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Corporate Criminal Liability

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Contents:

1. What is corporate criminal liability?
2. When can a corporate be criminally liable?
3. Recent reforms
4. The future of corporate criminal liability
5. Stakeholder views
6. International comparisons

Contents

Summary **3**

1. What is corporate criminal liability? **4**
What is a crime? 4
What is a corporate? 4

2. When can a corporate be criminally liable? **5**

3. Recent reforms **8**
Bribery Act 2010 8
Deferred Prosecution Agreements 8
Criminal Finances Act 2017 8

4. The future of corporate criminal liability **10**
Recent Government action 10
Call for Evidence: options for reform 10
Call for Evidence: response 11
Law Commission review 12
Financial Services Bill 2019-21: corporate crime amendment 12

5. Stakeholder views **15**
Treasury Select Committee 15
Media coverage 17
Financial Action Task Force 17

6. International comparisons **19**
United States 19
Germany and the EU 20
Law Commission 2010 review 21

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Summary

Corporates in themselves can't think or act – it's their members, employees or directors that do so. But they generally are legal persons, so can commit crimes.

As crime is devolved in Scotland and Northern Ireland, this briefing focuses on England and Wales. In England and Wales there are three ways a corporate can be prosecuted for a criminal offence committed by those acting on its behalf:

1 Where Parliament has created a specific criminal offence for corporates, such as under the *Bribery Act 2010* or the *Criminal Finances Act 2017*;

2 Through vicarious liability, which is generally used for regulatory offences that don't require proof of mental fault; and

3 Through the identification doctrine, when someone who can be said to be the "directing mind and will" of a corporate commits the offence.

Successfully prosecuting large corporates in particular has been challenging, leading to concern that the UK is falling behind internationally in tackling corporate crime. The identification doctrine has been interpreted narrowly by the courts, as shown in the recent *Barclays* case, and vicarious liability is limited in its scope. As a result there has been pressure from politicians and campaign groups to expand the first option - for Parliament to intervene and reform corporate criminal liability.

In its response to a Call for Evidence on this issue in November 2020, the Government said it had not identified a clear consensus on the best path for reform, and has asked the Law Commission to undertake a review, that will include examining whether the identification doctrine is fit for purpose. The Law Commission expects to report back with an Options Paper in late 2021.

In the meantime, there has been continued pressure on Government from within Parliament to move more rapidly, most recently in an amendment tabled at the House of Commons Committee Stage of the *Financial Services Bill 2019-21*.

For wider information about economic crime in the UK, see our briefing Economic crime in the UK: a multi-billion pound problem.

1. What is corporate criminal liability?

What is a crime?

Defining "crime" is hard, but at its heart a criminal offence is an act punishable by the State. It is tried in the criminal courts and the punishment imposed for committing it might include imprisonment and fines.

Sometimes, in addition to or instead of the power to bring criminal prosecutions, regulators – like the Financial Conduct Authority – are granted powers to impose punishments like fines, but these aren't crimes – they are regulatory penalties. The process for imposing them differs from criminal offences.

As an example, section 146 of the *Policing and Crime Act 2017* empowers the Office of Financial Sanctions Implementation (OFSI), a department within the Treasury, to impose monetary penalties for breaches of financial sanctions. To impose the penalty OFSI doesn't need to prove a breach to the criminal standard of being "sure that the defendant is guilty"[1] – it needs to prove it to the civil standard of "balance of probabilities" (i.e. more likely than not).[2]

What is a corporate?

When we talk about "corporates", we usually mean companies. But the definitions used in law are wider than this. For example, the corporate criminal offence of failure to prevent bribery under section 7 of the *Bribery Act 2010* applies to a "relevant commercial organisation" which includes:

- bodies incorporated in the UK;
- those incorporated outside the UK that carry on business in the UK; and
- partnerships (which by their nature are not incorporated).

[1] Crown Prosecution Service, The Code for Crown Prosecutors, 26 October 2018, para 4.7

[2] See Lord Nicholls in the case of In re H (Minors) [1996] AC 563, para 73

2. When can a corporate be criminally liable?

Corporates in themselves obviously can't think or act – it's their members, employees or directors that do so. But there are three ways a corporate can be prosecuted for a criminal offence committed by those acting on its behalf:

1. Parliament creates a specific criminal offence for corporates

Sometimes Parliament passes a law creating a criminal offence specifically intended for corporates. One example is corporate manslaughter,[3] a criminal offence applying to organisations whose activities are managed in a way that breaches duties it owes (for example to its employees) and causes a person's death. Since it's of course not possible to imprison a corporate, the punishment for committing these offences would typically be a fine. Separately, there is also the reputational damage caused to a company for being found to have committed a crime.

Other examples include offences under the *Bribery Act 2010* and the *Criminal Finances Act 2017*, discussed further below.

