend towards regulating corporate culture. As part of this discussion, the writer draws on the Australian experience of improving corporate attitudes to compliance with the criminal law. If companies were culturally attuned to the importance of their role as good corporate citizens, the scale of international tax evasion would be significantly reduced.

That said, invocation of the criminal law can have severe economic consequences for the well-being of a company, and in the third paper **Ailsa McKeon** explores the impact of a corporate conviction or deferred prosecution agreement for failure to prevent the facilitation of tax evasion. One vital question which arises is whether a conviction would operate to debar a company from tendering for public sector contracts. The paper explores this issue, together with other sentencing issues which arise.

Another topic to which too little consideration has been given is whether the "associated person" in the criminal offence could include a company. In her paper, **Natasha Reurts** addresses the position. As the writer notes, when the term "associated person" first appeared in section 7 of the *Bribery Act* 2010, concern was expressed about its open texture. The writer considers three potential scenarios which demonstrate the continuing ambiguity surrounding this term and draws out the distinction to be drawn between individuals who are genuinely independent of the company with which they have a relationship and other individuals whose perceived independence from the company is notional or highly artificial.

The final paper in the compendium, contributed by **José Leandro Secco Blanc**, addresses a surprising aspect of the proposed facilitation paper which gives its application a distinctly extra-territorial flavour. The point here is not that the criminal offence can be committed from abroad where the evasion relates to UK tax revenue, but rather that the offence can be committed in the UK where it relates to the evasion of foreign tax revenue. The writer explores whether this provision can be supported in terms of the public interest, and whether it amounts to legislative over-reach.

I hope that these pieces prompt thought about the proposed new offence and stimulate further discussion.

Jonathan Fisher QC

Bright Line Law Services Ltd

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The White Collar Crime Centre was set up by Bright Line Law Services Ltd to promote research into financial wrongdoing and produce high quality policy and strategic briefings. Established in 2016, The White Collar Crime Centre is non-partisan and independent of government and external funding.

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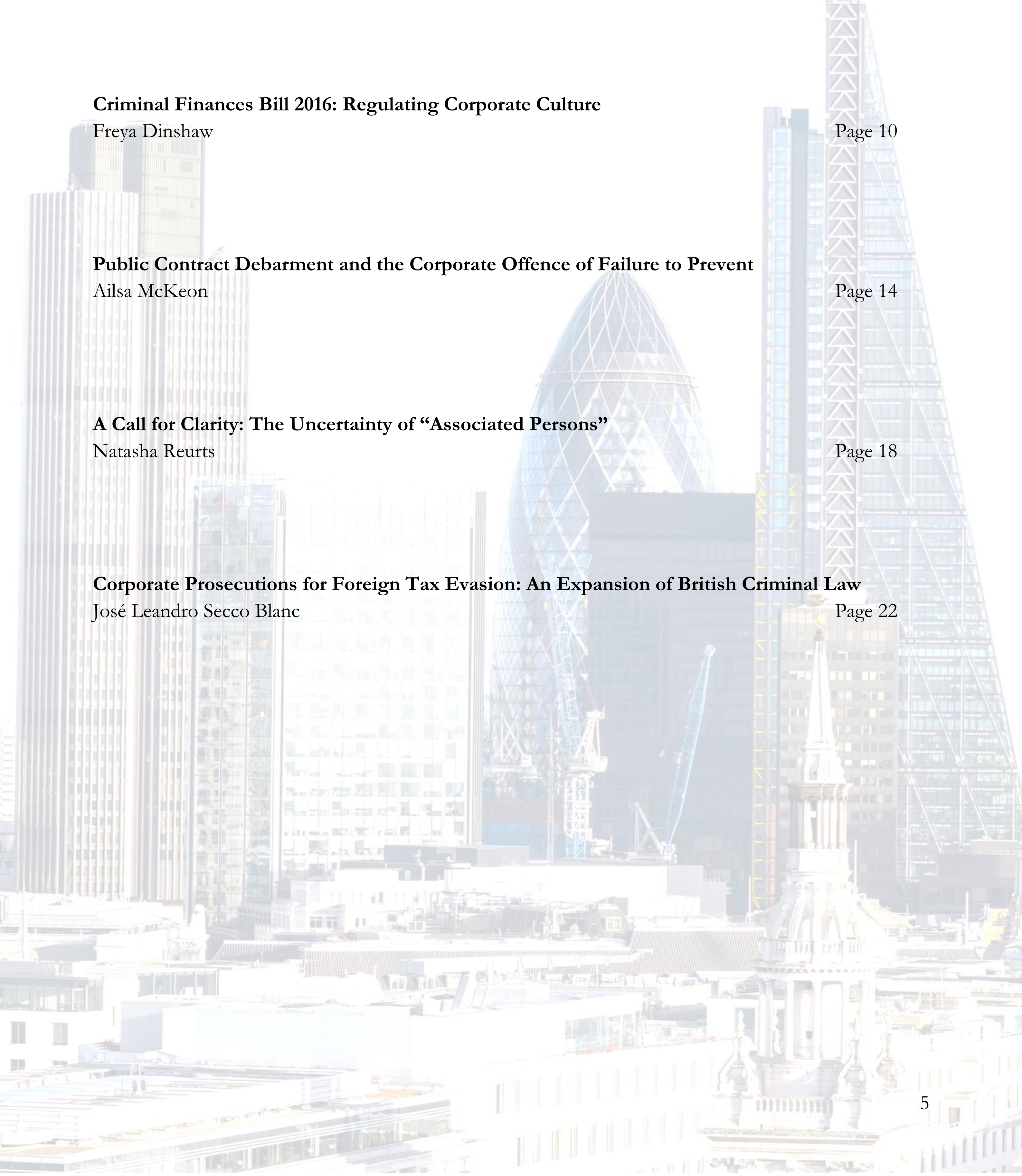

Failure to Prevent: Corporate Liability at the Cost of Individual Due Process?

By Anita Clifford

This piece explores whether the failure to prevent model at the heart of the proposed new offence of corporate failure to prevent facilitation of tax evasion contains a due process deficit.

Introduction

The proposed new corporate offence of failure to prevent the facilitation of tax evasion reflects a wider move toward corporate self-policing in the UK. Appearing in Part 3 of the Criminal Finances Bill 2016, the proposal is largely modelled on the corporate liability provisions of the Bribery Act 2010. A company could be prosecuted if an *"associated person"* commits a specific wrong and a complete defence is available if the company had adequate preventive processes. The conventional scenario would see a company exposed to criminal liability if, say, one of its tax consultants advised on a seemingly clever way for a client to evade taxes due to the Revenue. The criminal liability would fix on the company's lack of safeguards, and whilst it would be contingent on the tax consultant's commission of a *"tax evasion facilitation offence"*, this is not necessarily a high bar. The Bill does not require the associated person to have been convicted of the offence for a company to be liable. Consequently, the corporate liability model potentially engages a due process concern. Even if actual corporate convictions for failure to prevent the facilitation of tax evasion are rare, the way in which the provisions are configured means that a company could be found guilty on the basis that an associated person has committed a criminal offence – despite him never having had the opportunity to defend himself. Why the provisions have been crafted in this way and whether this sits entirely comfortably with an individual's due process rights is explored in this piece.

