

Corporate 'failure to prevent' offences

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Increasingly corporations find themselves responsible and accountable for conduct of associated persons (generally, their employees, agents and service providers) that could have been prevented.

This is certainly the case in Guernsey, where four new 'failure to prevent' offences came into force with effect from **26 April 2024**. This guide provides an overview of those four corporate preventative offences related to money laundering, terrorist financing, tax evasion and bribery; the extension of liability to officers of the corporation; and the defence available where a corporation has taken reasonable preventative steps.

Introduction

The Criminal Justice (Miscellaneous Amendments – Preventative Offences) (Bailiwick of Guernsey) Ordinance, 2023 (the **Preventative Offences Ordinance**) created the following offences:

- failing to prevent the facilitation of tax evasion
- failing to prevent money laundering and
- failing to prevent terrorist financing.

Whilst The Prevention of Corruption (Bailiwick of Guernsey) (Amendment) Law, 2023 (the **Prevention of Corruption Amendment Law**) created the offence of failing to prevent bribery.

Failing to prevent money laundering and terrorist financing

Being anti-money laundering/counter terrorist financing related, these offences apply broadly to persons licensed or supervised (a **licensee**) by the Guernsey Financial Services Commission (the **Commission**), including authorised and registered collective investment schemes. It is an offence for a licensee to fail to prevent money laundering and to fail to prevent terrorist financing.

A licensee is guilty of the offence and liable to an unlimited fine, if a person is engaged in money laundering or terrorist financing when acting in the capacity of a person associated with the licensee. That is, an employee of the licensee acting in the capacity of employee, an agent of the licensee (other than an employee) acting in the capacity of agent, any other person who performs services for or on behalf of the licensee acting in the capacity of a person performing such services, or a customer of the licensee (or its agent) in relation to any service performed by or on behalf of the licensee.

Failing to prevent the facilitation of tax evasion

It is an offence to fail to prevent the facilitation of Guernsey and/or foreign tax evasion.

Guernsey tax evasion: a body corporate or partnership (**B**), wherever incorporated or formed, is guilty of the offence if a '*Guernsey tax evasion facilitation offence*' is committed by a person acting in the capacity of a person associated with B, ie an employee of B acting in the capacity of employee, an agent of B (other than an employee) acting in the capacity of agent or any other person who performs services for or on behalf of B who is acting in the capacity of a person performing such services.

Foreign tax evasion: equally B is guilty of the offence if a '*foreign tax evasion facilitation offence*' is committed by a person acting in the capacity of a person associated with B (as described above) **and either**

- B is incorporated or formed under the law of any part of the Bailiwick of Guernsey (the **Bailiwick**)
- B carries on (part of a) business in the Bailiwick, or
- any conduct constituting part of the foreign tax evasion facilitation offence takes place in the Bailiwick.

A '*Guernsey tax evasion facilitation offence*' means an offence under the law of any part of the Bailiwick relating to the commission of, or aiding, abetting etc, the fraudulent evasion of tax.

A '*foreign tax evasion facilitation offence*' means an offence under the law of a foreign country constituting a breach of duty relating to a tax imposed under the law of that country and which in Guernsey would amount to a Guernsey tax evasion facilitation offence.

A relevant body or a person acting in a capacity associated with a relevant body who commits such an offence is liable to a fine.

Failing to prevent bribery

It is an offence to fail to prevent bribery.

A commercial organisation is guilty of the offence if an agent or other person associated with the commercial organisation bribes another person intending to obtain or retain business for the commercial organisation or to obtain or retain an advantage in the conduct of that commercial organisation's business.

A person is associated with the commercial organisation if that person performs services for and on behalf of the commercial organisation, in whatever capacity (including as an employee).

The offence may be committed by:

- a body incorporated in the Bailiwick which carries on a business (whether in the Bailiwick or elsewhere)
- a body corporate (wherever incorporated) which carries on a business, or part of a business, in the Bailiwick
- a partnership formed in the Bailiwick which carries on a business (whether in the Bailiwick or elsewhere), or
- a partnership (wherever formed) which carries on a business, or part of a business, in the Bailiwick.

A commercial organisation or a person acting in capacity associated with a commercial organisation who commits such an offence is liable to a fine.

Liability of officers

Each of these offences may confer guilt on another person if the offence is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, that other person. Whilst the language differs, broadly that includes:

- where committed by a body corporate, any director, manager, secretary or other similar officer, or any foundation official (and possibly any member that manages the affairs of the body corporate)
- where committed by a partnership, any partner of the partnership
- where committed by an unincorporated body, any officer of that body who is bound to fulfil any duty any breach of which is an offence or, if there is no such officer, any member of the committee or similar governing body, or
- any person purporting to act in any such capacity.

An individual who commits the money laundering or terrorist financing offence is liable to up to two years imprisonment, to a fine, or to both.

Prevention procedures are a defence

Where any such offence occurs, it is a defence to prove that, when the offence was committed, the person committing it had in place prevention procedures in relation to the activities of persons associated with it to prevent those persons from undertaking such conduct. The Preventative Offences Ordinance and the Prevention of Corruption Amendment Law provide for the States of Guernsey to publish guidance about

appropriate prevention procedures. Whether such defence exists will be determined by the court with reference to any relevant codes of practice or guidance issued by the Commission and/or any guidance published by the States of Guernsey.

The Commission has amended the Handbook on Countering Financial Crime to note that where a licensee has effective policies, procedures and controls to counter money laundering and terrorist financing which are in line with the requirements of Schedule 3 of the Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law, 1999, this could go towards 'prevention procedures' for purposes of the failure to prevent money laundering and terrorist financing offences.

Separately, the Committee for Home Affairs has issued guidance in respect of appropriate procedures to prevent the facilitation of tax evasion and bribery, based on UK government guidance.

How should corporations react?

Whilst for many, there has long been a focus on prevention of money laundering, terrorist financing, tax evasion and bribery (ML/TF/TE/B), corporations need to take positive steps to ensure that they have a robust defence to these 'failure to prevent' offences:

- prioritise ML/TF/TE/B prevention at a board level to demonstrate commitment, by including it as a board agenda item and allocating budget/resources
- conduct / update a risk assessment to understand the risks of ML/TF/TE/B at both a business, employees and associated persons level
- review any policies, procedures, communications and training materials relating to ML/TF/TE/B prevention and the various systems and controls necessary for monitoring, detecting, and preventing ML/TF/TE/B and assesses whether and how these may need to be changed or supplemented (including with clear prohibitions on behaviour of any kind that could facilitate ML/TF/TE/B, and
- review agreements with agents, outsourced service providers, and other third-party intermediaries to ensure they contain appropriate contractual provisions in relation to ML/TF/TE/B.

Contacts

A full list of contacts specialising in regulatory law can be found [here](#).