2. Vicarious liability

Vicarious means "experienced as a result of watching, listening to, or reading about the activities of other people, rather than by doing the activities yourself". In some cases, even though a criminal offence might not specifically be made for companies, the law considers it appropriate for a corporate to be held vicariously liable for criminal acts done by its employees or agents. A court might consider, looking at the language and purpose of a law, that it is appropriate for employers to take criminal responsibility for offences committed by its employees.[4] So for example an employer that owns shops can be held vicariously criminally liable if one of its employees sells lottery tickets to an underage person.[5]

In theory vicarious criminal liability is not based on fault – the corporate is found to be liable because it is appropriate for it to take responsibility, not because it has done anything wrong. That is why it is usually found in "strict liability" areas of the criminal law like environmental and consumer protection offences, which often don't require the person who committed the offence to be at fault – it is enough that the act was done.

Using the lottery example above, an employer can be held vicariously liable for their employee selling tickets to an underage person even if they weren't aware that the sale had happened, and even if the employee who sold the ticket didn't know they were selling the ticket to an underage person. The idea in such cases is not necessarily to punish people who have done something wrong but to "encourage greater vigilance in preventing the commission of the prohibited act".[6]

[3] Under section 1 of the *Corporate Manslaughter and Corporate Homicide Act 2007*

[4] See for example the case of Mousell Brothers Ltd v London & North Western Railway Co [1917] 2 KB 836, 845

[5] A criminal offence under the *National Lottery etc. Act 1993*

[6] *Harrow London Borough Council v Shah And Another* [2000] 1 W.L.R 83, p88

Vicarious liability is a narrow concept since it is used for regulatory offences, and so would not for example currently be used for economic crimes like fraud, which need proof of being at fault. For a crime like fraud the only current way of prosecuting a corporate is through the identification doctrine.

3. The identification doctrine

This is when someone who is the "directing mind and will" or "an embodiment" of a corporate commits the criminal offence.[7] The idea is that a person committed the offence in circumstances where it would be a fiction to try and distinguish between them and the company. It applies to all criminal offences which can be punishable by a fine (as a company clearly cannot be imprisoned) and which can sensibly be said to be committed by someone within the scope of their authority.[8] It might include for example fraud committed by the members of the board of a company.

It's unclear how senior someone must be within a company to be "identified" with it. By requiring that only the most senior persons can be the "directing mind and will" of a company, it's arguable that large companies are let off the hook, since many key decisions will be decentralised away from the most senior management.

The *Barclays* case and the identification doctrine

The recent high-profile *Barclays* case shows the limits of the identification doctrine. The case is from 2018 but the judgements were only released in 2020 after reporting restrictions were removed.

This was the only prosecution of a bank to emerge from the 2007/08 financial crisis.[9] In the *Barclays* case, senior executives of Barclays, including the Chief Executive (CEO) and Finance Director (CFO), attracted funds from Qatari investors to avoid having to be bailed out by the UK Government.

The Serious Fraud Office (SFO) alleged that the true commissions (fees) paid to the Qatari investors were far higher than had been publicly announced – and that the Barclays executives deliberately hid this to make their position seem stronger than it was, and to avoid having to pay similarly high commissions to other investors. The SFO argued that the alleged criminal dishonesty of the senior executives could be identified with the company, and prosecuted Barclays for conspiracy to commit fraud alongside the more technical offence of unlawful financial assistance.

However, the SFO's attempt failed in both the Crown Court and the High Court (which was effectively acting as an appeal court to the Crown Court decision). Both courts rejected the view that the senior executives could be the "directing mind and will" of Barclays, because

[7] See *Tesco Supermarkets Ltd. v Nattrass* [1972] AC 153

[8] So would obviously not apply to a crime like rape, for example. See CPS, Corporate Prosecutions

[9] Herbert Smith Freehills, No "directing mind and will" found in SFO prosecution of Barclays, 5 May 2020

although they occupied senior roles, they did not have the authority of the company to conclude the relevant agreements. The powers which they exercised had been entrusted to the board of directors, or the Barclays Board Finance Committee (BFC). The judge sitting in the High Court (Lord Justice Davis) concluded that since they did not have ""full discretion" to act independently and they were responsible to another person [viz the BFC] for the manner in which they discharged their duties…they could not be regarded as the directing mind and will for the purpose of performing the functions in question".[10] He also questioned the justification for prosecuting Barclays:

> In the present case, as I gather, Barclays is currently the subject of a regulatory investigation (albeit stayed, pending the criminal proceedings). It has also, I gather, been served with civil proceedings for financial redress by aggrieved parties claiming to have suffered loss as a result of what has occurred. Yet further, the individuals within Barclays itself said to have been responsible for what has happened are, as I have recorded, the subject of ongoing criminal prosecution. So why prosecute Barclays itself (the more so perhaps when, if there were a conviction, the resultant, presumably heavy, fine would in practice be borne by the innocent shareholders)? The answer I was given was that it was to promote deterrence and good corporate governance.
>
> This, however, leads to another consideration. It is always open to Parliament to draft statutory offences with the position of corporations in mind. […][11]

The judge in the *Barclays* case therefore suggested keeping the identification doctrine narrow in its scope, at least partly on the basis that if Parliament wanted corporates to be prosecuted more easily it could do so by creating a new corporate criminal offence.