Triggering corporate liability

The corporate liability model which features in the Bill – the 'tax model' – is similar to that in the Bribery Act 2010 subject to a notable distinction. For a company to be prosecuted for failure to prevent bribery, the associated person must have committed a bribery offence or, in other words, the substantive criminal conduct. The tax model arguably goes a step further by exposing a company to criminal liability despite the nexus between it and the substantive criminal conduct being less direct. A company could be prosecuted where a person associated with it facilitates or, in other words, assists another's tax evasion. On one view, an intermediate actor separates the company from the substantive criminal offence, indicating that the net of corporate liability is widening to encompass situations where the link between the company and the substantive criminal offending is more remote. Whether this really is the case, however, is questionable. There is a counter argument that there is no such separation between the company and the substantive criminal offending in the tax model. The facilitation of tax evasion by professional enablers – who conventionally owe professional duties yet are the architects of illicit schemes – ought to be considered serious criminal offending in its own right.

Notwithstanding the live question of whether the tax model represents an expansion of the 'failure to prevent' framework, one of the fundamental features of the framework is that an individual criminal conviction is not a prerequisite to corporate prosecution. Justifications for this approach were raised by the UK Law Commission close to a decade ago, when it recommended the wholesale reform of bribery laws. In its 2008 report to Parliament, the Commission contended that making corporate liability for bribery contingent on individual liability posed *"too onerous and too restrictive"*[1] a requirement. For corporate prosecutions to be workable, the Commission considered that:

> *"…it should be enough that, in the proceedings against the company for a failure to prevent bribery, the tribunal of fact is satisfied by the prosecution so that they are sure that the bribery offence was committed by someone on behalf of the company."*

Similar views have been expressed in regards to the concept of corporate criminal liability more broadly. In its 2007 report on the criminal liability of organisations, the Tasmanian Law Reform Institute referred to the following observations of academics Jonathan Clough and Carmel Mulhern:

> *"…it seems a backward step to make criminal liability contingent upon individual liability, particularly as the difficulty of prosecuting individuals is one of the justifications for proceeding against the company.'*[2]

These observations tie into the wider developing notion that individual criminal liability has no place in a contemporary model of corporate liability. The continued rise of corporate behemoths, whose actions and global influence are not driven by specific individuals suggests that making the conviction of a corporation contingent on individual liability is unsuitable. This is only reinforced by the difficulties that can arise in prosecuting an individual for wrongdoing in a commercial setting. When it comes to bribery, for example, variables include the lack of consistency in anti-bribery laws – and enforcement – around the world and diverging ideas about what amounts to a bribe and what is business efficiency. The same applies to tax evasion. Despite consensus at an inter-governmental level that tax evasion should be treated as a crime,[3] identifying the circumstances that justify an individual's prosecution for tax evasion is challenging in practice. All prosecutions, particularly those that involve any kind of financial investigation or cross-border conduct, require significant time and financial resources. In these circumstances, a model which enables a company to be prosecuted in the first instance holds considerable attraction. In terms of penalty, the pockets are likely to be deeper. The scope for large penalties combined with the ability to strike directly at the top sends a stronger message of general deterrence to companies. Further, the removal of individual criminal liability as a prerequisite means that the corporation's ability to disentangle itself from the wrong is limited as there is not necessarily a convicted employee to blame.

A due process deficit?

Against this background, the notion that corporate criminal liability should not be contingent on individual criminal liability would seem unanswerable. However, any proposed new criminal offence – even one premised on this broad principle – should be evaluated for its implications.

Essentially, in its present form, the tax model appears to permit a court finding that an

[1] The Law Commission, 'Reforming Bribery' (2008) 125-6.
[2] Tasmanian Law Reform Institute, 'Criminal Liability of Organisations' (2007) 46.

[3] See the Fourth Anti-Money Laundering Directive.

individual has committed a tax evasion facilitation offence, for example aiding an individual to cheat the Revenue, even if he has never had the opportunity to defend himself against the accusation of criminal conduct. In finding the company guilty – either following a trial or plea of guilty – the court is implicitly also making a finding of the associated person's guilt. Whilst the finding would not expose the associated person to any court-ordered penalty, this outcome raises several potential concerns.

Chief among these is that the proposed new failure to prevent the facilitation of tax evasion offence would seem to permit a 'mini-trial' of the associated person to be held without affording him a right to be heard. One of the elements is *"commission"* of a criminal offence, not *"conviction"*. Although in the early days of the offence, prosecutors are likely to be reluctant to pursue a company for failing to prevent tax evasion where the associated person has not himself been convicted of a related criminal offence the prospect is not unforeseeable. Practically, the requirement that an associated person has committed a tax evasion facilitation offence could be proven if, say, he disclosed his role in the evasion to the Revenue in exchange for a non-criminal settlement of the matter. Of course, where a person has confessed to tax evasion any due process concerns about his subsequent mini trial fall away. However, in some cases, the requirement could be established in the absence of the individual's deliberate admissions, for example, by reference to a paper trail showing involvement in establishing a tax evasion scheme. More creative prosecutors could even seek to establish it by inference against the associated person if the scheme recommended seemed so transparent in its purpose that a jury considered that it could only ever have been a vehicle to cheat the system.

In the light of recent calls for more aggressive action against tax evasion, the last two scenarios are possibilities and would fall within the ambit of the proposed provisions. However, in this way, a due process concern is at least engaged as there would appear to be no scope for the associated person – say, the tax consultant – to defend himself against the alleged criminal conduct. The ability to challenge the accusations would, at best, occur indirectly if he was called as a witness or through the corporate defendant if it tactically chose to dispute the tax consultant's involvement in a tax evasion, alongside reliance on the complete defence of adequate safeguards. In those circumstances, the tax consultant might be called upon to provide his version of events and detail his belief at the relevant time. In either scenario, however, the ability for him to put the prosecution to proof, call witnesses and raise defences specific to his case is non-existent. The fairness of this is questionable, particularly as the line between non-criminal tax avoidance and criminal tax evasion is ever shifting, with variables including not only time and place but new international agreements and prosecution policy change spurred on by public outcry. However, at its simplest, the associated person would lack any right to be heard even though the trial could result in a finding that he committed a serious offence of dishonesty.

Reconciling the mini trial with due process rights

Considering the grave criminal allegations that would be raised, the question arises as to whether the proposed provisions as presently framed are satisfactory. The duty to act fairly and the presumption of innocence are at the heart of our criminal justice system. How then does the prospect of a mini trial for a serious offence in which the individual concerned lacks the right to be heard reconcile with these fundamental concepts?

On one hand, the provisions square comfortably. Although in its present form the proposed offence is drafted in a way that leaves scope for a mini trial to take place, the associated person – the individual – is not *charged* with any criminal offence. Whilst he would be exposed to an adverse finding, this is distinct from a verdict of guilt. Even if a company were to be found guilty and, therefore, indirectly the court was satisfied that the associated person had committed a criminal offence, there is no court-ordered punitive effect on him. And where proceedings are not directed at the determination of a charge against a person or the finding of guilt, such as in proceedings for the civil recovery of property believed to be proceeds of crime, the European Court of Human Rights has held that an individual's criminal trial due process rights in Article 6 of the Convention are simply not engaged.[4] This includes the right to be presumed innocent, have a fair hearing, call witnesses and prepare a defence.

Further, and in any event, before an adverse finding against the associated person could be made, a jury would have to consider the evidence and be satisfied to the highest of standards – beyond reasonable doubt – that he had committed an offence of tax evasion facilitation. This would necessarily entail being satisfied that he acted with the requisite intention when setting up the tax arrangements. Beyond this, it is also true that criminal offences which derive from the commission of offences by others, even if they have not been convicted, are a well-established feature of our criminal justice system. This is the case for offences of money laundering and receiving stolen property to any number of offences based on the principles of aiding or abetting.

