

## Briefing for Committee Stage of the Criminal Finances Bill, 28 March and 3 April 2017

### Introduction

The Government has acknowledged that the UK's corporate liability regime is not fit for purpose in the 21st century, as many Peers recognised during Second Reading.

The current outdated identification doctrine needs to be replaced with a regime that reflects both the realities of modern corporations and public expectations of corporate accountability.

The Criminal Finances Bill introduces a welcome new corporate offence of failure to prevent tax evasion, but the corporate liability regime beyond bribery and tax evasion remains in crisis.

The extension of the 'failure to prevent' model to economic crimes such as money laundering and fraud is an essential next step. Broader corporate criminal law reform is also needed to ensure that irresponsible companies can be held liable for committing offences, not only omitting to prevent them.

While we welcome the Government's call for evidence<sup>1</sup> on corporate liability for economic crime, we are concerned that the current bill is missing a major opportunity to make progress in improving the legislative framework for corporate criminal liability particularly in light of anticipated forthcoming restrictions on legislative space arising from Brexit.

The following amendments would allow progress to be made and have our full support.

#### Clause 42

#### Amendment 161

#### After Clause 47

#### Amendment 163, failure to prevent an economic criminal offence

#### Amendment 166, corporate criminal liability for economic crime

#### Purpose of amendment

We support the objective of **amendments 161, 163 and 166** which is to ensure that a new offence of failure to prevent economic crime is introduced in the UK within the near future.

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<sup>1</sup> <https://www.gov.uk/government/consultations/corporate-liability-for-economic-crime-call-for-evidence>

The Government is currently conducting a Call for Evidence on corporate liability for economic crime. It has stated that if there is a need for a change to the regime, a consultation will be issued on proposals.

However, once Article 50 has been triggered, the UK will need to undertake what has been described as *“one of the largest legislative projects ever undertaken in the UK.”*<sup>2</sup> The Institute for Government has said that legislative process required to deliver Brexit will *“leave very little space for non-Brexit related legislation.”*<sup>3</sup> That means that the options for reforming the UK’s current corporate liability regime through primary legislation are likely to be severely limited for the next few years.

To protect its future as a leading financial centre, the UK must ensure equivalence with other leading financial centres. It is essential and indeed urgent to establish a robust corporate liability regime that is fair and consistent in its application and that provides clarity for business.

These amendments seek to ensure that the Government commits itself to corporate liability law reform either by:

1. Introducing into the current bill a new offence of failing to prevent economic crime which would enter into force by means of a statutory instrument following the conclusion of the Call for Evidence and a public consultation

**Amendment 163** would introduce the new offence through primary legislation, addressing concerns that criminal offences should not be introduced by any other means. It gives the Government the flexibility to trigger the new offences in the event that the Call for Evidence indicates support for their introduction.

OR:

2. Introducing a requirement on the Secretary of State to issue a public consultation on new criminal offences for economic crime within six months, and legislative proposals within 12 months of the Criminal Finances Bill becoming statute.

**Amendment 166** requires the Government to commit to prioritising law reform for economic crime in the year following the entry into force of the Criminal Finances Bill.

We are concerned that if neither of these approaches is accepted, the Government will not be able to make any serious change to the UK’s current corporate liability regime for several years. That would be a major missed opportunity for much needed reform.

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<sup>2</sup> <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7793>

<sup>3</sup> <https://www.instituteforgovernment.org.uk/publications/legislating-brexit>

## **After Clause 47**

### **Amendment 165, Corporate Probation Order**

A Corporate Probation or Remedial Order would in effect be a supervision order imposed by a Court on a company convicted of a serious offence. The Court can appoint a third party such as an expert or body to supervise the probation period.

Companies that cooperate with law enforcement bodies to the extent that they are offered a Deferred Prosecution Agreement (DPA) and companies convicted under the Corporate Manslaughter Act may have imposed upon them an order to remedy the management systems that allowed for an offence to occur. However, there are currently no powers available to a Court to impose such an order on companies that are convicted of non-manslaughter offences or which have not cooperated with law enforcement bodies sufficiently for a DPA.

The Government has suggested that Serious Crime Prevention Orders (SCPOs) fill this gap adequately. However, SCPOs' serious drawbacks mean they are highly unlikely to be used against companies in the context of financial crime. In particular, they require prosecutors to prove at a separate hearing that a company is likely to reoffend and that such an order would prevent a company committing an offence in the UK. Where the risk relates to potential reoffending overseas, such as in foreign bribery cases, SCPOs would not apply.

The result is that, perversely, companies that cooperate with law enforcement bodies have greater external scrutiny of their corporate governance programmes than companies that do not cooperate. This lack of scrutiny is a missed opportunity to improve corporate governance among convicted companies, but also provides a powerful disincentive for companies to cooperate with enforcement authorities.

Corporate Probation Orders are used in other jurisdictions. The US Sentencing Council for instance has given the courts the power to introduce "*any probationary conditions related to the nature and circumstances of the entire case*" when sentencing companies convicted of criminal offences. Their introduction in the UK could add another significant tool to the armoury of courts and prosecutors in dealing with financial crime and ensure that the discrepancy of treatment for companies that cooperate with law enforcement authorities and those that do not is evened out, creating a more level playing field for business.

## **After Clause 49**

### **Amendment 170, Disqualification order**

#### **Purpose of amendment**

**Amendment 170** is intended to address the very real issue that senior level executives rarely face any consequences when companies that they run engage in criminal activity. The lack of proper accountability for senior executives is a matter of serious public concern both here and in the US.

In the US, despite major corporate fines for wrongdoing, only one senior level executive has ever been prosecuted. The chairman of the US Financial Crisis Inquiry Commission, Phil Angelides, has pointed out how this failure to address the causes of wrong doing 'defies

common sense'.<sup>4</sup> In the UK, corporate fines were up to 80% lower than in the US, and no senior executives were prosecuted or even investigated.

The amendment would allow courts to order disqualification of a Director where a company is either convicted or agrees to a Deferred Prosecution Agreement for either of the two failure to prevent offences currently on, or about to enter statute: Section 7 of the Bribery Act and the failure to prevent tax evasion offence proposed in Part 3 of the Criminal Finances Bill. This would put these offences on a par with competition law offences, where the Court can make a disqualification order without having to go through the Secretary of State.

Removing the Secretary of State from the process for making disqualification orders for these offences would both make their use more efficient and potentially more frequent, and would also remove the potential for political or economic interference. Given that companies or financial institutions engaged in financial crime may have frequent political contact with ministers including the Secretary of State, ensuring that the process of disqualification is well insulated from political considerations is important.

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<sup>4</sup> <https://www.ft.com/content/380a4406-cf4e-11e5-831d-09f7778e7377>