[10] SFO v Barclays [2018] EWHC 3055 (QB), paras 118 and 119
[11] Ibid, paras 102 and 103

3. Recent reforms

Bribery Act 2010

Concern that the existing law on corporate liability for economic crime (essentially, the identification principle) was insufficient to tackle bribery led to the passing of the *Bribery Act 2010*, which obtained Royal Assent shortly before the 2010 general election.[12] Section 7 of the *Bribery Act 2010* introduced a new corporate offence of failure to prevent bribery. It applies where someone associated with the organisation bribes someone. It is an offence of "strict liability", which applies even if the organisation itself wasn't aware of the bribery that happened. The company has a defence if it can show that it had in place adequate procedures to prevent bribery.

The first prosecution under section 7 took place in 2016, relating to a UK-based company which failed to prevent bribes paid by its subsidiary in the United Arab Emirates. The offender was ordered to pay over £2m.

Deferred Prosecution Agreements

The *Crime and Courts Act 2013* then created Deferred Prosecution Agreements (DPAs), which had been available in the United States for some time.

DPAs were partly a response to difficulties involved in the prosecution of companies as a result of the high threshold needed under the "identification" principle.[13] They are a tool that allow corporates charged with certain offences relating to fraud and dishonesty to avoid prosecution. Instead, the corporate will enter into an agreement with prosecutors, under the supervision of a judge, to do certain things like paying a financial penalty, and co-operating relating to the future prosecution of individuals for the offence. When deciding whether to offer a DPA rather than to prosecute, prosecutors will take a number of factors into account including the seriousness of the offence and the level of co-operation it has received from the company.[14]

So long as the corporate abides by the DPA the matter will then be concluded without prosecution.[15] The first DPA was in 2015, concerning section 7 of the *Bribery Act 2010,* involving payments made to the Government of Tanzania, and they have been used a number of times since.[16]

Criminal Finances Act 2017

At the March 2015 Budget the Government announced that it would introduce a new corporate offence relating to the facilitation of tax evasion, again partly in response to concerns about the shortcomings of

[12] Law Society, Bribery Act 2010, 25 November 2019

[13] Ministry of Justice, Consultation on a new enforcement tool to deal with economic crime committed by commercial organisations, May 2012, para 26

[14] CPS, Deferred Prosecution Agreements Code of Practice

[15] See Serious Fraud Office, Deferred Prosecution Agreements

[16] Serious Fraud Office, About us, section of Deferred Prosecution Agreements

the "identification" principle.[17] The result was the *Criminal Finances Act 2017*, which represents the most recent reforms in this area.

Sections 44 and 45 established the corporate criminal offences of failing to prevent the facilitation of tax evasion (both in the UK and overseas). It might apply for example to a company whose employee agreed with a supplier that it could issue false invoices to the company to evade tax. These offences were also added to the list of offences that could be dealt with by DPA.[18]

Modelled on section 7 of the *Bribery Act 2010*, it imposes criminal liability on organisations that fail to prevent persons associated with them from facilitating tax evasion. A defence will be available for corporates who show they had reasonable procedures in place, or that it was reasonable to expect them to have had procedures in place.

As of 13 October 2020 there were 13 live investigations relating to these offences but no charges or prosecutions.[19]

[17] HMRC, Tackling tax evasion: legislation and guidance for a corporate offence of failure to prevent the criminal facilitation of tax evasion, April 2016, para 1.4

[18] See para 26A of Schedule 13 to the *Crime and Courts Act 2013*

[19] Gov.uk, FOI release, Number of live Corporate Criminal Offences investigations, 21 October 2020

4. The future of corporate criminal liability

Recent Government action

In December 2014 the Government published its Anti-Corruption Plan, that tasked the Ministry of Justice with examining the case for a new offence of corporate failure to prevent economic crime.[20] In May 2016, Prime Minister Cameron announced a consultation to consider the extension of the corporate liability "failure to prevent" model to a wider range of economic crimes such as fraud and money laundering.[21] The Ministry of Justice Call for Evidence in this area was published in January 2017, following David Cameron's announcement, while the then-*Criminal Finances Bill* was going through Parliament.

