ICAEW
REPRESENTATION 80/21

CORPORATE CRIMINAL LIABILITY

Issued 31 August 2021

ICAEW welcomes the opportunity to comment on the discussion paper on Corporate Criminal Liability published by the Law Commission on 9 June 2021 a copy of which is available from this link.

Public trust in business has been damaged by corporate scandals in recent years. There is a perception that large companies and their personnel are not held accountable for their actions and that criminal law sanctions are more readily applied to private individuals than to those involved in a business capacity even where the conduct involved is of a similar nature. These perceptions risk not only damaging the reputation of business but also trust in the criminal justice system.

We agree therefore that this is an important topic and that government should consider whether there are better alternatives to the current regime. It is clear from the materials provided by the Law Commission that there are no easy answers and each of the main alternatives comes with potential disadvantages or risks as well as advantages. We also therefore welcome the 'discussion paper' approach adopted by the Law Commission; it will be important to ensure that the potential implications of any change and impact on a variety of stakeholders and victims are taken into account in assessing the options.

This response is made in the spirit of contributing to the debate rather than advocating any particular solution to the issue and we look forward to seeing the outcome of the consultation.

This ICAEW response of 31 August 2021 is made by ICAEW's Business Law Department following limited consultation with its members, including its Economic Crime Sub-Committee.

ICAEW is a world-leading professional body established under a Royal Charter to serve the public interest. In pursuit of its vision of a world of strong economies, ICAEW works with governments, regulators and businesses and it leads, connects, supports and regulates more than 157,800 chartered accountant members in over 147 countries. ICAEW members work in all types of private and public organisations, including public practice firms, and are trained to provide clarity and rigour and apply the highest professional, technical and ethical standards.

ICAEW
Chartered Accountants' Hall Moorgate Place London EC2R 6EA UK
T +44 (0)20 7920 8100 F +44 (0)20 7920 0547 icaew.com

KEY POINTS

Support for the initiative

1. We agree that companies and their personnel should be accountable for their wrongdoings and there is good reason to question whether the current regime is best designed to achieve this. We therefore welcome this initiative from the Law Commission. We have found its discussion paper and related webinars to be extremely informative and thought provoking.

2. It appears from the materials provided that various approaches have been adopted internationally and that none of them is without its problems or critics. There is a balance to be drawn between making it easier to prosecute, convict or otherwise sanction in respect of wrongdoing and maintaining principles of justice such as burden of proof and it is difficult to determine where to draw a new line inspired by the various possible alternative approaches.

3. In view of the above, and limited time allowed for consultation, we have mainly drawn on the experience of our Economic Crime Sub-Committee rather than our general membership in making this response and our comments are intended to contribute to the debate rather than representing support by ICAEW of any one of the suggested alternatives.

4. We do not have the legal expertise necessary to identify what is the most likely of the approaches to be both effective and fair, but we support the Law Commission's intention to take this project forward to achieve better and just accountability and are happy to help where we can.

Holding individuals to account

5. Chapter 9 of the discussion paper notes that individuals can be prosecuted: for their own actions; as accessories who have aided, abetted or counselled, an offence; or for conspiracy. In some cases where a company is criminally liable under specific laws, individuals may also be liable for consent or connivence (and in some cases neglect). This leaves areas where a director or senior manager of a company cannot be prosecuted even though an onlooker might well conclude they 'must have known' or that they 'turned a blind eye' to criminal activity of others in the company (or of the company itself), which is particularly problematic where those individuals are in senior positions and benefit from the criminal conduct of those junior to them (who may be liable to prosecution if they had the requisite state of mind).

6. We believe that expanding the scope of consent and connivence offences should be considered as a potential way forward, but the potential impact on companies (and their personnel) would need to be assessed further (perhaps by reference to experience gained in relation to the existing offences).

7. In order for the scope of offences based on 'neglect' to be broadened, it would be necessary to define carefully what behaviour amounts to neglect (eg degree of responsibility for poor corporate culture) and any necessary links to the underlying crimes involved (whether by the company or others within it). The implications could be far-reaching and it would require extensive discussion and consultation with stakeholders.

