

Insights

CORPORATE CRIMINAL LIABILITY IN THE UK: A NEW ERA IS COMING... ISN'T IT?

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SUMMARY

"It has no soul to be damned and no body to be kicked".¹ How, then, can a company be held criminally liable? Various jurisdictions have grappled with this question and recent developments in the UK have increased the likelihood that the English common law corporate criminal liability regime may change significantly, even if not in the near future. In this article, we consider the problems with the identification doctrine, the alternative options being considered by the Law Commission, and give our view on what the future should look like.

The identification doctrine

In the UK, corporate criminal liability is generally determined according to the "identification doctrine". Prosecutors must prove that the most senior officers of the corporate, i.e. the company's "directing mind and will", had the requisite criminal intent. Should this intent be established then the company has direct liability because the state of mind of those senior individuals is considered to be the state of mind of the company. However, should the criminal intent belong to less senior individuals, who could not be considered the company's directing mind and will, the company will not be found criminally liable. The individual(s) acting as the directing mind and will may be determined by reference to the company's memorandum and articles of association. They may also be determined by reference to whether responsibility and authority for the particular actions which constituted the offence had been entirely delegated to them by the company's directors.

Problems with the identification doctrine

This approach to corporate criminal liability has come under considerable attack from both commentators and prosecutors. There are a number of objections, three of which we outline below.

1. The practical reality of a large modern-day company defeats the identification doctrine through *"the diffusion of managerial power"*²: a company's layers of management and decision makers

insulate the directing mind and will from any attribution of intent. These days, the board of a company will not be involved in the day-to-day decision making. To the prosecutor's dismay, this makes the large companies far harder to prosecute. Indeed, the authorities in the UK which make it their business to prosecute corporates have been vocal about their distaste for the identification doctrine.³

2. Conversely, the principle has the perverse effect of making it easier to prosecute smaller companies. It will always be easier to link the intent of a smaller company's directing mind and will with the criminal act. This creates an unbalanced corporate criminal landscape that favours larger entities. As a matter of legal principle this is an unfortunate outcome.
3. A company's decision making process cannot be reduced to the aggregation of individuals' decisions. "[The] *reality of modern corporate decision making... is often the product of corporate policies and procedures rather than individual decisions*".⁴

The struggles of the SFO

A recent example of the difficulty faced by prosecutors in this area is the failure by the UK Serious Fraud Office (the "SFO") to successfully prosecute Barclays. After the SFO's case was dismissed in the Crown Court,⁵ the High Court⁶ held on appeal that the "*alleged conduct and dishonest state of mind of the individual conspirators cannot properly be attributed to Barclays so as to make Barclays itself criminally culpable*".

We pause here to note that, subsequently, the four individual Barclays executives were acquitted of fraud at trial. The results of both the corporate's trial and the individuals' trial can only be described as a stunning failure for the SFO, given the high profile nature of the trials, the public expense that they would have incurred, and the comprehensive dismissal and acquittal by both judge and jury.

In any event enough, it seems, is enough. The UK Government has decided to act. Or, at least, it has decided to think about acting.

Potential for a change

There are two recent and connected developments that may signal the UK's approach to corporate criminal liability is about to change.

CALL FOR EVIDENCE ON CORPORATE CRIMINAL LIABILITY FOR ECONOMIC CRIME

The Government issued its Call for Evidence on corporate criminal liability for economic crime in January 2017 and continued until March 2017.

In total, the Government received 62 responses to its Call for Evidence. Below, we have picked out a few of the key points from those responses.

