KEY POINTS

- Any legislation expanding corporate criminal liability should only apply to specific offences (capable of being amended in the future).
- The potential effect of widening the UK's criminal jurisdiction extraterritorially merits very considerable thought.
- Businesses would have to invest considerably more resources into their legal and regulatory functions.

Feature

Author Eoin O'Shea

Criminal liability and the politics of enforcement

The UK is debating whether to reform criminal law in order to widen the liability of corporate bodies for a wide category of "economic crimes". If implemented, companies would be vicariously liable if they failed to prevent such crimes by their agents, including directors, employees, subsidiaries and intermediaries, and the law would have far-reaching effects on business life.

INTRODUCTION

Individuals usually have minds of their own. A working assumption is that an adult is responsible for his own voluntary conduct. Another working assumption is that the individual's voluntary conduct usually demonstrates their state of mind.

Corporate bodies are obviously different. As collections of contracted individuals, assets and legal rights, companies are essentially creations of law, without a single unified state of mind. It can be very difficult to identify a particular intention held by a corporate entity at a particular point in time. They can only act through individual agents. Nevertheless companies are "legal persons", separate entities from any agent or shareholder.

COMPANIES AND CRIME

This presents a problem for the criminal law. Almost all serious crime involves a mental element. The state of mind of the accused is what distinguishes borrowing from theft or a gift from a bribe.

In seeking a theory by which companies can be liable for acts of their agents, English law has developed the "directing mind" test, also known as the identification doctrine.[1] The doctrine is that where a person acts "as" the company, ie where his or her mind is the "directing mind and will" of the company, then his state of knowledge and state of mind can be attributed to the company and the company can be liable for his actions and defaults.

The classic expression of the identification principle is the case of *Tesco v Nattrass*.[2] In that case the errors of a supermarket store-manager were not attributable to the company, because the manager was not acting as the "directing mind" of the company as a whole. He was not a delegate to which the company had passed its responsibilities.

Although the binding effect of *Tesco* has been debated in some depth,[3] it is clear that the directing mind test remains at least the starting point for analysis of corporate criminal liability for crimes requiring a mental element.[4] Where Parliament has sought to impose criminal liability on companies it has done so in a piecemeal fashion, for example in the field of health and safety at work or corporate manslaughter.[5] Bribery is a special case which we will come on to later.

So the default position in England is that companies cannot commit crimes requiring a guilty mind, unless someone senior enough in the company can be proven to have the relevant mental state. This reflects a (usually) unspoken assumption of English law that a company is not obliged to police employee conduct which is unauthorised. The company is not its employees' keeper, if the employee is on a frolic of his own.

The US example?

We can contrast the English position with that in the US. In US federal law, a corporation is vicariously criminally liable for the illegal acts of any of its employees or other agents if the employee was acting within the scope of their employment and their actions were intended, at least in part, to benefit the corporation. The principle is accorded the Latin tag *respondeat superior* ("let the master answer"). It reflects a different assumption about the duty of employers to police the behaviour of employees, whether authorised or not.

Prosecutions against corporations are far more common in the US than in the UK and the phenomenon has not gone un-noticed by campaigners against corporate misfeasance or indeed by UK law-enforcement agencies. The latter believe that reform of corporate liability is an important step towards more effective enforcement action against white-collar crime.

The model proposed is an extension or adaptation of s 7 of the Bribery Act 2010. The proposal was originally championed by the Attorney-General,[6] though subsequent reports have suggested less enthusiasm by the Conservative Government, at least partly on the ground that there were no prosecutions under the Bribery Act at that point.[7]

However, in late 2015 the first settlement of a s 7 bribery case was approved by the English courts, being resolved by means of a deferred prosecution agreement involving penalties of more than US$33m.[8] In a separate case, a company has entered a guilty plea and will be sentenced later this year.[9] Therefore, the Bribery Act is starting to develop a track record. Moreover the concept of vicarious liability has gained acceptance and there seems no prospect of the UK changing the principle, at least as regards bribery.

