Transparency International UK's response to the Law Commission consultations on Corporate Criminal Liability Reform

Introduction

The UK is a safe haven for corrupt and criminal wealth. The list of exposés detailing the investments and indulgences of a global cadre of corrupt individuals in or through our economy has become too large to ignore. Yet it is very difficult to bring a successful prosecution against large companies for serious economic crime in the UK, due to the difficulties in establishing corporate criminal liability. Prosecutions are rare and slow to progress. A change to legislation to more effectively deter corporate crime is long overdue.

The lack of effective deterrent may be evidenced by the huge costs of economic crime to the UK economy. In 2017, the Annual Fraud Indicator put the cost of fraud to the UK economy at £190 billion.[1] The cost to the public sector is £40.4 billion, and it is estimated private sector fraud could cost the UK economy up to £140 billion. Procurement fraud alone is estimated to be £127 billion a year. It is likely that cracking down on economic crime would deliver huge potential savings to the UK taxpayer. A convicted corporation would be subject to the confiscation regime under the Proceeds of Crime Act 2002 and is also more likely than an individual defendant to be able to pay for the costs of the prosecution.

From an anti-corruption perspective, fraud and other economic crimes often go hand in hand with corruption. In some instances, it might be considerably easier to prove a company has engaged in fraud than corruption. Extending clear corporate liability to cover fraud and other economic crimes, such as money laundering, would significantly improve the prosecutor's tool kit for fighting corruption.

(1) What principles should govern the attribution of criminal liability to non-natural persons?

The principles that TI-UK believes should govern the attribution of criminal liability to non-natural persons reflect the gaps we see in the current system, lessons from international best practice and the importance of corporate wrongdoing being seen to be addressed for public confidence in the rule of law.

These principles should include:

Certainty and clarity in the law – so that the rules are applied and interpreted consistently by prosecutors, courts and corporates themselves. Clarity also reduces the impact of new laws on smaller businesses.

Fairness and equality before the law – all corporate bodies should be held to account equally before the law regardless of size, corporate structure or whether the

[1] https://www.crowe.com/uk/croweuk/-/media/Crowe/Firms/Europe/uk/CroweUK/PDF-publications/Annual-Fraud-Indicator-report-2017

conduct business solely in the in the UK or globally. Prosecutors have emphasised that the current identification doctrine does not allow for this to happen.

Credible deterrence recognising the serious detrimental impact or harm that corporate behaviour can cause society. It is important that there are seen to be consequences for wrongdoing so that this acts as a deterrent and helps to change corporate culture. The model of the Bribery Act does this well and has also led to improvements in corporate governance.

(2) Does the identification principle provide a satisfactory basis for attributing criminal responsibility to non-natural persons? If not, is there merit in providing a broader basis for corporate criminal liability?

No, we do not believe that the identification principle provides a satisfactory basis for attributing criminal responsibility to non-natural persons.

The principle is unnecessarily restrictive and makes it very difficult to prosecute large companies, as it requires evidence that a very senior person was complicit in the illegal activity. It results in real unfairness to smaller companies who are at far greater risk of prosecution under this principle. Even in the rare cases where it is possible to prove the 'directing mind and will' of the company has been involved in the criminal activity, this imposes an additional cost to enforcement authorities, who have to spend considerable extra resources and time to establish this.

Instead of providing a fair and clear legal principle that encourages compliance with the law, the identification doctrine can incentivise senior members of a corporation to turn a blind eye to criminal acts committed by its representatives, insulating the company (and themselves) from liability. The result is an unfair situation in which the 'low-hanging fruit' of crimes committed by small companies, with simpler corporate structures, are more easily prosecuted.

As the Law Reform Commission of Ireland has found, global regulatory trends in corporate governance have emphasised decentralised decision-making in large companies as a means for providing better oversight and corporate efficiency.[2] This trend towards decentralisation means that corporate culpability, where it occurs, is likely to be dispersed throughout the organisation and will, in all likelihood, be outside of the scope of the identification doctrine.

The challenges of prosecuting companies under the identification doctrine has been exacerbated by the recent Barclays ruling, which imposes further burdens on prosecutors to investigate and prove the relevant relationship with and authorisation from the Board.

