

Reforms of Corporate Criminal Liability: What I need to know?

Corporate liability and corporate prosecution in English law pertain to the legal responsibility of corporations for their actions and the possibility of legal proceedings against them. The concept involves holding a corporation accountable for any wrongdoing, and the legal mechanisms for addressing such issues can vary. It is an important tool in encouraging ethical and transparent business practices.

In June 2023, after years of discussion, the UK Government published its proposed Economic Crime and Corporate Transparency Bill. If the Bill is enacted, it could bring major changes and make it easier to prosecute corporations for financial crimes. Here is what you need to know:

What is Corporate Liability?

Under English law, a company has a legal personality which means that they are capable of being prosecuted for a wide range of offences. To be guilty of corporate crimes, the entity must be a company as defined under the Companies Act 2006. Partnerships or other nincorporated bodies may also be prosecuted where liability can be established.

Companies can be either held criminally or civilly liable.

- **Criminal Liability:** Corporations can be held criminally liable for offenses committed by their employees or agents in the course of their duties. The prosecution focuses on the collective actions of individuals within the corporation that led to the commission of a crime.
- **Civil Liability:** Corporations can also be held civilly liable for various wrongs, such as breaches of contract, negligence, or other civil offenses. This may result in financial penalties or other remedies to compensate the injured parties.
- **Vicarious liability:** Corporations can be held vicariously liable for the actions of their employees, agents, or associated persons. The company does not need to be complicit, have the intention or even have known about the commission of the offence. It will be liable if it fails to prevent the commission of such an offence.



Generally, to convict a company of a criminal offense, two elements must be proven beyond reasonable doubt:

- The company committed the act prohibited by the offense – known as the *actus reus*.
- The company had the required intention when committing the act that makes it an offense – the *mens rea*.

The second limb of the test is the hardest, as the intention must be attributed to a company using the identification principle as outlined in *Tesco Supermarkets Ltd v. Natrass* [1971] UKHL 1.

Examples of acts which could result in corporate liability:

- Money laundering
- Conspiracy to defraud
- Bribery and corruption
- Tax evasion, evasion of VAT or duty
- Theft
- Environmental offense
- Offences under the Financial Services and Markets Act 2000 (FSMA), such as market abuse
- Health and safety offenses
- Fraudulent trading
- False accounting.

Prosecuting a company

When a corporation is suspected of committing a criminal offense, it can face criminal prosecution. This involves bringing charges against the corporation itself, as opposed to individual employees. The prosecution seeks to establish the corporation's criminal liability and may result in fines or other penalties. Additionally, company officers may be prosecuted where a company has been dissolved.

In some cases, authorities may enter into deferred prosecution agreements (DPAs) with corporations as an alternative to prosecution for certain specific crimes. A DPA is a negotiated agreement that typically involves the corporation admitting to certain facts, paying a financial penalty, and implementing reforms to prevent future misconduct. It is not an agreement not to prosecute but as long as the company meets certain specified conditions, the prosecution will not continue.



Type of sanctions

Companies convicted of criminal offenses can face:

- Fines
- Compensation orders toward the victims
- Confiscation orders
- Debarment from public procurement processes (see Regulation 57 of the Public Contracts Regulations 2015)
- Serious crime prevention orders under Part 1 of the Serious Crime Act 2007

Where there is evidence that an offender has benefited financially from the offense, the court must, in accordance with the Proceeds of Crime Act 2002 (POCA), consider whether to implement a confiscation order.

Additionally, the company can face civil proceedings for the victim to recover property obtained through unlawful conduct. Prosecutors could also request interim measures prior to trial.



Bribery and corruption

The identification principle makes it difficult to convict companies. As a result, the law has already been reviewed in specific areas to ensure easier prosecution.

One of the best examples, is the Bribery Act 2010 which imposes a strict liability in its Section 7. In other words, companies that fail to prevent an act of bribery can be prosecuted. The Act creates a defence, whereby the company can prove that adequate safeguards were in place, yet the crime occurred.

The offence applies to all corporations or partnerships formed in the UK, irrespective of where it carries on business. Sanctions are identical to the ones mentioned above.