The Director of the Serious Fraud Office, David Green QC, has been a champion of extending the Bribery Act to all economic crime for quite some time. He is likely to be re-appointed to his position later this year. He has continued his campaign for vicarious liability in speeches and in the media, and the reform has long been supported by other

political parties. Mr Green's advocacy, and the recent successful prosecutions under the Bribery Act, have moved the issue of reform back into the limelight.

The very recent acqittal of six brokers on charges connected with LIBOR manipulation has been spun as a setback for the SFO. However the agency's supporters would claim such reverses strengthen the case for reform generally.

The Bribery Act as a model?

Section 7 of the Bribery Act circumvented the identity principle for corporate criminal liability by creating a specific offence of failing to prevent bribery by others. The offence can only be committed by commercial organisations (essentially companies and partnerships) and only applies if a person acting for or on behalf of the organisation pays a bribe in order to obtain or retain business or a business advantage for the organisation. There is no requirement of negligence on the part of senior management or anyone else and the offence is very close to the US rule of vicarious liability. However, the company has a defence if it can prove that it had "adequate procedures" designed to prevent the payment of bribes by associated persons – effectively a due-diligence defence.

Definition of offences

If the SFO persuaded the government to extend the Bribery model to other "economic" crimes then what would the new regime look like?

Defining "economic crime" would be critical. The obvious candidates for inclusion would include bribery, fraud, insider-dealing and false accounting.

Other candidates may not be as straightforward. For example, operating a cartel is a paradigm example of an economic crime, that is, an activity criminalised because of its wider economic effects. However there is already a detailed regime designed to prevent cartels and anti-competitive conduct generally. Although the criminalisation of cartels has not been seen as successful so far, recent reform of the law has taken place and there is already a specialised agency charged with regulating cartel activity.

Money-laundering is also an economic crime *par excellence* but it too is subject to an existing and highly complex[10] legal regime. Individuals (and companies[11]) already face strict liability for any involvement in suspected money-laundering. This is subject to a disclosure defence and is, arguably, more draconian than the failure to prevent the offence which is being proposed.

It may be that the best way to address these issues is for any legislation to apply only to a specific list of relevant offences which would be capable of being amended in the future, rather than effect a complete re-casting of corporate liability.

Extended jurisdiction?

Jurisdiction will also be a tricky issue. The default position is that UK criminal law is territorial in effect. Only if acts relevant to the crime occur in the UK will the UK have jurisdiction.

However, another of the innovations of the Bribery Act was to create a very wide, extra-territorial jurisdiction in relation to bribery offences, in particular under s 7. The proposal to model the new offence on s 7 of the Bribery Act would bring these extended jurisdictional provisions with it. The potential effect of widening the UK's criminal jurisdiction in this way merits very considerable thought. Do the British authorities really want the ability to prosecute crimes all round the world which have little or no connection with Britain save that the company potentially responsible happens to have a sales office in London?

Anti-crime compliance procedures?

The Bribery Act model carries with it a defence to the effect that a company may avoid vicarious liability if it can show it had adequate procedures designed to prevent the wrongdoing in question. It is too early to say what an acceptable anti-crime due-diligence programme might look like. But we can make an educated guess that, because of the much wider scope of liability, it would have to be considerably more involved and complex than the ABAC (anti-bribery and corruption) procedures which are now common in business.

If the bribery model is followed, a simple instruction to abide by the criminal law would not suffice. There would have to be risk-assessments, studies, surveys, board meetings and policy documents, not to mention more compliance professionals to keep the system running. Corporate employees may look forward to considerable time spent in training sessions on various forms of villainy of which they might previously have been ignorant.

Other effects of the reform

Extending the s 7 model to other economic crime may have much wider effects on corporate life and culture.