The identification principle has been criticised by the OECD systematically across common law countries, including in the December 2016 stock taking report on the topic.[3] The 2009 OECD Anti-Bribery recommendation crystallised the OECD's

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[2] p 358 para 8.57-8.59 Regulatory Powers and Corporate Offences, 2018, https://www.lawreform.ie/_fileupload/Completed%20Projects/LRC%20119-2018%20Regulatory%20Powers%20and%20Corporate%20Offences%20Volume%202.pdf

[3] http://www.oecd.org/corruption/roundtable-on-corporate-liability-for-foreign-bribery.htm

preferred approach in a standard that was agreed by the UK as part of the OECD Working Group on Bribery.[4] This recommended that 'the level of authority of the person whose conduct triggers the liability of the legal person [meaning corporation] is flexible and reflects the wide variety of decision-making systems in legal persons' (or that a functionally equivalent approach is used). The identification doctrine does not allow for such flexibility, as it rigidly restricts corporate identity only to the most senior figures in the company.

Lisa Osofsky has described the Serious Fraud Office as being "hamstrung"[5] by the identification principle. In evidence to the Treasury Select Committee she said that,

> "I can go after Main Street; I just cannot go after Wall Street, and that is unfair, because we know that there are cases where it is corporate culture, corporate demand for hitting sales targets, for doing away with inconvenient health and safety rules in a certain way, that will often make employees take action. Those employees need to be held accountable and we need to go after those individuals, but we also need to look at the corporate behaviour that led those individuals to perform those acts."[6]

The Government has previously acknowledged that the identification doctrine does not provide a satisfactory basis for attributing criminal responsibility to non-natural persons. When it introduced Deferred Prosecution Agreements the Government stated that "options for dealing with offending by commercial organisations are currently limited and the number of outcomes each year, through both criminal and civil proceedings, is relatively low." Further, the Government stated in its 2015 consultation on a new corporate offence of failure to prevent tax evasion that "under the existing law it can be extremely difficult to hold ... corporations to account for the criminal actions of their agents."

TI-UK believes it is necessary to introduce a broader basis for attributing corporate criminal liability to ensure that the UK's laws can, where appropriate, hold corporate bodies to account. As the consultation document makes clear, these challenges are not unique to the UK and many other jurisdictions have grappled with how best to implement corporate criminal liability. We believe the system of corporate criminal liability in the USA to be the most effective, and whilst we recognise the many differences in the respective legal systems are keen to see how lesson can be learnt from this model.

It is essential that the operation of the identification principle in England and Wales is reformed in line with global trends on corporate criminal liability. The Law Reform Commissions of both Ireland and Australia have both recently completed reviews of corporate criminal liability making strong recommendations for the expansion of the identification principle to reflect modern corporate decision-making. We support those recommendations.

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[4] See annex 1 of http://www.oecd.org/daf/anti-bribery/44176910.pdf
[5] Q 24 http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/serious-fraud-office/oral/94785.html
[6] Q 25 http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/serious-fraud-office/oral/94785.html

(3) In Canada and Australia, statute modifies the common law identification principle so that where an offence requires a particular fault element, the fault of a member of senior management can be attributed to the company. Is there merit in this approach?

Whilst this model appears, at first glance, to be an improvement on that in England and Wales, it is important to note that prosecutions remain very rare in both countries. The Australian Law Reform Commission has recently recommended further reforms to how corporate bodies are held liable for criminality in Australia. This proposed reform would extend liability from senior management to anyone who acts with "*actual or apparent authority.*"[7] We think it would be a mistake to adopt a model that is not considered successful by the Law Reform Commission of the country in which it is used.

(4) In Australia, Commonwealth statute modifies the common law identification principle so that where an offence requires a particular fault element, this can be attributed to the company where there is a corporate culture that directed, encouraged, tolerated or led to non-compliance with the relevant law. Is there merit in this approach?

As noted in our answer above, we do not think it would be appropriate to adopt a model that is not considered effective by the Law Commission in the country in which it operates. The Australian Law Reform Commission has recommended the Australian government legislate away from this corporate culture approach, and amend the country's Criminal Code so that corporate bodies can be held criminally liable where appropriate, where: "*one or more officers, employees, or agents of the body corporate, acting within actual or apparent authority, engaged in the relevant conduct, and had the relevant state of mind.*"[8]

(5) In the United States, through the principle of *respondeat superior*, companies can generally be held criminally liable for any criminal activities of an employee, representative or agent acting in the scope of their employment or agency. Is there merit in adopting such a principle in the criminal law of England and Wales? If so, in what circumstances would it be appropriate to hold a company responsible for its employee's conduct?

