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Failing to Prevent the Facilitation of Tax Evasion – the time to act is now

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A renewed focus on corporate behaviour has been one of the hallmarks of the domestic agenda that has emerged in the early weeks and months of Theresa May's tenure as Prime Minister. Mrs May has demanded a shake-up of boardroom representation, further checks on executive pay and new measures to make organisations criminally culpable for the actions of rogue employees.

This last point, in the form of the planned corporate criminal offence of "Failing to Prevent the Facilitation of Tax Evasion", should be focussing minds in the Channel Islands. It arises where there has been tax evasion in which someone "associated with" a company or partnership – including employees, contractors and even subsidiaries – acts as an accessory. It is a "strict liability" offence, meaning that the burden is then automatically on the business to demonstrate that it had reasonable procedures in place designed to prevent such conduct from occurring. If it cannot do so, it may be guilty notwithstanding that it had no direct involvement or actual knowledge. Thus, the focus is not so much on the tax evasion itself, but on whether the culture of the business – the lack of checks and balances – allowed the offence to happen.

It is similar in this regard to Section 7 of the UK Bribery Act, which the CI financial services sector will be very familiar with. And the similarities do not end there. The geographical scope of the new offence extends further than just UK corporations, potentially applying to companies and partnerships wherever they are located.

The drafting is a response to perceived problems with existing corporate offences, which usually require the prosecution to show intent on the part of those running the business. This may be especially difficult in bigger organisations, where decision-making may be devolved or delegated. The UK Government is also concerned that the existing suite of offences actually encourages directors to distance themselves from decision-making, in order to obviate the risk of corporate criminal liability.

Consultation on the "Failing to Prevent the Facilitation of Tax Evasion" offence took place earlier this year and we now have a clearer idea of what the law will look like in practice.

The fundamental point is that although regulated financial services businesses already have a raft of policies and procedures in respect of existing compliance obligations, for example anti-money laundering (AML), these may not be enough on their own. Top-level management will need to be integrally involved, driving a zero-tolerance policy towards the facilitation of tax evasion. The potential for tax evasion will need to form a specific part of the risk assessment and due diligence processes when taking on new business. It should also form a part of regular staff training. The additional burden will be an ongoing one, with periodic monitoring of procedures to ensure they remain fit for purpose.

The financial services sector in Jersey and Guernsey should be under no doubt that the UK Government is taking this area seriously. Businesses may not be immune simply by virtue of their location in the Channel Islands, and they may therefore wish to consider whether changes are needed to protect themselves. And with plans under active consideration to introduce additional corporate criminal offences of failing to prevent economic crimes such as money laundering, false accounting and fraud, this may very well be just the start of significant changes to corporate law and to the regulatory burdens on businesses generally.

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