

## Briefing for Second Reading of the Criminal Finances Bill, 9 March 2017

- The Government has acknowledged that the UK's corporate liability regime is not fit for purpose in the 21<sup>st</sup> century.<sup>1</sup>
- 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 needed to ensure that irresponsible companies can be held liable for committing offences, not only omitting to prevent them. It is also needed to ensure that large companies can be held criminally liable for offences in the same way as smaller firms. Regulatory reform in isolation is insufficient to achieve the necessary deterrence.
- Statutory changes to replace the outdated identification doctrine with a regime that reflects both the realities of modern corporations and public expectation of corporate accountability are necessary.

Such reform is essential for the following reasons:

- The Prime Minister has committed to getting *"tough on irresponsible behaviour in big business."* This must include dealing with problems of corporate impunity, detailed below.
- The current corporate liability regime makes prosecuting large companies *"impossibly difficult"*, according to the Law Commission.
- It is important that the majority of businesses that act responsibly are not put at a competitive disadvantage.
- Reform would cement the UK's international reputation as a jurisdiction where the law is applied in a fair and consistent manner, and where business is conducted with integrity and honesty. This reputation is essential for the UK to continue to act as a major financial centre.
- Cracking down on corporate economic crime has the potential to deliver significant savings to UK taxpayers.

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<sup>1</sup> [https://consult.justice.gov.uk/digital-communications/deferred-prosecution-agreements/supporting\\_documents/deferredprosecutionagreementsconsultation.pdf](https://consult.justice.gov.uk/digital-communications/deferred-prosecution-agreements/supporting_documents/deferredprosecutionagreementsconsultation.pdf);

- **Changing the law to make it possible to prosecute British companies responsible for damaging the environment and serious human rights harms overseas in their global operations would help to prevent irresponsible firms harming the reputation of British business abroad.**

## Introduction

This briefing is supported by the following organisations which form part of the BOND Anti-Corruption Group and the Business Integrity Network, and which are all working to ensure that UK companies can be held legally accountable for economic and broader crimes, including those committed across borders: 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 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, exploring other options beyond the failure to prevent model. We believe such changes are essential to ensuring a robust corporate liability regime.

Leaving the UK’s existing corporate liability regime ‘as is’, is not an option. Current laws tie the hands of prosecutors when they face large companies and seriously disadvantage SMEs, which are much more easily prosecuted under these laws. Poor corporate governance is a further result of such laws as companies’ may seek to shield their boards from knowledge of misconduct to avoid prosecution.

There was cross-party support for wider reform during the bill’s passage through the House of Commons. Reforms must address the following issues:

### 1. The need to level the playing field and end impunity

The Prime Minister, the Right Hon Theresa May MP, has promised to deliver “*an economy where everyone plays by the same rules.*” The UK’s current corporate liability regime - which makes the prosecution of large companies “*impossibly difficult*”, according to the Law Commission - is a key impediment to achieving this vision. Current 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;
- Undermines corporate governance by creating perverse incentives to keep boards in the dark about misconduct in order to avoid prosecution;
- Unfairly penalises SMEs which are more easily prosecuted under this test and subsequently bear the brunt of prosecution.

Several major recent scandals have resulted in no prosecutions against large 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 to be brought;

- *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;<sup>2</sup>
- *News Group Newspapers*: in December 2015, the Crown Prosecution Service stated that because of corporate liability laws it could not mount a successful prosecution against the companies in the phone hacking scandal.<sup>3</sup>

## 2. Provide reassurance to trading partners

As the UK seeks to negotiate new trading relationships, it will need a corporate liability regime that is broadly equivalent to its major trading partners. The US has some of the strongest corporate liability laws in the world and the EU's Directives on Human Trafficking and Money Laundering (to which the UK has previously committed to equivalence) include a corporate liability formula which is significantly stronger than the current UK regime.

