Ministry of Justice

Corporate Liability for Economic Crime

Call for evidence

This Call for Evidence begins on 13 January 2017

This Call for Evidence ends on 24 March 2017

Corporate Liability for Economic Crime

Call for evidence

Presented to Parliament
by the Lord Chancellor and Secretary of State for Justice
by Command of Her Majesty

January 2017

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About this call for evidence

To:	This call for evidence invites academics, business, civil society, lawyers and other interested parties across the UK to consider whether there is a case for changes to the regime for corporate criminal liability for economic crime in the United Kingdom.
Duration:	From 13 January 2017 to 24 March 2017
Enquiries (including requests for the paper in an alternative format) to:	Roderick Macauley Ministry of Justice 102 Petty France London SW1H 9AJ Tel: 020 3334 5010 Email: CorpCrimLiabilityCfE@justice.gsi.gov.uk
How to respond:	Please respond on-line by 24 March 2017 at https://consult.justice.gov.uk/digital-communications/corporate-liability-for-economic-crime If you are unable to respond online or experience any difficulties please send your response to: CorpCrimLiabilityCfE@justice.gsi.gov.uk
Response paper:	Publication of a response to this call for evidence at: https://consult.justice.gov.uk/ is expected during summer 2017

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Foreword

Corporate economic crime undermines confidence in business and markets, it causes financial harm to individuals and can destroy businesses, distort competition and hinder growth. Companies may perpetrate economic crime but they are also often the victims. The Government is exploring ways to improve its response to corporate economic crime.

In recent times public trust in business has been dented by the disclosure of fraudulent, dishonest and harmful activity by banks, international organisations and manufacturers at home and abroad. It is important that firms are properly held to account for criminal activity that takes place within them, or by others on their behalf and at their behest. It is equally important to foster and promote economic crime prevention as part of corporate good governance. Good corporate governance is a means to create a business environment of trust, transparency and accountability in order to promote investment, financial stability and sustainable economic growth.

In 2012 the Government consultation on Deferred Prosecution Agreements noted difficulties with the law of corporate criminal liability and that *under the current law, in order to obtain a conviction a prosecutor must show that the "directing mind and will" of the commercial organisation had the necessary fault element or "mens rea" for the offence. However, this is often difficult to prove, especially in increasingly large and more sophisticated modern commercial organisations. While the new offence in connection with the failure of a commercial organisation to prevent bribery under section 7 of the Bribery Act 2010 will help, more needs to be done, especially in relation to other types of economic offending.*[1] The implication is that the "directing mind and will" test potentially undermines the effectiveness of Deferred Prosecution Agreements because offences other than bribery lack a reasonable threat of prosecution.

The recent court approval of Deferred Prosecution Agreements premised on section 7 of the Bribery Act 2010 has brought the issue of corporate criminal liability to the fore again. The "directing mind and will" test otherwise known as the identification doctrine is often readily applicable to economic crimes committed on behalf of or in the name of small companies, but it may present unnecessarily difficult hurdles for prosecutors to overcome if they are to successfully prosecute large modern multi-national businesses. The Government has already taken steps, included in the Criminal Finances Bill currently before Parliament, to apply the failure to prevent model to the facilitation of tax evasion.

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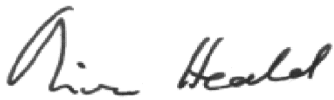
[1] Consultation on a new tool to deal with economic crime committed by commercial organisations: Deferred Prosecution Agreements, paragraph 26, page 8 https://consult.justice.gov.uk/digital-communications/deferred-prosecution-agreements/supporting_documents/deferredprosecution agreementsconsultation.pdf

The issue, therefore, is the potential for reform of the law, in areas of economic crime other than bribery and tax evasion, so as to provide a just and proportionate method of holding companies to account for the criminal wrongdoing of their employees, agents and representatives.

This paper examines whether there is a case for reform of corporate criminal law beyond the measures for bribery and tax evasion corporate criminal liability and sets out options by which this could be done, examining in some detail the corporate failure to prevent option, which has proved to be effective against bribery. It seeks evidence of corporate crime going unpunished because of the directing mind and will test or identification doctrine. It also seeks evidence on the costs and benefits of further reform, against the background of the significant changes that have already been made to tackle misconduct in some sectors. This evidence will inform Government decisions over whether to make further reforms.

Thank you, in advance for your response. I look forward to reading them.



The Right Honourable Sir Oliver Heald QC MP

Minister of State for Justice

Executive summary

Corporate economic crime is serious offending that causes harm to individuals, businesses and the economy at large. It needs to be addressed effectively.

With the exception of the Bribery Act 2010 corporate criminal liability for economic crime is governed by common law rules, i.e. law made by the courts rather than by statute. These rules are known collectively as the "identification" doctrine. This paper examines the development and operation of this doctrine, its limitations as a means of addressing corporate criminal responsibility for economic crime and explores options for possible reform.

Subject to the outcome of this first stage call for evidence, the Government may consult on the detail of a firm proposal for reform.

The identification doctrine attracts criticism. It is regarded by prosecutors, practitioners and legal academics as not being fit for purpose when applied to large modern companies. The Government is concerned to explore fully whether the operation of the doctrine is hindering the effective administration of justice.

Section 7 of the Bribery Act 2010 introduced a new form of corporate criminal liability that focuses on the failure of a company to prevent bribery on its behalf. Under this law a company can be guilty not of a bribery offence itself but of the separate offence of failing to prevent the bribery. A company may be able to avoid prosecution if it can show that, despite the bribery having taken place, it has implemented procedures designed to prevent it. Since its implementation in 2011, section 7 has incentivised companies in all sectors of the economy to assess the bribery risks they face and take steps to mitigate them.

This paper seeks evidence on the extent to which the identification doctrine is deficient as a tool for effective enforcement of the criminal law against large modern companies. It surveys the options for reform of the law, if reform is needed, asks for views as to suitability and the scope that would be most effective, the advantages and disadvantages of adoption and the implications of change, particularly in terms of the costs to businesses associated with the implementation of prevention procedures.

Criminal law enforcement is not the only deterrent to wrongdoing, and operates alongside regulatory enforcement. The Government has recently significantly reformed regulation in the financial services sector and expects this regulation to lead to improvements in conduct, and in particular to strengthened senior management accountability. The paper asks for information and views on the additional benefits of a new form of corporate liability for economic crime considered alongside the existing regulatory regime for the financial sector, and how any friction between criminal law and regulatory enforcement could be mitigated.

Introduction

This call for evidence is concerned with criminal offences designed to punish and prevent economic crimes such as fraud, false accounting and money laundering when committed on behalf or in the name of companies.

Corporate liability

Corporate liability is a term that describes the legal mechanisms by which companies – as separate legal entities distinct from their owners, officers or employees – can be held to account for wrongdoing.

The concept of corporate liability is well established in each of the legal jurisdictions of the United Kingdom.[2] Corporate liability for wrongs perpetrated by a company's employees or agents based on the principles of vicarious liability has been well established in civil law for at least two hundred years. Organisations can be held liable in civil law for damages as a result of financial loss incurred by an individual or a group of individuals resulting from conduct undertaken on behalf of the organisation.