8. The consultation paper also refers to the possibility that civil or regulatory law might be used to address the concerns and we agree that this should be considered further too.

9. The Directors' Disqualification Act 1986 already enables directors to be disqualified in a range of circumstances, including:

> "if it appears to the Secretary of State that it is expedient in the public interest that a disqualification order should be made against a person who is, or has been, a director or shadow director of a company".

On the face of it, the Act appears to offer a route to hold directors to account even in circumstances where criminal law might not. The review might usefully consider whether the Act could be more widely used, or whether it would need to be amended for the purpose (eg if 'expedient in the public interest' is too high a hurdle).

10. Disqualification is a significant sanction that carries a stigma and can severely damage the livelihood of those who wish to manage companies. We also note that compensation orders may be made against disqualified directors of companies that are insolvent, and perhaps that law could be broadened to cover those areas of concern where criminal law provides no sanction.

11. However, this remedy is limited in scope (to directors) and the consequences of a criminal conviction are typically more severe.

12. A civil or regulatory approach might be applied more broadly, offering remedies to poor conduct of directors (or potentially senior managers) falling short of that which should lead to disqualification. This could be more flexible than a regime based on criminal prosecutions (with burden of proof etc). It might help level the playing field between directors who are members of professional bodies and subject to their regulation (such as the ICAEW) and others.

13. However, the question then arises as to which regulator would be responsible (and what additional regulation would be required). Government is considering what powers to give to the Audit, Reporting and Governance Authority (ARGA), but this is part of a targeted reform and it is not proposed that ARGA should have such a broad role. Pursuing this option would also therefore require extensive further discussion and consultation.

Holding companies to account

14. Companies should be subject to criminal sanctions in appropriate circumstances.

15. Where it is necessary to prove the state of mind of a company using the 'directing mind and will' (DMW) principle, this can be difficult for reasons outlined in the consultation paper It does, therefore, seem to be a flawed principle to use widely in determining corporate liability.

16. However, given the range of crimes that exist and the differences between them (including, for instance, the severity of punishments attached), some caution is required in seeking to

apply another test that would apply to corporate crime generally. The possibility of dealing with corporate liability in relation to any offence on a case-by-case basis in legislation should not therefore be ruled out at this stage. This might require existing offences which would depend upon proving a DMW to be identified and reviewed where the current position is of concern.

17. This would enable the various alternatives outlined in the paper (including in certain cases, the most extreme one of vicarious liability) to be applied as most appropriate in the context of the legislation itself. Where two or more offences call for the same approach regarding corporate liability, we would like to see the same approach adopted in the interests of simplicity and consistency.

18. We believe the Bribery Act has been effective in raising the profile of risk of bribery in business and discouraging the related crimes and can see the attraction of applying that sort of 'failure to prevent' regime more widely, for instance to economic crime. However, for reasons outlined under Question 8 below, we do not support extending the failure to prevent regime to economic crime.

19. Where a company is convicted of a crime, the public might also expect to see individuals involved with it convicted, not least so that imprisonment might result. If it is made easier to convict companies, the implications under criminal law for individuals should be considered (alongside those outlined above) to ensure that individuals are not potentially exposed to risk of criminal proceedings that might seem unjust (eg when compared to the position for individuals not involved in a company).

20. We believe that possible civil or regulatory approaches should be considered further in addition to possible reform of the criminal regime, particularly where the underlying objective is to improve corporate culture and controls. However, the challenges noted above would apply here too.

21. We would like to see further analysis of whether existing laws that might address the concerns are being enforced as effectively as they might be or could be modified to achieve the desired outcomes.

ANSWERS TO SPECIFIC QUESTIONS

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

22. Where the criminal regime applies, we agree that large corporates should not be able to hide behind the disseminated management powers that are necessary to run such a business and it does appear that that the concept of a directing mind is outdated and unduly restrictive. Any criteria under the law should be clear, which is not the case for the current concept of a directing mind and will.