Still, on the other hand, there remains an argument that the corporate liability model upon which the proposed new offence is based does not sit entirely happily with a commitment to due process, manifested in the right to be presumed innocent and to heard. The European Court of Human Rights decisions which support that criminal due process rights are not engaged where proceedings do not result in a finding of guilt were decided in the context of civil asset recovery. Entirely distinct from a criminal trial, civil asset recovery proceedings are brought against property (*in rem*) rather than the individual (*in personam*). The proceedings are not focused on establishing whether an individual has committed a particular offence but rather whether, on the balance of probabilities, the property is derived from some illicit activity. As Lord Bingham observed in *McIntosh v Lord Advocate* [2003] 1 AC 1078 at 1088, the process is directed at determining *"an accounting record and not an accusation."* Quite simply, a criminal trial and determination to the criminal standard of proof that a particular offence has been committed never enters the frame.

Further, unlike the offences which derive from the conduct of others identified above, the proposed new offence expressly makes the commission of a criminal offence by a particular person – the associated person – a necessary element. This is an important distinction. In an aiding or abetting case there is no need to prove beyond reasonable doubt that a particular 'other' did a particular act. Although in practice, the acts of another are likely to be relied upon by the prosecution in building the case against a defendant it is not a prerequisite to establishing guilt. The tax model, in contrast, proposes to include in the statute books the criminal offending of one as an express element which is required to establish the guilt of another. Further, for a money laundering or receipt of stolen property offence to be proven, there is no need

[4] *Phillips v. United Kingdom* (2001) BHRC 280; *Walsh v United Kingdom* [2006] ECHR 43384/05, 21 November 2006.

to first establish that a particular person committed the underlying crime resulting in the illicit wealth or property theft. There is, in other words, no mini trial or finding against another individual to be made. And it is the latter that arguably causes the unease. Whilst an indirect finding that an associated person has committed an offence might not lead to any punishment by the court, it shares some of the stigmatising and punitive elements of punishment. In handing down the penalty on the company, a court can readily be expected to outline the facts as found or agreed and, in so doing, identify the individual and his conduct said to amount to a criminal offence. A public finding of this kind has a wider punitive effect in the sense of being highly damaging to a person's prospects, future employment and perhaps even their livelihood.

Conclusion

Fundamentally, this piece aims not to side with facilitators of tax evasion but to prompt thought about whether the proposed new offence contains a due process deficit and, if so, how this reconciles with fundamental values or is otherwise addressed. In this regard, two suggestions are offered. First, where the associated person has not been tried in respect of the serious allegations or made admissions, the default position ought to be that all publications relating to the corporate prosecution anonymise the associated person's identity. This would go some way to mitigating the stigma surrounding a public finding over the commission of an offence when he has not been heard on it. Second, ahead of any 'failure to prevent' prosecutions, it is perhaps time to think about whether an associated person should be heard on the accusation of criminal conduct or, at a minimum, notified of the accusation prior to the commencement of any proceedings against the company. This could be readily accommodated in legislation or Guidance. Ultimately, should future provisions targeting corporates be crafted in the image of the proposed new offence, this would go some way to quelling concerns about procedural fairness.

Criminal Finances Bill: Regulating Corporate Culture

By Freya Dinshaw

This piece analyses the new corporate facilitation offences as part of a trend towards regulating corporate culture and draws out the implications for the Criminal Finances Bill from the Australian experience of improving corporate attitudes to compliance with the criminal law.

In April 2016, the financial world collectively shuddered when the Panama Papers were revealed. While some of the leaked offshore arrangements danced precariously on the precipice of legality, the public outcry over the exploitation of offshore arrangements, and the facilitation of such arrangements by Panama-based law firm Mossack Fonseca, sparked moves by governments around the world to take steps towards ensuring that firms and companies are held to account for facilitating transnational tax evasion.

The Criminal Finances Bill, released on 13 October 2016, forms part of the UK government's response to combat certain forms of corporate crime. Among other reforms, the Bill proposes to establish a new corporate criminal offence of failing to prevent an 'associated person' from criminally facilitating tax evasion offences under UK or foreign law. This paper analyses how these new offences form part of a trend towards regulating corporate culture – noting particularly the Australian approach towards improving corporate attitudes to compliance with the criminal law. It highlights some potential implications for impact of these new offences on corporate culture.

Enhancing corporate culture?

The Second Reading Speech of the Bill and, in particular, the discussion around the new tax evasion facilitation offences, is peppered with references to addressing the *"permissive culture"* of institutions, [5] the *"culture at the top level"* of organisations,[6] and *"driv[ing] up standards"* within organisations.[7]

The rationale for this approach appears to have been influenced by the perceived impunity with which those involved in tax evasion efforts and other corporate crimes have acted. In the Speech, multiple references were made to the UK's reputation as an easy place in which to harbour, and benefit from, the proceeds of crime, including comments that London had *"laid out a welcome mat for launderers"* and that the UK was known as *"the most secretive tax jurisdiction in the world"*.[8]

In the Second Reading Speech, the Minister for Security, the Hon. Ben Wallace MP, introduced the tax evasion facilitation reforms, stating that:

> *"Tax evasion is wrong. It is a crime. It cannot be right that a business operating in the UK can escape criminal liability simply because a tax loss is suffered by another country rather than the UK. The new offence in relation to foreign taxes will be of particular benefit in tackling corporate facilitation of corruption in developing countries. HMRC has conducted two public consultations on these offences, including engagement with the private sector…and everyone is clear of the need to take responsibility for ensuring the highest possible standards of compliance in this area."*[9]

This introduction to the new tax evasion facilitation offences highlighted the importance for the government of enhancing and encouraging compliance by corporations. Mr Wallace also emphasised this in his speech:

> *"I am absolutely determined not only that the guys and girls at the top, the Mr Bigs, get sent to jail for as long as possible, but that those people who consider themselves a little removed from it – the facilitators, the white-collar smoothies who launder the money into property and so on – also face their time in court, because they are the people who contribute to the message that there is a permissive society and that it is okay to be associated with crime. They are the people who help the nasties to put a gloss on themselves."*[10]

In the debate that followed, the reversal of the burden of proof (requiring companies to demonstrate that prevention procedures were in place in order to escape criminal liability) was praised almost unanimously as incentivising *"companies [to take] the lead in rooting out bad practice to avoid being liable themselves for incidents being caused by their employees."*[11] In doing so, the offences were characterised as 'the stick' towards improved corporate culture, criminalising companies for

5 Criminal Finances Bill 2016, Second Reading Speech (25 October 2016) at 52 (per Roger Mullin).
6 Ibid 52 (per Roger Mullin); 23 (per Sir Edward Garnier).
7 Ibid 35 (per James Berry).
8 Ibid 14 (per Ms Diane Abbott); at 62 (per Dr Rupa Huq).
9 Ibid 9 (per Mr Wallace).
10 Ibid 10 (per Mr Wallace).
11 Ibid 35 (per James Berry).

allowing an atmosphere to be created in which tax evasion is possible.[12]

As aforementioned, the tax evasion offences were modelled on the 'failure to prevent' offences in the *Bribery Act* 2010. While enforcement has only recently begun in relation to that Act, it has been observed that "*[t]he fact that organisations – and particularly banks – regularly complain that they are not sure what exactly they should be doing to comply with the Act clearly indicates that it (the Act) is having an impact"*.[13] Further, this desire to implement adequate procedures has spread to a number of overseas jurisdictions, anxious of the potential implications of the extra-territorial reach of the corporate liability provisions. It can be considered, therefore, that the drafters of the Bill viewed the *Bribery Act* 2010 as being effective in improving corporate culture, and anticipated that the tax evasion facilitation offences might similarly reform corporate behaviour.

