Response to the Call for Evidence on Economic Crime: CORE Coalition

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CORE is the UK civil society coalition on corporate accountability. We work with our partner organisations to advance the protection of human rights and the environment with regard to the global operations of UK companies, by promoting a stronger regulatory framework, higher standards of conduct, compliance with the law, and improved access to remedy for those harmed by the activities of UK companies.

CORE welcomes the opportunity to respond to this call for evidence.

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

No. The UK appears (the absence of published data makes it difficult to determine corporate prosecution rates) to lag behind other major financial centres in prosecuting corporate wrongdoing.

From 2010 to 2014, 1309 companies were prosecuted in the United States.[1] Corporate criminal penalties in the U.S. increased year-on-year from around $1 billion in 2005 to over $9 billion in 2015.[2] Criminal penalties for money laundering were handed down to 19 companies through guilty pleas between 2001 and 2011,[3] while nine banks have received criminal penalties through Deferred Prosecution Agreements (DPAs) for specific money laundering offences between 2004 and 2017.[4] In the same period, 97 companies received DPAs or Non Prosecution Agreements (NPAs) from fraud sections of federal and district justice departments in the U.S.

In the Netherlands, around 1000 companies are convicted every year and around 2000 receive out of court settlements.[5] In Switzerland, there were two convictions of legal persons for money laundering in 2014 and in 2016, and nine cases under criminal investigation.[6]

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. The Law Commission has said that the identification doctrine '…can make it impossibly difficult for prosecutors to find some companies guilty of serious crimes, especially large companies with devolved business structures….[and] it gives a perverse incentive for companies to operate with devolved structures that insulate directors (or equivalent person) to a certain extent from knowledge of what their employees or managers are doing when that knowledge might involve awareness of offences being committed for the benefit of the company.'[7]

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

The examples given below are intended to illustrate a wider problem with the identification doctrine and should not be read as a comprehensive list. For additional examples, see submissions to the call for evidence from Corruption Watch UK and Traidcraft.

[1] http://trac.syr.edu/tracreports/crim/411/
[2] http://www.brandonlgarrett.com/blog/
[3] http://lib.law.virginia.edu/Garrett/plea_agreements/home.php
[4] http://lib.law.virginia.edu/Garrett/prosecution_agreements/taxonomy/term/170
[5] http://www.oecd.org/daf/anti-bribery/Netherlands-Phase-3-Written-Follow-Up-Report-ENG.pdf
[6] http://www.fatf-gafi.org/media/fatf/content/images/mer-switzerland-2016.pdf
[7] http://www.lawcom.gov.uk/wp-content/uploads/2015/06/cp195_Criminal_Liability_consultation.pdf

- Economic offences

LIBOR/EURIBOR: despite claims by individuals prosecuted under conspiracy to defraud laws that their actions were condoned and encouraged by their employers - Barclays, UBS, and Deutsche Bank - the Serious Fraud Office (SFO) has not charged any of the employers concerned.

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.

- Other offences

On 11 December 2015, the Crown Prosecution Service (CPS) announced that no further action would be taken against News Group Newspapers in relation to potential charges of corporate liability for phone hacking and perverting the course of justice, noting that, 'The present state of the law means it is especially difficult to establish criminal liability against companies with complex or diffuse management structures.'[8]

The CPS considered whether security firm G4S should be prosecuted for corporate manslaughter over the death of Jimmy Mubenga on a deportation flight to Angola in October 2010. In its conclusion that there was insufficient evidence to prosecute G4S, the CPS noted that to prove corporate manslaughter at common law would require evidence capable of establishing beyond reasonable doubt that a 'controlling mind' in the corporation – such as the chief executive officer – was personally guilty of manslaughter by gross negligence and that a prosecution under the 2007 Act would require proof to the criminal standard that the way in which G4S's activities were managed or organised was a cause of death and amounted to a gross breach of a duty of care towards the deceased. Additionally, this offence would only be made out if it could also be proved that the way in which G4S's activities were managed or organised by its senior management was a substantial element in the gross breach.[9]

This indicates a need to examine the corporate liability regime as a whole, beyond economic offences.

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. It is difficult to see how prosecutors could have confidence in the Courts adopting a different approach to corporate prosecutions without legislative reform.

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8 http://www.cps.gov.uk/news/latest_news/no_further_action_to_be_taken_in_operations_weeting_or_golding/

9 http://blog.cps.gov.uk/2014/03/death-of-jimmy-mubenga-charging-decisions-following-inquest.html

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?

The introduction of vicarious liability (option 2) would remove any doubt about corporate liability and provide prosecutors with the necessary flexibility to secure prosecutions.

An alternative, less far-reaching approach would be option 3 (strict liability with a due diligence defence as per the Bribery Act), in addition to option 1.