It is also established that organisations may be liable in criminal law in reliance on the principles of strict liability for breaches of a statutory duty embodied in legislation intended to regulate certain sectors of trade and industry, such as licensing laws or the rules providing for health and safety in the workplace.[3]

Except where there is statutory provision, such as the Corporate Manslaughter and Corporate Homicide Act 2007, the attribution of corporate criminal liability for serious mainstream offending is governed by common law rules. Common law in this context is law derived from judgments in individual cases rather than written in statute. Corporate liability for economic crimes, such as fraud and false accounting, perpetrated by employees or others representing the organisation is governed by common law rules known as the identification doctrine. The one exception to the applicability of the common law rules in the area of economic crime is the offence of a corporate failure to prevent bribery at section 7 of the Bribery Act 2010.

This offence was created as a response to evidence that the common law rules on corporate liability and regulatory sanctions were not tackling commercial bribery. Since its implementation in July 2011 section 7 has provided a powerful incentive for the inclusion of bribery prevention procedures as a component of corporate good governance. Its utility as an enforcement tool has been recently demonstrated.[4]

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[2] England and Wales, Scotland and Northern Ireland.

[3] Also under the Companies Act 2006, if a company is default of its statutory duties e.g. to keep a registers of its members, directors or beneficial owners the offence is committed by the company and every officer of the company who is in default.

[4] The two DPAs were agreed between the SFO and Standard Bank and 'XYZ' which can be found at https://www.sfo.gov.uk/cases/sweett-group/,https://www.sfo.gov.uk/cases/standard-bank-plc/. The plea of guilty by Sweett Group can be found at https://www.sfo.gov.uk/2016/07/08/sfo-secures-second-dpa/

Crimes are committed by individuals, who should be held to account in law for their actions. Corporate liability is not an alternative to individual accountability but an addition.

The issue to be addressed

In recent times there has been serious wrongdoing by companies. The media and public focus has been particularly but not exclusively on wrongdoing in the financial services sector. The response of the UK authorities has been to apply both regulatory and criminal law. Companies have been subject to fines[5] and individuals imprisoned.[6] There have been cases in which evidence of wrongdoing was insufficient to sustain a criminal prosecution of a company applying the identification doctrine. There are differing views as to the impact of this.

The identification doctrine has been singled out by some commentators as one of the challenges in bringing successful criminal corporate prosecutions. This doctrine requires prosecutors to prove that those who can be regarded as "the directing mind" of the company knew about, actively condoned or played a part in the offending.

The Government is concerned to establish the extent to which the identification doctrine may be hindering effective criminal law enforcement and to formulate reform proposals if necessary. In so doing it is important to determine how significant any such shortcomings are when taken in the context of wider Government action to tackle misconduct to date.

Wider Government action

Criminal prosecutions are just one of the tools available to provide deterrence and hold individuals to account; in some sectors and for some types of conduct, criminal sanctions sit alongside regulatory enforcement actions and fines.

For example the Competition and Markets Authority promotes open competition among companies for the benefit of consumers. The financial services sector is regulated by the Financial Conduct Authority (FCA) and the Prudential Regulatory Authority (PRA). That regime is designed to promote good governance of regulated financial organisations. The governance of companies more generally, including the duties placed on Directors, is addressed by the Companies Act 2006 and the Financial Reporting Council's Corporate Governance Code.

In the financial services sector reform has already taken place to improve conduct in firms through an increased focus in the regulatory regime on personal accountability for wrongdoing, particularly at senior management level. The Senior Managers and Certification Regime (introduced for deposit takers and PRA regulated investment firms in March 2016) takes steps to ensure that key decision makers at the top of firms can be held accountable if they fail to prevent wrongdoing within their organisation. "Statements of responsibilities" set out what areas of the business each senior manager is responsible

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[5] For example the FCA has imposed fines on banks for foreign exchange misconduct: Citibank N.A. £225,575,000 ($358 million), HSBC Bank Plc £216,363,000 ($343 million), JPMorgan Chase Bank N.A. £222,166,000 ($352 million), The Royal Bank of Scotland Plc £217,000,000 ($344 million) and UBS AG £233,814,000 ($371 million), Barclays £284m.

[6] UBS trader Kweku Adoboli sentenced to seven years for fraud and LIBOR traders and submitters Jonathan James Mathew, Jay Vijay Merchant and Alex Julian Pabon all received prison sentences.

for, and a statutory duty on senior managers enables the regulators to hold them to account if they fail to take reasonable steps to prevent regulatory breaches in these areas. A breach of this duty can result in an unlimited fine, and this incentivises an active, responsible approach to management and the prevention of misconduct within the firm. “Management responsibilities maps” at firm level ensure that all responsibilities are properly allocated across the organisation. There is evidence that the regime has been beneficial already, uncovering and fixing problems with governance that may otherwise have gone undetected. The Bank of England and Financial Services Act 2016 includes provision to enable the regime to be extended to all authorised financial services firms and it is expected that this will happen from 2018.

Where the Government has established a statutory regime for the prosecution of corporate economic crime, alongside the regulatory regimes that are in place to tackle misconduct, this has so far focused on areas where there is evidence of a problem of inadequate corporate supervision over the conduct of their staff, agents and other representatives. Section 7 of the Bribery Act focusses on the use of bribery in the pursuit of business objectives. More recently the Government has consulted on the extension of the Bribery Act corporate failure to prevent model to the facilitation of tax evasion and the Government is legislating[7] to introduce this offence.

The UK Anti-Corruption Plan, published in December 2014, tasked the Ministry of Justice to examine the case for a new offence of a corporate failure to prevent economic crime and the rules on establishing corporate criminal liability more widely. That work was stopped in the summer of 2015 because at that time the Bribery Act failure to prevent model had yet to be tested in an enforcement action and there was little evidence of corporate wrongdoing going unpunished.

The situation has changed. In December 2015, the Serious Fraud Office concluded the first Deferred Prosecution Agreement (DPA)[8] with Standard Bank premised on facts disclosing the commission of the Bribery Act failure to prevent offence. The same month saw the first conviction of a company (Sweett Group) for the same offence. On 11 July this year the High Court sitting at Southwark Crown Court approved the second DPA between the Serious Fraud Office and ‘XYZ Ltd’ premised on facts disclosing conspiracies, substantive offences and an offence under section 7 of the Bribery Act, arising from a number of cases of bribery in order to obtain contracts overseas.

The consultation process

As a result of these developments the then Prime Minister announced, at the time of the Anti-Corruption Summit on 12 May 2016, a consultation to consider the extension of the Bribery Act failure to prevent model offence to a wider range of economic crimes. This paper is published in pursuance of that announcement. It focusses on gathering evidence on the extent of the problem, information on the principal issues involved and views on the case for reform options including the failure to prevent model. It is published for

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[7] Criminal Finances Bill https://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/legislative-scrutiny/parliament-2015/criminal-finances-bill-/

[8] This is an agreement between the prosecution and the company under which a prosecutor would lay but not immediately proceed with criminal charges against the company pending successful compliance with requirements such as financial penalties, reparation for victims, confiscation of the profits of wrongdoing and measures to prevent future offending. See https://www.cps.gov.uk/publications/directors_guidance/dpa_cop.pdf

consideration by the general public but will be of special interest to companies and other corporate forms with legal personality, academics, civil society and the legal profession.

