Corporate Liability for Economic Crime

Call for Evidence

RESPONSE FROM SIMMONS & SIMMONS LLP

Introduction

1. Simmons & Simmons is an international law firm, based in London and with offices throughout Europe, the Middle East, and Asia. Our Crime, Fraud & Investigations group is ranked in Band 1 for Financial Crime by Chambers and Band 1 for Corporate Crime by Legal 500, and is also rated as one of the world’s top 30 investigations practices by Global Investigations Review. Given those credentials, and having taken soundings from a number of our corporate clients, we welcome the opportunity to contribute to the Government’s Call for Evidence on Corporate Liability for Economic Crime.

2. We recognise that businesses have an important role to play in combatting economic crime. This includes adopting good corporate governance practices to inhibit and prevent criminal activity, and assisting the authorities through detecting and reporting it. These goals are in the interests of business, not just the State – in many cases businesses are the victims of economic crime, or used as unwitting conduits for it, rather than seeking to gain from it.

3. We acknowledge that the public’s confidence in business, and in the justice system is vital; and that companies ought to be held accountable for egregious misconduct. The overwhelming majority of businesses, and businesspeople, will support effective measures to combat economic crime.

4. In summary, our view on the suggestions in the Call for Evidence is:

   (A) There are already extensive regimes, both criminal and regulatory, to hold both individuals and corporates to account for business misconduct.

   (B) Changes already made to the law since 2007 have addressed those areas where there has been evidence of wrongdoing going unpunished.

   (C) At present, we are not persuaded that there is evidence that the criminal aspect of corporate liability requires further reform.

   (D) Any reform needs to be targeted and effective, and to be reasonable and proportionate in its expectations of business.

   (E) That will involve assessing the factual evidence to back up specific proposals, in relation to specific offences.

   (F) If the ‘failure to prevent’ model is to be extended, we have a number of suggestions which we believe would assist.
Introduction

5. The identification doctrine allows a company to be convicted of a criminal offence only where it was committed at the direction of those at the head of the company. The doctrine does not enable companies to be held criminally liable for the crimes of individuals not acting at the behest of the company’s leadership, though legislation does allow that for certain specific offences – not only section 7 of the Bribery Act, but also laws on corporate manslaughter, environmental obligations, and the new offence in relation to facilitating tax evasion. In addition, new offences following the financial crisis, such as the benchmarking offences, whilst not removing the identification principle, have forced businesses active in that sector to address this particular form of misconduct.

6. In terms of enforcement, we have now seen three deferred prosecution agreements, with the prospect of more to follow. There has been one conviction under section 7 of the Bribery Act in England and a Civil Recovery Order imposed for a breach of the same legislation in Scotland. A number of investigations are ongoing under the Bribery Act and there is considerable activity aimed at corporate misconduct in regulatory and civil contexts.

7. Alongside the criminal route for addressing corporate misconduct, the financial services sector is heavily regulated, with a new regime for individual accountability which, it is hoped, will improve corporate culture and conduct. The sanctions available to the regulators are highly punitive. In the non-regulated environment the civil courts and other regulators are active in dealing with corporate misconduct.

8. While in theory the concept of a single test for corporate criminal liability can seem attractive, we believe there are dangers in adopting a ‘one size fits all’ approach in an area as complex and wide-ranging as economic crime. Law reform over the past 20 years or so has resulted in different approaches, tailored to the specific criminal conduct at hand. Against that backdrop, we are not persuaded that there is sufficient justification for the wholesale reform of corporate criminal liability in the UK at this time.

9. In our view, if there is to be reform in this area, it must:

(A) Be targeted to address clearly identified risks or inadequacies in the current legal and regulatory framework, supported by evidence of the types and extent of the wrongdoing in question;

(B) Be effective in reducing the level of offending through prevention, providing a more rigorous framework for prosecution and deterrence, again supported by evidence that there are solid grounds to believe that the reform will have the intended results; and

(C) Introduce reasonable and proportionate expectations on companies, taking into account existing measures for addressing misconduct by corporates and senior management and the risks faced by individual businesses.

10. Those principles have informed our detailed responses to the questions posed by the Government, which are set out below.
Question 1: Do you consider the existing criminal and regulatory framework in the UK provides sufficient deterrent to corporate misconduct?