A system of vicarious liability overcomes the weaknesses we have highlighted in the identification principle, and moreover has been proven to work very well in the US. Indeed, the US has one of the strongest records on corporate prosecutions across the board globally. In principle vicarious liability is the most viable, straightforward, evidence-based change in approach.

If the US model of vicarious liability were adopted in the UK, then in all cases of serious fraud or corruption and associated money laundering where it can be shown that an individual was acting in the course of his employment when he committed an

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[7] P14 Australian Law Reform Commission Corporate Criminal Responsibility (ALRC Report 136) https://www.alrc.gov.au/wp-content/uploads/2020/05/ALRC-CCR-Final-Report-websml.pdf

[8] P14 Australian Law Reform Commission Corporate Criminal Responsibility (ALRC Report 136) https://www.alrc.gov.au/wp-content/uploads/2020/05/ALRC-CCR-Final-Report-websml.pdf

offence, it would be open to the SFO to prosecute that corporation as well. There are many recent examples where such a prosecution could have followed, based on vicarious liability, but the identification doctrine appears to have prevented such a prosecution from taking place.

As noted above, the Law Reform Commission of Australia has recommended that the Australian government adopt a form of vicarious liability where an employee or agent acting with "actual or apparent authority" commits the criminality. The Netherlands has also introduced a system similar to that in the US, which could be a model for England and Wales. In the Netherlands, a company is liable:

i) Where the act is committed by an employee or someone contracted by the company
ii) Where the act is in the normal course of business of the company
iii) Where the act leads to benefit for the company
iv) Where the company failed to take reasonable care to prevent the behaviour occurring

TI-UK believes that an adapted form of vicarious liability such as that used in the Netherlands would be a good model for England and Wales to follow.

(6) If the basis of corporate criminal liability were extended to cover the actions of senior managers or other employees, should corporate bodies have a defence if they have shown due diligence or had measures in place to prevent unlawful behaviour?

Yes. We believe this model works well in the Bribery Act where there is a defence of having adequate procedures in place to prevent bribery. As well as ensuring that the extension of criminal liability would not be overly burdensome for business, this would incentivise and reinforce good governance in UK based companies.

Prosecutions, and a legal framework that makes them possible, are necessary to show that there are consequences to egregious behaviour and to maintain public confidence in the rule of law. However, the fight against corruption is best won by preventing corruption from happening rather than prosecuting people after the event. Any new model of corporate criminal liability reform should also include strong incentives for companies to prevent economic crime. This has happened with bribery where large corporations operating in risky environments have moved from seeing bribery as a routine part of doing business that could even be tax deductible, to a serious risk to their commercial reputation and prosecution risk.

It would be important to clearly define what adequate procedures in the context of money laundering. It should complement existing laws and regulations, such as the Proceeds of Crime Act 2002 and money laundering regulations 2017 on money laundering regulations and high levels of due diligence for customers, not just a scattergun approach to reporting suspicious activity to law enforcement agencies. One model would be requiring companies to act in accordance with a framework similar to the Ministry of Justice's 6 principles provided for the Bribery Act:

- Top-level commitment

- Proportionate procedures
- Risk Assessment
- Due diligence
- Communication (including training)
- Monitoring and review

In addition, it should include particular focus on areas of high money laundering risk, and a reporting requirement in order to increase accountability and raise standards. At its most basic level this reporting could involve publishing policies and statement of compliance. TI-UK has worked with businesses and specifically compliance officers to develop principles and guidance for anti-corruption corporate transparency. Although the research does not specifically address money laundering, the approaches outlined in Open Business could be adapted for these purposes[9].

(7) What would be the economic and other consequences for companies of extending the identification doctrine to cover the conduct along the lines discussed in questions (3) to (5)?

Assuming that companies had an adequate procedures defence we do not believe there would be significant negative consequences for companies that are not involved in economic crime. We are not aware of any evidence that strong corporate liability rules in the US or the Netherlands has impacted upon economic competitiveness in these jurisdictions.

