BACFI RESPONSE TO MINISTRY OF JUSTICE CONSULTATION

Corporate Liability for Economic Crime: Call for Evidence

A response from the Bar Association for Commerce Finance and Industry

INTRODUCTION

Founded in 1965, the Bar Association for Commerce, Finance and Industry ("BACFI") represents the interests of employed barristers working in commerce, finance and industry. BACFIs members include barristers employed in commercial organisations and law firms, employed by the government legal services, and those working through their own consultancy practices.

BACFI is keen to play its part as a representative organisation in helping shape the development of the Bar of England and Wales, by bringing forward the views of its members. BACFI actively supports the objective of an independent and high-quality bar, accessible to all.

RESPONSE

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

No. The existing system has proved difficult to apply to companies due to issues around proving the involvement of the "directing mind and will" of the company in criminality.

Criminal action against individuals and regulatory action, for example against financial services companies or employees and individuals, has been considerably more frequent and has provided a more effective deterrent than criminal action against companies.

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

Yes. There have been a very limited number of criminal cases undertaken against companies, and the majority of these have been against Small or Medium sized enterprises (SMEs) – largely due to the fact that it is simpler to show the involvement of a board member in criminality in a small organisation, and very difficult to do so when considering larger multi-national businesses. This means that SMEs face a disproportionate risk of prosecution. A further issue that should be considered here is whether prosecuting companies serves any additional purpose over and above regulatory intervention?

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

No. Such material should be available from law enforcement and regulators.

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?

No. Broadening the definition of who is the directing mind of a company or altering the identification doctrine would mean that this definition would apply to all criminal offences – such a significant widening of the applicability of the criminal law would be disproportionate and lead to a significant increase in the burden on companies to comply with the law, with no guarantee that it would either incentivise compliance or deter crime. Any such proposed broadening should be examined in detail by the Law Commission and could only be put into effect through legislation.

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?

Option 3 follows the same format as the UK Bribery Act section 7 offence, which has led to a number of successful prosecutions and settlements with both large and small companies. As such if this model is used for economic crime or a small number of fraud offences, with an adequate procedures defence, it has the best prospect of being an effective deterrent to companies committing economic crimes.

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

Any option which brings companies within the ambit of a criminal law or which increases the regulatory burden on companies will mean that new compliance measures will need to be funded and set up. As such all of the proposed options will increase the cost of corporate compliance, and may led to a competitive disadvantage if such burdens are not faced by other companies in other jurisdictions.

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

Possibly. If a new corporate offence is coupled with a defence of adequate or reasonable procedures, then companies will need to fund and set up such procedures and are therefore more likely to monitor the activities of individuals. This in turn may lead to more action being taken against individuals who breach these policies and procedures or who breach the criminal law.

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?

Yes. As mentioned in answer to question 2 a major issue that needs to be considered is whether prosecuting companies serves any additional purpose over and above additional regulatory supervision and regulatory intervention? Regulatory oversight can be less damaging than criminal intervention and can also prove to be an effective deterrent. The recent reforms in the financial sector have yet to be fully assessed in terms of their effectiveness and impact, but they could provide a useful blueprint for further regulatory reform. A further issue is whether regulatory liability is sufficiently punitive for criminal conduct and whether regulation is possible for all companies, particularly those that are currently unregulated.

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

Yes. The central issue here is to decide what activities companies should be held criminally liable for and what activities only require a regulatory response. A purely regulatory response is unlikely to be appropriate for serious crimes, where there have been numerous victims or significant harm.

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?

Yes. As mentioned in answer to question 5, option 3 follows the same format as the UK Bribery Act section 7 offence, which has led to a number of successful prosecutions and settlements with both large and small companies. As such if this model is used for economic crime or a small number of fraud offences, with an adequate procedures defence, it has the best prospect of being an effective deterrent to companies committing economic crimes. Any such criminal liability should only be imposed if a company has benefited or was intended to benefit from the crime and that the individuals involved were acting for or on behalf of the company.

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?

Possibly. Any new liability for companies needs to be based on evidence that companies would be able to deter the actions of individuals or "associated persons", and should be held liable for that particular crime if they fail to do so. It is unclear if any such research has been conducted into the list of offences on page 22.

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?

If the business is not in the financial services sector, or does not have them already, it will need to put in place measures to prevent financial crime.

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

Possibly. Section 7 of the UK Bribery Act led to policies and procedures being created or improved to prevent bribery, which in turn it is hoped has led companies to monitor the conduct of their employees and agents, thus improving their corporate conduct. If option 3 is adopted, then it is hoped that the failure to prevent economic crime offence and the defence of adequate prevention procedures would have a similar effect.

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?

Yes. Extra territorial reach is essential for offences such as fraud, that can have an international dimension, and particularly when companies will be operating internationally also.

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?

Corporate criminal prosecutions and regulatory interventions operate alongside each other currently and in other jurisdictions also. Any anticipated "friction" can and should be dealt with under the Prosecutors Convention or another Memorandum of Understanding.

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?

The compliance requirements in the financial services sector apply only to the financial services sector. Nevertheless they will bear similarities to any adequate procedures as set out under any new legislation. The latter should be high level principles, applicable to all companies, with the onus placed upon them to assess their risks and to mitigate them. These principles will need to be flexible, not overly proscriptive and not overly costly or burdensome.

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