Client Update
UK Government Launches Call for Evidence on Expanding Corporate Liability for Economic Crime

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OVERVIEW

On 13 January, the UK Government took a step towards significant reform of the business crime landscape by issuing a formal 'call for evidence' in relation to corporate liability for economic crimes such as fraud, false accounting and money laundering. While only the initial step – the next stage will involve a full consultation on a detailed proposal and draft legislation – it potentially heralds a new era of increased corporate exposure to prosecution.

Any changes that are enacted are broadly likely to take the form of corporate offences similar to section 7 of the Bribery Act 2010 (failure to prevent bribery by a person associated with the company) and section 40 of the Criminal Finances Bill, which is currently being reviewed by Parliament (failure to prevent the facilitation of tax evasion by a person associated with the company).

CURRENT STATE OF CORPORATE CRIMINAL LIABILITY

Except in a limited number of specific cases which are principally provided for by legislation (such as section 7 of the Bribery Act), companies can only be held criminally liable under English law if it can be proven that the 'directing mind and will' of the company knew about, actively condoned or was involved in the criminal conduct. 'Directing mind and will' has usually been interpreted to mean a natural person at or close to board level, *i.e.*, a director, senior officer or other person who exercises autonomous control over the company's management functions by reason of their role or delegated authority. This so-called 'attribution' test has been criticised for making it almost impossible to hold companies, and in particular large corporations, responsible for the wrongdoing of their employees, as it requires clear evidence that top-level management was involved in the misconduct.

OPTIONS FOR REFORM

The paper envisages that corporate liability will be reformed in relation to the most common of the serious economic crime offences, which could later be supplemented by secondary legislation if necessary:

- the common law offence of conspiracy to defraud;
- fraud by false representation, failing to disclose information and abuse of position (sections 2 to 4 of the Fraud Act 2006);
- false accounting (section 17 of the Theft Act 1968); and
- money laundering offences (sections 327 to 333 of the Proceeds of Crime Act 2002).

Five possible methods of reform are proposed:

- widening the definition of the 'directing mind and will' of a company through legislation;
- introducing strict vicarious liability, which would make a company automatically guilty of the offences committed by its employees, agents and representatives in the course of their employment (probably subject to a defence of having adequate procedures designed to prevent such wrongdoing);
- introducing strict direct liability, which would make a company guilty of a separate 'failure to prevent' offence where one of its employees, agents or representatives had committed an offence (likely also subject to an adequate procedures defence);
- formulating an alternative 'failure to prevent' offence which instead places the burden on the prosecution to prove that the company had not taken adequate steps to prevent the wrongdoing; and
- implementing regulatory reform on a sector-by-sector basis, rather than reform of the criminal law.

The paper seeks views as to whether reform is needed to deter and hold to account corporate misconduct, the most effective means of reform, and the benefits and costs of each option. In addition, questions are raised as to whether any new laws should have extraterritorial effect and how they should coexist with the regulatory regime in the financial services sector.

ANALYSIS

Reform of corporate criminal liability has previously stalled following pronouncements by politicians that measures would be taken. The paper indicates that it is now being taken seriously and reform is likely to proceed. The option most likely to be selected appears to be one modelled on section 7 of the Bribery Act with a 'failure to prevent' strict liability offence together with a defence of adequate procedures. Regardless of which option is adopted, compliance with the new laws will impose a significant (and ongoing) work and cost burden on companies, as was the case when the Bribery Act was introduced. In fraud and money laundering investigations brought by the Serious Fraud Office, it will be more difficult for companies to avoid liability, which is likely to result in an increased number of deferred prosecution agreements and prosecutions.

It remains to be seen how any new laws will fit into the existing fraud and money laundering regimes. In particular, the UK already has a complex framework of anti-money laundering legislation and it is possible that, in practice, a new corporate offence may have a limited impact. Given the very wide range of frauds that can take place, and the fact that it is frequently the companies themselves that are the victims of fraud by their employees, clear guidance on the applicability of a corporate offence will be needed.

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Please do not hesitate to contact us with any questions.