There would undoubtedly be an adjustment period and companies would need to understand and adapt to new guidance but this is something they do regularly. Companies that operate internationally already operate in countries with different systems for corporate criminal liability. There would need to be additional support and awareness raising campaigns for SMEs but this is something that can be managed and there are existing models of how to do this. Also as SMEs are disproportionately affected by the current identification principle we expect many would welcome the levelling of the playing field.

It is reasonable to expect that a more effective framework for corporate criminal liability is likely to lead to a greater self-reporting by companies. Consequently, this has the potential to bring in additional funds from successfully concluded Deferred Prosecution Agreements and reducing costs to the public purse of failed prosecutions or investigations. We do not believe that changes to the legal system should be made solely for the potential benefit to the public purse. However, it is important to recognise that there would in all likelihood be increased revenue from fines if corporate criminal liability were reformed.

The consequences we have seen from the Bribery Act have been largely positive, and we explore this in more depth in answer to question 9. Examples include the development of industry norms and codified standards including the ISO37001 anti-bribery standard, which has its origins in British standards[10] and benchmarking tools,

[9] Transparency International UK Open Business 2020 https://www.transparency.org.uk/publications/open-business-anticorruption-governance-disclosure-guidance
[10] www.iso.org/standard/65034.html

including TI-UK's Corporate Anti-Corruption Benchmark.[11] Many companies participate in a variety of fora to share best practice and to discuss developments, challenges and trends. TI-UK's Business Integrity Forum is one of these fora.[12] Increasingly, companies are now looking for ways to engage in collective action to further minimise their exposure to bribery risk and to reduce any unnecessary areas of compliance burden - for example through the Maritime Anti-Corruption Network which aims to address demands for bribes within ports and throughout the maritime industry.[13]

Norms have developed within the business community as to what kind of a compliance programme addresses the MOJ's guidance. These norms have been informed by guidance from professional services consultancies and other available guidance such as that provided by the OECD and TI-UK. Other factors, such the risks that the company is facing and industry and peer behaviour, also influence the development of the individual company's compliance programme.

In addition to the potential impacts on companies it is necessary to look at the societal impacts of a legal system that does not enable prosecutors to adequately tackle economic crime. A good illustration of this issue is Tom Hayes, a former trader for UBS and Citigroup who was arrested, tried, sentenced to fourteen years in prison for his role in the LIBOR Scandal. During his trial Hayes asserted managers were aware of his actions, and even condoned them. In 2016 the SFO stated the identification principle hindered prosecution of the companies involved:

> "Tom Hayes was prosecuted in this country for his role in LIBOR manipulation. The operation of the identification principle meant that we could not touch the bank for which he worked whilst manipulating LIBOR. That bank was held to account for Hayes' conduct in a New York courtroom, where vicarious liability made the prosecution a much simpler matter."[14]

The Attorney General identified LIBOR as one of the cases which the UK was not able to prosecute because of the identification doctrine, noting the "*clear implications for the reputation of our justice system*".[15] LIBOR was also cited by leading legal analysts, such as Jonathan Fisher QC, as a key reason for the need for a failure to prevent offence in relation to financial fraud.[16] The Telegraph Chief Business Correspondent meanwhile in September 2016 described the LIBOR and FOREX (see below) cases as examples of the UK "outsourc[ing] corporate accountability for criminality in the City to US prosecutors."[17]

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[11] www.transparency.org.uk/our-work/business-integrity/corporate-anti-corruption-benchmark/
[12] www.transparency.org.uk/our-work/business-integrity/business-integrity-forum/#.Wz87Y9UlPX4
[13] www.maritime-acn.org/
[14] https://www.sfo.gov.uk/2016/09/05/cambridge-symposium-2016/
[15] https://www.gov.uk/government/speeches/attorney-general-jeremy-wright-speech-to-the-cambridge-symposium-on-economic-crime
[16] https://www.brightlinelaw.co.uk/images/Laws_on_corporate_criminal_liability_for_economic_crime__woefully_inadequate___The_Times.pdf
[17] http://www.telegraph.co.uk/business/2016/09/12/a-crack-down-on-corporate-liability-is-long-overdue1/

FOREX[18] is another example where the US imposed criminal penalties on companies as well as regulatory fines while in the UK only regulatory fines were imposed. In the Forex cases where the US levied criminal as well as regulatory fines, the US imposed penalties were 84% higher than those imposed by the UK regulatory authorities.