The Government will carefully consider the information gathered by this call for evidence. If the Government determines that a new form of corporate liability for economic crime is required there will be a full consultation on a detailed proposal and draft legislation. An Impact Assessment will accompany the consultation.

Copies of the paper are being sent to:

Association of High Court Masters	Institute of Directors
British Bankers Association	International Chamber of Commerce
British Chambers of Commerce	Law Society
cifas	Magistrates Association
City of London Law Society	National Bench Chairmen's Forum
City of London Police	National Crime Agency
Competition & Market Authority	National Fraud Intelligence Bureau
Confederation of British Industry	Ofcom
Corruption Watch	Ofgem
Council of HM Circuit Judges	OFWAT
Council of HM District Judges (Magistrates' Courts)	Prudential Regulation Authority
The Crown Office Procurator Fiscal Service	Sentencing Council
Crown Prosecution Service	Serious Fraud Office
Federation of Small Business	The Sheriffs' Association
Financial Conduct Authority	Traidcraft
GC100	Transparency International

This list is not meant to be exhaustive or exclusive and responses are welcomed from anyone with an interest in or views on the subject covered by this paper.

The common law rules

Corporate and unincorporated bodies and partnerships

Under the common law it is “corporate bodies” that are capable of committing a crime. This is because companies have usually been created through a legal process of “incorporation”, which affords them a legal identity separate from the individuals who create, own or manage them, resulting in their being considered “legal persons” in their own right. This distinguishes them from most forms of “partnership” and “unincorporated bodies”.[9]

Partnerships are recognised in the common law and in statute and provide a framework in which individual partners engaged in the same profession are able to pool resources and share any liability arising from their activities. Most partnerships do not have separate legal identity from their members and are not considered to be “legal persons” for the purposes of the common law.[10] In Scots law the partnership (or firm) has legal personality separate from that of the individual partners,[11] and can be prosecuted separately from the partners.[12] Unincorporated bodies, which are usually associations representing a body of persons engaged in a particular activity and have no legal identity separate from the individual members, are not considered to be “legal persons” for the purposes of the common law.

The development of the identification doctrine

Having developed as a mechanism of commercial convenience in the Middle Ages,[13] companies quickly assumed a significant role in our economy and society. Consequently, it has long been accepted by the courts that the law should provide a remedy for

9 The term ‘company’ used throughout this consultation document refers to business and financial organisations that may also be accurately described as a corporate body, a legal person, a commercial organisation, financial institution or firm apart from where it would be misleading to do so.

10 Limited Liability Partnerships have legal personality.

11 Section 4(2) of the Partnership Act 1890

12 For example see section 53 of the Criminal Justice and Licensing (Scotland) Act 2010

13 The East India Company created by royal charter in 1600 is widely regarded as the first joint stock company in the England. Limited liability companies came into being through the Joint Stock Companies Act 1856, which was amended and consolidated by the Companies Act of 1862, now the Companies Act 2006. The concept of a company as a legal entity separate from its employees and agents, even where it is very small, was confirmed in the case of Salomon v Salomon [1897] A.C. 22

individuals against the excessive exercise of corporate power[14] and that the activities of companies should be subject to the criminal law.[15]

Since the passing of the Interpretation Act 1889 (now the Act of 1978) the word *person* when used in any criminal legislation is to be interpreted as a reference to a body of persons corporate or unincorporate as well as an individual.[16] For a company to be found guilty of an offence there needs to be a means of attributing the acts and, if required by the offence, the state of mind, of employees or agents in committing the offence to the company. The development of legal mechanisms to achieve this has been slow.

During the nineteenth century the courts came to recognise limited corporate criminal liability for a narrow range of offences that included public nuisance, criminal libel and breach of statutory duty.[17] Although, vicarious liability was accepted in civil law as a basis for holding a company liable for the wrongdoing of its employees or agents, it has not been accepted as the basis of corporate criminal liability in the UK. This contrasts with the position in the United States where the civil law vicarious liability doctrine of *respondeat superiore*[18] has been extended to the criminal law.

At the turn of the twentieth century the courts started to consider corporate liability for offences, such as economic crimes, that require the prosecution to prove criminal intent. The first cases were decided on principles similar to those employed in the earlier breach of statutory duty cases,[19] but no established principles emerged and the law developed slowly and unevenly,[20] until a series of cases in 1944.[21] In these cases the courts established the principle of companies being directly, rather than vicariously, liable for the conduct and state of mind of their employees and agents. Although identification doctrine concepts were not referred to in terms in any of these cases the judgments relied on identification reasoning.

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[14] Lord Denman in Great Northern Railway Co Case (1846) 9 Q.B. 315. "*There can be no effectual means for deterring from an oppressive exercise of power for the purpose of gain, except the remedy by an individual against those who truly commit it, that is the corporation acting by its majority, and there is no principle which places them beyond the reach of the law for such proceedings*".

[15] Per *Turner* J in R. v P&O European Ferries (Dover) Ltd (1991) 93 Cr. App. R. 72, 83 It is entirely proper to "*…impute to corporations social duties including the duty not to offend all relevant parts of the criminal law*".

[16] Schedule 1 to the Interpretation and Legislative Reform (Scotland) Act 2010 is to similar effect in relation to devolved legislation in Scotland.

[17] During the nineteenth the courts found railway companies guilty of offences based on a breach of statutory duty under regulatory statutes, required to regulate the expansion of the railways when harm occurred as result of the conduct of employees or agents. This was not vicarious liability arising from the conduct in question but direct personal strict liability for the breach of statutory duty.

[18] "let the master answer", in this case meaning that an employer is responsible for the actions of employees and agents, performed within the course of their employment or agency.

[19] See for example Mousell Bros Ltd v London and North West Railway Co Ltd [1917] 2 K.B. 836.

[20] See R. v Cory Bros and Co ltd – a failed corporate prosecution for manslaughter.

[21] DPP v Kent & Sussex Contractors Ltd [1944] 1 K.B. 146; R. v ICR Haulage Co Ltd [1944] K.B. 551; (1944) Cr. App. R. 31; Moore v Bresler Ltd [1944] 2 E.R. 515.