23. Having a single set of principles to make a company liable for crimes of individuals involved in it would have the advantage of simplicity and clarity. For instance, if companies were liable for negligence in not knowing about the conduct, or for a culture tolerating the criminal activity concerned, this would be readily understood by the public and no doubt easier for authorities to prosecute. However, applying such an approach to crime generally (or a broad segment of crime, such as economic crime) could tilt the balance too far.

24. If this route is pursued, we think that the corporate should only be criminally liable where the relevant individual (eg employee) intended to benefit the company. A defence should be available where reasonable procedures are in place and reasonable monitoring has been carried out to prevent the activity which in fact occurred. A corporate should only be held criminally liable for matters or individuals within its control.

Question 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?

25. No, we do not consider that the identification principle provides a satisfactory basis for attributing criminal responsibility for reasons outlined above; recent case law would appear to bear this out. Therefore, if use of criminal corporate liability is to be extended, a broader base has merit, although, as noted above, it may be that different principles should apply to different offences.

Question 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?

26. We think it is reasonable for the Law Commission to consider these possible approaches further, but we are not in a position to comment on the laws of other jurisdictions at this stage.

Question 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?

27. Again, we are not in a position to comment on Australian law, but we understand from the Law Commission's presentations that this aspect of Australian law has not yet been used to bring a prosecution. If the UK is inclined to go down this sort of route it would certainly be useful to understand more about the Australian model.

Question 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?

28. We would not support this approach based on feedback from our members to date. We cannot comment on US law, but if this option is to be pursued it would be necessary to consider how this principle works in the context of US company and criminal law as a whole; even if it works well there, it might not work so well here.

Question 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?

29. We would support the ability of corporate bodies to claim a defence if due diligence or other measures were in place to prevent unlawful behaviour. However, this should only be where the measures in place were sensible/reasonable, reviewed and tested where appropriate and the corporate had taken steps to review and improve any shortcomings in those measures

where identified. Training and reinforcement of a culture of compliance should form part of the consideration. It is important that there are not only policies and procedures, but also that there are consequences for ignoring these and is there a culture which will not tolerate breaches, even for those who are "rainmakers" or otherwise powerful in the organisation.

30. These are considerations that would apply also if a civil or regulatory regime applied, rather than a criminal one.

Question 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)?

31. It is likely that there would be a higher cost of compliance for corporate bodies, not only from initial implementation of policies and procedures to address the risk to the corporate, but also subsequent reviews by internal and external advisers. To the extent that this is the cost of improving management and culture that is otherwise proving fertile ground for crime, then that is the aim of the policy. The issue, however, would be the extent to which well managed companies with sound culture would feel at risk of the new doctrine and hence need to adopt new procedures etc 'to be on the safe side.

32. Government will need to assess the likely costs versus likely benefits as the possible approaches are developed and the 'drawing of the line' and the extent to which there may exposure for well managed companies, becomes clearer.

33. We believe that the UK should be a leader in encouraging good corporate conduct, but also in retaining and attracting reputable business to the UK. It is therefore important that any reform is well considered and it is sensible to consider the various alternatives applied in other leading economies (as the Law Commission is doing).

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

34. "Failure to prevent offences" are suited to specific (underlying) offences so that specific prevention systems can be implemented. We note that the failure to prevent bribery and tax evasion measures have been successful in that they have increased the focus of corporates on having sufficient measures (eg adequate procedures under the Bribery Act) in place to prevent these crimes. However, bribery and tax evasion are both relatively narrow offences compared to fraud and economic crime, and compliance has been fairly easy for most businesses.

35. Fraud is not limited to manipulation of statutory accounts – something which it may be foreseeable to prevent through adequate controls and procedures.

36. The wide-ranging nature of economic crime means that it may be entirely impractical for a business to be able to prevent the crime from taking place. For example, how will a bank prevent a customer from depositing dirty money into an account as a result of the customer becoming a money mule? While the bank can comply with applicable regulations on cash deposits (eg client due diligence) and take action once suspicions of the criminal activity have been identified, it is hard to see how the bank could have prevented the economic crime in the first place. If failure to prevent all economic crime were to be included within corporate criminal liability, then further thought would be needed on how this would increase

protection to society, and how the law would be capable of implementation on a practical basis.