The SFO[19] opened a criminal investigation into FOREX wrongdoing but closed it in March 2016 saying there was not enough evidence to continue with a prosecution despite there being reasonable grounds to suspect the commission of offences involving serious and complex fraud.[20] It is not clear whether the identification principle was a factor in the SFO's decision though it appears from public explanations from the SFO that it was evidentiary issues rather than the corporate liability regime. Legal commentators however suggested it was an issue. Alison McHaffie of CMS law firm was quoted in papers saying that the case showed:

> "The difficult job SFO has in demonstrating criminal activity by individuals for this type of type of market misconduct and without a change in the law on corporate criminal responsibility. This means it is always easier to impose regulatory fines against the firms themselves rather than criminal prosecutions."[21]

LIBOR and FOREX illustrate the general trend of the US being more easily able to prosecute large companies than the UK, which is due in large part to its more effective corporate liability laws. While the UK Financial Conduct Authority tends to levy only regulatory fines, in the US a significant portion of the fines are criminal fines levied by the Department of Justice. Because of this, the US is able to impose higher penalties than those imposed in the UK, creating a greater deterrent effect.

Not a single UK financial institution has faced criminal charges as a result of the 2008 financial crisis despite economic crime being a key contributing factor.[22] Economic crimes included mortgage fraud, predatory lending, Ponzi fraud schemes, market misconduct and market manipulation, crimes which have ultimately lead to far-reaching harm and significantly held back global development. The fact that there are seen to be no consequences to egregious corporate behaviour undermines public trust in in the rule of law and our democratic institutions.

(8) Should there be "failure to prevent" offences akin to those covering bribery and facilitation of tax evasion in respect of fraud and other economic

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[18] https://www.ft.com/content/23fa681c-fe73-11e4-be9f-00144feabdc0 http://www.telegraph.co.uk/finance/newsbysector/banksandfinance/11619188/Barclays-handed-biggest-bank-fine-in-UK-history-over-brazen-currency-rigging.html http://www.telegraph.co.uk/finance/newsbysector/banksandfinance/11619188/Barclays-handed-biggest-bank-fine-in-UK-history-over-brazen-currency-rigging.html

[19] It is not clear why while the US took criminal action against the relevant banks for breaches of anti-trust law, the UK was taking a fraud approach to the wrongdoing.

[20] http://www.telegraph.co.uk/business/2016/03/15/serious-fraud-office-ends-foreign-exchange-probe-but-admits-wron/

[21] http://www.telegraph.co.uk/business/2016/03/15/serious-fraud-office-ends-foreign-exchange-probe-but-admits-wron/

[22] See *The Financial Crisis and White Collar Crime: The Perfect Storm*, 2014, Ryder, N. Elgar Publishing, Chapters 4 and 5.

crimes? If so, which offences should be covered and what defences should be available to companies?

Yes. TI-UK believes that the failure to prevent model, first introduced in section 7 of the Bribery Act and subsequently extended to a failure to prevent tax evasion offence has been of significant benefit. We welcome proposals to extend this to other areas of economic crime. Our submission focuses on a failure to prevent money laundering offence as this is where our expertise lies, but we support calls from other organisations for failure to prevent fraud and false accounting.

According to the Government's own risk assessment, only a small proportion of the corrupt money entering the UK is being detected and investigated by the authorities. According to the NCA, billions of pounds of corrupt and illicit funds are laundered through the UK each year, fuelling global instability and threatening the reputation and success of the City of London and the wider UK economy. There are serious issues with fragmented supervision and ineffective enforcement which leads to a lack of effective regulatory and legislative deterrent.

For complex money laundering schemes, individuals with criminal intent usually purchase fiduciary or intermediary services from a range of financial and non-financial companies and professionals who, wittingly or unwittingly, facilitate the scheme. As the FinCEN files don't point at just one sector or bank or actor as the only weak link in an otherwise stable chain. There are many holes that allow the money to slip through, and several outstanding reforms that need to be implemented in order to plug the gaps.

Professionals involved in money laundering can include bankers, wealth management agents and other financial service providers, trust and company service providers (TCSPs), property lawyers and accountants. As well as laundering money through a complex chain of transactions, money can enter countries via formal investment schemes. It is possible that this will overlap with provisions in the Senior Managers Certification Scheme, but it would be a significant step forward in prosecuting others involved in money laundering.

