

Facilitating Tax Evasion - are you ready?

September 2017

The new corporate criminal offence of failure to prevent the facilitation of tax evasion (whether in the UK or elsewhere) comes in to force on 30 September and last week saw the publication of the final form Government guidance.

Businesses have already been designing their "reasonable procedures" that they need to put in place to provide a defence to the offence. The good news is that there have not been any major changes from the draft guidance published in May. Here are our three points to note, arising from the more subtle changes and our experience with the Bribery Act offences.

- Responding to the new offences is primarily about risk assessment, which needs to be ongoing and focus on the risks posed by the business's associated persons - the people who link the business with the underlying tax evasion. HMRC had already said that relevant bodies should 'sit at the desk' of their associated persons when addressing the new offences. Those drafting procedures will welcome the changes to Principle 5 (communication and training) that show a greater focus on practical issues (e.g. ensuring employees can raise concerns/seek advice) than more theoretical points (such as the socio-economic consequences of tax evasion).
- Helpfully, the updated guidance remains clear that "reasonable procedures" need only be proportionate. In one example, tax evasion by a sub-distributor does not lead to liability for the UK manufacturer, because it had reasonable procedures in place, even though

these did not extend to conducting due diligence for the entire onward supply chain. This also supports joining tax evasion related procedures to existing KYC, AML or anti-bribery systems.

- A trickier point is that, whilst people on the ground do not need to become global tax experts, it is very clear that "reasonable procedures" means both a binding commitment to preventing the facilitation of tax evasion (e.g. a clearly articulated policy with real sanctions for those that breach it) and a proper understanding by the people affected of what is expected of them. As Ben Morgan, then Joint Head of Bribery and Corruption at the SFO, said: "The quality of an organisation's compliance culture isn't defined by how much money it has spent on trying to implement it, or how earnestly people at the top talk about it, but rather by how people at the coal face actually live it."

The extra-territorial nature of the new offences cannot be forgotten, and those at the coal face need to be aware of how foreign tax risks may affect UK based businesses. Given the cost and reputational damage of unlimited fines and criminal prosecution - not to mention potential debarment from public procurement - businesses should be comforted by the latest guidance but realistic about the importance of taking time now to ensure that their reasonable procedures are in place by 30 September and that they continue to develop them thereafter.