11. We consider that the existing criminal and regulatory framework in the UK does provide sufficient deterrent to corporate misconduct. The current regime has extensive measures to address a wide range of activity. This includes:

(A) General corporate criminal liability, through the identification principle;

(B) Legislation of particular relevance for corporations in relation to economic crime and other serious offences;¹

(C) Individual criminal liability for economic crime offences;²

(D) Extensive financial services regulation, including the FCA Rules and the Senior Managers and Certification Regime (“SMCR”);

(E) Criminal offences under the Financial Services and Markets Act 2000 and Part 7 of the Financial Services Act 2012, as well as a number of offences under the Companies Act 2006; and

(F) Civil offences for corporate and individual market abuse under the Market Abuse Regulation (EU Regulation 596/2014).

12. This framework does not operate in isolation. Other key measures which support and/or complement it include:

(A) Various means of redress in the civil courts, such as asset recovery and damages claims, including for fraud, misrepresentation and negligence, and for regulatory breaches such as cartel infringements;

(B) Civil enforcement of financial sanctions and competition law breaches;³

(C) Company reporting and audit requirements;

(D) The directors’ disqualification regime;

(E) Regulatory regimes applicable to professional advisers, including those administered by the Solicitors’ Regulation Authority and the Financial Reporting Council;

(F) Investigation and enforcement powers of international organisations (e.g. the World Bank); and

¹ Such measures include, for example, the Corporate Manslaughter and Corporate Homicide Act 2007; section 7 of the Bribery Act 2010; various EU Regulations on financial sanctions; regulation 45 of the Money Laundering Regulations 2007; the Modern Slavery Act 2015; and the Criminal Finances Bill which, when passed, will introduce a new corporate offence of failure to prevent the facilitation of tax evasion (the “Tax Evasion Offence”). There is also provision for strict or vicarious liability in respect of particular Health and Safety and environmental offences.

² Such offences include conspiracy to defraud; fraud; theft; false accounting; money laundering; bribery; insider dealing; and the cartel offence.

(G) Standards, guidelines and corporate governance codes published by industry bodies and Trade Associations.

13. We believe that, together, these measures support the aim of deterring corporate misconduct by:

(A) Promoting accountability and deterring individual misconduct. Economic crimes are, ultimately, the acts of individuals. Individuals who commit crimes of any sort are most likely to be deterred from doing so by the risk that they themselves will be caught, prosecuted and convicted.

(B) Allowing for prosecution where a company’s leadership is complicit in criminal offending, including where it sets out to commit crimes as part of the company’s business.

(C) Offering a range of avenues through which redress for misconduct can be sought. In many cases, the alternatives to criminal prosecution are more flexible, efficient and cost effective, and can result in financial penalties that are as severe as those available on conviction.

(D) Facilitating the prevention and enforcement of economic crime by encouraging transparency and good corporate governance.

14. In circumstances where the individuals actually responsible for a crime are convicted and the company has been subject to regulatory action for any failures in oversight or control, the claiming of a corporate scalp may be a largely symbolic aim.

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

15. We are aware of concerns that (i) the identification principle makes it difficult to prosecute companies, particularly large ones, for wrongdoing by employees or agents where the company’s ‘directing mind and will’ was not involved, and (ii) companies themselves cannot be prosecuted for ‘consent and connivance’ offences where senior management may have been, or should have been, aware of criminal wrongdoing, but chose not to act.

16. However, four points should be borne in mind:

(A) Legislation for specific offences has significantly reduced the obstacles to prosecution in situations where a specific need to do so has been identified: for example, the Corporate Manslaughter and Corporate Homicide Act 2007, and the Bribery Act 2010.4

(B) The doctrine does not inhibit the prosecution of the individuals actually responsible for criminal offending.

(C) It does not prevent companies from being held to account in other ways for misconduct within their business, including via regulatory or civil action, nor

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4 The Corporate Manslaughter and Corporate Homicide Act 2007 followed the failure of attempted prosecutions over deaths caused by company activities (e.g. the Herald of Free Enterprise disaster, or the rail crashes at Ladbroke Grove or Hatfield); the failure of the attempted prosecution of BAe Systems over the Al Yamamah contract with Saudi Arabia was one of the triggers for the Bribery Act 2010.
does it protect them from associated media, public, or where appropriate Parliamentary scrutiny.

