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Berwin Leighton Paisner LLP's Corporate Crime & Investigations team is led by partners Aaron Stephens and Daren Allen. The team regularly share their views on topical corporate crime and investigations issues with our subscribers.
In their column for January, Aaron Stephens, James Sandham, Kate Ison and Rebecca Wardle consider:

- HMRC Consultation: "Tackling Offshore Tax Evasion: a new corporate criminal offence of failure to prevent the facilitation of tax evasion".
- Bribery Act 2010 enforcement update.
- Easing of Iranian sanctions - Implementation Day has arrived.

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HMRC Consultation: "Tackling Offshore Tax Evasion: a new corporate criminal offence of failure to prevent the facilitation of tax evasion"

HM Revenue and Customs has recently taken further steps in its increasingly hard-line attempts to tackle and prevent tax evasion. Of particular relevance to corporate clients is the proposed new criminal offence for corporates who fail to prevent the facilitation of tax evasion. On 9 December 2015, the government confirmed that it intended to proceed with this measure by publishing draft legislation which sets out the detail of the new offence, together with the summary of responses to its initial consultation on "Tackling Offshore Tax Evasion: a new corporate criminal offence of failure to prevent the facilitation of tax evasion". The government now intends to consult on the draft legislation and this new consultation is expected to open in early 2016, see *Legal update, Draft Finance Bill 2016 legislation: key business tax measures: Avoidance and evasion: Corporate criminal offence of failure to prevent facilitation of tax evasion (www.practicallaw.com/5-620-8987)* .

What does the new offence entail?

Corporations (and other relevant legal persons) will be criminally liable where a person representing the corporation during the course of business criminally facilitates the evasion of tax by others, unless the relevant corporation has put in place reasonable procedures to prevent its representatives from committing the tax facilitation offence. The offence will apply to the evasion of all UK taxes and all similar overseas taxes. Those corporations found guilty of this offence will be subject to a fine.

In many respects, the draft legislation is similar to, and indeed modelled on, the corporate offence introduced by section 7 of the Bribery Act 2010. This provides that a commercial organisation is guilty of an offence if it fails to prevent a person associated with it from engaging in bribery intending to benefit the commercial organisation (subject to an "adequate procedures" defence). In order to be found guilty under section 7 of the Bribery Act, it is not necessary to prove that the organisation itself had any criminal knowledge or intent. For more information see *Practice note, Bribery Act 2010: corporate criminal liability (www.practicallaw.com/5-505-3552)* .

However, whereas corporate liability under the Bribery Act will only be imposed where the representative was acting for the benefit of the organisation, there is **no similar requirement under the proposed tax offence**. The proposed offence will simply apply where the representative is providing services (that is, to third parties) for or on behalf of the organisation. The effect of this is to potentially lower the threshold for liability and broaden the scope of the new offence: corporations and other organisations will be liable where the representative is providing services for or on their behalf (even if not directly for their benefit). A "representative" includes natural and legal persons acting on behalf of a corporation - for example an employee of a bank dealing directly with a customer, a subsidiary of a corporation or a third party organisation providing services to a customer as part of a package provided by a bank.

What is the practical impact?

The offence is, of course, subject to the defence that the corporation had put in place reasonable procedures to prevent the criminal facilitation of tax evasion. As with the Bribery Act defence of "adequate procedures", the key issue is what will constitute "reasonable procedures" for these purposes. Guidance will be released in early 2016 and will be subject to further consultation.

However at this stage the government has stated in its response to the original consultation that it is "mindful of the need not to overburden corporations". It contemplates that whether the procedures are reasonable will differ in each case and will depend very much on the relevant context. Although the government appears to envisage that the new legislation will not require corporations to carry out additional checks on their clients, it is clear from the responses to the consultation that many organisations do not already have sufficient controls in place to monitor whether its staff have deliberately facilitated tax fraud, and to prevent staff from doing so. Currently, the government's response believes that a formal policy will be necessary. Accordingly, if the legislation is enacted organisations will need to ensure that they have appropriate policies, procedures and guidance in place.

When will the offence come into force?