The identification doctrine was first described in an appeal to the House of Lords in a civil law case concerning a maritime trading dispute.[22] The court found that the appellant company's managing owner of the vessel was *the directing mind and will of the corporation* by looking at his role in the company and comparing this to a proper reading of the relevant legislation.[23]

The leading case

In the leading case of *Tesco Supermarkets Ltd v Nattrass*,[24] the House of Lords ruled that the attribution of corporate criminal liability for offences requiring proof of criminal intent is governed by a doctrine of general application applied without reference to the legislative context of the offence. It was accepted that corporations acted through living persons and that such a person properly identified would not be acting or speaking for the company but as the company, but only if the person were the *directing mind and will of the company*. In his leading opinion, Lord Diplock took the view that in order to determine the scope of the persons, the acts and state of mind of whom can be attributed to the company, one need only look to the company's memorandum and articles of association[25] i.e. the board of directors, the managing director and possibly other superior officers of the company.[26] The reasoning of the judgement recognises that in many cases the proscribed act or omission will be undertaken by those not at the corporate centre. In those circumstances a criminal conviction of the company requires a person who is properly regarded as a directing mind and will of the company to possess the intent required for a conviction of the company for the offence.

The emphasis on a proper reading of the legislation in determining the attribution of corporate liability returned in the Privy Council case of *Meridian Global Funds Management Asia Ltd v Securities Commission in 1995*.[27] In his leading opinion Lord Hoffman said that the courts should regard the Tesco and Nattrass directing mind test as one attribution rule, which if applied indiscriminately could easily defeat the purpose of the legislature. In appropriate cases it should be abandoned in favour of applying the usual canons of interpretation, taking into account the language of the statutory provision, its

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[22] Lennard's Carrying Co Ltd v Asiatic Petroleum [1915] A.C. 705 HL

[23] section 502 of the Merchant Shipping Act 1894

[24] [1972] A.C. 153, accepted in Scots law in *Transco v HM Advocate 2004 SCCR*

[25] Under the Companies Act 2006 company registration requires: A memorandum of association, which sets out the basic constitution of the company, and articles of association, which provides amongst other things for the appointment of the board, responsibility for policy decisions and general administration of the company and for delegation, for example, of responsibility for the day-to-day running of the company to a managing director.

[26] Lord Diplock in Tesco Supermarkets Ltd v Nattrass *My Lords, a corporation, incorporated under the Companies Act 1948, owes its corporate personality and its powers to its constitution, the memorandum and articles of association. The obvious and the only place to discover by what natural persons its powers are exercisable, is in its constitution … In my view, therefore , the question: "what natural persons are to be treated in law as being the company for the purposes of acts done in the course of its business" … is to be found by identifying those natural persons who by the memorandum and articles of association or as a result of action taken by the directors, or by the company in general meeting pursuant to the articles, are entrusted with the exercise of the powers of the company.*

[27] [1995] 2 A.C. 500, PC

content and policy to determine whose acts (knowledge or state of mind) was to count as the acts or state of mind of the company.[28]

Despite the persuasive reasoning in the Meridian case the Court of Appeal has as recently as 2012 reasserted the primacy of the *Tesco and Nattrass* test.[29]

Criticism of the identification doctrine

Some prosecutors, academics[30] and practising lawyers regard the *Tesco v Nattrass* test as being inadequate as a means of holding companies liable for criminal wrongdoing. Critics argue that it encourages companies to decentralise responsibilities to avoid liability, making it difficult to identify a senior individual who is in charge of a particular operation. The *Tesco v Nattrass* test prevents commercial organisations from being held criminally liable in circumstances where there has been a collective failure at board level but it is not possible to attribute particular failings to specific individuals.

The necessity of proving that the required intent of an offence was possessed by an individual occupying a senior position in the company management structure is not usually a problem for prosecutors when investigating small companies. It is argued, however, that this law makes the successful prosecution of a large modern multinational corporation difficult because many companies will have complex management structures. These have the effect of insulating those identified as the *directing mind and will* of the company, as defined in *Tesco v Nattrass,* from allegations of knowledge of or complicity in the crime.

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[28] Although the *Meridian* reasoning is persuasive for cases that are concerned with the application of statutory provision intended to regulate the operation of certain aspects of trade, transport, manufacturing production, commercial retailing or the financial services sector, its application to modern economic crime offences such as fraud or false accounting is untested and there remains uncertainty over the way it would be applied by the courts to such offences, which are drafted in order to effect as general and wide an application as possible.

[29] R. v St Regis Paper Co Ltd [2012] 1 Cr. App. R. 14. The decision in this case can be conceived as a finding of no justification for modifying the primary rule of attribution upon the application of the Meridian principles.

[30] E.g. Professor Celia Wells: Paper prepared for OECD Anti-Corruption Unit. Working Group on Bribery in International Business transactions Paris October 2000 "Identification is seen as insensitive to the diversity of corporate organisation. Modern corporations are fragmented and decentralized. They do not conform to the company image prevailing at the time of Tesco v Nattrass of command and control."
Ernest Lim University of Hong Kong - Faculty of Law November 28, 2011, *[2013] Journal of Business Law 333* A Critique of Corporate Attribution: *Directing Mind and Will* and Corporate Objectives: *There are at least three problems with the [identification doctrine]. First, this approach seems to unfairly prejudice one-man companies whereas it allows large and diffuse companies, where it is hard to pin down the directing mind and will, to escape criminal liability. Second, there are cases in which the law was intended to apply to companies only (thereby excluding liability on vicarious or agency grounds) but neither the company in its board or shareholders' meeting has authorized the wrongdoing nor can the directing mind and will be identified … The third problem with the identification doctrine … is this: Once the directing mind and will in a one-man company is identified, his intent or acts are automatically attributed to the company; although his acts or intent could be attributed, it begs the question as to why it should be. To reply that this is because he is the directing mind and will is circular*.
J Gobert *Corporate Criminal Liability: four models of fault* Legal Studies (1994) *One of the prime ironies of Nattrass is that it propounds a theory of corporate liability which works best in cases where is needed least and works least in cases where it is needed most.*

The issue to be addressed

Economic crime robs people, organisations and the economy. It is serious offending which needs to be addressed effectively.

Commentators point to recent enforcement actions to illustrate their contention that the identification doctrine can have an adverse impact on enforcement strategies.

It is argued that the common law rules serve to perpetuate an imbalance in enforcement practices. Tom Hayes, the Libor-fixer employed by UBS, was held to account in a criminal court in England but UBS, a large multi-national bank could not be prosecuted in the UK. The SFO did not have sufficient admissible evidence that a person who was identified as a directing mind was party to Hayes's conduct and therefore could not conclude that there was a realistic prospect of conviction.[31] The difficulties associated with the application of the common law rules to offending within large companies may be encouraging prosecutors to focus on wrongdoing on behalf of small companies run by a few people who are readily identified as the *directing minds*. There is no doubt that smaller companies have featured significantly in SFO enforcement actions in recent years.[32]

Commentators suggest that the challenges presented by identification doctrine results in proceedings in other jurisdictions with more flexible law to hold companies that do business in the UK to account, with a consequent undermining of public confidence in our own criminal justice system. The Libor-fixing investigation is again cited as an example. UBS could not be prosecuted in the UK but entered a non-prosecution agreement with the United States Department of Justice as a result of which it paid US$500 million in fines. It then breached the agreement through FOREX misconduct and, on its consequent revocation, pleaded guilty and paid an additional $203 million.[33] The financial services regulators in the UK also imposed a fine of £160 million on UBS in relation to the LIBOR manipulation.