A total of 3,282 British companies were named in the leaked suspicious activity reports[23] - more than any other country in the world. Most of these were Limited Liability Partnerships and Limited Partnerships.[24] Although we are yet to see all of the UK companies involved, it would be no surprise if they turned out to be part of industrial-scale money laundering schemes like the Russian Laundromat[25] and Azerbaijan Laundromat[26] exposed by the Organised Crime and Reporting Project (OCCRP).

The majority of UK firms flagged in the files had been formed by a handful of company formation agents[27], some of which had close links to Baltic Banks who

[23] https://www.bbc.co.uk/news/uk-54204053 Accessed 27 August 2021
[24] https://www.transparency.org.uk/publications/offshore-in-the-uk Accessed 27 August 2021
[25] https://www.occrp.org/en/laundromat/the-russian-laundromat-exposed/ Accessed 27 August 2021
[26] https://www.occrp.org/en/azerbaijanilaundromat/ Accessed 27 August 2021
[27] https://www.icij.org/investigations/fincen-files/inside-scandal-rocked-danske-estonia-and-the-shell-company-factories-that-served-it/ Accessed 27 August 2021

have become synonymous with money laundering. This adds to the evidence collated by ourselves[28] and others[29] over recent years.

The current system of AML supervision is inadequate and does not act as a deterrent to companies profiting from handling the proceeds of crime and corruption. This is one of the reasons why we believe a failure to prevent money laundering offence is necessary. This is explored in more detail in response to Q 10.

Despite the benefits of a failure to prevent offence, it is no substitute for reforming the identification principle. Prosecutors need flexibility and a range of options when dealing with economic crime offences, particularly in complex cases. As demonstrated by the Airbus case, the existence of a failure to prevent offence did not prevent action on other charges. If failure to prevent was introduced without reforming the identification principle, prosecutors would still be hamstrung and prevented from charging companies with what the courts view as more substantive offenses. Also failure to prevent offences do not incur mandatory exclusion from public procurement, whereas a conviction for a substantive offence does. This further entrenches and perpetuates the unfairness of the identification principle as smaller companies are likely to face increased prospect of exclusion from public procurement than larger companies.

(9) What would be the economic and other consequences for companies of introducing new "failure to prevent" offences along the lines discussed in question (8)?

We now have ten years of experience of working with the failure to prevent provisions in the Bribery Act. It can therefore provide a relevant model of the consequences we might expect from extending failure to prevent offences.

The Bribery Act has set a new higher standard for business and governments globally which helps to deter bribery both in the UK and abroad. It is common for global businesses irrespective of the jurisdiction of their headquarters to implement anti-bribery programmes which set their policies and procedures at the high watermark set by the act. They are typically motivated to do so because they either conduct some business in the UK or work with British companies.

TI-UK consults widely in order to inform our advocacy positions with heads of compliance and general counsel at multinational UK companies. Larger companies recognise that compliance requirements will not go backwards or be reduced. On the question of whether the Bribery Act makes companies less competitive, a General Counsel from a multinational oil company stated that:

> "The Bribery Act has worked well; it has encouraged companies to review their systems and make sure staff aren't paying bribes. It has had the benefit that companies have really raised their game to combat bribery. It is a very poor argument to say 'if we weren't allowed to commit these crimes, we'd have to limit ourselves."

[28] https://www.transparency.org.uk/publications/hiding-in-plain-sight Accessed 27 August 2021
[29] https://www.private-eye.co.uk/pictures/special_reports/where-theres-muck.pdf Accessed 27 August 2021

TI-UK has extensive engagement with the UK businesses on anti-corruption matters, including through our Business Integrity Forum and other meetings. Through our Corporate Anti-Corruption Benchmark participating companies provide comprehensive information about how they seek to implement compliance programmes.

We have found that reputable and ethical companies do not propose the argument that the Bribery Act is limiting their business abroad since ultimately complying with the law protects corporate reputation and supports a sustainable business model. Ultimately reputable companies believe that they should be acting responsibly and the Bribery Act helps to encourage this.