The government has announced that it intends the offence to come into force prior to the UK commencing the exchange of information regime with the other territories under the Common Reporting Standard. This is expected to take place in September 2017.

Bribery Act 2010 enforcement update

The end of 2015 saw two significant landmarks in the application and enforcement of the Bribery Act 2010 (the Act), with the Serious Fraud Office (SFO) achieving its first guilty plea under section 7 of the Act and, separately, obtaining court approval of its first Deferred Prosecution Agreement (DPA).

Both cases involved investigation and prosecution for the corporate offence of failure to prevent bribery by associated persons. Whilst the circumstances surrounding the DPA between ICBC Standard Bank PLC (the Bank) and the SFO are well publicised (and will not be rehearsed again in this article), the full details leading to the Sweett Group's decision to plead guilty to an offence are not yet fully known pending the sentencing hearing due in February 2016. However, it is interesting to consider the potential differences between the two cases leading to these distinct resolutions.

When considering an application by the SFO for a DPA the court must consider whether the proposed DPA is "likely to be in the interests of justice" and whether its proposed terms are "fair, reasonable and proportionate". In considering whether or not a DPA was likely to be in the interests of justice in this case, one of the factors that Sir Brian Leveson looked at was the seriousness of the conduct in question. In this regard, he observed that the Bank was not to be judged in respect of a predicate offence of bribery (that is, as a knowing participant in a scheme of bribery), but rather for a failure to prevent bribery by executives of a sister company (Stanbic Bank Tanzania Ltd). This is because the evidence did not suggest that anyone within the Bank knew that the executives of Stanbic Bank Tanzania Ltd intended to bribe other persons by way of a payment to a "local partner" (in connection with a sovereign note placement with the government of Tanzania). The seriousness of the offence has a bearing on whether a prosecution will be required in the public interest (the more serious the offence, the less likely that it will be appropriate to resolve the matter by a DPA). Accordingly, it would appear that in approving a DPA on this occasion the judge took the view that a corporate committing the "strict liability" section 7 offence is less serious than a corporate committing a section 1 or section 6 offence requiring evidence of *mens rea*.

The judge also identified a number of additional factors that caused him to consider that the DPA was likely to be in the interests of justice, namely:

- The promptness of the Bank's self-report to the SFO (within days of the suspicions coming to the Bank's attention and before its solicitors had commenced its own internal investigation).
- The fully disclosed internal investigation.
- The co-operation of the Bank throughout.

In addition, he also found that as the Bank agreed to an independent review of its anti-corruption policies and had undergone a change in ownership, all these factors meant that he was satisfied that, subject to its terms, a DPA was in the interests of justice.

By comparison, it has been reported that Sweett Group was charged by the SFO with the following offence:

> "Between 1 December 2012 and 1 December 2015 Sweett Group PLC, being a relevant commercial organisation, failed to prevent the bribing of Khaled Al Badie by an associated person, namely Cyril Sweett International Limited, their servants and agents, which said bribing was intended to obtain or retain business, and/or an advantage in the conduct of business, for Sweett Group PLC, namely securing and retaining a contract with Al Ain Ahlia Insurance Company for project management and cost consulting services in relation to the building of a hotel in Dubai, contrary to Section 7(1) of the Bribery Act 2010."

By pleading guilty to this offence, it is assumed that Sweett Group (like the Bank) did not consider that it had a reasonable prospect of demonstrating an "adequate procedures" defence to the conduct in question. However, whilst it is not known whether the SFO and Sweett Group ever had any preliminary discussions regarding a potential DPA, clearly the SFO did not consider that a DPA was an appropriate method for resolving this case and did not apply to the court for a relevant declaration.

Key differences between the two cases appear to have been the speed with which Standard Bank made suspicious activity reports (SARs) to the Serious Organised Crime Agency (now the National Crime Agency) and its self-report to the SFO, as well as the cooperative posture it adopted throughout its own internal investigation. By comparison, allegations regarding Sweet Group first became public (and presumably to the attention of the SFO) when they were reported by The Wall Street Journal in 2013. In addition, whilst the SFO investigation into Sweet Group is said to have begun in July 2014, by November 2014 the company had released a statement which indicated that the SFO no longer viewed the company as being "cooperative".

