Overtaxing Criminal Law

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The criminal law took a giant leap into the dark when the corporate facilitation of tax evasion offences came into force on 30 September 2017. Previously, where a company employee assisted a customer or supplier to evade tax, the employee would be criminally liable but the company would not.

Now, both the employee and the company will be held criminally liable, unless the company can show it had put in place reasonable procedures to prevent the employee from facilitating tax evasion, or it was unreasonable to expect the company to have these procedures in place.

New corporate offences

Initially directed at tax advisers working in banks and accountancy practices who devised complex tax schemes which drifted across the line between lawful tax avoidance and criminal tax evasion, the offences apply to all companies and partnerships wherever incorporated or formed. As the Government explained in its explanatory notes, the new offences give effect to David Cameron's commitment to legislate following publication of the Panama Papers.

There are two offences set out in sections 45 and 46 of the Criminal Finances Act 2017. The first focuses on facilitating evasion of UK taxes. The second offence applies where a company facilitates the evasion of foreign tax.

In some respects, the corporate facilitation offences are no more than a logical extension to the ground-breaking corporate offence established in section 7 of the Bribery Act 2010. Under this provision, a company or partnership is held criminally responsible where it has failed to put in place adequate procedures to prevent the payment of a bribe made or received by a person associated with the company or partnership. The company is liable to be punished by the imposition of an unlimited fine, and there is potential exposure to criminal liability for the directors under section 10 of the Aiders and Abetters Act 1861 as aiders and abetters to the company's default.

But the corporate facilitation offences apply more widely.

Under these new offences, there is no need for a prosecutor to establish that a company or partnership benefited from the facilitation of tax evasion which has taken place. The revenue authority is the loser, with the direct gain made by the company's customer or supplier and not by the company or partnership itself. The position is different in a bribery case where an associated person bribes another person intending to obtain or retain business for the company or partnership, or to obtain or retain an advantage in the conduct of its business. Here, the gain for the company or partnership is obvious.

The underlying misconduct is more remote in the corporate facilitation offences than in the bribery offence. If a company is to be convicted of failing to put in place adequate procedures to prevent bribery, the prosecution must prove the existence of the bribe which will have been paid or received by the person associated with the company or partnership. Whereas in the case of the corporate facilitation offences, the underlying tax evasion is committed not by the associated person who is the facilitator but by the person whom he or she facilitates.

Increasing corporate responsibility

This extension of corporate criminal liability into the boardroom has passed into law largely unnoticed. Practitioners have warned about the increasing burden of new compliance obligations resting on companies and partnerships to put in place reasonable prevention systems to prevent the facilitation of another person's tax evasion. However, the widening of the principle to capture secondary parties where there is no direct corporate benefit has gone unchallenged.

The imposition of corporate criminal liability for failure to prevent offences reflects a growing desire to persuade companies and partnerships of their societal responsibility to curtail corruption and tax evasion. In the current climate, companies and partnerships are expected to police themselves as part of a corporate enforcement strategy.

This trend will continue, and the UK government has already consulted on the extension of the corporate bribery offence to cover all economic crimes. The approach is international and

harks back to a Council of Europe Recommendation in 1988 which regarded the development of the criminal law as a convenient tool for fostering good corporate culture and governance processes. As paragraph 4 of the Recommendation provided, a company should be exonerated from criminal liability only where its management is not implicated in the offence and has taken all necessary steps to prevent its commission. The key point for companies and directors to appreciate is that the criminal law is not holding a company or partnership liable for the failings of its employee or servant or agent, but for the commission of its own offence defined in the statutory sub-heading as a failure to institute adequate procedures to prevent the occurrence of an act of bribery or facilitation of tax evasion in question.

There is nothing wrong with criminal law playing a proactive role to achieve a socially useful aim. The days have long gone when directors could say that their singular role in life was to maximise company profits, without consideration of the wider implications of their actions. For some years, the civil law has required a director to have regard not only to the likely consequences of any decision in the long term and the interests of the company's employees, but also the impact of the company's operations on the community and the environment, and the desirability of the company maintaining a reputation for high standards of business conduct. These obligations are set out in section 172 of the Companies Act 2006 and apply to all company directors, irrespective of whether the company is a private or public limited company. The criminal law obligation to take adequate measures to prevent the commission of bribery or facilitating a tax evasion offence is completely aligned with the wider obligations of a director in civil law under section 172 of the Companies Act 2006.

But for those who regard the introduction of the bribery offence as the thin end of the wedge, the width of the wedge has just got thinner.

Foreign taxes

It is unprecedented for Parliament to have created a financial crime offence directed at the prevention of loss to a foreign revenue authority. Entirely different considerations of public policy apply where the corporate offence is directed at the prevention of tax loss to the UK revenue in contrast to the prevention of loss to a foreign revenue authority. Historically, it has always been a widely recognised principle of private international law that one State will not assist another State in the enforcement of its revenue claims. This is because the enforcement of a claim for tax is an exercise of sovereign power by the State which imposed the tax, and so enforcement of the foreign tax constitutes an assertion of sovereign authority by one State within the territory of another. This principle has been recognised in England as well as courts in several other common law jurisdictions such as United States, Canada, Ireland, South Africa, and Australia. Accordingly, even where a foreign State respects the Rule of Law, the new corporate offence involving facilitation of foreign tax evasion takes international co-operation to a new level.

Under this new law, cases may arise where, for example, the UK authorities wish to prosecute a company or partnership for facilitating a French or German football player with a Premier League club to evade tax in his home country. However, the potential application of the offence is not so confined. Suppose the football player comes from a country against whom the UK has economic sanctions in place. Is it seriously contemplated that the UK will assist a rogue State in the collection of its revenue?

It is true that criminal proceedings can be brought in a case involving loss to a foreign revenue authority only where the Director of Public Prosecutions or the Director of the Serious Fraud Office grants his consent, but there is nothing in the wording of the offence which restricts its geographical application. Reliance on the exercise of prosecutorial discretion is not a sufficient safeguard where the scope of a criminal offence breaks new ground in the sphere of corporate criminal liability and is configured so widely. This is a step too far on the part of our legislators, and it needs to be called out.

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