Enabling companies to be held to account for substantive offending would:

- Create a level playing field between large and small companies. Currently within a statute such as the Bribery Act, SMEs are more liable to prosecution under Sections 1 and 6 (the substantive offences) while larger companies will mainly be able to be held to account under the Section 7, failure to prevent offence.

- Failure to prevent offences, while an essential tool for prosecutors, are regarded by the courts as 'lesser offences' and likely to incur lower fines. The effect of this is that larger companies are likely to face lower fines as a proportion of their revenue than small and medium firms who can be held to account for the more serious 'substantive' offences.

- Failure to prevent offences can inhibit senior level executives being held to account for organizational failings; steps should be taken to mitigate this if the failure to prevent model is to be extended.

Option 4 imposes a significantly higher hurdle on prosecutors by requiring them to prove that the company did not have in place adequate procedures, and as such is not appropriate. Companies themselves hold all the evidence on their procedures and it is right that the burden should be on them to prove that through an adequate procedures defence.

We do not support option 5.

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

The greatest potential benefit of a more effective corporate liability regime would be improved corporate conduct and an associated increase in public trust in business. There is also the potential to provide very significant savings to the public purse: the Annual Fraud Indicator puts the cost of fraud to the UK economy at £193 billion. The cost to the public sector is £37.5 billion, with procurement fraud costing £127 billion a year.[10] The National Crime Agency estimates that billions of pounds of suspected proceeds of crime are laundered through the UK every year.

[10] http://www.bbc.co.uk/news/uk-36379546

Changes to the corporate liability regime particularly with regard to economic crime are likely to assist the UK in achieving the equivalence that it needs in the context of Brexit with financial centres in the U.S. and EU.

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

While individual accountability, particularly at senior level is recognized as a key deterrent factor in preventing corporate economic crime, it is not a substitute for corporate accountability before the law. Instead, individual accountability should be seen as an essential element of a holistic, complementary prevention strategy.

A potential shortcoming of the 'failure to prevent' model is that it can lead to no senior level individual being held to account for the failings. A new corporate offence of failure to prevent should therefore be accompanied by measures to ensure individual senior managers' accountability. This could be achieved by:

- extending the Senior Managers Regime beyond the financial regulated sector;
- creating a new individual offence of negligently failing to prevent the commission of an offence by the corporate (as proposed by the Law Commission in 2010);
- creating a means for courts to be able to order Director's Disqualification in circumstances where a company is convicted of failure to prevent an offence.

Our view is that directors of companies convicted of serious offences and/or regulatory breaches should be subject to disqualification proceedings.

We do not believe that the abolition of the identification doctrine would have an impact on individual liability.

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?

No. The current regulatory approach has proven ineffective in tackling corporate malpractice and preventing repeated malpractice by the same firms.

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

It seems odd to suggest that a 'purely regulatory approach' could be an appropriate response to criminal conduct. Criminal conduct by its very nature is of a different order of seriousness to a regulatory breach, and should be dealt with through prosecution. Beyond serious economic crime, we are concerned that other serious corporate misconduct is going unpunished. This should be examined as part of the follow up to this call for evidence.

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?

There is a clear case for introducing a corporate failure to prevent economic crime offence based on the section 7 model. This would create parity and consistency for enforcement authorities dealing with economic crime. The Deferred Prosecution Agreement regime applies to a full range of economic crimes; however, other economic crimes outwith the Bribery Act do not include a failure to prevent offence, and are consequently more difficult to prosecute. To incentivise companies to come forward and self-report wrongdoing in order to be eligible for a DPA, there must be a realistic prospect of conviction.

The failure to prevent offence:

- Addresses a significant part of corporate offending and addresses criminality from the useful perspective of corporate culture and corporate failing.

- Is easier to prove than substantive offending enabling swifter investigations and resolutions;.

- Helps the UK achieve equivalence with EU Directives which require that companies are held legally liable where there is a lack of supervision or control.

- The adequate procedures defence encourages good corporate governance and incentivizes companies to comply with the law.

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?

The facility to add to the list by secondary legislation is an appropriate mechanism. We believe that there may be other serious crimes beyond economic crime that it would be appropriate to add to the list and that this should be examined in greater detail as part of the follow up to this call for evidence.

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?

Responsible businesses should already have in place procedures to prevent bribery. They will also have to have in place procedures to prevent tax evasion, in time for the commencement of the new offence of failure to prevent tax evasion that will be created by the passage of the Criminal Finances bill.

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

Yes.

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. The global nature of business means it is essential for corporate liability to have extra-territorial reach.

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?

See response to Questions 8.

It would be desirable that in the course of meeting compliance requirements, companies are putting in place procedures to prevent criminal offences occurring. Compliance requirements that do not fulfil this purpose are at risk of being reduced to box-ticking exercises that do not result in changes to practice. Government should clarify what, if any, are the differences between 'adequate' procedures as specified by the Bribery Act and 'reasonable procedures' as specified in the new failure to prevent facilitation of tax evasion offence.

ENDS.