Compare this to the cooperation offered by Standard Bank, who in the words of Sir Brian Leveson:

> "[The bank] fully cooperated with the SFO from the **earliest possible date** by, among other things, **providing a summary of first accounts of interviews, facilitating the interviews of current employees, providing timely and complete responses to requests for information and material** and **providing access to its document review platform**. The Banks has agreed to **continue to cooperate fully and truthfully with the SFO and any other agency or authority, domestic or foreign**, as directed by the SFO, in any and all matters relating to the conduct which is the subject matter of the present DPA. Suffice to say, this self-reporting and co-operation militates very much in favour of finding that a DPA is likely to be in the interests of justice (emphasis added)."

The judge also noted that, absent the Bank's self-report, the conduct "might otherwise have remained unknown to the prosecutor". This is of course true, however it is relevant to recall that unlike Sweett Group, the Bank is a regulated financial institution subject to the positive requirement to submit timely SARs in compliance with the Proceeds of Crime Act 2002 (POCA), with the Bank and its nominated officer also exposed to "failure to disclose" offences under that legislation (see *Practice note, Failing to disclose offence: nominated officers in the regulated sector (www.practicallaw.com/8-593-0625)*). Furthermore, the Bank is subject to the Principle 11 obligation to deal with its regulators in an open and cooperative way, and to disclose to the appropriate regulator anything relating to the Bank of which the regulator would reasonably expect notice (see *Practice note, FCA notification requirements: decision tree (www.practicallaw.com/2-518-4719)*). One might observe that once any SARs and/or Principle 11 notifications were made by the Bank, it had no real option left but to report the matter to the SFO as well.

For more information, see also *Legal update, First DPA approved (Crown Court) (www.practicallaw.com/5-620-7445)* and *Practice note, Deferred Prosecution Agreements: overview (www.practicallaw.com/0-590-4442)* .

Easing of Iranian sanctions: Implementation Day has arrived

Somewhat earlier than expected, 16 January 2016 marked the day that international inspectors verified Iran's compliance with the initial requirements of the Joint Comprehensive Plan of Action (JCPoA). The JCPoA was an accord reached between Iran and the P5+1 (that is, the five permanent members of the UN Security Council plus Germany, also referred to as the E3+3) regarding Iran's nuclear programme. As at "Implementation Day", the US and EU/UK have commenced a coordinated easing of sanctions against Iran.

However, there are very significant differences between the changes to US sanctions and the changes to EU/UK sanctions.

US sanctions

In broad terms, the US has lifted most of the "secondary" sanctions that were imposed in relation to Iran, while leaving in place the core of the "primary" sanctions against Iran.

Primary sanctions apply to "US persons", for example:

- Any US citizen or permanent resident overseas national, wherever situated in the world.
- Any person while in the US.
- Any US organised company and its foreign branches, including any US subsidiary of a foreign company and any foreign companies that are "owned or controlled" by a US person.
- Any foreign company with a branch or other presence in the US.

Accordingly, Implementation Day has not brought about any major changes to the position for US persons other than in certain limited ways:

- A new "favourable licensing policy" which will enable US persons to seek specific licences from the Office of Foreign Assets Control (OFAC) to export and re-export commercial passenger aircraft and related parts and services to Iran.
- A new general license that makes it permissible to import Iranian carpets and food into the US.
- A new "general license H" that authorises foreign entities that are owned or controlled by US persons to engage in certain transactions, directly or indirectly, with the government of Iran and other Iranian individuals and entities.

Secondary sanctions apply to foreign (that is, non-US) persons and entities who are not typically covered by the primary sanctions. They work by creating disincentives for non-US persons and entities to do business in certain sectors of the Iranian economy or with specified Iranian individuals or entities. They apply even where there is no US nexus or jurisdiction over the transaction in question, and are enforced by the imposition of negative consequences on any non-US person who violates the sanctions (for example, freezing of US bank accounts and/or other action designed to limit the non-US person's ability to access US markets or the US financial system).

