

Proposed reform of UK corporate criminal liability – a failure to grasp the nettle?

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Following mounting calls for reform of the UK's corporate criminal liability regime, the Government is expected to consult later this year on potential reforms, which are likely to include a new corporate offence of failing to prevent economic crime. Such an offence would expand the scope of corporate criminal liability and increase the compliance burden for businesses in the UK.

On 6 March 2019, a cross-party group of MPs and peers sent a letter to the Prime Minister and on 8 March, the Treasury Committee reported on economic crime. Both urged reform of the UK's corporate criminal liability regime and the introduction of a new corporate offence of failing to prevent economic crime¹. These are the latest in a series of interventions from politicians, prosecutors and senior members of the judiciary in support of such an offence², which is intended to make it easier to prosecute companies in the UK for economic crimes.

Why is this happening?

Currently, it is difficult for prosecutors to establish corporate criminal liability for most offences, due to the 'identification principle'. A company is criminally liable for an offence where a person constituting its 'directing mind' is proved to have done the necessary acts with the necessary intention or mental state.

Identifying the relevant person(s) and obtaining the necessary proof is often challenging, particularly in larger companies that have diffuse management structures or senior personnel with limited operational involvement. This has been a source of frustration for prosecutors, with a previous director of the SFO remarking "*[i]n practice, the email trail has a strange habit of drying up at middle management level*"³. The 'identification principle' also unfairly penalises smaller companies, where the relevant persons are generally easier to identify and more likely to be directly involved in or aware of wrongdoing.

Section 7 of the UK Bribery Act 2010 took a new approach to corporate criminal liability. It made companies criminally liable for failing to prevent bribery by associated persons (subject to a compliance defence of having 'adequate' anti-bribery procedures in place), with no need to prove involvement or intent by the company's

¹ The letter is available [here](#) and the Treasury Committee report is available [here](#).

² For example, Lisa Osofsky, the new director of the Serious Fraud Office ("SFO"), said that the offence was needed and that the SFO is "*hamstrung right now by the identification principle*" for non-bribery cases (see [here](#)). Sir Brian Leveson, President of the Queen's Bench Division, believed that the offence "*would be in the public interest*" (see [here](#)). The Treasury Committee report recommends that the Government consult on the offence and other reforms to corporate criminal liability.

³ Speech by David Green CB QC on 2 September 2013, available [here](#).

'directing mind'. This incentivised companies to put in place an appropriate compliance program, and made it easier to prosecute companies for bribery and corruption.

The proposed new offence – 'failure to prevent economic crimes'

Subsequently, there has been considerable support for a new offence expanding the 'failure to prevent' approach to other economic crimes (such as fraud, theft, false accounting and money laundering). The Government agreed to consult on a new offence in May 2016, and the Ministry of Justice ("MoJ") concluded a call for evidence in March 2017. The following month, the Criminal Finances Act 2017 introduced corporate offences of failing to prevent facilitation of tax evasion, which (like the Bribery Act) is prompting companies to assess and upgrade related compliance measures.

Progress on the new offence subsequently stalled, with no consultation or follow-up from the MoJ for the past two years, likely due to the demands of Brexit preparation and pushback from businesses unhappy at the prospect of an increased compliance burden. However, the recent interventions have put the offence firmly back on the agenda, and the Government is expected to consult later this year on the offence and on other potential reforms to corporate criminal liability⁴.

What does this mean?

The degree (and sources) of support for the offence suggest that it is likely to be introduced after the consultation in a similar form to the existing 'failure to prevent' offences, with a defence based on implementing appropriate procedures to prevent economic crimes. This would increase the compliance burden for companies operating in the UK. Some will already have procedures in place for certain economic crimes (such as money laundering), but many will not have considered or implemented procedures to tackle the full range of economic crimes that could be covered by the new offence.

Is a 'failure to prevent' model the best way to deter economic crime?

In the face of mounting international criticism of the UK's poor track record in prosecuting corporates, and following a string of unsuccessful attempts to do so by the SFO, it seems that a groundswell is building in favour of extending the range of 'failure to prevent' offences.

This would help to drive companies doing business in the UK to introduce and upgrade compliance procedures across a much broader landscape, and would undoubtedly make it much simpler for the SFO to prosecute and convict companies that failed to address this need. It might also lead to a revival of the Deferred Prosecution Agreement, which has had a very limited uptake in the five years since legislation introducing it came into force.

On the other hand, will an extension of the regime really act as a deterrent to wrongdoing? While the attraction for the SFO in lowering the bar for corporate prosecutions is clear, the current proposals do nothing to address the situation where corporate entities either plead guilty or enter into a DPA, yet no individual is held accountable.

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⁴ See the comments from Edward Argar MP (Under-Secretary at the Ministry of Justice) to the House of Lords Select Committee on the Bribery Act 2010 (available [here](#)) and the recommendations in the Treasury Committee report.