It is further suggested that the identification doctrine may encourage bad corporate culture and practices. Examples cited include the manipulation of meeting minutes which fail to record the identity of those present, in order to conceal the presence of board members; the petering out of communications about known wrongdoing in organisations before they reach board level; and contrived corporate structures designed to insulate the board from evidence of wrongdoing, for example by the creation and use of zero-asset companies to handle negotiation with third party agents or the use of personal emails to discuss business related matters.

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[31] Prosecutors are subject to a duty under the Code for Crown Prosecutors to make sure that prosecutors will proceed with cases in which there is a realistic prospect of conviction, and prosecution is in the public interest.

[32] For example Smith and Ousman Ltd, Mabey & Johnson and Innospec.

[33] Similarly, 6 former employees of Barclays Bank charged in UK for Libor-fixing. Barclays Bank could not be prosecuted in the UK but entered into a non-prosecution agreement with US Department of Justice paying a $452.3 million fine. Ten former bankers at Deutsche and Barclays were charged in the UK for Euribor fixing. Deutsche Bank could not be prosecuted in the UK but entered into a DPA with DoJ and paid fines of $775 million.

Critics of the identification doctrine argue that these challenges increase the risk of extra cost to the taxpayer of criminal investigations. Commentators contrast this with the SFO's recent experience in its successful section 7 Bribery Act cases where clarity on corporate liability facilitated early and decisive conclusions.

However it is important to note that the UK criminal deterrence sits alongside the regulatory regime. For example, the financial services regulatory regime can impose substantial corporate financial sanctions that frequently are higher in quantum than those imposed by the criminal courts.[34] Shareholders and those running companies will usually make a clear connection between the value of a commercial organisation and its reputation. Concerns about reputational damage following enforcement action against a company can be an effective deterrent. As noted in the above discussion, the financial services regulators in the UK impose a fine of £160 million on UBS in relation to the LIBOR manipulation.

Financial penalties against banks and other financial institutions are part of the array of mechanisms that the regulator can bring to bear. In accordance with the experience in financial services Government has emphasised the importance of greater individual senior management accountability as an important means of preventing wrongdoing and as a driver of improved conduct standards. It is important therefore to avoid an unintended reduction in individual accountability.[35] The Government has established a new Senior Managers and Certification Regime (SM & CR) after the Parliamentary Commission on Banking Standards highlighted the difficulty of holding to account those responsible for misconduct in banks.[36] Any additional deterrent arising from extending corporate criminal liability would also have to be considered alongside the SM & CR, given the incentives it introduces on the most senior individuals in a firm to take steps to prevent wrongdoing within it.

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[34] For example UBS & Deutsche Bank fined £160 million and £227 million respectively by the FSA for manipulation of LIBOR; Barclays Bank was fined £284.4 million by the FSA for manipulation of the currency exchange market (FOREX).

[35] As the then Chancellor of the Exchequer explained very clearly: *Of course, boards and top management must live up to their responsibilities – and face the consequences if they don't. But simply ratcheting up ever-larger fines that just penalise shareholders, erode capital reserves and diminish the lending potential of the economy is not, in the end, a long term answer. It also leaves those guilty of misconduct untouched. The public rightly asks why it is that after so many scandals, and such cost to the country, so few individuals have faced punishment in the courts. In any other walk of life those who committed these offences would be in prison. The Governor [of the Bank of England] and I agree: individuals who fraudulently manipulate markets and commit financial crime should be treated like the criminals they are – and they will be. For let us be clear: there is no trade-off between high standards of conduct and competitiveness. Far from it. Implementing the reforms set out in this Review will ensure trust in our markets and strengthen London's global leadership position.* Annual Mansion House speech by Chancellor of the Exchequer, RT Hon George Osborne MP – 10 June 2015.

[36] Under the regime each senior manager must have a statement setting out his or her responsibilities in the firm *while* the firm has to comply with rules requiring it to ensure that key responsibilities are clearly allocated to individual senior managers. The regulators can then take enforcement action against senior managers if they fail to take reasonable steps to ensure that their firm complies with financial services regulatory requirements that apply to the aspects of the firm's business for which the senior manager is responsible.

The market abuse regime, enforced by the FCA, which has been on the statute book since 2000, applies to the public at large, and tackles behaviour that also constitutes serious criminal offences. The Government has also made the manipulation of LIBOR and seven other key benchmarks a criminal offence.

The UK is therefore different from the US, and the evidence that a greater facility for criminal prosecutors to impose fines would present a greater deterrent to corporates based in the UK to tolerate wrongdoing is not straightforward.

The government is interested in hearing evidence as to how further corporate offences on top of the regulatory regimes that exist in different sectors could impact on firms and on the competitiveness of the UK as a placed to do business, and on growth. The government is also interested in hearing views about what lessons for tackling misconduct across the wider economy can be learned from the regulatory approach in the financial sector.

Nonetheless, a criminal sanction generally applies to everyone, and reflects societal norms arising from our collective experience of what we consider to be right and wrong. Criminal law is mandatory for all of us and enshrined in our legal system. As the recent reliance on section 7 of the Bribery Act in the first two DPAs demonstrates, the role of the criminal law is different in character to that of a regulatory regime. Standard Bank PLC, for example, was, at the time of the offending on which the DPA was premised, a regulated financial institution, subject to a requirement to maintain standards in its bribery prevention regime along with other aspects of corporate governance. Liability for a section 7 offence is not necessarily inconsistent with the maintenance of required regulatory standards and vice versa. A number of insurance companies have been fined by the FCA or its predecessor the Financial Services Authority (FSA) for failing to meet required standards relating to bribery prevention procedures. Neither the FSA nor the FCA made allegations of actual conduct on the part of employees or agents that amounted to criminal offences.[37]

Options for reform

The Government is concerned at this stage to assess the evidence of the extent of any problems with identification doctrine and the case for change so as to inform Government decision making on reform of corporate criminal liability in areas of economic crime other than bribery and tax evasion.

Strengthening deterrents to misconduct through regulatory reform in sectors where it is less developed must always be regarded as a possible alternative to the extension of the criminal law.

The Government is therefore seeking views and evidence on the following potential options for reform. These options are not mutually exclusive: new legislation could include multiple options and be accompanied by regulatory reform.

[37] The FCA fined Besso Ltd £315,000 in March 2014 for anti-bribery and corruption systems and controls failings. FCA fined JLT Speciality £1.8 million for their unacceptable approach to bribery and corruption in December 2013. The Financial Services Authority fined Willis £6.895 million for anti-bribery and corruption systems and controls failings in July 2011. FSA fined Aon £5.25 million for anti-bribery and corruption systems and controls failings in January 2009.

Option 1: Amendment of the identification doctrine

The suggestion that the common law rules are the principal difficulty faced by prosecutors when seeking to hold large companies to account for economic crime committed in their name or on their behalf begs the question: is it possible and desirable to overcome the difficulties by legislating to amend the common law rules?

