spotlight on corruption

Spotlight on Corruption briefing on Corporate Liability Reform for economic crime

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We strongly support an amendment to the Economic Crime and Corporate Transparency Bill that:

- *Introduces failure to prevent offences for key economic crimes, in particular, fraud (including false accounting), money laundering and sanctions evasion where companies fail to have the right procedures in place;*
- *Amends the identification doctrine underlying substantive economic crime offences so that large companies can be prosecuted for active authorisation of criminal activity not just failure to prevent it;*
- *Ensures effective liability for senior directors particularly where a company has been found to be negligent and for strict liability offences.*

Rationale

1. An amendment along these lines will bring greater clarity, and consistency to the fight against economic crime by aligning corporate criminal liability for fraud and money laundering with other economic crime such as bribery and facilitation of criminal tax evasion.

2. The government has stated that it will bring forward an amendment in the Lords. It will be a missed opportunity if it comes forward with a very narrowly drawn amendment, which only covers one offence, and does not address the identification doctrine and senior director level liability. Such an amendment would add to the piecemeal, offence-by-offence nature of reform to date that has led to serious inconsistencies in how different economic crime offences are investigated and prosecuted.

3. A broad amendment which addresses all the above points will give effect to some of the Law Commission's main proposals for corporate liability reform.

4. In other areas, in particular with regard to failure to prevent money laundering and sanctions evasion, the amendment would go further than the Law Commission in order to ensure that the UK adequately responds to concerns raised by international bodies and that it does not fall behind other jurisdictions in emerging best practice.

Background

5. In its review of criminal corporate liability rules, the Commission found that the current status quo:
   - **a.** is unfair – as it enables "*large companies to be acquitted for conduct which would see small businesses convicted*" and "*could diminish confidence in the criminal law*"*;* and
   - **b.** incentivises poor corporate governance, by "*reward[ing] companies whose boards do not pay close attention*" and penalising those that do.

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6. The Law Commission's options paper noted that reform should follow several principles:
    a. There should be one or more means of attributing corporate criminal liability to companies.
    b. It should be possible to convict a company on the basis of collective negligence where negligence has occurred.
    c. The introduction of failure to prevent offence should reflect general principles which it outlined.
    d. Directors' liability for neglect should be limited to strict liability or negligence offences.

Why reform the identification doctrine as well?

7. While failure to prevent offences are more akin to negligence offences, the identification doctrine still applies to the main or substantive offences, for instance in the Bribery Act. The result is that the same limitations identified by the Law Commission apply to these offences even where a failure to prevent offence is introduced.

8. Introducing both failure to prevent offences and reform to the identification doctrine ensures that the law can be fairly applied regardless of the size of the company for substantive offences. Currently, for instance, under the Bribery Act, smaller companies can be convicted of both failure to prevent and substantive or main offences under the Act, where larger companies may only realistically be prosecuted for failure to prevent. The result of this is that:
    i. smaller companies are likely to face proportionately higher fines than larger ones, because substantive offences are treated as more serious criminality than failure to prevent;
    ii. smaller companies are more likely to face collateral consequences such as exclusion from public procurement which is only mandatory where there are convictions for substantive offences.

Why money laundering and sanctions evasion?

9. Including failure to prevent money laundering and sanctions evasion would help bring the UK in line with emerging best practice. It would also help allay concerns expressed by international bodies that the UK's prosecution of high-end money laundering is not commensurate with its risk profile. The IMF in its 2022 financial sector assessment program review of the UK noted that: "*Enhancing the legal framework on corporate criminal liability can contribute to ensuring strong AML/CFT compliance in large entities by holding senior management accountable for failure to prevent economic crimes.*"

10. While current criminal offences under the UK's Money Laundering Regulations (MLR) have allowed for prosecutions such as the Natwest conviction, this is the only corporate conviction under the Regulations since 2018, when the UK reported to FATF that it had 180 high-end money laundering investigations under way. The UK is

now lagging other jurisdictions in such prosecutions, having fallen from 2nd (behind the US) in 2016, to 7th in 2020 for corporate criminal money laundering fines. There has yet to be a corporate conviction in the UK for direct money laundering offences under the Proceeds of Crime Act POCA (327-329). Unlike offences under the MLR, a failure to prevent sections 327-329 of POCA would put the onus on companies to prove that they have the right procedures in place, thus incentivising culture change.

11. The UK's Crown Dependencies are moving ahead of the UK on this issue. Jersey introduced a failure to prevent money laundering offence in June 2022 for the regulated sector. Jersey has stated that its intention in doing so is to ensure that the burden of proof is on a business to prove it has adequate and not just reasonable procedures in place in any prosecution rather than the burden being on the prosecutor to prove it did not, as under the criminal provisions for anti-money laundering regulations. Guernsey is also considering introducing a failure to prevent money laundering offence. The Jersey offence (at article 35A of the Proceeds of Crime (Jersey) Law 1999, does not require the prosecutor to prove the company benefited from the money laundering, nor allow corporates the defence of being a victim, as it did not consider these to be suitable in the context of money laundering.

12. The Law Commission's consultation on the Suspicious Activity Reporting regime noted that a failure to prevent offence in the context of money laundering would create "*a powerful incentive to put in place adequate procedures.*" It is likely that a criminal offence of failure to prevent under sections 327-329 would help shift compliance culture for money laundering away from tick-boxing and towards meaningful implementation.

13. A separate offence of failing to prevent sanctions evasions would also reflect the UK's efforts to prioritise enforcement of sanctions evasion in the current geopolitical climate.

Why senior director liability?

14. UK senior executives face very little prospect of criminal or civil penalties where companies they oversee and manage engage in economic crime. However, ensuring that individuals in senior management are held to account where there is corporate wrongdoing has long and widely been regarded as critical to preventing corporate crime. Recent research in the US strongly suggests that corporate fines on their own, and occasional targeting of junior employees, are not sufficient deterrence against corporate crime.

15. None of the 28 individual convictions secured by the FCA between 2017-2021 relate to senior managers. The FCA has only ever brought one enforcement action under the Senior Managers and Certification Regime. And there has been only one censure of a senior manager in relation to each of the major money laundering fines the FCA has imposed on banks over the past 5 years.

16. There is no standard way in which senior managers can be held liable for corporate criminality in the UK with different statutes having different modes of liability and

different definitions of “senior managers” or officers. The Law Commission’s 2022 review of corporate criminal liability found this current situation to be “*highly unsatisfactory*.”

17. In its 2010 consultation on corporate liability, the Law Commission earlier found that where a corporate offence resulted from the negligence of a director, it might be appropriate to have an individual failure to prevent targeted at that director.

18. Ensuring that a senior manager can be convicted where a corporate offence of failure to prevent has been committed with their consent, or connivance or as a result of their neglect would be a powerful way to address the accountability gap that appears to have emerged in relation to senior executive liability.