There were concerns around whether the Bribery Act was deterring SMEs from exporting to higher risk countries. However, a 2015 Government study on insight and awareness of the act among SMEs emphasised that the Bribery Act was not generally deterring export activities:

> "The majority of SMEs aware of the Bribery Act (89%) felt that the Act had had no impact at all on their ability or plans to export. Furthermore, when prompted as to whether they had any other concerns or problems related to the Bribery Act, nine in ten (90%) reported they had no specific concerns or problems."[30]

The report summarised that 'SMEs are generally taking a proportionate, pragmatic and low-cost approach to winning business without bribery.' The 2015 study is now six years old, but it is likely that with increased resources aimed at SMEs and general embedding of the Bribery Act, SMEs are likely to be more familiar than ever with the legislation and understand how to export alongside it. Therefore, we do not believe that there will be negative economic consequences to extending the failure to prevent model. It should also be noted that money laundering regulations have been in place since 2017, so the foundation for what adequate procedures could look like in practice, is already well established.

(10) In some contexts or jurisdictions, regulators have the power to impose civil penalties on corporations and prosecutors may have the power to impose administrative penalties as an alternative to commencing a criminal case against an organisation. Is there merit in extending the powers of authorities in England and Wales to impose civil penalties, and in what circumstances might this be appropriate?

We do not believe there is merit in this approach. A regulatory approach has already been shown to be ineffective at preventing economic crimes such as money laundering.

A fine from the Financial Conduct Authority doesn't carry the same level of stigma or deterrent as a criminal conviction. The UK still has a £100bn money laundering

[30] www.assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/440661/insight-into-awareness-and-impact-of-the-bribery-act-2010.pdf

problem. We need a mechanism that can drive culture change and the failure to prevent offence in the Bribery Act has demonstrably done this.

It is also important to note that the global trend is away from OECD jurisdictions only using civil or administrative penalties to address corporate criminality. Germany, which has been the main outlier in this regard, is in the process of introducing a Corporate Sanctions Act, precisely because of sustained criticism of its lack of criminal penalties for corporates from the OECD.

It is important that prosecutors have flexibility and can take different approached depending on the nature of the breach. Civil penalties should certainly be an option where a prosecution is not in the public interest, or where a prosecution is not possible. However, it is important to recognise that the current system for AML supervision and regulation is not up to this task.

Research conducted by TI-UK found that the system that should prevent dirty money from entering the UK is failing. There are twenty seven supervisory bodies overseeing anti-money laundering compliance in sectors such as banking, property and luxury goods, leading to a fragmented system. Our research has identified severe failures in relevant sectors, such as a failure to identify risk, conflicts of interest, and an approach to enforcement which is inconsistent and neither transparent nor effective.

- **Ineffective sanctions.** No sector supervisor is providing a proportionate and credible deterrent to those who engage in complicit or wilful money laundering. The average house price in central London is more than the total amount of fines dished out to those who laundered money through property in a recent 12 month period.

  Out of the 22 supervisory bodies covered in a recent TI report[31], only the FCA has above a low or unreported level of enforcement of the rules. The level of enforcement and fines by AML supervisors in the UK is generally low relative to the scale of money laundering passing through the UK, and is not likely to have a deterrent effect.

- **There is a failure to identify where the risks are and mitigate against those risks**. The lack of a risk-based approach leads to poor oversight. TI-UK research discovered that the majority of sectors covered in this research are performing very badly in terms of identifying and reporting money laundering - over half of the supervisory bodies are failing to identify where the risks are. Major problems have been identified in the quality, as well as the quantity, of reports coming out of the legal, accountancy and estate agency sectors. One supervisor even admitted it carried out no targeted AML monitoring at all during 2013.
- **Independence questioned** – Many of the supervisors have serious conflicts of interest, which we believe prohibits these bodies from doing a good job. Just 7/22 supervisors control for institutional conflicts of interest, whilst 15 are also lobby groups for the sectors they supervise.

[31] Don't Look Won't Find: Weaknesses in the Supervision of the UK's Anti-Money Laundering Rules (November 2015)

- **Conflicts of interest**. The Government identified that most of the private sector supervisors are lobby groups for the sectors that they supervise and are funded by firms that they are obliged to investigate. Only 6/22 met the Clementi Standard[32].