1. 52.5% of respondents did not believe that the existing criminal and regulatory framework in the UK provided sufficient deterrent to corporate misconduct.
2. 75.9% of respondents agreed that the identification doctrine inhibited holding companies to account for economic crimes committed in or on their behalf. Many emphasised the difficulty we have already discussed in applying the doctrine to large and multi-national companies. The corresponding disparity in the ease of its application to small versus large companies is also discussed above.
3. There were five possible options for reform of corporate liability for economic crime.
 - a) Legislate to replace the current common law rules and establish corporate criminal liability in economic crime cases due to the actions of a wider range of people than currently permitted under the identification doctrine. We are not told how many respondents chose this option.
 - b) A new form of vicarious liability as in the USA whereby a company would be guilty, through the actions of its employees, representatives or agents, of the substantive economic crime offence without the need to prove the existence of a directing mind or will. 10.7% of respondents chose this option.
 - c) A new strict liability offence akin to s7 of the Bribery Act 2010 (failure to prevent model) that provides for guilt of a separate offence of failing to prevent a substantive offence rather than the substantive offence itself, without the need for intent on the part of the company. This would likely include the defence of having adequate procedures. 46.4% of respondents chose this option.
 - d) A variant of the failure to prevent model in which the burden of proof is on the prosecution to prove not only the occurrence of the predicate offence but also the failure on the part of the management of the company to prevent the offence. 39.3% of respondents chose this option.
 - e) Investigate the scope for further regulatory reform by investigating whether the Senior Managers and Certification regime in the financial services sector and its focus on individual responsibility may be applicable in other sectors. 25% of respondents chose this option.
4. 34.5% of respondents felt that reform of the law would have a potentially adverse impact on competitiveness or growth. 32.7% of respondents said reform would create increased compliance costs but the same percentage said any additional costs would be necessary and manageable.
5. 51.6% of respondents believed there was a case for introducing a corporate failure to prevent economic crime offence akin to s7 Bribery Act 2010.

6. 48.1% of respondents felt any new form of corporate liability should have extraterritorial reach.

On 3 November 2020, three years after the Call for Evidence ended, we have the Government's response.⁷ This inordinate delay could, on its own, lead people to draw a fairly obvious conclusion as to the Government's enthusiasm for reform in this area, even before you get to the substance of the response. That response is inconclusive. In summary: "*The findings of the Call for Evidence do not provide a conclusive evidence-base on which to justify reform but raised important questions about the operation of the identification doctrine.*"

The Government's seeming lack of enthusiasm for drawing its own conclusions at this stage is likely to be more complex than simply being Brexit-weary. Four years have now passed since David Cameron hosted the international Anti-Corruption Summit in London, which was intended to set up global action to expose, punish and drive out corruption in all walks of life. In front of representatives from over 40 countries, he publically declared that the United Kingdom wants "*firms properly held to account for any criminal activity within them.*"⁸ Since then, the SFO's track record has done little to action the Government's stated desire and its reputation is suffering on the international stage. The Government will also be conscious that white collar crime is thriving due to the pandemic. Better arming prosecutors to tackle corporate perpetrators should not only improve the SFO's reputation but could also be a way of raising revenue and balancing the books after Covid-19. We expect the Government does want change and sees the economic benefit in achieving it, but it is all too aware that the real economy has suffered immensely due to the pandemic. As such, the Government will likely be reticent about taking any action that could add to the current burden already being borne by companies and their employees, and the political ramifications of the same.

LAW COMMISSION OPTIONS PAPER ON CORPORATE CRIMINAL LIABILITY

The Government's solution to this is the Law Commission. On the same day that the response to the Call for Evidence was published, the Government asked the Law Commission to "*investigate the laws around corporate criminal liability and provide options to reform them.*"⁹ The Law Commission has been asked to draft an Options Paper in which it will "*analyse how effective the law is and where it could be improved*". It will then "*present various options for reforming the law so that corporate entities can be held appropriately to account*".

The announcement explicitly references the possibility of the UK falling behind "*international standards in the prosecution of economic crime*". This may be a reference to Australia, which has recently taken steps to consider reforming its corporate criminal liability regime (see our [previous blog post on this topic](#)) by proposing a form of vicarious liability with a defence of reasonable precautions.

The terms of reference for the Law Commission include:

1. whether the identification doctrine is fit for purpose, when applied to organisations of differing sizes and scales of operation;
2. the relationship between criminal and civil law on corporate liability;
3. other ways in which criminal liability can be imposed on non-natural persons in the current criminal law of England and Wales;
4. the relationship between corporate criminal liability and other approaches to unlawful conduct by non-natural persons, including deferred prosecution agreements and civil recovery of proceeds of unlawful conduct;
5. approaches to criminal liability taken in relevant overseas jurisdictions;
6. whether an alternative approach to corporate liability for crimes could be provided in legislation;
7. the implications of any change to the liability of non-natural persons for the liability of directors and senior managers (including under “consent or connivance” provisions, such as those in regulation 92 of the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017; and
8. with reference to the options for corporate criminal liability in general, to consider what additional provision for particular offences, including economic crimes, may be necessary and to set out the options for reform.