Implementation Day has removed most (but not all) of the secondary sanctions that had been imposed because of Iran's nuclear programme, including in respect of key sectors and activities such as:

- Iran's oil and gas, ship and shipbuilding and automotive industries.
- Trade in gold and other precious metals.
- Trade in graphite as well as raw or semi-finished metals such as aluminium, steel and coal.
- The purchase, subscription or facilitation of the issuance of Iranian sovereign debt.
- Provision of US banknotes to the government of Iran.
- Provision of insurance and re-insurance.

The US has also removed over 400 individuals and entities from OFAC's Specially Designated Nationals (SDN) list and related lists, although over 200 individuals and entities remain on the lists and there is nothing to stop individuals or entities being added (or re-instated) in the future.

Accordingly, Implementation Day has brought about changes that are likely to spur European and other non-US companies to start doing much more business with Iran, in circumstances where the ability of US companies to engage with Iran will remain quite limited. However, non-US companies engaging with Iran will need to continue to ensure that they are complying with the remaining secondary sanctions and that their Iran-related activities do not involve the US financial systems (for example, by making electronic US dollar payments) or otherwise expose US affiliates or operations to liability under the remaining primary sanctions.

EU/UK sanctions

Following Implementation Day the UK Foreign & Commonwealth Office (FCO) published an upbeat FAQ document which stated that "[t]here is a positive outlook for UK-Iran trade relations and the UK government fully supports expanding our trade relationship with Iran" (see *Foreign & Commonwealth Office: Guidance: Iran trade guide and frequently asked questions on doing business with Iran*).

This was accompanied by guidance on the "initial phase" of EU and UN nuclear-related economic and financial sanctions relief, focussing on the major sectors of financial services (including insurance); oil, gas and petrochemicals; shipping, shipbuilding and transport; gold and other precious metals; and banknotes and coinage.

According to HM Treasury publications, the key aspects of EU/UK sanctions relief are that:

- 34 individuals and 298 entities have been removed from HM Treasury's Consolidated List of Targets (and are thus no longer subject to an asset freeze).
- The restrictions on financial transfers to and from non-listed Iranian entities has ended (along with the requirement to seek prior authorisation for, or notify HM Treasury of, transfers of funds to or from Iran).
- Banking activities involving Iran are now permitted in the EU (for example, establishment of new correspondent banking relationships with Iranian banks, or Iranian banks opening branches, subsidiaries or representative offices).
- The provision of insurance and reinsurance to non-listed Iranian entities is now permitted.
- The supply of financial messaging services to non-listed Iranian financial institutions is now permitted.
- Transactions in public or public-guaranteed bonds with Iranian non-listed entities are now permitted.

Certain UN/EU/UK sanctions remain in place in respect of proliferation and human rights sanctions programmes.

Whilst remaining positive in relation to the opportunities offered by trade with Iran, the FCO has warned that key challenges will continue to affect business with Iran, including:

- A high risk of bribery and corruption.
- The fact that many Iranian companies are influenced, or directly or indirectly controlled by, the Iranian security services.

- Inflation, price controls and subsidies (and the dampening effect these may have on private sector growth).
- Lack of investment in infrastructure.
- Risk of bureaucratic delays.
- The fact that some sanctions remain in place.

For more information, see *Legal updates, HM Treasury publishes updated guidance and Financial Sanctions Notice on financial sanctions on Iran following Implementation Day (www.practicallaw.com/7-621-9310)* and *HM Treasury updates their FAQs on doing business with Iran (www.practicallaw.com/3-621-9289)* .

Resource information

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Related content

Topics

Bribery and Sanctions Offences (http://uk.practicallaw.com/topic5-607-9645)

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Substantive Law (http://uk.practicallaw.com/topic6-204-9134)

Tax Evasion Offences (http://uk.practicallaw.com/topic9-607-9653)

Practice note: overview

Deferred Prosecution Agreements: overview (http://uk.practicallaw.comtopic0-590-4442)

Practice notes

Bribery Act 2010: corporate criminal liability (http://uk.practicallaw.comtopic5-505-3552)

Failing to disclose offence: nominated officers in the regulated sector (http://uk.practicallaw.comtopic8-593-0625)

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