Executive summary

Power Without Responsibility

The state of senior executive accountability for economic crime in the UK today

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The UK has a serious accountability gap when it comes to senior executives. Those at the helm of large firms that engage in economic crime, financial wrongdoing or regulatory breaches rarely face any consequence at all.

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This is bad for UK business and it is bad for the people of Britain. It leads to poorer corporate governance standards, and greater risks that the huge costs of corporate failure and misconduct are borne by ordinary people. It is also unfair: directors in the smaller business sector face the vast brunt of prosecutorial and regulatory action.

The government has recently introduced measures to toughen up the UK's corporate liability laws, particularly for large firms, but has taken no corresponding action to ensure senior executives of those firms face greater accountability for corporate economic crime. Without this individual accountability, corporate fines risk becoming a cost of doing business, and deterrence against corporate crime is weakened.

In fact, the UK appears to be heading down the path of ever weaker senior executive accountability.

During 2023 the government has opened reviews into whether current measures to hold senior managers to account should be reformed and has dropped proposed corporate governance reforms altogether. This is leaving the UK dangerously out of step with the US, which has gone in the opposite direction, and toughened up corporate governance standards in recent years.

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Tackling the accountability gap in relation to senior executives is crucial for long-term sustainable and equitable economic growth in the UK, and for the integrity and stability of our financial system.

Our report looks at the UK record on tackling senior executive accountability, how the US is doing this better on many of these fronts, and what lessons we can learn. We come up with nine concrete measures the government can take to get to grips with the growing risks of impunity for those who run Britain's largest firms.

Overall Findings

Our research looked at four different forms of accountability for senior executives in relation to economic crime in the UK: prosecution, regulatory action, disqualification, and removal of directors' benefits.

While each of these accountability mechanisms can be effective in their own right, those at the stronger end of accountability such as prosecution and robust regulatory action are more likely to provide, where appropriate, long-term deterrence and incentives for good corporate governance. Those at the weaker end of accountability, such as removal of directors' benefits are often best used in conjunction with stronger accountability mechanisms particularly in egregious cases.

We found that:

1. All the top bodies responsible for prosecuting serious economic and financial crime are struggling to land prosecutions against senior executives in large firms:

a. Since 2013, only 13% of the Serious Fraud Office (SFO)'s individual convictions have involved senior executives in large firms despite over 60% of SFO cases involving wrongdoing associated with large firms.

b. Since 2013, just 6% of the Financial Conduct Authority (FCA)'s individual convictions have involved senior executives in large firms.

c. HM Revenue and Customs does not report on the number of prosecutions it undertakes into serious and complex cases, while the number of its prosecutions, including into enablers of tax crime, has dropped across the board.

d. The Competition and Markets Authority (CMA) has failed to prosecute any senior executives in large firms following 11 prosecutions, and appears to be deprioritising prosecution altogether.

e. None of these agencies have specific prosecution strategies or guidance that focuses on individual accountability.

2. Where corporate fines are imposed – whether through prosecution, settlement or regulatory action – it is extremely rare to have any corresponding individual enforcement action:

a. The SFO has achieved just one conviction of a senior executive of a large firm (on minor charges) following eight corporate convictions, and a conviction of one individual for taking bribes following 12 Deferred Prosecution Agreements.

b. The FCA has imposed individual fines in just 13% of cases where it imposed corporate fines between 2013 and 2022.

c. The FCA took just one regulatory action against an individual in response to £777 million worth of fines imposed on 17 banks for money laundering failures. This is despite failures continuing after the Senior Managers and Certification Regime (SM&CR) came into effect in seven of these cases.

3. Directors in Small and Medium-Sized Enterprises (SMEs) have become 'low-hanging fruit' for prosecutors and regulators and are far more likely to face conviction, regulatory fines and bans than senior executives in large firms, at the same time that large firms are likely to face lower corporate fines relative to turnover than SMEs:

a. Three times more directors of SMEs are convicted following SFO prosecutions than senior executives in large firms.

b. Five times more individual fines are imposed by the FCA on directors of SMEs than senior executives in large firms.

c. 90% of published prohibitions (or bans) against directors in the financial sector imposed by the FCA went to those in the SME sector.

d. The largest firms investigated by the SFO faced fines of 0.2-1% of average turnover, compared to 3-9% of average turnover for the smallest firms..

4. Overall, the FCA's use of regulatory fines and prohibition orders against individuals has declined over the past decade despite the introduction of the 2016 Senior Managers and Certification Regime (SM&CR), and there has been little enforcement of the SM&CR itself:

a. The number of prohibition orders (or bans) by the FCA against individuals has shrunk by 62% since 2013.

b. The FCA issued half as many individual fines in 2022 than it did in 2013, and the average value of those fines (with two notable exceptions) has fallen by 32%.

c. Just six financial penalties have been issued under the SM&CR by the Prudential Regulation Authority (PRA) and FCA, one of which was overturned, one is being appealed, and another was not enforced in exchange for compensation.

d. Just two financial penalties have been issued solely by the FCA (both for non-financial conduct and one of which is being appealed) following 70 investigations since 2016.

e. Just 6% of investigations under the SM&CR by the FCA have resulted in any enforcement action since its introduction in 2016.

