



global witness



Briefing for Report stage of the Criminal Finances Bill: 21 February 2017 Amendments to create a corporate offence of failure to prevent economic crime

- **The proposed amendments to the Criminal Finances Bill to create a corporate offence of failure to prevent economic crime would enable the government to fulfil its full manifesto promise and its commitment from the UK Anti-Corruption Summit to create a modern, fit for purpose corporate liability regime in the UK.**

- **Reform would also form an important element of the Prime Minister’s commitment to “get tough on irresponsible behaviour in big business” and deal with problems of corporate impunity such as:**

-Not a single UK financial institution has faced criminal charges as a result of the 2008 financial crisis and several major recent scandals have resulted in no prosecutions against companies;

The Serious Fraud Office (SFO) has not charged any of the organisations involved in the LIBOR/EURIBOR affair, despite prosecuted individuals arguing that their actions were condoned and encouraged by their employers;

-In November 2015, the SFO was forced to drop its case against Olympus after the Court of Appeal found that it is not illegal under current corporate liability laws for companies to mislead their auditors.

- **Cracking down on corporate economic crime would deliver huge potential savings to the UK taxpayer.** In May 2016, the Annual Fraud Indicator put the cost of fraud to the UK economy at £193 billion. The cost to the public sector is £37.5 billion. Procurement fraud costs £10.5 billion a year. The National Crime Agency estimates that billions of pounds of suspected proceeds of crime are laundered through the UK every year. This greatly exceeds the cost to the UK of tax evasion, estimated by HMRC in 2016 to be £5.2 billion, out of a national tax gap of £36 billion.

- **Reform would give the UK the best corporate governance regime of any major economy, without imposing additional burdens on business.**

Companies are already required under Financial Conduct Authority regulations to have effective systems and controls in place to prevent their being used to further financial crime, including money laundering and fraud. The imposition of criminal sanctions would properly penalise the irresponsible actors who refuse to meet regulatory standards.

A robust corporate liability regime which ensures public and international trust in the integrity and fairness of our financial and legal system is essential as Britain begins to negotiate new trade arrangements. The government has acknowledged on various occasions that the current corporate liability laws in the UK are unfit for the purpose of prosecuting companies, particularly large companies, for economic crime.

Leaving the UK’s existing corporate liability regime as it is would be a badly missed opportunity. Current laws leave prosecutors with their hands tied when facing large companies, seriously disadvantage SMEs who are much more easily prosecuted under these laws, and encourage poor corporate governance as companies shield their boards from knowledge of misconduct to avoid prosecution. Broad cross-party support for corporate liability reform is essential to ensure that the UK has the fair and clear corporate liability laws it needs to be a successful global trading nation.

Introduction

This briefing is supported by the following organisations who form part of the BOND Anti-Corruption Group and the Business Integrity Network and who are all working to ensure that UK companies can be held legally accountable for economic and broader crimes, including those committed abroad: Amnesty International, CAFOD, CORE Coalition, Corruption Watch, Global Witness, ONE, Rights and Accountability in Development (RAID), Tax Justice Network, The Corner House, Traidcraft, Transparency International UK.

The 2015 Conservative Party Manifesto promised to make “it a crime if companies fail to put in place measures to stop economic crime, such as tax evasion, in their organisations and making sure the penalties are large enough to punish and deter.” At the UK Anti-Corruption Summit on 12th May 2016, the government announced a forthcoming consultation on extending “the criminal offence of a corporate ‘failing to prevent’ beyond bribery and tax evasion to other economic crimes,” which appeared to make good on that promise. On 13th January 2017, the government published a ‘Call for Evidence’ to examine the case for reform of corporate liability for economic crime.

The proposed new clauses NC2, NC3 and NC4 would have the following effects:

1. Level the playing field and end impunity

The Prime Minister, the Rt Hon Theresa May MP, has promised to deliver “*an economy where everyone plays by the same rules.*” The current corporate liability regime in the UK, where large companies cannot be prosecuted for their role in economic and other crime, is a key impediment to achieving that vision. Current UK corporate liability laws rely on a ‘directing mind’ test that requires prosecutors to prove that senior board level executives intended for misconduct to occur. This test:

- Results in effective impunity for large, global and decentralised companies where directors are not intimately involved in decisions taken by lower level employees;
- Unfairly penalises SMEs where directors are more involved and who can therefore be more easily prosecuted;
- Undermines corporate governance by creating perverse incentives to keep boards in the dark about decisions that might lead to misconduct.