Changing culture through the criminal law: a comparative perspective

As discussed above, the 'failure to prevent' tax evasion facilitation offences deploy the 'stick' of corporate criminal liability in order to improve internal culture and compliance within organisations. By contrast, in Australia, the 'corporate culture' of an organisation contributes to the *mens rea* or mental element of a corporate crime.

Under section 12.3 of the *Australian Criminal Code* ("the Code"), the express, tacit or implied authorisation or permission to commit an offence be a corporation can be established, among other methods listed in that provision, by *"proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision*";[14] or by *"proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provisio*n."[15]

Corporate culture is defined in the Code as *"an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes place.*"[16]

Unlike the proposed 'failure to prevent' offences and section 7 of the *Bribery Act* 2010, the 'corporate culture' provisions of the Code are not new, and have been in force since 1996. Further, a poor corporate culture can lead to a finding of guilt on behalf of a corporation for any criminal act contained within the Code, not just specific corporate crimes. Despite these perceived advantages over UK legislation, the Australian corporate culture provisions have scarcely been enforced or used by Australian prosecutors or regulators to date. As a result, corporate efforts to implement adequate procedures to prevent, for example, bribery of foreign public officials have occurred at a much slower pace than in the UK. This may reflect certain differences between the regimes, for example, that the prosecutor still bears the burden of proof to establish the corporate culture fault element, or that there may be a lack of awareness among Australian corporations of the broad application of the Code more generally.

In spite of this history, regulatory scrutiny of corporate culture appears to be undergoing a renaissance in Australia. In parallel to the UK government's initial response to the Panama Paper revelations in mid-2016, senior personnel from Australia's financial regulator, ASIC, have made numerous speeches and statements during which the importance of improving corporate

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12 Ibid.
13 Dr Dan Hough, 'A view from academia – how effective is the UK Bribery Act?' Transparency International, 30 July 2014 <http://www.transparency.org.uk/how-effective-is-the-uk-bribery-act/>.
14 Criminal Code Act 1995 (Cth), Schedule, s 12.3(2)(c).
15 Ibid s 12.3(2)(d).
16 Ibid, s 12.3(6).

culture in order to reduce white collar crime has been directly addressed. Further, many of these statements complement the debate which accompanied the introduction of the tax evasion facilitation offences in the UK Bill.

John Price, Commissioner at ASIC, has stated that one of ASIC's key priorities is to create trust and confidence in the financial system, which is directly impacted by corporate culture. In his words, "*[t]rust and confidence is critical to the operation of the financial system. Poor culture can undermine that trust and confidence"*.[17]

Further to this, he noted that:

> *"Bad conduct can flourish, proliferate and may even be rewarded in a bad culture. A good culture, on the other hand, can help uncover and inhibit bad conduct and reward and encourage good conduct."*[18]

For Price, good culture culminates in a workplace environment which rewards and encourages *"doing the right thing*". Importantly, he emphasised that poor culture *"is not something that can simply be resolved through regulation with black letter law*" – rather, it is an issue that organisations themselves must address. Despite this fact, however, Price noted that ASIC has begun to specifically incorporate 'corporate culture' as an individual risk factor when determining whether or not to investigate companies for misconduct.[19]

Greg Medcraft, Chairman of ASIC, has described good culture as focusing on achieving and rewarding good conduct and outcomes for customers.[20] He also emphasised the importance of *"setting the tone from the top"*,[21] and suggested that the regulator would share with companies concerns around culture where issues were detected in order to prevent against future misconduct.

Implications for the Criminal Finances Bill from the Australian experience

As the movement of money between countries becomes more easily facilitated, so too has transnational corporate crime. Regulators and governments all over the world are now exploring ways legislation can be used as a catalyst to change corporate culture.

As highlighted above, both UK and Australian regulators and legislators appear to be in agreement that corporate culture is a key aspect of cracking down on the proliferation of white collar crime. However, the UK and Australia have approached the issue of corporate culture using very different legal mechanisms designed to achieve similar ends.

The UK approach is billed as being more effective in improving corporate momentum towards seeking to implement prevention procedures, but now that these legislative mechanisms have been in place for some years, there is a need for substantive research to explore how these measures have, or have not, changed corporate culture. Regardless, the tax evasion facilitation offences in the Bill could nonetheless be enhanced by reference to the Australian experience. For example, while enhanced prevention procedures might reduce the

17 John Price, 'ASIC's focus on culture - digging into the detail' (25 May 2016), 2 <http://asic.gov.au/about-asic/media-centre/speeches/asic-s-focus-on-culture-digging-into-the-detail/>.
18 Ibid; see also Greg Medcraft, 'The importance of corporate culture' (8 December 2016), <http://download.asic.gov.au/media/4108464/greg-medcraft-speech-to-ausclub-published-13-december-2016.pdf>.
19 Ibid 4.
20 Greg Medcraft, Directors' duties and culture' (19 June 2016), 4 <http://download.asic.gov.au/media/3900174/greg-medcraft-speech-corporations-workshop-19-june-2016.pdf>.
21 Greg Medcraft, 'Tone from the top: Influencing conduct and culture' (21 June 2016), 1-2 <http://download.asic.gov.au/media/3901451/greg-medcraft-speech-thomson-reuters-4th-annual-australian-regulatory-summit-21-june-2016.pdf>.

facilitation of criminal tax evasion, such procedures may not improve the culture within firms and organisations to the extent of engendering a culture of 'doing the right thing' more generally. Further, the risk of a 'tick box' approach to the 'failure to prevent' offences might mean that UK firms can continue to avoid criminal liability for the acts of their employees or agents while failing to address the root causes of facilitating or engaging in criminal activity.

While it remains to be seen whether the tax evasion facilitation offences are effective in improving public confidence around tax evasion in the UK, the new offences contained in the Bill are broad and novel, and likely to cause ripples through advisory firms worldwide if enacted. Proactive attention to signs of a 'poor culture', and cooperative efforts to address culture between UK regulators and the private sector, may further enhance the effectiveness of these new laws by reducing the prevalence of cultures in which the facilitation of tax evasion is allowed to flourish.

Public Contract Debarment and the Corporate Offence of Failure to Prevent

By Ailsa McKeon

This piece explores the impact that a corporate conviction for failure to prevent the facilitation of tax evasion could have on a company and specifically asks whether debarment is a potential consequence.

The proposed new corporate offence of failure to prevent the facilitation of tax evasion aims not so much to punish but rather to prevent unlawful tax evasion. Despite being front and centre in Part 3 of the Criminal Finances Bill 2016, the offences are really means to an end with the real thrust of the regime being to make companies implement prevention procedures. The latest draft of the Bill sheds little clarity on the magnitude of the fines to be imposed on a company following conviction, so the impact of the penalties of themselves cannot be assessed. However, the very fact of conviction may have serious additional consequences. In particular, the question arises as to whether a conviction could lead to debarment from public procurement processes, a matter which was raised before the Public Bill Committee in late 2016. A detailed examination of the debarment position as it relates to the proposed new offence is the focus of this piece.