## 3. Ensure that facilitators of corruption are held to account

The 2016 UK Anti-Corruption Summit committed countries to pursuing and punishing those who facilitate corruption. Failure to ensure our laws are able to hold such facilitators to account, and to proactively enforce such laws, will open the UK to charges of hypocrisy and undermine our reputation as an anti-corruption champion within the international community.

While Unexplained Wealth Orders outlined in the Criminal Finances Bill will make it easier for law enforcement to investigate and act on the wealth of kleptocrats and corrupt officials, it remains the case that companies that facilitate money laundering rarely face prosecution. No bank has been prosecuted in the UK for laundering corrupt wealth from another country. An extension of a failure to prevent offence to money laundering, in conjunction with other necessary reforms to the money laundering regime would significantly enhance the scope for criminal sanctions.

## 4. Reducing the cost to the UK economy of economic crime

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.<sup>4</sup> In May 2016, the Annual Fraud Indicator put the cost of fraud to the UK economy at £193 billion.<sup>5</sup> The cost to the public sector is £37.5 billion with procurement fraud costing £127 billion a year.<sup>6</sup> The National Crime Agency estimates that billions of pounds of suspected proceeds of crime are laundered through the UK every year.<sup>7</sup>

## 5. Rationalising 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 Deferred Prosecution Agreements. Not extending 'failure to prevent' offences to the other economic offences listed in the Crime and Courts Act results in real disparity in the way prosecutors are able to deal with different economic crimes - all of which cause significant damage to the taxpayer.

<sup>2</sup> <https://www.ft.com/content/8c57044e-87c9-11e5-90de-f44762bf9896>

<sup>3</sup> [http://www.cps.gov.uk/news/latest\\_news/no\\_further\\_action\\_to\\_be\\_taken\\_in\\_operations\\_weeting\\_or\\_golding/](http://www.cps.gov.uk/news/latest_news/no_further_action_to_be_taken_in_operations_weeting_or_golding/)

<sup>4</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/561312/HMRC-measuring-tax-gaps-2016.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/561312/HMRC-measuring-tax-gaps-2016.pdf)

<sup>5</sup> <http://www.experian.co.uk/blogs/latest-thinking/fraud-costs-uk-economy-193-billion-year-equating-6000-lost-per-second-every-day/>

<sup>6</sup> <http://www.port.ac.uk/media/contacts-and-departments/icjs/ccfs/Annual-Fraud-Indicator-2016.pdf>

<sup>7</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/468210/UK\\_NRA\\_October\\_2015\\_final\\_web.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/468210/UK_NRA_October_2015_final_web.pdf)

## **6. Further strengthening 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 required under Financial Conduct Authority (FCA) regulations to have effective systems and controls in place to prevent their being used to further financial crime, including money laundering and fraud.<sup>8</sup> They are also already subject to criminal law on the basis of the current 'directing mind' test for the additional economic crime offences that were proposed in amendments to the bill at Report Stage in the House of Commons. Criminal sanctions would properly penalise the irresponsible companies who refuse to meet existing standards.

### **The case for broader corporate liability reform**

The Call for Evidence on Corporate Liability for Economic crime suggests that there are several options for addressing current weaknesses. While a failure to prevent economic crime offence is one option, the paper also asks for views on changing the identification doctrine, introducing US style vicarious liability or extending regulatory reform instead.

Pursuing regulatory reform in isolation will not, in our view, provide the necessary deterrent or enable the UK to impose appropriate sanctions to tackle economic crime. While a failure to prevent offence for economic crime would be much needed and significant improvement to the UK's corporate liability regime, our belief is that this on its own is insufficient. Reform of the identification doctrine through a change in statute is required to enable large companies to be held criminally accountable in the same way as smaller firms. Until large companies can be held to account easily for committing offences as well as omitting to prevent them, the UK's corporate liability regime will remain fundamentally flawed.

### **ENDS**

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<sup>8</sup> See Senior Management, Systems and Controls (SYSC) rule 3.2.6  
<https://www.handbook.fca.org.uk/handbook/SYSC/3/?view=chapter>