Common law offences are abolished by Acts of Parliament. A recent example is the abolition of the common law offence of bribery by the Bribery Act 2010. This reform is different in nature to legislation designed to amend or replace a judge made rule employed to determine the scope of liability for criminal offences.

The Government is interested to receive views on the advantages and disadvantages of such an approach. Legislation could for example amend the identification doctrine by broadening the scope of those regarded as a directing mind of a company.

Retaining the identification doctrine in any form would perpetuate the notion that a company can commit a criminal offence. It would encourage corporate efforts to limit potential liability through the adoption of evasive internal structures. It would not promote the prevention of economic crime as a component of corporate good governance.

Option 2: Strict (vicarious) liability offence

The creation of a strict liability offence based on the principles of vicarious liability would make the company guilty, through the actions of its employees, representatives or agents, of ***the substantive offence***, without the need to prove any fault element such as knowledge or complicity at the corporate centre.

The principles of vicarious liability are well established in UK civil law. As has already been noted, in the United States corporate criminal liability is governed by vicarious liability expressed as the doctrine of *respondeat superior*e (“let the master answer”), which is generally regarded as an effective and just means of attributing liability.

If the solution is to create such a new statutory form of vicarious liability, one needs to consider whether it should be subject to a due diligence type defence if it is to be effective as a means of incentivising economic crime prevention as part of corporate good governance.

Option 3: Strict (direct) liability offence

A strict direct corporate liability offence would focus on the responsibility of a company to make sure that offences are not committed in its name or on its behalf. A company would be convicted without the need for proof of any fault element, not of the substantive offence, as with vicarious liability, but of a separate offence akin to a breach of statutory duty to ensure that economic crime is not used in its name or on its behalf.

By focussing on a failure to exercise supervision over the conduct of those pursuing a company’s business objectives, this model may more accurately target the real nature of corporate culpability.

As with the strict vicarious liability option it is necessary to consider whether direct strict liability should be subject to a due diligence type defence. The Government's view is that if it is to be effective as a means of incentivising economic crime prevention as part of corporate good governance such a defence is required.

This combination of a strict direct liability offence and a due diligence type defence is the model that is employed at section 7 of the Bribery Act, where it is entitled failure to prevent liability. This model is discussed in detail in the next section.

In this model the due diligence type defence is expressed in terms of adequate procedures in place to prevent the predicate offence occurring. The defence carry the legal burden of proving that the defence applies, albeit to the lower civil standard.

Option 4: Failure to prevent as an element of the offence

In this option the concept of a failure on the part of those managing the company to prevent the occurrence of the relevant offending is an element of the offence. It is for the prosecution to prove not only that the predicate offence occurred but also that it occurred as a result of a management failure, manifest either as negligent conduct or as systemic inadequacies in the mechanisms that the company relies on to prevent the relevant predicate offences occurring.

In effect this model takes the principles of option 3 but places on the prosecution the burden of proving that the company had not taken adequate steps to prevent the unlawful conduct occurring rather than placing the burden on the defence to prove that the company had done so.

Option 5: Investigate the possibility of regulatory reform on a sector by sector basis

As noted above, there has been significant reform in the regulation of the financial services industry in order to deter misconduct through strengthening individual accountability, particularly at senior manager level. There is the potential for lessons to be learned from the experience of strengthening the regime for financial services which may be applicable more broadly.

Assessment of the impact of reform

In assessing the suitability of any reform proposals, should the case for change be made out, the Government will need to consider any additional costs against the anticipated benefits of more efficient application of the criminal law and improved corporate good governance. Costs will include those arising from the need for companies to understand the new law and any associated guidance, to make adjustments to corporate governance, to assess the risk of economic crime and to implement measures across their operations to mitigate them. It will also have to consider the additional benefits over existing deterrents and to assess the overall benefits and risks to the economy of making any change.

Questions

Question 1: Do you consider the existing criminal and regulatory framework in the UK provides sufficient deterrent to corporate misconduct?

Question 2: Do you consider the identification doctrine inhibits holding companies to account for economic crimes committed in their name or on their behalf?

Question 3: Can you provide evidence or examples of the identification doctrine preventing a corporate prosecution?

Question 4: Do you consider that any deficiencies in the identification doctrine can be remedied effectively by legislative or non-legislative means other than the creation of a new offence (Option 1)?

Question 5: If you consider that the deficiencies in the identification doctrine dictate the creation of a new corporate liability offence which of options 2, 3, 4 or 5 do you believe provides the best solution?

Question 6: Do you have views on the costs or benefits of introducing any of the options, including possible impacts on competitiveness and growth?

Question 7: Do you consider that introduction of a new corporate offence could have an impact on individual accountability?

Question 8: Do you believe new regulatory approaches could offer an alternative approach, in particular can recent reforms in the financial sector provide lessons for regulation in other sectors?

Question 9: Are there examples of corporate criminal conduct where a purely regulatory response would not be appropriate?

The Bribery Act model of a corporate failure to prevent

The proposals for the reform of the criminal law of bribery, developed at the Law Commission,[38] addressed the problem of bribery committed for the benefit of companies. Change was driven by the need to provide an effective enforcement alternative to the existing common law rules of corporate liability, in order to be able to address bribery by or on behalf of UK companies.

The reform project was an opportunity to provide an incentive for companies to assess the bribery risks that they face and put in place procedures to mitigate those risks. Section 7 of the Bribery Act 2010[39] introduced a new form of corporate criminal strict liability for bribery coupled with a due diligence defence.

Under section 7, if an employee or agent of a company uses bribery for a business purpose the company is guilty, not of the substantive bribery offence but of the offence of failing to prevent the bribery. The prosecution does not have to secure a conviction of a substantive bribery offence to prosecute under section 7, but it does have to prove to the criminal standard that the offence was committed.

The adequate procedures defence

If a defendant company had in place procedures that, if followed, are adequate to prevent persons associated with it from committing bribery, it is entitled to a full defence.[40]

This adequate procedures defence is designed to focus the use of criminal sanctions on cases where the offence has occurred as a result of a failure of prevention procedures. Where a company has put risk based adequate procedures in place to prevent offending it would be unjust to sanction the organisation for wrongdoing that manifestly and deliberately flouts those procedures.

In HMRC's consultation document Tackling tax evasion: *legislation and guidance for a corporate offence of failure to prevent the criminal facilitation* of tax evasion the defence to a charge of failure to prevent the facilitation of tax evasion is formulated slightly differently

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[38] Reforming Bribery https://www.gov.uk/government/publications/reforming-bribery

[39] Failure of commercial organisations to prevent bribery
(1) A relevant commercial organisation ("C") is guilty of an offence under this section if a person ("A") associated with C bribes another person intending—
(a) to obtain or retain business for C, or
(b) to obtain or retain an advantage in the conduct of business for C.
(2) But it is a defence for C to prove that C had in place adequate procedures designed to prevent persons associated with C from undertaking such conduct.
(3) For the purposes of this section, A bribes another person if, and only if, A—
(a) is, or would be, guilty of an offence under section 1 or 6 (whether or not A has been prosecuted for such an offence) …

[40] Although the defence shifts a burden of proof to the defendant, in any case that proceeds to trial on this issue the prosecution will find it necessary to lead evidence supporting their contention that the organisation's bribery prevention procedures are not adequate. The operation of the defence has no impact on any culpability associated with the commission of the predicate offence.

to the section 7 Bribery Act defence. It will be a defence, for example, to show that the "relevant body" had in place prevention procedures that were reasonable in the circumstances to expect the body to have, or that in the circumstances it was not reasonable to expect the body to have prevention procedures.