Debarment

When considering the proposed new corporate offence during the Sixth Sitting of the Public Bill Committee, the Hon. Tristram Hunt MP proposed an additional clause that would expressly make a corporate conviction for the offence a mandatory ground for excluding an ‘economic operator’ from participation in public tender processes or public procurement procedures. To facilitate this, it was proposed that Regulation 57 of the *Public Contracts Regulations* 2015 (“PCR”) - which makes exclusion mandatory only in specific situations – be amended. These include, for example, conviction for corruption, bribery or money laundering, or proven breach of obligations relating to social security contributions or, importantly, payment of taxes, as set out in Regulation 57(3).[22]

While the proposal was not adopted, the discussions around it are enlightening. In particular, Mr Hunt emphasised the deterrent power of debarment, stating that:

> *"[t]he threat of exclusion from public procurement is known to be one that companies fear more than fines. Making the new offences subject to exclusion would ensure that companies take preventing such offences seriously."*[23]

He went on to contend that in its present form, Regulation 57(3) could conceivably be construed narrowly – not by the courts, but by the Crown Commercial Service ("CCS"), the agency tasked with providing commercial services to the public sector. Specifically, the concern ventilated was that the CCS might not find that a corporate conviction for the proposed new offence would amount to a *"breach of… obligations relating to the payment of taxes…"*[24]

The Minister for Security, the Hon. Ben Wallace MP, sought to allay Mr Hunt's concerns by reference to the discretionary exclusion provision in Regulation 57(8)(c). That provision permits exclusion of an economic operator (in other words, a company) *"where the contracting authority can demonstrate by appropriate means that the economic operator is guilty of grave professional misconduct, which renders its integrity questionable"*. The Minister also pointed out that the present list of mandatory exclusions is exhaustive insofar as it accords with an EU Directive, to which addition may not be made. Satisfied with that response, Mr Hunt withdrew the additional clause from consideration.[25]

Three points can be distilled with respect to the above interchange, each of which is considered in turn. First, what is the significance of debarment as a deterrent and is this a useful approach? Secondly, is it indeed correct that the British Parliament may not add to the Directive's list? Thirdly, what is grave professional misconduct, and does a corporate conviction for failure to prevent tax evasion facilitation fit within it?

Deterrence

Taking a high-level view, debarment is a form of punishment that is well established in connection with bribery and corruption, owing to the potential link between a bribe and the winning of a tender. The connection is not quite so obvious with an offence of failing to prevent tax evasion facilitation but, arguably, is still there. Although tax evasion is unlikely to directly increase a company's chances of obtaining a contract, tax evasion is essentially theft of public revenue and results in a harm to the public. Seen through this lens, debarment is potentially also an appropriate form of punishment for those who fail to prevent the facilitation of tax evasion.

Against this background, is it the case that a company convicted of the proposed new offence could be debarred? As will be discussed, it would seem that the PCR provisions make debarment discretionary, not mandatory. There is debate in the literature about which approach is more effective. In the US, debarment is a wholly discretionary response, requiring consideration of whether debarment is in the government's

22 PCR regs 57(1)-(3).
23 House of Commons Parliamentary Debates, Public Bill Committee – Criminal Finances Bill, Sixth Sitting, 22 November 2016, 183. <https://www.publications.parliament.uk/pa/cm201617/cmpublic/CriminalFinances/PBC_Criminal%20Finances%201-6%20sits%2022.11.16.pdf>.
24 Ibid.
25 Ibid 183-84.

interests. In contrast, debarment for bribery, corruption, and the like is mandatory in the EU.[26] The difference between the two attitudes is the purpose for which debarment is effected: in the US, it is said that "[t]he serious nature of debarment and suspension requires that these sanctions be imposed *only in the public interest for the Government's protection and not for purposes of punishment*".[27] In contrast, the EU's stance manifests a punitive aim. Further, its mandatory rather than discretionary applicability ensures transparency. However, research by Youngman points to one potential unintended consequence of the mandatory debarment approach, namely that prosecutors may be reluctant to charge companies with bribery offences and instead opt for lesser offences, in the light of the potentially disproportionate consequences.[28]

EU Directive

Turning to the second point, is it the case that British Parliament could not add to the specified grounds for mandatory corporate debarment owing to the existence of an exhaustive EU Directive which deals with this issue? A close review of the authorities reveals that it is *"settled case-law"* of the European Court of Justice ("ECJ") that:

> *"Article 45(2) of Directive 2004/18* [the predecessor of Article 57(4) of Directive 2014/24] *exhaustively lists the grounds capable of justifying the exclusion of a contractor from participation in a contract for reasons, based on objective factors, that relate to his professional qualities and therefore precludes Member States from adding to the list contained in that provision other grounds for exclusion based on criteria relating to professional qualities"*[29]

The exhaustive nature of Article 57(4) was said by the ECJ to be founded in the objective of *"coordinat[ing] national procedures"*[30] and ensuring throughout the EU respect for *"general principles of transparency and equal treatment"*.[31]

Thus, a quandary ensues. It is settled that a corporate conviction for failure to prevent the facilitation of tax evasion is neither grounds for mandatory exclusion from public procurement processes nor, as will be discussed, discretionary exclusion. However, as the triggering of Article 50 of the Lisbon Treaty draws ever nearer, the extent to which the government will seek to retain EU-derived legislation remains unclear.

Discretionary exclusion

Turning now to the third issue, the PCR provide no guidance as to what might constitute *"grave professional misconduct."* It is at least plain on the face of the PCR, however, that even if the grave professional misconduct criterion applied, not every conviction for the proposed offence would necessarily lead to exclusion. The exclusion is discretionary – *"Contracting authorities may exclude"*[32] – and so key considerations will include not only the misconduct itself, but the degree to which it reflects negatively on the economic operator's integrity.

What exactly does corporate integrity mean? Guidance in EU Directive 2014/24 – the current

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26 Lauren Youngman, 'Deterring Compliance: The Effect of Mandatory Debarment under the European Union Procurement Directives on Domestic Foreign Corrupt Practices Act Prosecutions' (2013) 42 *Public Contract Law Journal* 411, 415-16416.
27 United States Federal Acquisition Regulation, reg 9.402(b) <https://www.acquisition.gov/?q=browsefar>, as quoted in Ibid 417.
28 See generally Youngman, above n 26.
29 *Forposta SA and ABC Direct Contact sp. z o.o. v Poczta Polska SA* (C-465/11, 13 December 2012) ('Forposta') [38] and cases therein cited.
30 *La Cascina and Others* (Joined Cases C-226/04 and C-228/04, 9 February 2006) [20].
31 Ibid 22.
32 PCR reg 57(8)(c) (emphasis added).

Directive on public procurement – is of little assistance. It identifies potential grounds such as *"violations of environmental or social obligations, including rules on accessibility for disabled persons…[,] of competition rules or of intellectual property rights"*, and unadjudicated but demonstrable breaches of obligations, *"including obligations relating to the payment of taxes or social security contributions"*. [33] There are qualitative differences between this sort of *"misconduct"* and that involved in failure to prevent offences. As to what falls in this category, the leading ECJ case on this point states that *"in order to find whether 'grave misconduct' exists, a specific and individual assessment of the conduct of the economic operator concerned must, in principle, be carried out"*.[34]

Although the *Forposta* case was decided with respect to a different Directive - Directive 2004/18 - it nonetheless sheds further light on whether conviction for a failure to prevent offence could ever amount to *"grave professional misconduct"*, being the term used in the PCR. The Court further considered the term to refer to breaches of ethics, and that it:

> *"covers all wrongful conduct which has an impact on the professional credibility of the operator at issue and not only the violations of ethical standards in the strict sense of the profession to which that operator belongs, which are established by the disciplinary body of that profession or by a judgment which has the force of res judicata."*[35]

According to the court, national law is capable of specifying what amounts to grave professional misconduct, but must do so in a manner respectful of EU law. [36] Thus, the court considered this concept ordinarily to refer to *"wrongful intent or negligence of a certain gravity"*[37] on the economic operator's part.