Failure to prevent the facilitation of tax evasion

Similar to the Bribery Act 2010, the Criminal Finances Act 2017 creates a failure to prevent offence where an associated person facilitates, during the course of business, the criminal evasion of UK or foreign tax.

The scope of the offence is wide as it applies to any corporate, anywhere, that fails to prevent the facilitation of tax evasion in the UK. For foreign tax evasion offence, it requires that the company is either:

- Incorporated in the UK
- Conducting its business or part of its business in the UK
- Facilitating any aspect of foreign tax evasion in the UK

Finally, the prosecution will have to prove 'dual criminality', i.e. that both the tax evasion and facilitation are offences in both the UK and the country in which the offences were committed.

Similar to the Bribery Act 2010, a corporation has a defence if it can demonstrate that it had reasonable procedures in place to prevent the facilitation of criminal tax evasion. The Act also introduced a second aspect of the defence: that it was not reasonable to expect the company to have any prevention procedures in place. Sanctions are similar to the ones stated above.

Reforms

The Economic Crime and Corporate Transparency Bill contains two key changes:

- Expansion of the identification principle.
- Introduction of an offence of failure to prevent fraud and money laundering.

As mentioned, one of the major issues prosecutors faced was to successfully apply the narrow identification principle. Currently, a company can only be held criminally liable if the commission of an offence can be attributed to a natural person who holds such a position that this person can be said to represent the company's "directing mind and will" at the time the offence was committed.

The Bill proposes to replace the "directing mind and will" by the "senior managers" test. This would expand the group of individuals whose actions could lead to corporate liability. Providing that a senior manager is acting within the actual or apparent scope of their authority and committing a relevant offence (as defined in the Bill), then the corporation will be guilty of that offence.

The definition of 'senior manager' is borrowed from the Corporate Manslaughter and Corporate Homicide Act 2007. It includes those individuals who play significant roles in:

- Making decisions about the whole or substantial part of the company's activities.
- The actual managing or organising of the whole or a substantial part of those activities.

In other words, the term 'senior manager' not only includes those who decide on broad strategy but also those who make operational decisions.

Finally, it is important to note that an offence will have been committed, even if the company's management did not order or know about the fraud. Any fraud offence will very likely engage other criminal offences such as money laundering or tax evasion. The proposed thresholds are currently:

- More than 250 employees.
- More than £36 million turnover.
- More than £18 million in total assets.

However, there has been much debate and proposal to reduce them so that Small and Medium Enterprises could also be caught.

Regarding the failure to prevent fraud and money laundering, such change follows the same idea as for bribery. Companies will still be able to raise the compliance defence, i.e. that the entity had adequate procedures in place to prevent fraud or money laundering. Additionally, the term fraud is broadly defined to include:

- Tax evasion
- Fraudulent trading
- False representation
- Failure to disclose information
- Participation in fraudulent business
- Obtaining services dishonestly
- False accounting

Regulatory enforcement

Regulatory bodies, such as the Financial Conduct Authority (FCA) or the Competition and Markets Authority (CMA), play a significant role in enforcing corporate compliance with laws and regulations. They may investigate and take enforcement actions against corporations that violate specific rules within their purview.





Corporate manslaughter

In addition to individual criminal liability, there is a concept of corporate manslaughter, where a corporation can be held criminally responsible for causing a person's death through gross negligence.

Procedures

The above-mentioned legislation requires to either have adequate procedures or reasonable procedures in place. Despite this difference, both tests require companies to ensure they have identified areas within the business that are exposed to the relevant risks and implemented measures or policies to tackle them.

Although there are no one-size-fits-all measures, in general implementing such procedure helps:

- Risk assessment
- Due diligence
- Proportionate policies and procedures
- Ensuring senior management is actively involved in compliance;
- Monitoring and reviewing procedures on a frequent basis
- Training
- Internal and external audits

We can help...

It's important to note that the legal landscape is still subject to change as the Economic Crime and Corporate Transparency Bill has not yet been enacted. It is, therefore, crucial to seek legal advice to avoid any form of criminal liability or prosecution. We could help revise your corporate compliance programme and ensure that sufficient safeguards are in place.

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