Should the case for reform be made and the failure to prevent model be considered the best option for reform, the formulation of a defence appropriate for economic crimes other than bribery and the facilitation of tax evasion and the extent to which it would have similar policy benefits will need to be carefully considered. A defence may not necessarily take the same form as section 7 of the Bribery Act or the proposed defence to a failure to prevent the facilitation of tax evasion.

The impact of section 7 Bribery Act

In the five years since its commencement section 7 of the Bribery Act has provided a significant incentive for companies to make proportionate bribery prevention part of corporate good governance and encouraged the private sector to play its part in the fight against corruption.

The introduction of section 7 generated concerns that the section and the Ministry of Justice guidance on the Act would involve additional costs for businesses. It was anticipated that the burden would be felt most by small and medium sized enterprises.[41]

Industry led promotional work and awareness raising by the Ministry of Justice and agencies such as the Financial Conduct Authority, the City of London Police, the Serious Fraud Office and the Crown Prosecution Service, afforded commercial organisations opportunities to gain a good understanding of the new form of liability, the role of the defence and the Ministry of Justice guidance.

The Bribery Act is recognised internationally as a leading legislative model for dealing with commercial bribery alongside the United States' Foreign Corrupt Practices Act.

Failure to prevent as a reform option

In the event that the Government decides, after considering all the available evidence, that reform is required, the failure to prevent model as enacted at section 7 Bribery Act 2010 has some clear advantages. It would be readily applicable to offending by large and small organisations. In addition, it is likely to be a means of providing an incentive to companies to include the prevention of economic crime as an integral part of corporate governance and, should it afford a more realistic threat of prosecution, it might enhance the effectiveness of DPAs as an alternative to criminal prosecution.

The focus of a new failure to prevent offence for economic crime would be the commission of offences by employees, agents and of representatives that is linked to furtherance of the business objectives of the company in question. It should not be used

[41] The MoJ and BIS jointly commissioned research in 2014 into the impact of the Bribery Act among exporting SME's. The findings of a telephone survey of 500 exporting SMEs showed that levels of awareness of the Act were high but that there was a need to enhance awareness of the MoJ guidance. The survey results suggested that the Act was neither impeding exports nor imposing disproportionate burdens on SMEs.

to hold companies criminally liable for offences which have no connection to the company; in other words where the perpetrator employee or agent is on a *frolic of his, or her, own*.[42]

If a new corporate failure to prevent economic crime offence proves to be the best option for reform, the scope of the relevant predicate offending will need to be considered. In these circumstances the Government's starting position is that the offence should initially apply to a short list of the most common serious economic crime offences, which could be added to if necessary by secondary legislation.[43] This list could comprise:

- the common law offence of conspiracy to defraud;
- the offences at section 1 of the Fraud Act 2006;
- the offence of false accounting at section 17 of the Theft Act 1968;
- the money laundering offences at section 327 to 333 of the Proceeds of Crime Act 2002.

Consideration would also need to be given to whether any new failure to prevent liability should accrue from secondary participation (aiding & abetting etc.) in the predicate offending and inchoate conduct (statutory conspiracy, attempt and assisting and encouraging).

Question 10: Should you consider reform of the law necessary do you believe that there is a case for introducing a corporate failure to prevent economic crime offence based on the section 7 of the Bribery Act model?

Question 11: If your answer to question 10 is in the affirmative, would the list of offences listed above, coupled with a facility to add to the list by secondary legislation, be appropriate for an initial scope of the new offence? Are there any other offences that you think should be included within the scope of any new offence?

Question 12: Do you consider that the adoption of the failure to prevent model for economic crimes would require businesses to put in place additional measures to adjust for the existence of a new criminal offence?

Question 13: Do you consider that the adoption of these measures would result in improved corporate conduct?

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[42] A phrase used in reference to claims in tort law based on vicarious liability. "The master is only liable where the servant is acting in the course of his employment. If he was going out of his way, against his master's implied commands, when driving on his master's business, he will make his master liable; but if he was going on a frolic of his own, without being at all on his master's business, the master will not be liable." Parke B in *Joel v Morison* [1834] EWHC KB J39

[43] Additional predicate offences could be drawn from Schedule 17 of the Crime and Courts Act 2013, which lists offences eligible for disposal by way of a Deferred Prosecution Agreement.

Deferred Prosecution Agreements (DPAs)

DPAs between prosecutors and companies were introduced in 2014 as a fair and transparent alternative to a criminal prosecution for corporate crime. Every DPA must be judicially examined to make sure that it is in the public interest, and that the terms are fair and reasonable and approved in open court. A company that breaches the terms of a DPA risks being prosecuted for the initial offence. The effectiveness of the DPA as an alternative disposal is dependent on there being a realistic threat of prosecution, without which companies will be less willing to cooperate with the authorities.[44] The first two DPAs[45] were premised, at least in part, on the alleged commission of the section 7 Bribery Act offence. This lends weight to the suggestion that the failure to prevent model would offer a more realistic threat of a successful prosecution than a case built on the application of the identification doctrine.

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[44] David Green CB QC, Director of the Serious Fraud Office, at the Cambridge Symposium on Economic Crime 2015, Jesus College, Cambridge *There is, I suggest, one more step necessary to make DPAs mainstream. That involves moving away from the identification principle of corporate criminal liability in English law and embracing something closer to vicarious liability, as in the USA. Until that is done, a corporate might conclude that if the prosecution of a company is so difficult under our law, why should they agree to a DPA? On a broader front, if the public interest, in terms of public confidence, demands more prosecutions of corporates, then such change is surely necessary.*

[45] https://www.sfo.gov.uk/2015/11/30/sfo-agrees-first-uk-dpa-with-standard-bank/; https://www.sfo.gov.uk/2016/07/08/sfo-secures-second-dpa/

Extraterritorial jurisdiction

Extraterritorial jurisdiction is the legal term to describe the ability of our courts to try cases that are based on facts that occurred overseas. For example the commission of bribery offences on behalf of "commercial organisations" anywhere in the world falls within the scope of the Bribery Act corporate failure to prevent liability.

The Bribery Act jurisdictional provision is an exception to the Government's policy that criminal offences are best dealt with by the criminal justice system of the country in which they occur. The policy recognises that it is the local community that has been wronged and the evidence is most likely to be found in the country where the conduct took place. The UK is committed to help other countries to prosecute offences that take place within their territory or within their jurisdiction, including the extradition of UK nationals.