The situation that arose in *Forposta* was not analogous to the question of non-prevention offences but considered instead a contractor's failure to perform 5% of the contract's value. Nonetheless, its guidance is valuable. Moreover, its characterization at [27] of professional misconduct was reiterated in the more recent case of *Generali-Providencia Biztosító Zrt v Közbeszerzési Hatóság Közbeszerzési Döntőbizottság,* [38] which asked whether non-criminal infringements of competition rules could lead to exclusion under the previous public procurement Directive. On the basis of the *Forposta* approach, the court answered in the affirmative, placing particular weight on the infringement's 'penalisation' by a regulator-issued fine.[39]

Against that background, it is probably not open to question that broadly speaking, a criminal conviction has the capacity to amount to a breach of grave professional misconduct. However, that does not appear inevitably to be the case and particularly, it is argued, not with respect to corporate failure to prevent offences. This point was taken by Webster in relation to conviction for an offence under section 7 of the *Bribery Act* 2010 (upon which the proposed new corporate offence of failure to prevent tax evasion facilitation is modelled) in relation to which she wrote that:

> *"it is… possible (depending on the circumstances) that a conviction for a s.7 offence could be viewed as the result of a compliance failure, and something less than 'grave professional misconduct'"*.[40]

33 Directive 2014/24, Recital 101(1), (2).
34 Above n 29 31.
35 Ibid 27.
36 Ibid 30.
37 Ibid 30, 33.
38 (C-470/13, 18 December 2014).
39 Ibid 35.
40 Alexandra Webster, 'Could a Company be Debarred Following a Conviction for Failure to Prevent Bribery?' (2016) 7 Criminal Law Review 485, 486.

Webster's argument is potentially also applicable to the proposed new offence. Arguably, if a company fails to prevent bribery or tax evasion facilitation, it cannot be said that such failure automatically goes to its ethics or integrity, unless it is proven that the failure was deliberate. The latter is a finding that no court is required to make in either context, although the factual circumstances 'specifically assessed' in an individual case, may point in this direction. In the ordinary case, a relevant body's failure to put in place adequate prevention measures could only amount to grave professional misconduct on the basis of "negligence", rather than its "wrongful" nature. A deficiency in ethics and integrity either has nothing to do with it or, at the least, would be difficult to prove.

In any event, if it were the case that company was debarred following a conviction for failure to prevent tax evasion facilitation, it should be noted that there would be a temporal limit. Regulations 57(13)-(17) of the PCR deals with a process referred to as 'self-cleaning', by which an economic operator may alter its circumstances so as to become eligible for selection once more. To do this, an economic operator must *"provide evidence to the effect that measures taken by [it] are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion"*.[41] In the context of the proposed offence, the obvious means of doing this is by implementing a raft of prevention procedures and anti-tax evasion facilitation safeguards. If the economic operator is able to satisfy the contracting authority that it has changed its ways, *"the economic operator concerned shall not be excluded from the procurement procedure"*.[42]

Conclusions

This paper has sought to examine the impacts of a corporate conviction for failure to prevent on public procurement processes. The foregoing examination indicates that even if some corporations were to be convicted of the new offence, it is an open question as to whether debarment would follow on the basis that they have engaged in *"grave professional misconduct"*. In the present circumstances, it would seem there is a need for clarity and case-by-case consideration. If, however, it was thought that debarment ought to automatically follow a conviction for failure to prevent the facilitation of tax evasion for reasons of deterrence, the PCR could potentially be amended post-Brexit to expand the list of mandatory exclusions. Such an opportunity does not seem too far away and would provide certainty over the debarment position.

A Call for Clarity: The Uncertainty of 'Associated Person'

By Natasha Reurts

This piece explores the issues that could arise if the "associated person" referred to in the Criminal Finances Bill is a company.

The proposed new corporate offence would see a company liable for failing to prevent a person *"associated"* with it from facilitating tax evasion. Associated person is defined as "*a person"* who *"performs services for or on behalf"* of a *"relevant body"*, either an employee, an agent of the relevant body, or a person acting in any of these identified capacities. The offences (comprising an offence based on UK tax evasion and an offence based on foreign tax evasion) are modelled on the strict liability offence of 'failure to prevent bribery' in section 7 of the *Bribery Act* 2010 which renders

41 PCR reg 13.

42 PCR reg 14.

corporates liable, in certain specified circumstances, for the acts of associated persons, subject only to raising a defence relating to having reasonable prevention procedures in place designed to prevent the commission of the offence.

When the term "associated person" first appeared in section 7 of the *Bribery Act* 2010, concern was expressed about its open texture. The argument made at the time was that the undefined nature of the term has the potential to bring within scope individuals over whom a corporation has no reasonable means or opportunity to exercise control or oversight, particularly when the associated person is based abroad. The use of the term in the *Criminal Finances Bill* 2016 and the corporate offence of failure to prevent the facilitation of tax evasion has done little to alleviate those previously held concerns. Ambiguity still surrounds the 'failure to prevent' offence as contained in the *Bribery Act* 2010, and, by extension, this can be expected to affect the clarity of the proposed new offence which similarly hinges on the actions of an associated person.

When one considers who might be encompassed by the term "associated person", the mind typically conjures up employees, subsidiaries, agents and contractors – and indeed, some of these persons are specifically contemplated by the Bill's proposed provisions.[43] However, the categories of persons falling within each of these titles may often be hard to discern in practice. There is, for example, a distinction between individuals who for whatever reason wish at all times to be treated as independent of the company with which they have a relationship, and companies who for own reasons of self-interest seek to artificially distance themselves from individuals with whom they in fact have a close relationship. However, specific issues and peculiarities arise when the associated person is a company and not an individual. This piece explores these issues, drawing out the idiosyncrasies of such a scenario and the inherent uncertainties surrounding the term and definitional limits of "associated persons" as contained in the Bill.

A discussion on the implications of an "associated person" being a corporation is perhaps best illustrated and discussed through a hypothetical case studies.

Case 1

Presently, there is much debate as to whether a 'gig' work arrangement amounts to a conventional employment arrangement. Recent legal challenges, however, suggest that it can amount to an employer-employee relationship.[44] In these circumstances, assume, for example, a gig economy employee (e.g. a driver) – a "gigger" – evades UK tax. If a separate corporate entity, such as a law firm, chooses to use the gigger's employer for the transportation of staff, is the law firm a "relevant body" liable for failing to prevent the facilitation of tax evasion if the gig employer deliberately structured its affairs in a way that made it easier for their gigger to cheat the Revenue? Theoretically, the law firm engages with a person, the gigger's employer, for the performance of services. If its anti-tax evasion stance is deficient, is the law firm exposed to liability?

43 "Associated person" can be an individual or an incorporated body. This point is made clear in the HMRC's October 2016 issued guidance on the corporate offence of failure to prevent the criminal facilitation of tax evasion.

44 *Mr Y Aslam and Mr J Farrar & Others v Uber B.V., Uber London Ltd, Uber Britannia Ltd* (Case Nos: 2202550/2015) Employment Tribunals (28 October 2016).

Case 2

The above might seem wholly far-fetched but the provisions are drafted widely. Let’s take a simpler example which gives rise to the same questions. What about where a company engages a cleaning agency which contracts with individual cleaners to provide cleaning services? The agency partially pays the cleaners cash in hand. This precise arrangement is not known to the company but overall it means that the company is receiving the services at less than market rate. Is the company a “relevant body” that is potentially exposed to criminal liability for failure to prevent the facilitation of tax evasion? Theoretically, the agency is the “associated person” that has facilitated the tax evasion committed by the individual cleaner.