(D) Care should be taken before assuming that a company ought to be held liable for acts which it did not instruct and to which it did not consent. Criminalising a company, because of an isolated act of a subordinate employee, would impose the burden of any sanctions on the whole business – and hence in effect on innocent employees and investors, as well as senior management who were not involved in the crime.

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

17. We referred above to the steps already taken to address issues which have arisen as a result of the identification doctrine in the context of specific offences and we noted the difficulties with applying a single standard in determining corporate criminal liability for all offences. In light of those points, it is not clear to us that the areas in which the identification doctrine has proved to be a weakness in the past remain in effect.

18. We are not aware of any recent attempts to prosecute companies for criminal wrongdoing (including in respect of fraud or money laundering), where a prosecution failed due to an inability to show that information about that wrongdoing had reached board level. In respect of the Libor cases (where frustration has been expressed at the inability to prosecute the employers of culpable individuals), it is worth noting that Parliament did not see fit to create an offence of strict liability for the benchmarking offences set out in section 91 of the Financial Services Act 2012.

19. It may be that enforcement agencies will be able to provide evidence of such occasions. Interestingly, though, it appears that following its investigation into Solar Energy Savings Limited and other companies, the SFO has decided to charge a number of individuals, including former directors who would have constituted the corporate directing mind and will, but has not seen the need to bring corporate prosecutions as well.

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)?

20. On the evidence presently available, it is unclear (i) to what extent the identification doctrine remains a problem in practice, and (ii) whether legislation to amend the doctrine to allow for a broader range of individuals to be regarded as a company’s directing mind would adequately address any remaining challenges.

21. Should the Government seek to pursue Option 1, it will be necessary for it to consider further, in consultation with the Law Commission and law enforcement agencies:

(A) The underlying policy drivers for holding corporate entities directly criminally liable for economic crime offences;

(B) How far the directing mind principle should be extended, to ensure the right balance is struck between making corporates responsible for offences committed in the conduct of their business, and introducing a disproportionate
level of direct corporate liability for the actions of a potentially vast range of individuals;

(C) Whether any proposed new formulation of the doctrine will in fact:

(1) introduce greater certainty and clarity to corporate criminal liability;

(2) offer increased flexibility in holding companies to account;

(3) increase corporate and senior management accountability;

(4) act as an effective deterrent, leading to a real reduction in economic crime; and

(D) The consistency of any proposed legislative change with the fundamental tenets of English criminal law.

22. We see a real practical obstacle to Option 1, given the enormous variance in internal structures between different companies. That will make it difficult, if not impossible, to articulate an alternative which gives businesses certainty as to whose acts or omissions could give rise to corporate liability. That almost inevitable lack of clarity is unlikely to be beneficial to businesses or corporate culture.

23. In any event, we agree with the Government’s view that Option 1 (however articulated) would be unlikely to promote the prevention of economic crime as a component of corporate governance.

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?

24. Although we do not believe there is sufficient evidence that weaknesses in the identification doctrine continue to inhibit the holding of companies to account for economic (and other serious) crime, should the Government form a different view we consider that any reform must:

(A) Be targeted to address clearly identified risks or inadequacies in the current legal and regulatory framework, supported by evidence of the types and extent of the wrongdoing in question;

(B) Be effective in reducing the level of offending through prevention, providing a more rigorous framework for prosecution and deterrence, again supported by evidence that there are solid grounds to believe that the reform will have the intended effects; and

(C) Introduce reasonable and proportionate expectations on companies, taking into account existing measures for addressing misconduct by corporates and senior management and the risks faced by individual businesses.

25. These principles inform our views on the proposed options, and we set out our analysis in detail below. In summary, we do not consider that any of Options 2, 3, 4 or 5 offers a suitable remedy to the perceived deficiencies in the identification doctrine, although they may offer a means of incentivising economic crime prevention as part of good corporate governance, which we understand to be the Government’s
key aim. Rather, our view is that any weaknesses in the identification doctrine should be addressed by specific reforms.

