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Criminal Finances Bill: UK Government presses ahead with financial crime reforms

On 14 October, the UK Government introduced the Criminal Finances Bill ("**the Bill**") to Parliament. This draft legislation proposes the introduction of a new offence of failing to prevent the facilitation of tax evasion as well as changes to certain aspects of the anti-money laundering ("**AML**") and counter terrorism financing ("**CTF**") framework. Although the precise shape and impact of the proposed new measures will evolve as the Bill progresses through Parliament, it is clear that they will affect the way in which banks will have to approach financial crime compliance, work with one another to share information and report suspicions.

This briefing examines the key measures proposed (and those which the Government has decided not to progress at this stage). It looks at how they fit into the current enforcement landscape and how they may presage other important financial crime measures in the UK.

Key measures proposed

New offence of failure to prevent the facilitation of tax evasion

Further to a consultation exercise conducted by HM Revenue and Customs ("**HMRC**") earlier in 2016, the Government now proposes to legislate to make it an offence for a "relevant body", which can include advisers, to fail to prevent the commission of tax evasion (whether in the UK or elsewhere) by a person with which they are "associated".

The offence is similar in some respects to that of failing to prevent bribery under section 7 of the Bribery Act 2010 ("**BA 2010**"), which has formed the basis of the first two deferred prosecution agreements to be concluded in the UK and one conviction of a corporate organisation.

However, there are some important differences. The scope of the proposed offence of failure to prevent the facilitation of tax evasion is wider than that of the equivalent bribery offence. The latter requires the corporate organisation concerned to have benefited from the conduct in question but there is no such requirement in the tax evasion offence. On the other hand, the defence to the proposed new offence is more widely drafted. Whereas the defence under BA 2010 depends upon a corporate establishing that it took "adequate procedures" to avoid the commission of a substantive bribery offence, a "relevant body" would have a defence under the new offence as currently drafted if it could establish that it had in place such "prevention procedures" as were reasonable in all the circumstances, or alternatively that it was not reasonable in all the circumstances to expect it to have any such "prevention procedures" in place.

The territorial scope of the new offence as currently drafted is potentially wide. The Bill provides for the new offence to apply extraterritorially in some circumstances. Overseas tax evasion will be covered where the conduct concerned would amount to an offence in the jurisdiction concerned as well as in the UK.

The detail of the circumstances in which the new offence will be available for use, what will amount to reasonable "prevention procedures" and when the defence will be available remain up for discussion. These provisions and proposed accompanying guidance (published in draft by HMRC) will be the subject of lively debate during and following the passage of the Bill through Parliament.

Reform of the suspicious activity reporting regime

In its consultation paper detailing its "action plan", published in April 2016, the UK Government indicated that it was at that time considering the relatively radical option of removing the statutory money laundering defence provided by the consent regime in relation to suspicious activity reports ("**SARs**"), and replacing it with a more targeted system aimed at entities deemed to represent the highest money laundering and terrorism financing risks.

That proposal has not made it into the Bill, with the Government instead opting to retain the current model but modifying it with a proposed ability for law enforcement agencies to extend the "moratorium period" (i.e. the period during which those who have filed a SAR and sought consent from the National Crime Agency ("**NCA**") to proceed with a transaction are prevented from doing so before consent is deemed to be given). It proposes that this period can be extended by court order from the current total of 31 days by an additional 186 days. The stated rationale is to allow law enforcement agencies more time to respond to information contained in SARs (by, for example, assembling evidence in support of applications for restraint orders and/or making mutual legal assistance requests to agencies in other countries) before having to undertake the more burdensome task of seeking an injunction.

However, a potentially intended by-product of the proposal if enacted will be to encourage those filing consent SARs to think carefully about whether it is necessary to do so. The Government remains concerned about the strain resulting from ever increasing numbers of SARs requesting consent to proceed with transactions. It considers many of these to be based on a defensive approach by some reporting firms. If it survives the parliamentary process, the much longer moratorium period would potentially have an extremely disruptive, and in some cases fatal, impact on many transactions, particularly given the restrictions on parties disclosing any information about SARs for fear of committing tipping off offences.

The Bill also proposes new powers to enhance the ability of the UK Financial Intelligence Unit, the part of the NCA responsible for receiving and processing SARs, to obtain further information. These legislative measures are accompanied by proposed improvements to IT and resourcing to address the current considerable backlog of consent SARs.

Up to now, parties affected by delays arising from the reporting process have only resorted to litigation in a handful of cases. Courts have been at pains to emphasise that declaratory relief will only be available in exceptional circumstances. The lengthening of the moratorium period could lead those affected by the freezing of transactions to look to the Courts in greater numbers.