Case 3

Let’s take another example.

A sole trader – say a suburban accountant who operates his own business – provides accounting services to a separate corporate entity, a small IT outfit. The suburban accountant has knowingly assisted in moving another client’s funds offshore in an attempt to evade UK taxes. In this example, the offshore tax evasion has no relation or bearing on the services the accountant provides to the IT outfit. Is the IT outfit *“a relevant body”* exposed to criminal liability for failing to prevent the facilitation of tax evasion by the suburban accountant, an *“associated person”*? The absurdity of this example is self-evident, but prosecution is theoretically possible on a strict reading of the proposed new offence.

Analysis

Imposing criminal liability on a company that has such a tenuous connection to the tax evasion and its facilitation may seem illogical but prosecution in these circumstances is theoretically possible. The provisions are drafted widely and there would appear to be few defined bounds. Clarifying whether liability could arise in the above case scenarios matters as, if the scenarios fit within the provisions as presently drafted and theoretically able to be prosecuted, this will inevitably make companies more cautious about their service providers and alert to who may even constitute a service provider, and therefore an associated person.

At its simplest, the catch-all phrase *“acting in the capacity of a person performing such services”* leads to the ambiguity. In effect, the crucial question that corporations need urgent guidance on is – must the services performed by the associated person for or on behalf of the relevant body facilitate the underlying tax evasion? Is a nexus required or are services performed generally sufficient to potentially trigger corporate criminal liability under the proposed new offence? Certainly, the ambiguity is something that respondents to the consultation on the offence had in mind when calling for a requirement that the relevant body benefit from the failure to prevent the facilitation of tax evasion in the legislation by the associated person.[45] If such a requirement was introduced, the ability to prosecute companies would be narrowed but there would at least be some certainty of the circumstances that could give rise to prosecution.

Overall, the proposed new offence has the consequence of requiring relevant bodies to not

45 HM Revenue & Customs, ‘Tackling Tax Evasion: Legislation and Guidance for a Corporate Offence of Failure to Prevent the Criminal Facilitation of Tax Evasion’ Summary of Responses (13 October 2016) <ttps://www.gov.uk/government/uploads/system/uploads/attachment_data/file/560118/Tackling_tax_evasion-legislation_guidance_corporate_offence_of_failure_to_prevent_criminal_facilitation_tax_evasion-Summary_Responses.pdf> 9.

only be more cautious about who they do business with but, in being so cautious, requiring them to ask of associated persons the details of their anti-tax facilitation policies to ensure that they themselves do not fall foul of the offence provision. In this regard, the legislation could place heavier burdens on corporates that perhaps initially appreciated.

HMRC's issued guidance on this proposed offence notes that a person will not be considered an "*associated person*" if the person is off on a frolic of his own. However, just when a company can contend that an associated person is 'on a frolic' is unclear, as is how a company would go about demonstrating such a frolic in the context of these offences. Moreover, although the guidance helpfully provides some detail as to who will not fall within the category of "*associated person*", glaring gaps in understanding what performing services for or on behalf of the relevant body means remain. The Explanatory Notes state that an associated person will not include someone who provides tax advice in a personal capacity to their relatives, but there are many other scenarios, such as those identified above, which remain wholly unclear. This makes the offence uncertain though is not to say that there are no limits to it. One way in which the offence is limited is that the offence must be criminally facilitated by an associated person. This necessarily means that the associated person must deliberately and dishonestly facilitate the evasion. HMRC issued guidance on this point notes that if the facilitation can only be proved to an accidental, ignorant or negligent standard then the corporate offence of failure to prevent the facilitation of tax evasion has not been made out.[46] This should provide some relief to corporations who will no doubt appreciate the higher bar required.

One further unexplored area concerns the interaction between the identification doctrine, as a means of establishing corporate criminal liability in the UK, and the associated person being a corporation. The identification doctrine requires that a company can only be criminally liable where an individual who is the directing will and mind of the company is attributed to the criminal conduct. The practical effect of this is that if an associated person is a company it will be necessary to establish that an individual who is the directing mind and will of that company, i.e. a director, has facilitated the tax evasion. This poses a difficulty where the associated person is a large corporate entity, such as in Case 1 and, possibly, Case 2 (depending on its size). Although there is a call for evidence on the deficiencies of the identification doctrine in the UK, it presently remains the primary mode of establishing corporate criminal liability.

Where the relevant body has put in place reasonable prevention procedures to prevent the criminal facilitation of tax evasion by an associated person, the relevant body has a defence. Again, this will be familiar as the same structure appears in section 7 of the *Bribery Act* 2010. And again, corporations can expect some HMRC issued guidance on the types of procedures expected. In contrast to the section 7 offence, the proposed new offence adds an additional limb to the reasonable prevention procedures defence in extending the defence to circumstances where it "*not reasonable*" to expect the relevant body to have in place such procedures. Arguably the defence that it was *"not reasonable in all the circumstances"* to have prevention

46 HM Revenue & Customs, 'Tackling Tax Evasion: Government Guidance for the Corporate Offence of Failure to Prevent the Criminal Facilitation of Tax Evasion' Draft Government Guidance (October 2016) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/560120/Tackling_tax_evasion__Draft_government_guidance_for_the_corporate_offence_of_failure_to_prevent_the_criminal_facilitation_of_tax_evasion.pdf> 8.

procedures directed at preventing a supplier's facilitation of a wholly separate person's tax evasion could be deployed in the three case scenarios. This should provide companies with some further comfort against absurd prosecutions or, on a cynic's view, the extension might be viewed as a license for corporate complacency. In practice, how and when a corporation can rely on this extension is unknown. However, in principle, this extension should be warmly received so as to guard against the overcriminalisation of corporate behaviour. Moreover, it will be worth watching the development and usage of this extension and whether its practical application is something for consideration as an amendment to the bribery provisions.

Concluding Remarks

The above discussion has illustrated the need for clarity over what kind of actions of an associated person will be sufficient to ground a prosecution against a relevant body for failure to prevent the facilitation of tax evasion. Specifically, is there a need for a benefit to be derived by the relevant body from the associated person's services or actions? In the event there is not, this may have the inevitable effect of making corporates wary of who, and how, they engage the services of other corporate entities. The long-term effect of this may be to fundamentally change the way corporates interact.

Corporate Prosecutions for Foreign Tax Evasion: An Expansion of British Criminal Law

By José Leandro Secco Blanc

This piece explores the proposed new corporate offence of failing to prevent the facilitation of foreign tax evasion, with focus on potential for overreach and practical difficulties.

If passed, the Criminal Finances Bill 2016 proposes to introduce in sections 40 and 41 corporate criminal liability for failing to prevent the facilitation of tax evasion. The proposed provisions warrant special attention. One reason, amongst many, is that two new offences would be created, including one (section 41) that would enable UK prosecutors to take action against a company or partnership for failing to prevent the facilitation of foreign tax evasion by foreign tax-payers. The peculiarity of the proposed arrangement has been recognised by lawmakers. Page 37 of the Bill's Explanatory Notes states:

> "*it is foreseen that in many cases it will be preferable for legal action to be taken in the foreign country suffering the tax loss, that being the convenient forum.*"

This, in turn, suggests that prosecuting a company's failure to prevent foreign tax evasion facilitation will not necessarily be at the top of the law enforcement priority list. However, if the 'foreign' offence is to be introduced, the question arises as to how it would work in practice and whether it could ever be said to be in the UK's public interest to prosecute a company in the UK for failing to prevent the facilitation of tax evasion that has ultimately resulted in loss elsewhere. Both questions are the focus of this piece.