37. Those businesses which are in the regulated sector for the Money Laundering Regulations (such as banks, accountants and lawyers) already have extensive obligations to mitigate the risk of their facilities being abused by third parties for economic crime, and to report knowledge or reasonable grounds for suspicion of such crimes. It could be considered whether this regime should be extended to other businesses which are not currently in the scope of the Money Laundering Regulations, albeit in a modified way. This would be a regulatory alternative to criminal liability.

38. If corporate criminal liability for failure to prevent economic crime were introduced, the scope would need to be set very carefully. Particular types of economic crime could be specified. These offences may not all be obvious 'economic crimes' as such but they are crimes that may result in the proceeds of crime (and so potential money laundering offences) eg:

    - offences in relation to wildlife;
    - environmental crimes (eg developers damaging protected trees and other offences which are currently seen as part of the cost of doing business); and
    - modern slavery.

39. These are crimes where there is a public interest in ensuring that corporates are behaving in both a legal and responsible way, and where there would be justified public outrage if a company were not held accountable for conducting or enabling such activity.

40. The Bribery Act requires the person associated with the company and who commits the offence to intend the company to benefit if the company is to be liable for the act. If the failure to prevent approach is extended to economic crime, it will be important that it applies only where the relevant company is a perpetrator (companies are often victims of economic crime, not perpetrators). In general, it would seem unjust that if a business fell victim to fraud, that it would also receive a penalty for having inadequate controls to prevent the fraud from taking place. The shareholders will suffer the loss where a company is victim, so the question might rather be whether they have appropriate remedies under the current regime rather than how the company should be punished.

41. Company directors, like everyone else, have limited time and have to prioritise various demands made of them. The creation of wide-ranging offences of failure to prevent is likely to be unwelcome (if not effectively unmanageable for some) in that context.

42. Each time the approach is applied, there is a risk that it comes to be considered as the norm and more readily extended to other crimes (or all crimes) in future. The implications therefore need to be considered carefully at this juncture.

Question 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)?

43. See response above.

Question 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?

44. As noted above, we believe it may be appropriate to impose civil or administrative penalties, particularly for less serious types of crime. However, it would need to be clear which regime particular conduct would fall under to prevent confusion for companies and the public. While some sectors are regulated (eg financial services), not all are so this would need to be addressed (see Key Points above). It would make sense for civil or administrative penalties to form part of the sanctions issued under a regulatory regime rather than through the courts.

Question 11. What principles should govern the sentencing of non-natural persons?

45. No comments on this question.

Question 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?

46. Please see our comments in Key Points above regarding liability of directors and other individuals generally.

47. In some cases it is appropriate for a company to be subject to criminal sanctions and in our view the general law of accessory is not sufficient to dispose of the need for "consent or connivance" or "consent, connivance or neglect" offences. However, they themselves currently apply only in respect of specific instances set out in the legislation that creates the offences connived at etc. They are, therefore, not of general application and use.

48. An alternative approach may be for there to be a separate offence of neglect by the directors in failing to implement appropriate procedures. Typically, the serious cases arise from poor controls, no controls, or a culture which turns a blind eye to non-compliance either generally or for key individuals. However, if this would render an individual liable for criminal prosecution due to negligence (rather than dishonesty or other relevant state of mind applying to private individuals), it may in some cases be unjust. Thus any personal responsibility in relevant cases would need to be proportionate and to meet societal requirements whereby those who have the highest rewards must also bear the highest levels of responsibility.

49. This issue would need to be considered alongside any reform of criminal liability (eg extensions of consent, connivance) applying to individuals noted in Key Points above. Care will be required to ensure that potential sanctions on directors are proportionate to ensure that the risk of being a director of even a well-run company is not too high.

Question 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?

50. Please see Key Points above, particularly regarding holding directors to account for their actions.

51. Where concerns extend to senior managers who are not directors, the financial services sector provides a model in its senior management regime. We note, however, that this is largely a civil/regulatory regime (with criminal sanctions applied where insolvency results). Given the compliance work it entails, there would need to be compelling evidence of the extent of the perceived problem to treat all businesses as if they were banks (or other financial services businesses covered by that regime).