**Option 2 (vicarious liability)**

26. Although it is the model followed in the United States, we do not consider that Option 2 would provide a suitable framework for corporate liability in the UK, because:

(A) imposing broad criminal liability on UK corporates, without more, for the actions of employees, representatives or agents is likely to have an unfair and disproportionate effect (e.g. a company could be found criminally liable for the actions of an employee acting in deliberate contravention of its policies and procedures), and could cause significant harm to business;

(B) the overall structure of regulation and enforcement in the US is very different from the UK;

(C) the vicarious liability model is not followed in many of the other markets in which UK businesses trade and/or with which they compete (where corporate criminal liability may not be recognised at all); and

(D) critically, it is not clear that this model has led to lower levels of economic crime in the US – and as noted above, we believe that any change must be effective.

**Options 3 and 4 (failure to prevent)**

27. We assume that the Government intends that Options 3 and 4, if adopted, would be implemented in the way envisaged at pages 21–22 of the Call for Evidence, applying the model at section 7 of the Bribery Act 2010 to the underlying economic crime offences on the short list at page 22.

28. Whilst we recognise that it may be difficult to identify offences to which the proposed failure to prevent offence should apply, no clear rationale for the selection of the offences on the short list is given in the Call for Evidence. In our view, any selection made should be well-reasoned, and informed by evidence both of the extent and characteristics of the problem being addressed, and the likely effectiveness of the solution being proposed.

29. In any event, we do not consider that the offences identified are the most appropriate targets for the proposed failure to prevent offence, or that the introduction of such an offence would materially increase the detection and/or prevention of those crimes. Specifically:

(A) It is not necessarily appropriate to take the approach from the Bribery Act and apply it to all other economic crime offences. “Economic crime” covers a diverse range of activities which require a nuanced approach. For example, bribery covers relatively easily identifiable behaviour to which specific business areas and activities are particularly vulnerable. By contrast, fraud covers almost any dishonest acquisitive act or omission. Different crimes raise different challenges, and call for different solutions.

(B) No evidence has been put forward of the economic crimes identified by the Government being regularly perpetrated on behalf of corporates, or for their
benefit. Indeed in many cases, a corporate is likely to be a victim of, or unwitting conduit for, fraud and money laundering.

(C) Similarly, it has not been demonstrated that the current legal and regulatory framework does not, on the whole, adequately address both corporate and individual participation in those economic crimes.

(D) The proposed offence could have a disproportionate effect: companies might be convicted on the basis of remote or indirect conduct, such as a conspiracy to defraud between an associated person and a third party, or a failure to prevent money laundering or false accounting resulting from other criminal conduct for which there would be no question of the company being liable. Were the offence also to accrue from accessory participation in economic crimes and/or inchoate conduct, the risk of a disproportionate outcome would be even greater.

(E) It is not clear (for the reasons explained in answer to Question 12 below) that, at least for most large and/or multi-national corporations, the proposed offence would materially increase the systems and controls already in place to prevent the economic crimes identified.

30. For those reasons, we are not persuaded that an offence of corporate failure to prevent economic crime as currently suggested by the Government would achieve its intended aims.

31. Nonetheless, in the event that the Government considers that an offence of failure to prevent economic crime modelled on Options 3 or 4 should be introduced in the UK, we make the following observations:

(A) Any defendant is entitled to a presumption of innocence. That, if anything, applies even more strongly where (as with a failure to prevent offence) a defendant faces conviction not for its own acts or omissions, but those of an “associated person”, particularly where that “associated person” may be far removed from the heart of the company. For those reasons, we believe that it should be incumbent on the prosecution to make the case that the defendant failed to prevent the underlying offence – in other words, Option 4 is strongly to be preferred over Option 3.

(B) An offence should only be made out where an economic crime is committed by an “associated person” with the intention of obtaining or retaining business or a business advantage for the company. Without this qualification, a company may face liability for criminality occurring outside of the scope of its usual business, or where it is the intended victim.

