Crime, fraud and investigations 2018: New corporate offences

The Government is expected to respond to the results of its Call for Evidence on Corporate Criminal Liability. Will new legislation follow?

In brief

- The Government’s response to its Call for Evidence on Corporate Criminal Liability is expected in early 2018.

- The two new corporate offences of failing to prevent the facilitation of tax evasion, which came into force on 30 September 2017, may reduce the need for a wider form of liability.

- Moves to introduce a new offence of failing to prevent the facilitation of money laundering have been put on hold pending the outcome of this wider review, but could be revived if no wider offence is to be created.

All quiet on failure to prevent economic crime?

At the time it was issued, the Ministry of Justice’s Call for Evidence on Corporate Criminal Liability provoked a vocal response among legal professionals. The idea of an all-encompassing “failure to prevent economic crime” offence had been around for some time, but the legislative demands of Brexit had led many to assume such an ambitious change to the law would not happen any time soon.

Though the Call for Evidence closed on 31 March 2017, we are still awaiting the Government’s response, which is likely to be delivered in the first half of 2018. The outcome is inevitably difficult to predict, but it is more than possible that, if the tenor of much of the feedback is that no need has been shown for this new offence (because there is no evidence of crimes going unpunished) the proposals may be buried, given the burden of the current legislative agenda.
Since the consultation closed (please see the response prepared by this firm here) we have of course seen the implementation of the two new corporate offences of failing to prevent the facilitation of tax evasion, contained within the Criminal Finances Act 2017, which came into force on 30 September 2017. We have also seen the proposed introduction of a corporate “failure to prevent money laundering” offence into the draft Sanctions and Money Laundering Bill currently (at the time of writing) at the reporting stage in the House of Lords. Both events seem likely to feed into the Government’s response on the need for, or approach to, any new broader offence.

A new money laundering offence?

This proposal for a new money laundering offence (which has now been withdrawn, at least temporarily) would have created a crime committed by a company when a person associated with it committed an offence under sections 327, 328 or 329 of the Proceeds of Crime Act 2002. These offences encompass the acquisition, use, possession, concealing, disguising, converting, transferring or removing of criminal property, and entering into an arrangement which the person knows, or suspects, facilitates (by whatever means) the acquisition, retention, use, or control of criminal property.

The principal reasons for this proposal, as articulated in the Lords, are similar to those that were aired in relation to previous amendments to corporate criminal liability, such as the Corporate Manslaughter and Corporate Homicide Act and the Bribery Act. The first is a perceived imbalance created by the identification doctrine (the so-called “directing mind and will” test) between large and small corporate bodies, because for large companies, it is said, “directors are not regarded as able to know everything and, indeed, the concept of collective responsibility of boards effectively prevents it”. The success of the “failure to prevent” model of corporate criminal liability was shown, it was argued in the House of Lords, in the different results of the SFO’s 2003 - 2010 investigation into corruption allegations against BAE Systems and the SFO’s recent, high profile, Deferred Prosecution Agreement (DPA) with Rolls Royce plc.

Another aspect of the proposal for a new money laundering offence was for the introduction of a new, positive requirement, for a court that finds a corporate offence has been committed, to investigate whether the directors of that corporate should be disqualified from acting as directors. It is arguable that such a step is unnecessary, given that prosecution agencies routinely look at actions against directors personally whenever a company is convicted or enters a DPA. It is also notable that it would be somewhat inconsistent to have such a provision in a failure to prevent money laundering offence, but not in either of the existing failure to prevent offences. There is already some inconsistency in that the Bribery Act contains a “consent and connivance” offence for senior officers of a company convicted of bribery offences, while the Criminal Finances Act 2017 makes no provision for action against senior officers where a company is convicted of failing to prevent the facilitation of tax evasion.

This proposed amendment to the draft Sanctions and Money Laundering Bill was withdrawn because it was recognised that its introduction would pre-empt the outcome of the Government’s consultation on a wider offence of failing to prevent economic crime. The proposal does indicate, however, that there remains support for extending the current regime for corporate criminal liability. While all may have gone quiet again on this front for the time being, given the strength of feeling apparent from the debate, it seems likely that the enthusiasm for specific legislation in relation to money laundering will survive.

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