Several major recent scandals have resulted in no prosecutions against companies due to the current corporate liability regime:

- *LIBOR/EURIBOR*: individuals prosecuted under conspiracy to defraud laws have argued that their actions were condoned and encouraged by their employers, however the Serious Fraud Office (SFO) has not charged any of the employers concerned (Barclays, UBS, and Deutsche Bank). Not a single UK financial institution faced criminal charges as a result of the 2008 financial crisis. A *failure to prevent* offence for fraud and conspiracy to defraud would have enabled such prosecutions;
- *Olympus*: in November 2015, the SFO was forced to drop its case against Olympus after the Court of Appeal found that it was not illegal under current corporate liability laws for companies to mislead their auditors;¹
- *News Group Newspapers*: in December 2015, the CPS stated that because of corporate liability laws it could not mount a successful prosecution against the companies in the phone hacking scandal.² While the amendments would not specifically address this case, they highlight the need for broader corporate liability reform to be urgently addressed.

2. Tackle the facilitators of corruption

Unexplained Wealth Orders will help law enforcement more easily seize the wealth of kleptocrats and corrupt officials, however without an amendment to the Bill, the banks who facilitate this corruption by failing to conduct due diligence on their clients will go unpunished, even when gross negligence is involved. Not a single bank has yet been criminally prosecuted for handling the proceeds of corruption. An extension of a *failure to prevent* offence to money laundering would significantly help enhance the scope for criminal sanctions. The UK Anti-Corruption Summit committed countries to pursuing and punishing those who facilitate corruption. Failure to include measures in the Bill to strengthen action against those miscreants could lead to charges of hypocrisy

¹ <https://www.ft.com/content/8c57044e-87c9-11e5-90de-f44762bf9896>

² http://www.cps.gov.uk/news/latest_news/no_further_action_to_be_taken_in_operations_weeting_or_golding/

against the UK and undermine our reputation as an anti-corruption champion within the international community.

3. Address the cost to the UK economy

The cost of fraud and money laundering to the UK greatly exceeds the cost of tax evasion. In 2016, HMRC estimated that the UK's tax gap stood at £36 billion, of which tax evasion accounted for £5.2 billion.³ In May 2016, the Annual Fraud Indicator put the cost of fraud to the UK economy at £193 billion.⁴ The cost to the public sector is £37.5 billion with procurement fraud costing £10.5 billion a year. The National Crime Agency estimates that billions of pounds of suspected proceeds of crime are laundered through the UK every year.⁵

4. Rationalise the UK's approach to economic crime

The Crime and Courts Act 2013 specifies that certain economic crimes including fraud, money laundering and false accounting as well as bribery and tax evasion can be dealt with by way of a Deferred Prosecution Agreement. The absence of an extension of a *failure to prevent* offence to the other economic crime offences listed in the Crime and Courts Act results in real disparity in how different economic crimes – which all cause significant damage to the taxpayer – can be dealt with by prosecutors.

5. Further strengthen corporate governance without imposing a burden on business

Contrary to arguments made by some companies, the extension of the *failure to prevent* model to economic crime would not impose an additional regulatory burden on business. Companies are already subject to criminal law for all of the additional offences listed in the amendments, although currently on the basis of the 'directing mind' test. In addition, companies are already required under FCA regulations to have effective systems and controls in place to prevent their being used to further financial crime including money laundering and fraud.⁶ Criminal sanctions would properly penalise the irresponsible actors who refuse to meet existing regulatory standards.

The FCA's Financial Crime guide published in April 2015 could easily be used as the basis for guidance on appropriate procedures to prevent economic crime, ensuring no duplication of regulation. Additionally, the current *failure to prevent* facilitation of tax evasion offence has already significantly shifted the standard for an 'adequate procedures' defence to allow companies to claim in their defence that it was not reasonable for them to have such procedures in place. This shift is likely to address many of the concerns business would have about extending the *failure to prevent* model to other economic crime.

The call for evidence on corporate liability for economic crime

As the Call for Evidence makes clear, extending a *failure to prevent* offence to all economic crime is one of several ways of achieving reform of corporate liability for economic crime. Another possibility is much broader corporate law reform, such as the US model of vicarious liability, which would help tackle broader corporate crime, such as the phone hacking scandal and corporate involvement in human rights abuses abroad. The amendment by the government to the Criminal Finances Bill (NC7) to recognise that Gross Human Rights Abuses should be grounds for the confiscation of assets by perpetrators is a major and very positive development. Ensuring that the UK's corporate liability regime can address more effectively the role of UK companies in such abuses would be significant advance in deterring future misconduct.

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³ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/561312/HMRC-measuring-tax-gaps-2016.pdf

⁴ <http://www.experian.co.uk/blogs/latest-thinking/fraud-costs-uk-economy-193-billion-year-equating-6000-lost-per-second-every-day/>

⁵ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/468210/UK_NRA_October_2015_final_web.pdf

⁶ See Senior Management, Systems and Controls (SYSC) rule 3.2.6

<https://www.handbook.fca.org.uk/handbook/SYSC/3/?view=chapter>