It asked whether it was worth building on the corporate criminal offences created relating to bribery and tax evasion, in response to corporate wrongdoing that had occurred (particularly) in the financial services sector. It explained the shortcomings in the "identification" principle and summarised the problem faced by prosecutors:

> Tom Hayes, the Libor-fixer employed by UBS, was held to account in a criminal court in England but UBS, a large multi-national bank could not be prosecuted in the UK. The SFO [Serious Fraud Office] did not have sufficient admissible evidence that a person who was identified as a directing mind was party to Hayes's conduct and therefore could not conclude that there was a realistic prospect of conviction.[22]

It's worth noting that regulatory sanctions are sometimes available where criminal ones are not, so whereas UBS could not be prosecuted for a crime relating to LIBOR manipulation, the Financial Conduct Authority did impose a £160 million fine on UBS.[23]

Call for Evidence: options for reform

In the Call for Evidence, the Ministry of Justice put forward a number of (not mutually exclusive) options for expanding corporate criminal liability to areas other than bribery and tax evasion (like fraud and money laundering):

1 Legislating to amend the "identification" principle so that it was more able to hold large companies to account;

2 Create a new "strict liability" offence based on the principle of vicarious liability. The offence would therefore apply to employees/agents of the company but the company could be prosecuted because of vicarious liability;

3 Create a new "strict liability" offence which was not based on vicarious liability, and therefore would be specifically targeted at

[20] Gov.uk, UK anti-corruption plan, 18 December 2014

[21] The Guardian, The fight against corruption begins with political will, David Cameron, 11 May 2016

[22] Ministry of Justice, Corporate Liability for Economic Crime, Call for evidence, January 2017, p14

[23] Ibid, p15, and see FCA, UBS fined £160 million for significant failings in relation to LIBOR and EURIBOR, published 19 December 2012

corporates. To benefit from a defence that the corporate had adequate procedures in place, the burden of proof would be on the defence (the corporate). Out of the options, this is most similar to the section 7 of the *Bribery Act 2010* offence;

4 Option 3 above but require the prosecution to prove that the company had not taken adequate steps to prevent the unlawful conduct, rather than the defence; or

5 Leave the criminal law as it is but look at reforming the regulatory regime (for example FCA powers).

Call for Evidence: response

The response to the Call for Evidence was published in November 2020. The response concluded that:

> There was no clear consensus from respondents on what corporate liability offence should be created if the identification doctrine was replaced. Equally, some responses disclosed significant opposition to reform given the potential adverse impact of new criminal liability on growth and competition. Others questioned whether there was a need for further criminal sanctions at all in the already heavily regulated financial services sector. In general, however, although a range of divergent and often conflicting views were expressed, there was no new or significantly persuasive evidence submitted by the CfE respondents to support the case for a change to the law.[24]

Some key points emerging from the response to the Call for Evidence (which obtained 62 responses) are that:

- A slim majority of respondents did not believe the existing framework provides sufficient deterrent;
- None of the five options mentioned above obtained majority support from respondents;
- 34.5% of respondents felt that reform of the law might adversely impact UK competitiveness and/or growth;
- 73.6% felt that there were examples of corporate criminal conduct where a purely regulatory response would not be appropriate (and therefore criminal sanctions should be available);
- A slim majority said there was a case for introducing a corporate failure to prevent economic crime offence along the lines of section 7 of the *Bribery Act 2010*; and
- Two-thirds felt that adopting expanded "failure to prevent" offences would improve corporate conduct.

The response therefore considered the evidence received "inconclusive". Recent reforms in this area have also not yet been fully implemented, allowing their outcomes to be assessed, including:

a. the failure to prevent offences relating to tax evasion introduced under the *Criminal Finances Act 2017* described above;

[24] Ministry of Justice, Corporate Liability for Economic Crime, Call for Evidence: Government Response, 3 November 2020, para 15

b. the introduction of the Senior Managers & Certification Regime (a regulatory regime replacing the existing "approved persons regime". It, for example, requires senior managers of financial services firms to be approved by the regulators); and

c. the *Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017* (which introduced requirements on financial institutions and "gatekeepers" to the financial system such as tax advisers, to help prevent money laundering and terrorist financing. Failure to comply with these obligation is a criminal offence),

(for more information on these recent reforms, see paragraphs 67 to 70 of the Response to the Call for Evidence). Therefore, the Government felt that more time was needed to allow these reforms to show their impact and then properly assess what is needed.

Law Commission review

In the meantime, the Government has commissioned an "expert review" of the identification principle from the Law Commission (which last properly considered the issue in 2010), which is estimated to take around 12 to 15 months. Once the Law Commission's work has concluded, expected to be in late 2021, the Government will evaluate it alongside the impact of the recent reforms it has made to "inform" any future decision in this area.[25]

Financial Services Bill 2019-21: corporate crime amendment

During the Second Reading debate on the *Financial Services Bill 2019-21* on 9 November 2020, backbench MP Kevin Hollinrake (Conservative, Thirsk and Malton) pressed for the introduction of a new corporate economic crime offence:

> Another area that was mentioned in an earlier intervention was the Government's commitment to make the failure to prevent economic crime a corporate offence. It is great that they have said they will do that, and that will start with a Law Commission review to see how best it can be done. As the Law Commission rightly said, if we do not change the rules on that, the UK risks falling behind international standards, which I am sure we would not want. That is clearly something to bring forward, but it could be done more hastily in the Bill, with a framework added on later, which would expedite the process. That would make a huge difference.
>
> The Serious Fraud Office has tried to take forward many cases—those involving Serco, Barclays and Olympus, for example—but it could not do that because it had to establish a directing mind principle for the people at the top of those organisations before it could proceed with the offence of corporate fraud. The proposed measure would make that much easier. It is great that the Government are willing to take it forward, but they could do so more quickly.[26]

[25] Ibid, paras 73 to 75

[26] HC Deb 9 November 2020, vol 683, col 677

The issue was also raised during Committee Stage. In written evidence, campaign group Spotlight on Corruption wrote:

> Spotlight on Corruption believes that there are several important reasons for the urgent introduction of a failure to prevent economic crime offence as outlined in this amendment. These reasons are:
>
> · to promote strong corporate governance and deter wrongdoing in the financial sector after the UK leaves the EU (protection of market integrity);
>
> · to create a level playing field for how large and small companies are held to account for economic crime, particularly in response to the burgeoning fraud crisis resulting from COVID-19 (fairness);
>
> · to ensure that the UK does not fall behind international standards on prosecuting economic crime (equivalence); and
>
> · to create a level playing field on how liability is attached to companies across different economic crimes within the UK (consistency).[27]

In oral evidence, Dr Susan Hawley from Spotlight on Corruption argued:

> Just to explain the problem we think needs addressing, fundamentally at the moment, particularly after the judgment in the Barclays case, which was the only prosecution for financial crime following the last financial crisis, there is increasing legal commentary that large financial institutions are beyond the reach of prosecutors for certain economic crimes. Legal attempts to resolve this have failed—in fact, the Barclays judgment has now made it even more difficult for prosecutors to prosecute large financial institutions—and only action by Parliament can change that.[28]

Asked whether he would support the introduction of a "failure to prevent economic crime" corporate criminal offence, Duncan Hames from campaign group Transparency International replied:

> Yes, we would. That is separate to the discussions about the identification doctrine, on which, as I am sure you will be aware, the director of the Serious Fraud Office has frequently shared views and on which now the Law Commission has been invited to bring forward its own options for reform. These are complementary measures.
>
> We now have a "failure to prevent" offence in relation to two areas of offending: one, the Bribery Act and, two, failure to prevent the facilitation of tax evasion. Applying a "failure to prevent" offence more widely, while still considering reform of the identification doctrine in regard to the substantive offence, would be entirely complementary, rather than the House having to consider doing one or the other.[29]

The Labour frontbench (Pat McFadden, Abena Oppong-Asare and Jeff Smith) subsequently tabled an amendment (New Clause 24)[30] that would create a new criminal offence for corporates who facilitate

[27] Financial Services Bill, Written Evidence submitted by Spotlight on Corruption, 19 November 2020

[28] Official Report, Public Bill Committee, Financial Services Bill, p80

[29] Ibid, p99

[30] Public Bill Committee Proceedings, Financial Services Bill, Thursday 3 December 2020, p22

economic crime or fail to take steps to prevent economic crime by a person acting in its name (similar in its approach to Option 3 in the Ministry of Justice "Options for reform"). It would apply to fraud, false accounting and the main money laundering offences under the *Proceeds of Crime Act 2002*. Mr McFadden said:

> What would creating an offence of failure to prevent economic crime do? It would create a level playing field between small and large companies; it would send out a strong signal about the kind of financial sector that we want as we come to the end of the transition period; and it would equalise how different kinds of economic crimes are treated, because such a liability—I stress that it would be a corporate liability—already exists when it comes to, for example, bribery or tax evasion. Why should the ignorance defence be available for some offences but not for bribery or tax evasion? The Treasury would never accept it if senior members of a company said, "Oh, we didn't know we were supposed to pay those taxes." That would not be a legitimate defence, and yet it can be used for some other kinds of wrongdoing.[31]

Economic Secretary to the Treasury John Glen responded that stronger evidence would be needed before a new offence could be supported:

> Before any broader new "failure to prevent" offence for economic crime is introduced, there needs to be strong evidence to support it. It will also be important that any new offence is designed rigorously, with specific consideration given to how it sits alongside associated criminal and regulatory regimes and to the potential impacts on business. The scope of who a new offence applies to must also be holistically worked through.
>
> The Law Commission's work will take some time, but it is clear that we are zoning in on that aspect of the problem. In the light of that response, I ask the right hon. Gentleman to withdraw the new clause.[32]

Mr McFadden subsequently agreed to withdraw the amendment, though he said he suspected "the Minister might meet a very similar amendment later in proceedings on the Bill."[33]

[31] Ibid, p405
[32] Ibid, p407
[33] Ibid

5. Stakeholder views

The 62 responses to the Ministry of Justice Call for Evidence (which are summarised above) came from law firms, financial services firms, trade and industry bodies, civil society organisations (non-profit interest groups), police organisations, prosecutors, academics, individuals and Parliamentarians.[34] The consultation response doesn't match up the organisations to the responses they provided, but it provides a useful understanding of the general sentiment.