Proposed operation of the offence

Central to both offences is that a company could commit a criminal offence if it failed to prevent an "*associated person*" (defined in the Bill) from facilitating tax evasion. Specifically in regards to the 'foreign offence', a company could be exposed to criminal liability if underlying tax evasion and tax evasion facilitation offences were committed in a foreign country. A dual criminality requirement would arise, such that UK prosecutors would have to show that the conduct was contrary to the laws of the country in which it occurred as well as in the UK if it the occurred there. Where this is satisfied, companies could be in the reach of prosecutors if one of three conditions were satisfied – (1) they were incorporated in the UK; (2) they carry on business in the UK; or (3) any conduct constituting part of the offence took place in the UK. The third condition is especially noteworthy as it potentially means that a company, wherever situated or formed and irrespective of where it carries on business, could face criminal liability for failing to prevent the commission of foreign tax evasion so long as a *part* of the act of facilitation occurred in the UK.

Public interest

The proposed width of the new foreign offence suggests that, in theory, a company with no connection to the UK and which has, essentially, failed to prevent a person associated with it from causing a tax loss to another country's economy, could be prosecuted in the UK. This, in turn, raises two issues – how would this work in practice? And, are prosecutions of this kind in the public interest?

Public interest is, of course, both an elusive concept and yet an essential feature of any prosecutorial decision. According to Ashworth, it is regarded as a *"a balancing exercise between considerations of evidential sufficiency, culpability, law enforcement and resource management*."[47] In a practical sense, the CPS Code for Crown Prosecutors reflects these considerations in its requirement that prosecutors must weigh the potential costs of a prosecution action against the damage caused to society by the alleged offence.[48]

Against this background, one could argue that there is little or even no harm to the UK when offences of foreign tax evasion or foreign tax evasion facilitation are committed. Central to this argument is that HM Revenue & Customs and, moreover, the British public suffer no loss, or at least, no economically quantifiable damage from foreign conduct of this kind. Further, in some cases, no part of the offending conduct will have taken place in the UK. In these circumstances, any decision to invest human and economic resources to pursue offences which occurred abroad, or have, at first glance, no relation to the UK other than the subject being incorporated or carrying a part - not even a major part - of its business in the UK is questionable.

But does this mean that the public interest is never served by prosecuting cases with a foreign element? A strong counter argument to the above is that the simple fact that a company is formed or does business in the UK – and therefore is submitting to the regulation, laws and jurisdiction of the UK in order to reap the benefits of the UK markets – ought to mean that it should be held to the high standard of conduct. If this is not the case, the UK's reputation as a global financial and corporate centre risks damage. This, in turn, suggests that even if another country's tax authority happened to technically suffer the economic loss, harm could still be said to exist in the UK. This point was reflected in a statement by the Hon. Ben Wallace, Minister of State Security, which was made during in a parliamentary intervention on 25 October 2016:

47 Andrew Ashworth, 'The "public interest" element in prosecutions' *Criminal Law Review* 1987, 595.

48 The Code for Crown Prosecutors 4.12 (January 2013).

> "*Tax evasion is wrong. It is a crime. It cannot be right that a business operating in the UK can escape criminal liability simply because a tax loss is suffered by another country rather than the UK.*" [49]

Arguably, implicit in this statement is the notion that the UK, as a global financial leader, must shoulder some of the burden in the international fight against tax evasion.

Taking this further, it is also noteworthy that the proposed foreign offence makes the commission, rather than the conviction, of a foreign tax evasion and foreign tax evasion facilitation offence a pre-requisite. This is an important distinction as, arguably, if a foreign tax-related offence has clearly been committed but no person convicted, there is a public interest in taking steps against the company that allowed the evasion to happen 'on their watch' owing to their lack of supervision or controls. There is, arguably, a case for the evasion of UK taxes and the evasion of foreign taxes to be seen equally. The case is only made stronger where, for example, the foreign tax evasion has resulted in a loss to public revenue in a developing country. As HM Revenue & Customs has stated:

> "*Whilst the preference is for a prosecution to take place where the loss occurred, we recognise that in some circumstances this may not be possible. In such circumstances it is not appropriate that a corporation [...] is not held to the same standard as [...] facilitating evasion of UK taxes.*"[50]

The justification for a UK prosecution where foreign tax evasion is involved is, of course, likely to be stronger where at least some part of the sanctioned conduct occurred in the UK. There is a public interest in ensuring that the UK is not used as an intermediary platform to re-direct economic resources to 'tax havens'. This fear has been expressly admitted by the Home Office and HM Treasury in 2016.[51] Enlivening the criminal jurisdiction where part of the offending conduct occurred in the UK follows, after all, a conventional understanding of criminal jurisdiction. For example, in the context of individuals, if part of the alleged conduct took place in a particular jurisdiction this can be sufficient to ground a successful application for extradition. But such applications are not straightforward – in one decision precisely where "the harm" occurred was relevant to the court's determination of a judicial review application relating to an extradition determination.[52]

Unanswered questions?

The above points to several arguments able to be deployed in support of prosecuting companies for failing to prevent the facilitation of foreign tax evasion. However, whilst the provisions may be sufficiently wide, it is questionable whether UK prosecutors would seriously consider investing valuable and already limited resources to investigate and prosecute companies where the associated person's offending conduct only had a minimal connection to the UK.

Associated with this, it remains to be seen as to what will sufficiently constitute a *'part'* of a conduct? This issue has growing importance in view of the use of technology in the commission of criminal offences, and the majority of today's financial operations being internet-based. Could, for example, receiving or sending an e-mail in the UK pertaining to the alleged nefarious tax arrangement constitute part of an offence? And what if a communication potentially relevant to proof of a conspiracy is sent from overseas, but

49 Above n 5 200.
50' Tackling offshore tax evasion: a new corporate criminal offence of failure to prevent the facilitation of evasion'. July 2015.
51 'Action Plan for anti-money laundering and counter-terrorist finance'. April 2016, 1.3.
52 R *(on the application of Gary McKinnon) v Secretary of State for Home Affairs* [2009] EWHC 2012 (Admin).

through a British service provider or British-based chat room?

A further practical issue deserving of consideration is the ‘dual criminality’ requirement, identified earlier. For a company to be exposed to criminal liability on the basis that an associated person has facilitated foreign tax evasion, there will be a need for the associated person’s conduct to be contrary to the criminal laws of the country in which it occurred. Although the direction of travel in terms of law reform is toward the criminalisation of tax evasion, global consistency is yet to be achieved. In Switzerland and Uruguay, for example, tax evasion is traditionally treated as a non-criminal matter. It follows that the dual-criminality requirement could pose as a significant practical hurdle to the prosecution of the foreign offence.

These are only some of the questions for consideration when there is an offence with an extraterritorial reach and it will be interesting to see in practice how they are answered. A safeguard against prosecutions that would seem too remote may be found in the proposal that proceedings under section 41 would require the consent of the Director of Public Prosecutions or the Director of the Serious Fraud Office. Accordingly, this process will serve as an additional filter as regards prosecutions in the “*public interest*”.

Concluding remarks

The new offence, in attempting to criminalise tax loss in foreign jurisdictions, sets a tone internationally: tax evasion is a crime. This strategy could be labelled as far-reaching as it may be seen as an interference with foreign jurisdictions and their legislative prerogatives. Equally, however, it could be seen as the UK taking the lead in holding companies the world over to account for their role in preventing tax evasion.