Reform of corporate criminal liability: two ways about it

On 3 November 2020, the Law Commission (the Commission) announced that it had been tasked by the government to investigate the laws around corporate criminal liability and provide options for reform. This is the next step in a protracted and increasingly controversial discussion on whether or not to reform the law of corporate criminal liability for economic crime.

The Commission's project follows the government's much delayed response to its January 2017 call for evidence on this topic, which was published on 3 November 2020 (*https://consult.justice.gov.uk/digital-communications/corporate-liability-for-economic-crime/results/corporate-liability-economic-crime-call-evidence-government-response.pdf*). The response confirms that the government was unable to come to a decisive conclusion as to whether, and how, its approach to corporate liability for economic crimes can be strengthened.

Call for reform

When the call for evidence was published in January 2017, the government was concerned that the identification principle, on which the law of corporate criminal liability is based, might operate too restrictively, effectively putting large companies beyond the reach of the criminal law even when they have committed serious economic crimes to help boost their profits (*see box "Identification principle"*). The then Justice Minister, Sir Oliver Heald, explained that the purpose of the call for evidence was to restore public faith in business and make sure that the right tools are available to "crack down on" corporate criminality (*www.gov.uk/government/news/new-crackdown-on-corporate-economic-crime*). It would look, in particular, at whether successful convictions are hindered by the need to prove the "directing mind and will" of businesses that undertake criminal activity.

Sir Oliver's concern about public faith in business was driven in part by the lingering impact of the 2008 financial crisis and also by the UK's decision to leave the EU. If the UK was to continue to attract investment after its departure from the EU, it would need to demonstrate a clean business environment. This point was made clear in the government's Anti-Corruption Strategy published in December 2017 (*www.gov.uk/government/publications/uk-anti-corruption-strategy-2017-to-2022*). It therefore made sense to examine whether the law of corporate criminal liability helped to meet these objectives.

Identification principle

In England and Wales, the law of corporate criminal liability is based on the identification principle. This means that a company can only be held liable for a crime if the prosecution can attribute the criminal conduct in question to the small group of people who represent the company's directing mind and will.

Competing arguments

The proponents of reform argued that the current law was unprincipled. Their view was that it could not be right that the identification principle alone applied to such serious crimes as fraud and money laundering yet there was a new, lower standard for corporate criminal liability in cases of bribery. Indeed, the government had been criticised by the Organisation for Economic Co-operation and Development for its weak implementation of the Convention against Bribery of Foreign Public Officials, and tax evasion, where the government itself stood to be the victim.

In addition, proponents argued that the identification principle was unfair because it made it easier to impose criminal liability on smaller companies than on larger ones, and it was unhelpful in creating a good business environment because it incentivised company leaders to distance themselves from the company's operations. Anticipating an argument that would be made against them, they also noted that the vicarious liability test in the US had not impeded the growth of the US economy.

However, the opponents of reform argued that there was no or insufficient evidence that companies were not currently being held responsible for economic crimes undertaken by their employees, or otherwise on their behalf, where the company stood to profit from the crimes in question. They argued that the Bribery Act 2010, the new corporate tax evasion offences and the anti-money laundering regime had already cleaned up corporate culture significantly, and that the regulatory regime increasingly supported this effort, with its focus on sound governance principles and the introduction of the senior managers and certification regime (*see feature article "Bribery Act 2010: ten years on", www.practicallaw.com/w-026-9809 and "Facilitation of tax evasion: new offences of failure to prevent", www.practicallaw.com/w-010-4276; News brief "Anti-money laundering: HMRC raises its game", www.practicallaw.com/w-022-1261; and Briefing "Senior managers and certification regime: another year on", www.practicallaw.com/w-013-8923*). Opponents also argued that reform would be bad for business as it would inhibit growth and competition.

Government stance

While each practitioner may form their own view on the competing merits of these two arguments, it seems unlikely that this will take as long as the three years that it took the government to respond to its 2017 call to evidence. The government's delay in responding suggests that there is no consensus in government on the issue and no desire on the part of the government to use up political capital to impose a solution or to risk negative headlines. If the government had chosen reform, it would have been criticised for being anti-business, but if it had chosen to do nothing, it would have been criticised for giving big business preferential treatment over SMEs.

Starting from scratch

The Commission's announcement of its new project shows how little progress has been made over the last three years. In the announcement, Commissioners Professor Penney Lewis and Professor Sarah Green referred to the public confidence and clean business imperatives driving the continuing need for options for reform.

In starting from scratch, the Commission's review will be guided by the need to ensure the proper accountability of companies that engage in criminal conduct, without imposing a disproportionate burden on businesses. Other key factors underpinning the review will be the public interest in the prevention of crime, the ability of law enforcement

and prosecution authorities to prosecute offenders, and the legitimate interests of businesses. Particular consideration will be given to:

- Whether the identification principle is fit for purpose when applied to organisations of different sizes and scales of operation.
- The relationship between criminal and civil law on corporate liability.
- Other ways in which criminal liability can be imposed on non-natural persons in the current criminal law of England and Wales.
- The relationship between corporate criminal liability and other approaches to unlawful conduct by non-natural persons, including deferred prosecution agreements and the civil recovery of proceeds of unlawful conduct.
- The approaches to criminal liability in relevant overseas jurisdictions.
- Whether an alternative approach to corporate liability for crimes could be provided for in legislation.
- The implications of any change to the liability of non-natural persons for the liability of directors and senior managers.

These are important issues, and the broad scope of the Commission's new project suggests that all options truly are open: from doing nothing, to the introduction of an all-encompassing failure to prevent economic crime offence, or to a US-style vicarious liability model. The Commission estimates that it will take 12 to 15 months to fully consider these options, during which time it will be able to assess the impact of the various potential legislative changes and regulatory reforms. It is aiming to publish an Options Paper in late 2021.

It is likely that the Commission will also consult on this issue and campaigners on both sides of the argument will be keen to have their voices heard. Hopefully, once the Commission's work is complete, the government will be able to make a decision, one way or another.

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