(C) There must be a clear link between the underlying economic crime offence and the company’s business in the UK. In addition, the question of whether extraterritorial application of the failure to prevent offence is necessary and appropriate should be considered for each underlying offence individually. For example, both failure to prevent bribery and the Tax Evasion Offence have a broad territorial reach because those offences were targeted to address, inter alia, bribery of foreign public officials and the facilitation of overseas tax evasion by UK companies.
(D) The language in the Bribery Act “adequate procedures” defence raises the unfair risk that any procedure will be deemed inadequately designed if the underlying economic crime which it intended to prevent nonetheless took place. We suggest that any new offence should provide that a company would not be liable if it has reasonable and proportionate procedures designed to prevent the offence in question, or if it was reasonable and proportionate, in the circumstances, for it not to have any such procedures in place.

(E) The defence, however formulated, should give explicit and robust recognition to a company’s compliance with existing regulatory requirements, particularly in the regulated financial sector. If a company in that sector is charged with failure to prevent a particular economic crime, it should be a defence for it to show that it complies with any applicable rules or regulations that include measures to prevent that crime.

(F) Businesses deserve clarity as to the standard of procedures that they are expected to implement in response to a failure to prevent offence. Any new legislation should contain provision for sector-specific guidance to be developed by the Ministry of Justice in collaboration with appropriate organisations in currently unregulated sectors. If a company has acted consistently with that guidance, it should have the benefit of the defence. In the absence of recognised guidance, a company should still be free to point to its compliance with other more general guidance, produced by the Ministry of Justice or others, as evidence of the adequacy of its procedures.

**Option 5 (regulatory reform)**

32. As regards Option 5:

(A) The Money Laundering Regulations already apply not only to the financial sector but in many other fields where AML measures are called for, including non-contentious legal work and the provision of accountancy services. In that regard, we note the Government’s plans to establish a new Office for Professional Body Anti-Money Laundering Supervision (OPBAS), which will set out how professional body AML supervisors should comply with their obligations in the updated Money Laundering Regulations (expected to come into force by 30 June 2017), and use its enforcement powers to ensure that they do so.

(B) In the financial services sector, there are already extensive provisions for both corporate and personal accountability. Given the recent introduction of the SMCR, which introduces both individual and corporate obligations, we suggest that the Government revisit the position once there has been enough experience of that regime to make a meaningful assessment of its successes and shortcomings.

(C) So far as other sectors are concerned, there may be scope for measures to be implemented through existing sectoral regulators, who understand the issues which arise in their respective sectors and will be able to work collaboratively with firms operating within them. Where there are clearly identified risks or inadequacies within a specific sector, this approach will be preferable to a wholesale change to the criminal law.
However, it cannot be assumed that what works for the financial services sector will be equally suitable elsewhere. Financial services regulators govern financial activity, and so economic crimes fall naturally within their remit. Regulators in other sectors have entirely different purposes. Adding financial crime to their remits may involve each of them setting up new units, recruiting specialist expertise, and embarking on a new field of activity, completely removed from their core regulatory mission.

33. As set out above, we believe that any new corporate liability offence or sector based regulation should be targeted, effective, and reasonable and proportionate. That means that the Government should consider, and seek views on, measures in relation to specific forms of offending that are likely to have a material impact in preventing the offences in question. For the reasons given above, it is not clear that Options 3, 4, or 5, as currently envisaged, would necessarily achieve those aims.

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

34. In order to assess the likely impact of any reform on UK business, there needs first to be a specific proposal, in order to gather evidence of its likely practicality, effectiveness, and proportionality.

35. It is possible that the reform of the identification doctrine (Option 1) would encourage a greater focus by senior officers on the threat of economic crime and a corporation’s role in combatting it. However, we have seen little evidence that corporations do not appreciate the significance of economic crime and its threat to their business. For those in the financial services sector, as we have said, the regulatory framework already requires ownership of financial crime risk. It is also worth noting that section 6 of the Financial Services and Market Act 2000 makes the reduction of financial crime (defined as offences of fraud, dishonesty or involving the proceeds of crime) one of the statutory objectives of the FCA. This plays out in the FCA Handbook and, in particular, the SYSC and the associated guidance in the FCA’s Financial Crime Guide.

36. For the reasons given in response to Question 5 above, we consider that Option 2 would risk imposing an unfair and disproportionate burden on companies which could be expected to have a negative impact on competitiveness and growth, particularly given that the vicarious liability model is not widely adopted outside of the US.