The decision to stop short of abolishing the consent regime will be a source of relief to banks and individuals within them responsible for AML and CTF compliance. Had this measure been taken forward, the onerous burden of assessing whether to take a risk as to whether money laundering had occurred or was occurring (often on the basis of incomplete facts) would have been placed upon them. However, the proposed changes would still require changes to compliance systems and controls, and the option of the removal of the consent regime has not been taken off the table altogether.

The FCA has so far kept its counsel in relation to the proposed reforms to the reporting regime. It has, though, consistently been highly critical of inadequacies in reporting mechanisms and other AML and CTF systems and controls in banks and has not hesitated to take enforcement action against firms and individuals where it has found shortcomings. Earlier this month, it concluded its most recent enforcement case involving Sonali Bank (UK) Limited and its former money laundering reporting officer which concerned, amongst other issues, shortcomings in knowledge amongst various individuals as to when SARs should be filed. Replicating its approach in a previous AML related enforcement case, the FCA imposed restrictions on conducting new business in addition to financial penalties. Its action was echoed by tough action on AML compliance taken by other authorities in separate cases concluded in Singapore and Switzerland during the same week.

New information sharing gateway

The Government has decided to place the Joint Money Laundering Intelligence Taskforce ("**JMLIT**") on a permanent footing. The proposals would enable the more efficient exchange of information on suspicions of money

laundering and terrorism financing between private sector firms (and not just to/from the NCA). The Bill includes proposals for immunity from criminal or civil liability in respect of such transfers and a facility for joint SARs to be submitted to the NCA. This proposal received strong support from banks and law enforcement agencies at the consultation stage.

Introduction of unexplained wealth orders

Looking to similar measures already used in Australia and Ireland, the Government proposes to introduce orders requiring individuals to explain the origin of assets that appear to be disproportionate to their known income. These would be available for use against any person who law enforcement agencies have reasonable grounds to suspect has links to serious crime and overseas politically exposed persons.

The threshold would probably be set at £100,000 and failures by individuals to provide adequate explanations as to the origin of the property in question would give rise to a rebuttable presumption that the property in question was "criminal property" for the purposes of existing civil recovery powers in the Proceeds of Crime Act 2002 ("**POCA**").

Strengthening of investigative and asset recovery powers

The Bill also proposes various amendments to the powers of the NCA and other agencies (set out in POCA). These changes are aimed at enabling them to respond more efficiently to SARs and to disrupt suspected money laundering through the forfeiture of monies and portable high value items used to store and move the proceeds of crime.

Changes are also proposed to the steps required to be taken by investigating authorities prior to obtaining disclosure orders (which are typically used to gather information from banks and the professional advisers of those suspected of involvement in money laundering). Specifically, it will not be necessary for investigating authorities to obtain authorisation from prosecutors in order to obtain disclosure orders, as is currently the case, but rather will be able to do so with the authorisation of senior officers within the relevant investigating authority. The scope of disclosure orders will also be widened to cover investigations concerning a wider range of money laundering and other offences.

Key measures not proposed

Also notable is what does not appear in the Bill and the Government's accompanying paper.

No mention yet of the proposed new offence of failure to prevent economic crime

Ahead of its publication, there was much speculation in some quarters that the Bill may be used to bring forward proposals to extend the scope of the offence under section 7 of BA 2010 to cover offences other than bribery (i.e. fraud, money laundering, false accounting etc). The Government has decided not to implement the "failure to prevent economic crime" offence for now, although senior prosecutors continue to lobby vociferously for this change. The debates in relation to the more self-contained proposed new offence of failure to prevent facilitation of tax evasion will be of interest from this perspective, and there may be potential for the Bill to be widened as it progresses through Parliament.

No illicit enrichment offence

Given concerns raised during the consultation process about the reversal of the burden of proof, the Government has decided not to proceed with proposals to introduce an offence of illicit enrichment. It also stated that its decision not to do so has been based upon its likely limited practical effect, particularly against individuals not located in the UK.

No introduction of power to designate an entity as being of money laundering concern

The Government originally consulted on the introduction of a power to designate an entity as being of money laundering concern. Similar provisions appear in the US PATRIOT Act.

It has decided not to do so at this stage, largely in response to representations from law enforcement agencies about the potential need to disclose details of sources of intelligence and the potential for lengthy challenges to decisions to designate entities. It is keeping the question of whether or how to introduce this power under review.

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