Treasury Select Committee

In March 2019 a report published by the Treasury Select Committee (TSC), then chaired by Nicky Morgan, said that:

> The Government's proposals on reforming the law on corporate liability around economic crime have stalled…Without reform in this area, multi-national firms appear beyond the scope of legislation designed to counter economic crime. That is manifestly unfair, and weakens the deterrent effect a more stringent corporate liability regime may bring.[35]

The TSC report examined in detail the views of different stakeholders:

> In his evidence Mark Thompson [then interim director of the SFO] also provided a glimpse into the potential factors the Government may be considering around whether or not to legislate for these changes to the legislative framework:
>
> "The Government continue to consider whether it is necessary. My understanding of the Foreign Office's position, for example, is that it was not necessary because the regulatory regime around senior persons in the City was sufficient to address a lot of this."
>
> Colin Bell, of HSBC, also argued that the FCA's Senior Managers Regime effectively bound those in financial services:
>
> "As an approved person under the senior managers regime, with accountability for financial crime risk within HSBC, I feel that accountability very keenly. I feel bound by that statement of responsibilities. I think my colleagues and peers feel the same way. There has been a sea change in the way that is tackled, and we feel it. We really do feel it."
>
> However, in its evidence, the SFO argued that a regulatory response alone was not enough:
>
> "Regulation has an important part to play, but it does not meet the challenge. Regulation only covers a limited section of corporate activity and cannot affect non-regulated sectors and the SFO has several investigations underway into non-regulated businesses that illustrate this point. Regulation also tends to focus on procedures and record keeping rather than on the end goals of preventing and punishing offending. In addition, a regulatory sanction does not carry the weight or impact of a criminal conviction or the terms of a DPA [Deferred Prosecution Agreement]"

[34] Ministry of Justice, Corporate Liability for Economic Crime, Call for Evidence: Government Response, 3 November 2020, para 12

[35] Treasury Committee, Economic Crime - Anti-money laundering supervision and sanctions implementations, 4 March 2019, para 28

> The Solicitor General also appeared unsympathetic to any attempts by industry to forestall reform. He told us that:
>
> "In any development of policy you are going to have debate, but in response to that I would say this. Companies and corporates have already brought in measures to deal with failing to prevent bribery and tax evasion and, if they have not, they ought to get on with it, because this is the law of the land. Frankly, if they brought in mechanisms and systems to deal with those particular aspects of criminality, it would not be a leap in the dark to extend them to economic crime more generally."[36]

The report went on to say:

> When the Committee queried whether preparations for the UK's departure from the EU had hampered work in this area, the Solicitor General replied: "I have been rather busy on Brexit, as have my colleagues. Although some people think I have unbounded energy, I have to prioritise. This is a very important priority for me.[37]

The report also described the SFO's proposals for reform:

> Having identified the problem with the UK's regime, the SFO argued for "two equally favoured and parallel options". It called for:
>
> 1. Replacing the identification doctrine with a new principle for the attribution of corporate liability. This would set out the circumstances in which a company would be liable for the substantive criminal offence. The SFO's proposal is that a company would be guilty of the substantive offence if a person associated with it commits that offence intending:
>
> - To obtain or retain business for the company;
> - To obtain or retain a business advantage for the company; or
> - Otherwise to (financially) benefit the company.
>
> This solution would provide a principled basis on which all companies would be liable for all substantive offences.
>
> 2. The introduction of a new offence of failing to prevent economic crime. This solution aligns well to the provisions of section 7 Bribery Act 2010, as well as the new Criminal Finances Act offence of failure to prevent tax evasion, and promotes consistency across the wider economic crime landscape. Section 7 of the Bribery Act has been proven to be effective in its application. This would allow for a quicker and consistent solution to this urgent problem.[38]

The TSC has recently announced that it will conduct an inquiry to "review what progress has been made in combatting economic crime" since its last inquiry. The new inquiry will explicitly include corporate liability for economic crime. A call for evidence was published which closed on Friday 27 November 2020.[39]

[36] Ibid, paras 191 to 193
[37] Ibid, para 197
[38] Ibid, para 188
[39] See UK Parliament, Call for evidence, Economic crime

Media coverage

The Financial Times reported on the day the Ministry of Justice's response to the consultation was published, 3 November 2020, criticism from stakeholder groups of the "slow pace" of reform.[40] Among the stakeholders quoted are:

- Susan Hawley, director at campaign group Spotlight on Corruption, who said there was "a real danger that this decision kicks reform into the long grass, and will result in corporate impunity for large banks and companies for several more years". Of course, the current law does not provide for literal corporate impunity, but it does set a high threshold for corporate prosecution of economic crime because of the "identification" doctrine;
- Barry Vitou, a partner at US law firm Greenberg Traurig, who welcomed the review sought from the Law Commission but said it was "long overdue", pointing out that the government had first issued a call for evidence in 2017; and
- David Green QC, who in 2013 (then director of the UK Serious Fraud Office), called for changes so that companies could be held to account for failing to prevent any kind of economic crime, not just bribery. With reference to the Barclays case mentioned above, David Green, now a consultant at law firm Slaughter and May, is quoted as criticising the identification doctrine, saying "It is almost impossible to find a controlling mind and prove that controlling mind is complicit in any criminality… The email chain tends to dry up at middle management level.[41]

  Lisa Osofsky, current Director of the SFO, has said that the identification doctrine was a "standard from the 1800s when 'mom and pop' ran companies – that is not at all reflective of today's world".[42]

A former senior prosecutor is quoted the Financial Times in March 2020, referring to possible legal reform of the "identification doctrine":

> You've got to ask how attractive this will be to Boris [Johnson] and his post-Brexit Britain…The prime minister is not going to want to be seen to be adding red tape to business right now. If they want to hold corporates accountable, they need to make this change, but will probably kick it into the long grass and give it to the Law Commission to consider…[43]

Financial Action Task Force

The Financial Action Task Force (FATF) sets international standards for countering money laundering and terrorist financing. It is an inter-governmental body set up in 1989 which now has 37 members

[40] Financial Times, Campaigners criticise slow pace of reform to UK corporate crime law, 3 November 2020

[41] Financial Times, Barclays: the legal fight over a company's 'controlling mind', 9 March 2020

[42] Ibid

[43] Ibid

(including the UK).[44] In its last analysis (Mutual Evaluation) of the UK's standards in 2018, it said:

> Where legal persons are involved in offending, the UK will wind up shell or front companies and pursue prosecution of the natural persons or civil or regulatory actions. Complicit legal persons are investigated as part of the broader investigation, but rarely convicted. This is because the UK's ability to prosecute large legal persons for criminal ML [money laundering] offences under POCA and notable predicates such as fraud remains limited due to difficulties in proving criminal intent. Under the 'Identification Doctrine' established in UK case law, a criminal act can only be attributed to a legal person where the natural person committing the offence can be said to represent the "directing mind and will" of the legal person. In large companies with diffused decision-making responsibilities, proving this is extremely difficult, as was acknowledged by the NCA and the SFO. In response to this issue, the UK has made legislative changes to ease the intent requirements with respect to certain offences, including bribery and corruption and, with the enactment of the Criminal Finances Act 2017, tax evasion. The UK opened a call for evidence on making similar changes to corporate liability for economic crime offences in January 2017 and as at March 2018, was analysing the feedback.[45]

The FATF report was cited by Pat McFadden in making the case for a new corporate economic crime offence as part of the Committee Stage of the *Financial Services Bill 2019-21*. He noted that "The lack of such an offence was also pointed out in the Financial Action Task Force 2018 UK evaluation, which pointed out the difficulties in proving criminal intent."[46]

[44] Financial Action Task Force, FATF Members and Observers

[45] Financial Action Task Force, United Kingdom Mutual Evaluation Report, December 2018, p71

[46] Official Report, Public Bill Committee, Financial Services Bill, p406

6. International comparisons

United States

Because of its wider treatment of the concept of vicarious liability, the United States is often used as a comparator. The TSC report summarises the position:

> The United States provides an interesting comparator to the UK due to its differing framework for corporate liability. Naomi Hirst outlined the following advantages of the US system:
>
> "There is a debate to be had about what that offence looks like. It is worth considering that the DOJ [Department of Justice] in the United States have a definition of vicarious liability that they can use very easily, very successfully, and we are very far away from that. That is to the point where, from the outside, it might look like the UK is actually outsourcing some of our corporate prosecutions to other jurisdictions that can do this much easier than we can."
>
> Mark Thompson, then Interim Director of the SFO, also noted the implications of this difference in the law between the US and the UK:
>
> "They have significant advantages, particularly in respect of dealing with companies and corporate entities because their system relies on vicarious liability. If an employee of a bank is involved in money laundering, the bank is pretty much liable. We do not have that here, which makes it more difficult for British regulators and prosecutors to take the same action that our American colleagues take."
>
> Mr Thompson noted that "there are some corporate criminal fraud offences that could be prosecuted with a different regime".
>
> The United States example was also explored by the Solicitor General:
>
> "Nobody can deny that [the United States] is not anything other than a very vigorous free market economy, and yet its criminal rules on corporate liability are very tight indeed. They have a system of vicarious criminal liability, which means that the corporate is responsible for the acts of the individual, even if the corporate has taken steps to stop or prevent the individual from wrongdoing. That is a model we need to look at that very carefully."
>
> However, the Solicitor General did note some potential drawbacks to the position taken by the US:
>
> "In going down the path of enhanced corporate criminal liability, we must not take away from the fact that there will be cases of rogue individuals who behave in a way that a well-intentioned company did not intend or wish. It would be a false choice for us to make, when it comes to prosecution, between corporates and individuals. This is one area where we need to have our cake and eat it. […] What draws me away from the American vicarious liability model is that it tends to focus very much on the corporate and not on the individual, in a way that the public would be concerned about."[47]

[47] Treasury Committee, Economic Crime - Anti-money laundering supervision and sanctions implementations, 4 March 2019, paras 189 and 190

Expanding vicarious liability along the lines of the US model, so that it extends beyond "regulatory" offences, would be roughly equivalent to option 2 in the Ministry of Justice's Call for Evidence described above.