These wide-spread failures in the system show that a different approach to tackling money laundering is needed so that regulation and legislation is a sufficient deterrent to complicit and/or wilful money laundering. So while there can be a role for civil sanctions, this is not an alternative to an effective system of attributing criminal corporate liability.

(11) What principles should govern the sentencing of non-natural persons?

TI-UK believes that it is necessary to amend the Sentencing Code to ensure that it adequately reflects that nature of corporate offending and acts as a deterrent.

The principles governing corporate sentencing should include:

1. **Rehabilitation or reform of the corporate body.**

This already exists within the Deferred Prosecution Agreement regime but there is no equivalent mechanism for criminal cases. This could be achieved through the introduction of corporate probation or rehabilitation orders at sentencing stage. This would also reduce costs on the prosecutor and the courts of holding additional hearings to impose a Serious Crime Prevention Order.

Publication orders should be a routine part of rehabilitation and reform. This would allow for appropriate publication of convictions and allow accurate statistics on corporate prosecutions to be maintained.

2. **Compensation**

It is important that this reflects the complexity of, and extent of harm caused by, corporate crime. The current system does not meet this need.

Current case law establishes that compensation orders cannot be given in 'complex' cases. Corporate crime is, by its very nature, often complex. This means victims of corporate crime are left facing an additional injustice - that they are unable to get remedy in criminal cases. Even under the Deferred Prosecution Agreement regime, compensation is rare and limited owing to this case law. So in practice the more complex and egregious the offending, the less likely it is that the corporate will be ordered to pay compensation.

TI-UK supports calls for a full review of whether concepts of 'social harm' could be introduced which reflect the full impact of corporate offending.

[32] The Clementi principle requires that the same organisation should not be both responsible for professional lobbying on behalf of their sector membership and provide supervision and enforcement actions over their sector.

3. **Consistency**

We support the proposal of the Law Commission to amend the Sentencing Code to reflect corporate offending, and to remedy the situation where penalties have only been set in statute with natural persons in mind. In certain very egregious circumstances, we believe it would also be appropriate for Courts to be given the power to dissolve a company in circumstances, and to disqualify it from undertaking certain activities. This has also been recommended by the Australian Law Reform. Commission[33].

(12) What principles should govern the individual criminal liability of directors for the actions of corporate bodies? Are statutory "consent or connivance" or "consent, connivance or neglect" provisions necessary or is the general law of accessory liability sufficient to enable prosecutions to be brought against directors where they bear some responsibility for a corporate body's criminal conduct?

In addition to holding companies criminally liable for economic crime, there may be instances where individuals who have seriously failed in their duties and obligations should also be legally liable. Directors are agents of the company, they run its day-to-day affairs and are responsible for making both strategic and operational decisions for the company and have legal obligations in how they do this.

Currently company directors face civil penalties for failing in their duties, one of the most serious being disqualifications. Where it is not possible to prosecute individuals for crimes committed, or for failures of oversight, in relation to economic crime, disqualification should be an option for prosecutors. This could be done by amending the disqualification procedure under the Company Directors Disqualification Act 1986 ("CDDA"), or potentially through a failure to prevent offence for individuals. If Directors proven to have behaved in such a way that led to the company's failure to prevent an offence were disqualified this could create a further incentive for board members to ensure that companies are fully compliant with the new legislation.

(13) Do respondents have any other suggestions for measures which might ensure the law deals adequately with offences committed in the context of corporate organisations?

No comment.

ABOUT TRANSPARENCY INTERNATIONAL UK

Transparency International (TI) is the world's leading non-governmental anti-corruption organisation. With more than 100 chapters worldwide, TI has extensive global expertise and understanding of corruption.

[33] https://www.alrc.gov.au/wp-content/uploads/2020/05/ALRC-CCR-Final-Report-websml.pdf

Transparency International UK (TI-UK) is the UK chapter of TI. We raise awareness about corruption; advocate legal and regulatory reform at national and international levels; design practical tools for institutions, individuals and companies wishing to combat corruption; and act as a leading centre of anti-corruption expertise in the UK.

We work in the UK and overseas, challenging corruption within politics, public institutions, and the private sector, and campaign to prevent the UK acting as a safe haven for corrupt capital. On behalf of the global Transparency International movement, we work to reduce corruption in the high-risk areas of Defence & Security and Pharmaceuticals & Healthcare.

We are independent, non-political, and base our advocacy on robust research.