On occasion it is necessary to assume extraterritorial jurisdiction over offences, typically when committed by UK nationals, in order to serve a domestic policy objective or fulfil international obligations and where there is a clear link between the offending and the United Kingdom (this last condition will typically be satisfied by the nationality criteria).

Corporate criminal liability is always founded upon the commission of offences by individuals. But that does not mean necessarily that in order to assume extraterritorial jurisdiction for corporate liability the courts also require such jurisdiction over offending overseas by individuals. The Bribery Act removes the qualifying criteria for extraterritorial jurisdiction for the purposes of the failure to prevent liability so as to provide for non-UK nationals committing the predicate offence overseas, a common occurrence.

The extent to which extraterritorial jurisdiction would be necessary and to which the current policy criteria will be met by any new form of liability will need careful consideration.

Question 14: Do you consider that it would be appropriate for any new form of corporate liability to have extraterritorial reach? Do you have views on the practical implications of such an approach for businesses?

Guidance

The Bribery Act requires the Secretary of State to publish guidance to assist businesses in deciding what procedures they could implement to prevent bribery. Following a consultation the Ministry of Justice published *Guidance about procedures which relevant commercial organisations can put in place to prevent persons associated with them from bribing (section 9 of the Bribery Act 2010)* on the 31 March 2011, three months before the commencement of the Act.

The Government has consulted on the provision of guidance on the proposed new offence of a failure to prevent the facilitation of tax evasion, which is based on the Bribery Act failure to prevent model. The Government considers that in light of the Bribery Act experience, there would be support for Government guidance for businesses on the approach to the prevention of economic crime.

Corporate criminal liability reform and the regulated financial services sector

If reform were justified, any new basis of corporate criminal liability for economic crime would need to be implemented in a way that was compatible with the regulatory framework in the financial service sector. The co-existence of criminal law enforcement regimes, including the application of the Bribery Act failure to prevent liability and its adequate procedures defence, and the FSMA regulatory regime does not currently involve significant conflict. The scope for overlap is currently limited. The Government considers that it is important to ensure that any extension to corporate criminal liability does not impede the effectiveness of the financial services regulatory regime.

There is a risk that an increased likelihood of criminal investigations and prosecutions would reduce willingness of firms to cooperate with the regulators, to accept regulatory failings or to institute remedial action. There is a further risk of delay incurred in FCA and PRA regulatory proceedings while a criminal investigation is undertaken.

If the failure to prevent model proves to be the way forward the relationship between the adequacy of prevention procedures for the purposes of the defence to that charge and the relevant regulatory requirements will require careful consideration. It will be vital to make sure that firms and entities subject to regulation and prosecution are not able to play off one system against the other to the detriment of effective enforcement or action. Equally it will be important to avoid duplication and unnecessary burdens.

While the SM & CR has already started to have beneficial effects, it has only been in operation for banks for seven months and has not yet been applied to the whole financial services industry. When considering the suitability of a new form of corporate criminal liability intended to run alongside the regulatory regime in the financial services sector it will be necessary to take account of the lessons learnt from, and the future expansion of, the SM & CR regime.

Question 15: Is a new form of corporate liability justified alongside the financial services regulatory regime? If so, how could the risk of friction between the operation of the two regimes be mitigated?

Question 16: What do you think is the correct relationship between existing compliance requirements in the financial services sector and the assessment of prevention procedures for the purposes of a defence to a criminal charge?

Questionnaire

Question 1: Do you consider the existing criminal and regulatory framework in the UK provides sufficient deterrent to corporate misconduct?

Question 2: Do you consider the identification doctrine inhibits holding companies to account for economic crimes committed in their name or on their behalf?

Question 3: Can you provide evidence or examples of the identification doctrine preventing a corporate prosecution?

Question 4: Do you consider that any deficiencies in the identification doctrine can be remedied effectively by legislative or non-legislative means other than the creation of a new offence?

Question 5: If you consider that the deficiencies in the identification doctrine dictate the creation of a new corporate liability offence which of options 2, 3, 4 or 5 do you believe provides the best solution?

Question 6: Do you have views on the costs or benefits of introducing any of the options, including possible impacts on competitiveness and growth?

Question 7: Do you consider that introduction of a new corporate offence could have an impact on individual accountability?

Question 8: Do you believe new regulatory approaches could offer an alternative approach, in particular can recent reforms in the financial sector provide lessons for regulation in other sectors?

Question 9: Are there examples of corporate criminal conduct where a purely regulatory response would not be appropriate?

Question 10: Should you consider reform of the law necessary do you believe that there is a case for introducing a corporate failure to prevent economic crime offence based on the section 7 of the Bribery Act model?

Question 11: If your answer to question 10 is in the affirmative, would the list of offences listed on page 22, coupled with a facility to add to the list by secondary legislation, be appropriate for an initial scope of the new offence? Are there any other offences that you think should be included within the scope of any new offence?

Question 12: Do you consider that the adoption of the failure to prevent model for economic crimes would require businesses to put in place additional measures to adjust for the existence of a new criminal offence?

Question 13: Do you consider that the adoption of these measures would result in improved corporate conduct?

Question 14: Do you consider that it would be appropriate for any new form of corporate liability to have extraterritorial reach? Do you have views on the practical implications of such an approach for businesses?

Question 15: Is a new form of corporate liability justified alongside the financial services regulatory regime. If so, how could the risk of friction between the operation of the two regimes be mitigated?

Question 16: What do you think is the correct relationship between existing compliance requirements in the financial services sector and the assessment of prevention procedures for the purposes of a defence to a criminal charge?

Thank you for participating in this call for evidence.

About you

Please use this section to tell us about yourself

Full name	
Job title or capacity in which you are responding to this consultation exercise (e.g. member of the public etc.)	
Date	
Company name/organisation (if applicable):	
Address	
Postcode	
If you would like us to acknowledge receipt of your response, please tick this box	☐ (please tick box)
Address to which the acknowledgement should be sent, if different from above	

If you are a representative of a group, please tell us the name of the group and give a summary of the people or organisations that you represent.

Contact details/How to respond

Please respond on-line by 24 March 2017 at https://consult.justice.gov.uk/digital-communications/corporate-liability-for-economic-crime

If you are unable to respond online or experience any difficulties please send your response to:

CorpCrimLiabilityCfE@justice.gsi.gov.uk

Complaints or comments

If you have any complaints or comments about the call for evidence you should contact:

Roderick Macauley
Ministry of Justice
Criminal & Civil Law Policy
3.22 3rd Floor
102 Petty France
London SW1H 9AJ

Tel: 020 3334 5010

Email: CorpCrimLiabilityCfE@justice.gsi.gov.uk

Representative groups

Representative groups are asked to give a summary of the people and organisations they represent when they respond.

Confidentiality

Information provided in response to this Call for Evidence, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Ministry.

The Ministry will process your personal data in accordance with the DPA and in the majority of circumstances, this will mean that your personal data will not be disclosed to third parties.

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The principles that Government departments and other public bodies should adopt for engaging stakeholders when developing policy and legislation are set out in the consultation principles.

https://www.gov.uk/government/publications/consultation-principles-guidance

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