## The Criminal Finance Act 2017: What are the implications for Businesses? (1)

The UK Criminal Finances Act received royal assent on 27th April and is expected to come into force in September 2017. Reflecting growing international concern over, amongst other things, tax evasion, corruption, disguised ownership and terrorism, the Act marks a significant move forward in the UK’s anti-money laundering provisions with a number of key developments including:

* A new corporate offence of failing to prevent the facilitation of tax evasion
* The creation of Unexplained Wealth Orders, or UWOs
* New provisions to allow information sharing between regulated companies
* An extension of the SARs moratorium period
* New powers to allow the seizure of criminal proceeds in forms other than cash
* An expansion of Disclosure Orders to cover money laundering and terrorist financing investigations
* An expansion of the existing civil recovery regime to enable the recovery of the proceeds of gross human rights abuses or violations overseas.

So how might these developments impact on regulated firms in the UK? There are many important factors that we will be examining over the next few months. In this current article we have focused on two key aspects of the new Act and their implications for regulated firms.

### Corporate offence of failing to prevent the facilitation of tax evasion

This new offence ([Part 3](http://www.legislation.gov.uk/ukpga/2017/22/part/3/enacted) of the Act) is in much the same mould as the [Bribery Act’s section 7](http://www.legislation.gov.uk/ukpga/2010/23/section/7) offence of failing to prevent bribery. It is an offence which, like the section 7 offence, is designed to make companies more accountable for the actions of their representatives. It will make businesses liable for the acts of its employees and agents where these are deemed to have encouraged, enabled or otherwise assisted a third party in evading payment of a tax liability.

The offence applies to both UK and foreign entities ([section 44](http://www.legislation.gov.uk/ukpga/2017/22/section/44/enacted)) and covers the evasion of both UK ([section 45](http://www.legislation.gov.uk/ukpga/2017/22/section/45/enacted)) and foreign tax liabilities ([section 46](http://www.legislation.gov.uk/ukpga/2017/22/section/46/enacted)). The Act asserts a long arm jurisdiction which means that the offence does not have to have taken place within the UK for an offence to have been committed under UK law.

Concerns have been raised that many businesses do not seem sufficiently aware of this new corporate offence or its implications. Pinsent Masons have reported that as many as 67% of large businesses are unaware of the offence ([Outlaw.com, May 2017](https://www.out-law.com/en/articles/2017/may/survey-finds-low-levels-of-awareness-of-new-failure-to-prevent-tax-evasion-offences/)). Up to 58% of firms in the financial services and accountancy sector are reported to be unaware ([Accountancy Age, May 2017](https://www.accountancyage.com/2017/05/03/failure-to-prevent-tax-evasion-becomes-criminal-offence-in-criminal-finances-act-2017/)). This is despite the obviously serious consequences that may befall any businesses convicted of the new offence. Commentators have pointed out that convicted businesses may find themselves effectively excluded from bidding for government contracts or from operating in regulated markets. We may also assume that convicted firms are likely to face substantial fines (Sweett Group plc, the first company to have been convicted in 2016 of a corporate bribery offence under section 7 of the UK Bribery Act, was [ordered to pay £2.25M](https://www.sfo.gov.uk/2016/02/19/sweett-group-plc-sentenced-and-ordered-to-pay-2-3-million-after-bribery-act-conviction/)). We won’t know the true consequences until the first cases start to pass through the UK courts, but there can be little doubt of both the reputational and financial impact for businesses that are convicted of failing to prevent the facilitation of tax evasion.

Businesses facing investigation for this corporate offence do have a defence available to them, provided they are able to show that they had reasonable prevention procedures in place. Nonetheless the introduction of this new offence should trigger a substantive review of the preventive measures that businesses currently have in place including:

* The quality, content and effectiveness of relevant training for staff
* The effectiveness of senior management oversight and related procedures for reporting to senior management
* Whistleblowing policies and procedures including the effectiveness of protections afforded to whistleblowers reporting suspicions of tax evasion facilitation.

### Unexplained Wealth Orders (UWOs)

UWOs are a new tool made available under the Criminal Finance Act and designed to strengthen the hand of the authorities in their fight against money laundering. We have discussed these previously in [UWOs: How will they help in the fight against corruption?](http://www.lessonslearned.co.uk/assets/unexplained-wealth-orders---gill-peeling.docx).

In brief, a UWO can be applied for wherever there is a suspicion that funds may have derived from grand corruption or other crime. The [requirements that must be met](http://www.legislation.gov.uk/ukpga/2017/22/section/1/enacted) for the courts to issue a UWO are that:

* The assets in question are worth more than £50,000; and
* Are clearly in the possession of the respondent; and
* The respondent is either a politically exposed person (PEP), or suspected of involvement in serious crime, or a person connected with either one of these.

UWOs put the onus of proof on the owner of the property to provide evidence that their property is legitimate. If the respondent is unable to provide satisfactory evidence that the assets were legitimately obtained then that is sufficient for the assets to be frozen or seized. This is a significant development which adds considerable weight to the authorities’ powers to recover unlawfully acquired assets.

It goes without saying that the introduction of UWOs is going to put a spotlight on financial institutions and their due diligence standards. UWOs do not rely on a successful prosecution and conviction for assets to be seized. In effect this makes it easier for UK agencies to seize assets that have even a taint of illegitimacy about them. This in turn means that seizure actions arising from UWOs are potentially far more likely and the odds somewhat shortened that a firm will, at some stage, find itself associated with a client who has been subject to a seizure.

Clearly there is a reputational risk here. Where a client becomes the subject of a UWO then that could raise questions about the quality and robustness of an institution’s procedures for verifying their clients’ sources of wealth. If the institution has done a good job with due diligence then it should already have identified and documented the client’s sources of wealth before entering into a relationship with the client. It should have continually monitored and updated this information throughout the lifetime of the relationship. The fact that a UWO has been issued against a client raises the question of whether the institution should have recognised and reported any discrepancies earlier.

The introduction of UWOs reinforces the responsibility of financial institutions to:

* Accurately identify and verify their clients’ wealth and sources of income
* Be rigorous in identifying and reporting apparent inconsistencies between their clients’ apparent assets and known wealth.

Institutions may need to:

* Review due diligence procedures to ensure their provisions for establishing sources of wealth are sufficiently robust
* Audit client records to ensure that sources of wealth have been accurately and reliably documented
* Reinforce staff awareness and understanding of the importance of obtaining good quality information on sources of wealth.