5. There has been encouraging use of director disqualification by the Competition and Markets Authority (CMA) and the Insolvency Service against directors in large firms, in competition and bankruptcy cases, but it is heavily reliant on voluntary undertakings and rarely accompanied by attempts to recover funds:

a. The CMA has imposed 26 disqualifications since 2019 after it introduced a new strategy, compared to just three before that, and nearly half (16 out of 29) worked for large firms.

b. The rate of the Insolvency Service's disqualifications has slowed, and prosecution of directors declined overall (despite a spike resulting from Covid-19 prosecutions).

c. The Insolvency Service achieved significant orders against former senior executives of Carillion, which is a positive step forward, but it took five years and has not yet been accompanied by efforts to recover funds from those executives.

d. 96% of the CMA's disqualifications and an average of 84% of the Insolvency Service's disqualifications are based on voluntary undertakings, with a crucial court decision pending in the case of the CMA likely to affect how it uses disqualifications going forward.

e. The Insolvency Service has sought compensation orders against disqualified directors just three times since 2015.

6. The UK's regime to recoup directors' benefits (malus and clawback) following corporate misconduct is weak and poorly enforced, and is generally only invoked when there is public outcry:

a. There is uneven implementation of malus and clawback outside of financial services, and little if any public supervisory enforcement even within the financial services for failure to impose clawback.

b. According to a 2022 industry survey, clawback provisions have been invoked on average just 1.3 times a year between 2014 and 2022.

c. Just one of the five large firms that received the biggest criminal penalties following SFO investigations imposed any clawback on directors.

d. Despite a lowering of the total bonus pool as a result of the fine imposed on NatWest following its money laundering prosecution in 2021, the CEO's overall remuneration package rose 19%.

7. Recent government and regulator announcements are pulling the UK in the opposite direction from the US, which has much stronger enforcement against directors and is expanding malus and clawback in light of evidence about its positive impact on corporate governance and business growth:

a. The UK has recently dropped proposals to set minimum conditions for malus and clawback while financial regulators are consulting on removing any such requirements for smaller banks.

b. The removal of clawback requirements for smaller banks would appear to leave many fintech challenger banks out of scope despite the International Monetary Fund (IMF) warning of real risks from this sector to financial stability.

c. The US by contrast is introducing mandatory clawback provisions, greater incentives for firms to clawback director remuneration where criminal investigations are underway, and robustly enforces strong powers by regulators to impose clawback.

Recommendations

1. The government should undertake a full review of the legislative and enforcement barriers to holding senior executives to account for economic crime.

2. The Attorney General should form a Corporate Crime Advisory Group with prosecutorial bodies and relevant regulatory bodies to develop principles for individual accountability across the economic crime landscape.

3. The government should work with prosecuting bodies and the judiciary to review how cooperating witnesses and whistle-blower compensation could enhance enforcement against senior managers for corporate criminality.

4. The FCA and the PRA should conduct and publish a full review of the roadblocks to regulatory enforcement of the Senior Managers and Certification Regime (SM&CR), and of their broader regulatory tools, including the impact of Directors and Officers Liability insurance.

5. The FCA should ensure it has far more consistent and transparent data about its enforcement, particularly of the SM&CR, and should develop principles on individual accountability for its corporate regulatory enforcement.

6. The National Audit Office (NAO) should conduct a review of whether the CMA and Insolvency Service are using director disqualification effectively and speedily, whether the agencies are resourced sufficiently to make the most use of this tool, and whether they have complementary prosecution strategies alongside effective ways to seek compensation from directors.

7. Serious consideration should be given to granting the SFO similar director disqualification powers to the CMA for economic crime.

8. The government and the Financial Reporting Council (FRC) should undertake a review of the risks to financial stability, the integrity of markets, and public confidence in the business sector arising from the UK's lack of robust powers and enforcement to require malus and clawback, with a view to reinvigorating corporate governance reform.

9. The SFO and FCA should be given stronger powers to impose and incentivise clawback on directors of firms involved in corporate misconduct.

www.spotlightcorruption.org
info@spotlightcorruption.org
@EndCorruptionUK

Spotlight on Corruption is registered as a charitable company.

Charity Number (England and Wales) 1185872.

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Spotlight on Corruption's work would not be possible without the generous support of our funders and partners. **Thank you all.**

Funders

The David and Elaine Potter Foundation

John Ellerman Foundation

The Joffe Charitable Trust

The Joseph Rowntree Charitable Trust

Luminate Foundation

We are also grateful for the support of the Open Society Foundations.

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