37. If implemented, Options 3 and 4, and to some extent Option 5, could see an increased compliance burden on some UK companies, which may have an impact on competitiveness and growth. We consider this in further detail in our answer to Question 12 below.

38. It is also worth noting that any significant legislative change in this area would coincide, and may even conflict with, the work being undertaken by companies to adapt to the significant regulatory change that will follow the UK’s exit from the European Union.

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

39. The existing criminal and regulatory framework already ensures individual accountability for economic crime. For that reason, the proposed new corporate
offence would be unlikely to increase materially the number of individual prosecutions.

40. However, with the advent of any new corporate offence, it will be important to ensure that the value of prosecuting those who commit the economic crimes on which the corporate liability is based is not overlooked. In all but exceptional cases, corporates should be prosecuted alongside, and not instead of, the culpable individuals.

41. Indeed, there is a risk that, if only the corporate is prosecuted, the individuals most likely to suffer adverse consequences are directors and senior managers who were not responsible for the crime.

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?

42. As we commented above (Question 1), criminal prosecution is only one of a range of avenues by which redress for corporate misconduct may be sought. Generally speaking, regulatory routes are quicker, more flexible, and (being funded by regulated entities) more cost effective for the tax payer. They can be just as powerful in terms of their ability to impose financial penalties where appropriate.

43. As noted above (Question 5) there will almost certainly be valuable lessons from the implementation of the SMCR, which will become apparent in due course. However, it cannot be assumed that what works for the financial sector would necessarily be appropriate in other sectors. We envisage that any new regime would be costly to create, police, and enforce. It is of course commendable for the UK to be at the forefront of tackling economic crime, but the reality is that new regulatory regimes would, at this point, not reflect the regimes in other countries, thus creating a degree of legal/regulatory dissonance.

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

44. This will depend on the gravity and extent of the conduct, and the level of corporate culpability. It should be borne in mind that at the highest levels of corporate culpability, the company will already be criminally liable under the identification doctrine. It is also relevant to note that separate regimes exist to hold companies criminally to account for cases of death or serious physical injury, as well as for environmental breaches; and that a wide range of measures operate outside the criminal law.

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?

45. For the reasons set out above, we are not yet persuaded that an offence of corporate failure to prevent economic crime would achieve the Government’s intended aims.

46. Nonetheless, in our comments on Question 5 we set out a number of developments on that model which we believe would be necessary, were the Government to introduce such an offence – see paragraph 31 above.
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?

47. In our comments on Question 5, we describe the factors which we believe should be considered before introducing any new corporate liability offence and make a number of observations on the specific offences to which the proposed failure to prevent offence may be intended to apply – see paragraph 24 above.

48. We consider that any provision for the scope of such an offence to be broadened by secondary legislation should also take account of the factors identified, to ensure that any changes in the law are targeted, effective, reasonable and proportionate.

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?

49. The impact on corporate compliance of the section 7 offence of failure to prevent bribery is well recognised and, in many ways, required a shift in corporate culture and behaviour.

50. However, at least insofar as large, sophisticated multi-national corporations are concerned, we consider that it is unlikely that a failure to prevent economic crime offence would have anything like as significant an effect. This is because most companies of that nature (and in particular those in the financial services sector) already have extensive financial crime controls embedded within their businesses as a consequence of their regulatory obligations, industry or public expectation, and/or to protect themselves from being targets of economic crime.

51. Nonetheless, whilst a new failure to prevent economic crime offence is unlikely to require those companies to make wholesale changes to their internal arrangements, they would be expected to revisit their existing procedures, and restructure or refocus them with that offence in mind. It is worth noting that this exercise is already underway in preparation for the Tax Evasion Offence.

52. It is likely that all businesses will, to some extent, already have procedures to prevent economic crime – for example, in the form of internal audit, HR processes and contractual arrangements with third parties. However, given their reduced exposure to regulation, public pressure or financial crime risk, the impact of the proposed offence on SMEs is likely to be much greater, and may introduce a significant and even disproportionate compliance burden on them. It is worth noting in that regard that it is those smaller companies that are more likely to be caught by the identification doctrine, and can be prosecuted with relative ease.