Germany and the EU

Germany has for some time been considered an outlier in not providing for any form of corporate criminal liability[48], but that appears likely to change soon. In August 2020 law firm Pinsent Masons wrote:

> Although there is no corporate criminal law in Germany yet, fines of up to €10m can be imposed on companies if managers commit criminal or administrative offences, including the failure to take compliance measures. Alternatively, a forfeiture order can be issued.
>
> […]
>
> The [German] Federal Ministry of Justice has recently published the draft Corporate Sanctions Act which would introduce corporate criminal liability in Germany, and make enforcement action against companies mandatory in cases of reasonable suspicion. The draft law aims to provide incentives for compliance measures and the investigation and disclosure of compliance violations and provides for monetary sanctions of up to 10% of the annual worldwide group turnover.
>
> […]
>
> It should be noted that contrary to other corporate sanction laws, such as the UK Bribery Act, the German draft Corporate Sanctions Act does not only apply to specific crimes like bribery and anti-money laundering, but to each and any illegal act that would comprise to a criminal offence in Germany or abroad, in that sense it is more similar to the UK's failure to prevent the facilitation of tax evasion offence which criminalises a corporate's failure to prevent any act that amounts to dishonest facilitation.[49]

The EU's *Sixth Money Laundering Directive*[50] required Member States to "take the necessary measures to ensure that legal persons can be held liable"[51] for money laundering crimes. The UK Government decided not to opt in on the basis that the "UK's domestic legislation is already largely compliant with the Directive's measures" and in fact "goes much further"[52] in some areas.

In oral evidence to the *Financial Services Bill 2019-21* Public Bill Committee, Susan Hawley from Spotlight on Corruption said:

> Under the EU's sixth anti-money laundering directive, all states must have corporate criminal liability and must impose criminal and non-criminal sanctions that are proportionate and dissuasive. We are already seeing countries such as Germany taking really strong steps to implement that. It has a corporate sanctions Bill coming up, which has a clause that requires prosecutors to

[48] See the useful liability map produced by law firm Clifford Chance, dated April 2016

[49] Pinsent Masons, Germany to strengthen criminal liability for acts committed in UK, 4 August 2020

[50] OJ L 284/22, 12 November 2018

[51] See Article 7, para 1 of the Directive

[52] Home Office and Ministry of Justice, Eighth Annual Report to Parliament on the Application of Protocols 19 and 21 to the Treaty on European Union (TEU) and the Treaty on the Functioning of the Union (TFEU) in Relation to EU Justice and Home Affairs (JHA) Matters (1 December 2016 – 30 November 2017), February 2018, p7

> investigate suspicions of corporate crime. It is a very strong Bill. Before that, Germany was the outlier and had no proper corporate criminal liability. We see it in the Netherlands as well, where increasing levels of corporate fines are being imposed for money laundering, and there is a very strong corporate liability framework there as well. In Ireland, the Irish Law Commission has recommended changes to the law on corporate liability. We are seeing a raising of standards across the EU that the directive will bring in the context of money laundering.[53]

Law Commission 2010 review

The Law Commission's last review of this area (now slightly dated, from 2010) considered the models adopted in different countries. After explaining that some countries operated a "general liability" scheme (where corporate criminal liability used the same principles for all different types of crimes) and some adopted different models for different criminal offences, it said:

> Most jurisdictions adopt a general liability scheme. Many have a generic – one size fits all – model that applies to all types of offence. So for example the USA, Austria, Belgium, France, and South Africa apply the same model whatever the type of offence… Australia…and Canada on the other hand have a general liability scheme but apply different models according to the fault element of the offence…It is thus possible to develop a relatively simple scheme which caters for the full range of types of offences within it (as in Australia and Canada). This has the advantage that the jurisprudence in relation to corporate liability can develop independently of other principles of criminal liability.
>
> England and Wales has a complex scheme combining both different liability models applying to types of offence together with some exempt offences to which specific rules apply. Examples of [these] are the stand alone offence of corporate manslaughter and the Law Commission proposal in relation to bribery [which became section 7 of the *Bribery Act 2010*].[54]

[53] Official Report, Public Bill Committee, Financial Services Bill, pp 82 and 83

[54] Law Commission, Criminal Liability in Regulatory Contexts, published 25 August 2010, paras C36 and C37

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