

Tax Evasion Knows No Borders

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Authors: [Jonathan Pickworth](#), [Kim Marie Boylan](#), [Jonah Anderson](#)

A former senior bank executive, a UK citizen who worked at a bank with branches in Budapest, Hungary and Saint Vincent and the Grenadines, has recently pleaded guilty in the U.S. to conspiracy to defraud the U.S. Government in relation to tax compliance issues under the Foreign Account Tax Compliance Act (“**FATCA**”). Historically, tax evasion has been seen by some as a domestic issue, but extraterritorial action regarding alleged tax evasion is not a new trend in the US. Will the UK take a similar approach?

Factual Background

In June and July 2017, Adrian Baron, the then CEO of Loyal Bank (“**the Bank**”), a bank based in St Vincent, was caught in a sting operation by a U.S. undercover agent posing as a customer involved in stock manipulation schemes. The operation came about through a U.S. Department of Justice (“**DOJ**”) investigation into alleged market manipulation by brokerage firms based in Belize. The DOJ came to suspect that the Bank was laundering proceeds flowing from the market manipulation scheme.

Mr Baron promised the undercover agent that he would open a number of corporate accounts at the Bank for him, without his name appearing on any of the account opening documentation. The agent made it clear that he would need to circumvent the U.S. Internal Revenue Service’s (“**IRS**”) reporting requirements under FATCA, which requires financial institutions to identify their U.S. customers and report information about financial accounts held by them (either directly or through a foreign entity) to the IRS. Mr Baron confirmed to the agent that the Bank would not report an account for purposes of FATCA unless the paperwork indicated “obvious” U.S. involvement.

A number of accounts were subsequently opened and at no time did Mr Baron or the Bank request or collect FATCA information, as they were clearly required to do.

Mr Baron was extradited from Hungary to face proceedings in the US, and pleaded guilty to one count of conspiracy to defraud the U.S. by failing to comply with FATCA. He faces a maximum sentence of five years imprisonment.

US Extraterritoriality

This was the first ever conviction under FATCA, a 2010 law designed to reduce tax evasion through the use of bank accounts outside the US. The passage of the legislation was not without controversy; many felt that the requirements imposed on non-US financial institutions – namely, searching the banks’ databases (and potentially other documents) to identify potential U.S. customers, collecting additional information from such customers, and disclosing certain information about U.S. accounts – was too far-reaching in terms of extraterritoriality.

However, Mr Baron’s recent conviction sends a clear message, that U.S. enforcement authorities are prepared to prosecute not just the U.S. account holders themselves, but also those (whatever their nationality) who facilitate the tax evasion. It was irrelevant that Mr Baron was a UK national, that the Bank was based in St Vincent, and that the meetings with the undercover agent took place in Budapest. What mattered was that

Mr Baron was well aware that the agent was a U.S. citizen, but failed to make the proper disclosures to the IRS under FATCA.

Extraterritorial action by the U.S. is not unknown. The DOJ's Swiss Bank Program, was announced by the DOJ and the Swiss government on 29 August 2013. The Program provided a path for certain Swiss banks to resolve potential U.S. criminal liabilities, if they had reason to believe that they may have committed tax-related criminal offences or monetary transactions offences in connection with undeclared US-related accounts held by the Bank during a specified time period. Thus far, 80 non-prosecution agreements have been entered into and significant fines have been paid.

The Pursuit of Extraterritorial Tax Evasion: What About the UK?

The UK also has the elimination of tax evasion (both domestically and abroad) well within its sights. The UK Criminal Finances Act 2017 introduced two new offences for corporates relating to the failure to prevent facilitation of tax evasion of either UK taxes or non-UK taxes by employees, agents or any other person performing services for or on behalf of the corporate (in each case, acting in that capacity).¹

The offences are modelled on the strict liability corporate offence in the UK Bribery Act. Their extraterritorial application is wide and applies to companies incorporated in the UK or which carry on a business (or part of a business) in the UK or if any part of the non-UK tax evasion facilitation offence takes place in the UK. Similar to the UK Bribery Act, there is a compliance defence if the corporation had in place "reasonable prevention procedures" with similar requirements to the Bribery Act.

This enables UK enforcement authorities to prosecute companies in relation to the evasion of both UK and overseas tax, depending on the circumstances. The UK revenue collection agency, HM Revenue & Customs ("HMRC"), is not to be underestimated. HMRC has proved itself willing to deploy undercover operatives, pay informants and, in certain circumstances, use stolen data.² Its team of sophisticated investigators regularly conduct complex criminal and civil investigations.

In a world where it is increasingly hard to keep affairs private and data leaks by employees are a serious risk for corporates, the risk of a tax investigation or prosecution based on complex cross-border arrangements has never been higher. These new offences will make it much easier for HMRC, possibly in concert with the taxing authorities of any other jurisdiction involved, to pursue corporates regarding such arrangements.

White & Case LLP
5 Old Broad Street
London EC2N 1DW
United Kingdom
T +44 20 7532 1000

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¹ See our previous alert - <https://www.whitecase.com/publications/alert/facilitating-tax-evasion-how-to-avoid-being-unwittingly-caught-criminal-finances-act>

² See our previous alert - <https://www.whitecase.com/publications/alert/criminal-consequences-use-leaked-data-tax-authorities>