Businesses would have to invest considerably more resources into their legal and regulatory functions. The role of General Counsel, traditionally less prominent in the UK than in the US, would grow considerably. The resources available to the SFO and other law-enforcement agencies dealing with economic crime would also have to grow. Much as has happened in relation to bribery, a mini-industry of compliance, advisory, consulting and training experts would develop. Corporate decision-making would probably become more risk-averse but also, perhaps more deliberative.

The merits of reform

Whether one sees such changes as positive or negative turns ultimately on deeper views about business, economics and society. David Green believes the change is necessary in order to fulfil public expectations.[12] There is clearly a perception that bad actors in the City and elsewhere have not felt the full force of the law (despite record penalties having been imposed by regulators such as the FCA). There is also a perception that US prosecutors are more effective in holding corporations to account, due in part to the effect of vicarious liability.

These are powerful arguments. Companies do have a responsibility to discourage wrongdoing by those acting on their behalves, especially when the misconduct is facilitated (wittingly or not)

Biog box

Eoin O'Shea is a partner at Reed Smith. Eoin's practice focuses on corporate crime, in particular the law of bribery and corruption, money-laundering and fraud. Eoin is experienced in managing internal investigations, criminal and civil fraud matters side by side. He also acts for senior individuals under investigation for financial crime. Eoin is dual-qualified as a barrister and solicitor. He was called to the Bar of England and Wales in 1996 and is also a member of the Irish Bar. He is the author of the leading textbook on the UK Bribery Act. Email: eoshea@reedsmith.com

by the individual miscreant having access to the company's resources. Accountability is in the long-term interests of management and investors alike. At present, blind eyes can be turned too easily and too often.

Nevertheless, there is something to be said for the general principle that culpability should depend on voluntariness, and vicarious liability should be an exception rather than a rule. It would be unfortunate if a side-effect of corporate criminal liability was an over-legalistic approach to every issue or making companies so intrusive and controlling that they stifle individual responsibility and risk-taking.

More pragmatic considerations may ultimately decide the fate of these proposals. Unfortunately, the prestige of the SFO tends to ebb and flow according to the results of high profile cases and it is impossible to predict its influence on government policy in future. But politics and economics are never far from the minds of those who will consider the case for reform. Further financial scandals or business failings in the next years may galvanise legislators and have more of an effect on the nature of corporate criminal liability than the arguments of prosecutors or commentators ever could. ■

1 Like so much of company law, the principle was first developed in the civil context, see for example, *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] A.C. 705.

2 [1972] A.C. 153.

3 For example *Meridian Global Funds Management Asia v Securities Commission* [1995] 2 AC 500.

4 See, for example, the current guidance for crown prosecutors issued by the Crown Prosecution Service www.cps.gov.uk/legal/

5 Corporate Manslaughter and Corporate Homicide Act 1997, Health & Safety at Work Act 1974.

6 Financial Times, 2 September 2014.

7 http://www.lawgazette.co.uk/news/government-drops-plan-to-extend-corporate-criminal-liability/5051277.fullarticle

8 *Serious Fraud Office v Standard Bank*, Southwark Crown Court 30 November 2015, https://www.judiciary.gov.uk/judgments/serious-fraud-office-v-standard-bank/

9 http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2015/sweett-group-plc-pleads-guilty-to-bribery-offence.aspx.

10 Proceeds of Crime Act 2001, Pt 7. The legislation and the disclosure/enforcement regimes are far from satisfactory, especially in the context of corporate offending, however the proposed reform is most unlikely to change this.

11 Albeit subject to the identification test.

12 "Fraud chief calls for tougher corporate prosecution laws", *London Evening Standard*, 6 January 2016.

Further Reading:

- The Financial Conduct Authority continues to explore bribery and corruption risks in regulated firms [2015] 4 JIBFL 226.
- The extraterritorial reach of criminal and enforcement action in the English courts [2014] 1 JIBFL 47.
- LexisPSL: Corporate Crime: Bribery and corruption – 2015 in review.