Just in case all of those options make it seem like change is inevitable, the terms of reference also state that any changes should occur “*without imposing disproportionate burdens upon business*”. While this consideration is to be expected and indeed welcomed given the ever increasing amount of regulation companies are facing (together with the attendant increase to the company in cost and time), it raises an obvious question: will the Government want to increase the burden on companies when the next few years will be about recovering from the impact of Covid-19 and ensuring the UK is best equipped after Brexit? Already there are mutterings that the effect of the Government’s recent actions is to kick the decision over changes to the UK’s corporate criminal liability regime into the long grass. The Commission is aiming to publish an Options Paper in late 2021 and there may then be a full Law Commission project on corporate criminal liability. Change may be coming, but it won’t be arriving any time soon.

Our view

As set out above, we have some doubts about the Government’s appetite to bring about meaningful reform in this area in the immediate future. Nevertheless, we expect reform will come, spurred on by pressure from the public and the prosecuting agencies, a desire to make good promises to tackle the “*evil of corruption*”¹⁰ whilst also trying to balance the hard hit public purse.

The issues with the identification doctrine are known and real. Its alternatives, however, don't all represent an improvement. In particular it would be a mistake for the Government to adopt the US model of vicarious liability to determine corporate criminal liability. This model would swing the pendulum too far in the other direction, making it excessively easy to attribute liability to companies. This could see defence practitioners essentially forced to become an arm of prosecutors, given the need to demonstrate wholesale cooperation in the hope of avoiding liability for an offence committed by an employee. It is unsurprising that prosecutors like the SFO may advocate this approach, but the US model is, in our view, far too burdensome on companies and would make the UK a less attractive place to do business.

Vicarious liability becomes more attractive when paired with a due diligence or "reasonable precautions" defence. This is the newly proposed Australian model.¹¹ It avoids the issues present in the identification doctrine while still ensuring a corporate with all the appropriate procedures in place does not commit a criminal offence by virtue of a few bad actors.

The failure to prevent model found in s7 of the Bribery Act, is also attractive. We prefer the option suggested in the Call for Evidence, in which the burden of proof is on the prosecution to prove not only the occurrence of the predicate offence but also the failure on the part of the management of the company to prevent the offence. It ensures that corporates are not liable for the actions of rogue employees while also providing incentives for the corporate to put in place measures to prevent (to the extent practically possible) such actions.

We are wary of the ever increasing compliance burden on companies. Far too often a change in the law is seen as the solution to apparent criminality or perceptions of unfairness when better (or better funded) enforcement is the answer. That being said, we think issues in the identification model demand a change. Prosecutors should not, however, view a change in the law as a panacea to all their problems, many of which are operational rather than legal. For their part, we encourage companies to ensure that they have adequate systems and controls to mitigate both the risk of corruption and, if necessary, any corporate liability, however such liability may be made out in the future.

Endnotes

[1] Edward, First Baron Thurlow (1731-1806).

[2] E. Ferran, *Corporate attribution and the directing mind and will*, L.Q.R. 2011, 127(Apr), 239-259.

[3] Oral evidence given by Lisa Osofsky on 13 November 2018 to the House of Lords Select Committee on the Bribery Act 2010.

[4] 561, C.M.V. Clarkson, *Kicking Corporate Bodies and Damning Their Souls*, (1996) 59 MLR.

[5] *R v Barclays PLC & another*, Indictment No: T2017 7247-7251 & T2018 0055;
<https://www.judiciary.uk/wp-content/uploads/2020/02/sfo-v-barclays-dismissal-application-21-05-18.pdf>

[6] *The Serious Fraud Office v Barclays PLC & another*, [2018] EWHC 3055 (QB);
<https://www.judiciary.uk/wp-content/uploads/2020/02/sfo-v-barclays-judgment-12-11-18.pdf>.

[7] <https://consult.justice.gov.uk/digital-communications/corporate-liability-for-economic-crime/>

[8] <https://www.gov.uk/government/speeches/anti-corruption-summit-2016-pms-closing-remarks>

[9] <https://www.lawcom.gov.uk/law-commission-begins-project-on-corporate-criminal-liability/>

[10] <https://www.gov.uk/government/news/pm-announces-new-global-commitments-to-expose-punish-and-drive-out-corruption>

[11] <https://www.alrc.gov.au/publication/corporate-criminal-responsibility/>

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