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

53. For the reasons identified above, it is unlikely that significant additional measures would be required to be adopted by large, sophisticated multi-national corporations. For that reason, whilst they may bring structurally disparate procedures more closely together, any measures adopted are unlikely to have a material impact on corporate conduct.
54. It should be recognised that since the coming into force of the Bribery Act in 2011, the compliance environment has developed significantly, evidenced by an increasing trend towards self-policing in the private sector, promoting good governance and encouraging lawful compliant practices.

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?

55. As noted in answer to Question 5 above, the question of whether an extraterritorial application is necessary and appropriate should be considered for each underlying offence individually. The Bribery Act – which was introduced as part of the UK’s commitment to the OECD Convention against bribery of foreign public officials – was specifically targeted to address, \textit{inter alia}, offending overseas, including in jurisdictions which lacked their own effective anti-bribery measures. In that context it was reasonable to apply UK standards of behaviour, unless local law could be shown expressly to permit what had been done.

56. It is not clear that the same rationale would be present in respect of the economic crime offences considered in the Call for Evidence. In particular, offences such as fraud and false accounting closely reflect UK conceptions of the relevant conduct and may not have the same resonance with overseas approaches. Accordingly, the broad brush approach of the Bribery Act to extra-territoriality is far less likely to be practicable in targeting those offences.

57. If a new form of corporate criminal liability is introduced, it will need to make clear what level of nexus with the UK is required for the offence to be engaged. It seems to us that English law can properly address acts which take place in, or are directed from, the UK; and acts which cause a direct effect in the UK.\footnote{We do not address here the complex area of inchoate or accessory liability in an overseas context. There is also, for example, developing law around the extra-territorial ambit of the Proceeds of Crime Act 2002.} It is also worth noting that companies which operate in other jurisdictions are subject to the criminal laws of those jurisdictions in relation to their activities there, which may conflict with any wide-ranging new offence under UK law.

58. More important, in the context of the fight against economic crime, is the strong culture of co-operation between authorities internationally. Care should be taken that the UK does not disturb that by introducing legislation which those in other jurisdictions could legitimately complain amounted to over-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?

59. We are not persuaded that there is a need for a new form of corporate criminal liability in the financial sector, in view of:

(A) The existing ability to prosecute individuals and corporations engaged in criminal activity;

(B) The existing array of regulatory and compliance requirements designed to combat economic crime;
The scope for both corporate and individual criminal liability pursuant to the Money Laundering Regulations; and

The strengthening of individual and corporate accountability under the SMCR.

60. Furthermore, we consider that to introduce a new form of corporate criminal liability alongside the financial services regulatory regime risks:

(A) Impeding the effectiveness of the existing regulatory regime by delaying regulatory proceedings while criminal proceedings are ongoing; and

(B) Jeopardising co-operation between regulators and the entities they regulate, and thereby doing more harm than good in terms of practical efforts to enhance systems and controls and so improve rates of prevention and detection.

61. If the Government wishes to introduce a further layer of corporate criminal liability in the regulated financial sectors, we believe that the friction identified should be addressed by giving the primary responsibility for deciding whether to prosecute regulated entities for any new offence to the relevant regulators – the FCA and the PRA. Those regulators are more familiar with the financial sector than bodies such as the CPS and the SFO. They also have access to regulatory sanctions, and are therefore more familiar with the full range of remedies available when dealing with companies in the financial sector. Moreover, their investigations are quicker and more cost-effective, given that there are significant drivers towards cooperation in regulatory enquiries, and that the financial services industry funds the FCA.

62. In any event, prosecution guidance for such an offence should make clear that, where regulatory redress is available in relation to a matter, a would-be prosecutor must be satisfied that the special circumstances of the case are such that those sanctions are not adequate, and that only a criminal prosecution will suffice. We would also suggest that the prosecutor be required to satisfy the Court that there is at least a good arguable case to that effect, before a prosecution can be commenced.

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?

63. The panoply of regulation in relation to the financial sector’s compliance requirements, particularly in relation to AML, is designed and overseen by those authorities with the closest familiarity with the sector, who are uniquely well-placed to determine the measures that the firms under their supervision should implement.

64. As we commented in relation to Question 5, where such regulatory measures include those aimed at preventing a particular economic crime, it should be a defence for a company charged with failure to prevent that crime that it had complied with those regulations.

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