Modernisation of the identification doctrine

Corporate Crime analysis: On 15 June 2023, the UK government announced its proposed reforms to the so-called identification doctrine, in attempt to overhaul corporate criminal liability in the UK. Blake Woodfield, director, Elliott Kenton and Farheen Ishtiaq-Stansfeld, senior associates in Fieldfisher's Commercial Crime team and Stuart Biggs, barrister from Cloth Fair Chambers consider the key aspects of the biggest reform in this area in over 50 years.

This analysis was first published on Lexis®PSL on 28 June 2023 and can be found here (subscription required).

The amendments to the Economic Crime and Corporate Transparency Bill (ECCT Bill) proposed by Lord Sharpe (Amendment 104), seek to place the identification doctrine on a statutory footing for economic crimes by confirming that organisations can be held criminally responsible for the acts of their senior managers.

Why is this amendment being made now?

The identification doctrine is an established principle of common law that in order to attribute the actions or state of mind of a person to a legal person such as a company that person must be the company's 'directing mind and will' either for all purposes and/or functions or for the performance of the particular function in question (Davies LJ *in SFO v Barclays* [2018] EWHC 3055 (QB), paras 110–111).

Prosecutors have long argued that the management structures of most large companies today make it extremely difficult to identify any individual who satisfies this test and, as a result, corporate liability very rarely attached to such organisations. The proposed amendments to the ECCT Bill seek to change that. The Barclays case pushed the issue to the fore-although it involved the application of long-established principles - and was followed, in November 2020, with the commencement by the Law Commission of an examination of corporate criminal liability, the Commission producing an Options Paper in June 2022.

There is also a perception that smaller organisations are at a disadvantage under the current law because it is easier to demonstrate that, for example, a sole director represents the 'directing mind and will'. This means that successful prosecutions against corporates for substantive criminal offences (as opposed to so-called 'failure to prevent' offences, such as that contrary to section 7 of the Bribery Act 2010 (BA 2010)) have tended to be against SMEs rather than larger multinationals. Successful enforcement against the latter category of business in England and Wales has generally been in relation to either a BA 2010, s 7 offence, or in the context of a negotiated settlement, concluded by means of a Deferred Prosecution Agreement.

Under the proposal, when could an organisation be held criminally liable for the economic crimes of its senior managers?

As set out in Amendment 104(1), whenever:

> '…a senior manager […] acting within the actual or apparent scope of their authority commits a relevant offence […] the organisation is also guilty of the offence.'

A 'senior manager' is proposed to be:

> '…an individual who plays a significant role in […] the making of decisions about how the whole or a substantial part of the activities […] or the actual managing or organising of the whole or a substantial part of those activities.'

It is clear that there will be a great deal of debate as to the definition of a 'significant role'. If, as appears, these reforms are targeted at large multinationals then the role that any individual plays in the company as a whole rather than, for example, a particular sub-division, would seem to be crucial.

There will also be considerable discussion as to whether, when committing a criminal offence, an individual can be said to be '…acting within the actual or apparent scope of their authority'.

It will be rare that there is evidence of authorisation of fraudulent conduct—indeed where there were such there would generally be no need for this provision, so the issue will be how the fraudulent conduct sits within the perimeter of authorised conduct. What does 'apparent' mean in this context and is it distinct from the concept of 'actual or ostensible authority' which appears in the law of contract? Apparent to whom? Does it encompass the situation where the manager misleads the victim of the offence as to his authority? Will the criminal law borrow from the civil law jurisprudence, as recently summarised by HHJ Cawson KC in *Clear-course Partnership Acqireco Ltd v Jethwa* [2023] EWHC 1122 (Ch):

- a principal may be liable for fraudulent misrepresentations if made by its agent if those misrepresentations are made within the scope of the agent's actual or ostensible authority or, as Mr Justice Henshaw put it at [428] 'in the course of a negotiation which the agent had the principal's actual or ostensible authority to carry out', and
- it is not necessary that the agent has actual or ostensible authority either to make the specific fraudulent misrepresentations on which the claimant relies or to commit fraud. It suffices that the agent is authorised (actually or ostensibly) to act in a way that would involve making representations of the kind that it did

The proposed 'relevant offences' contained within the ECCT Bill include (among others):

- cheating the public revenue
- conspiracy to defraud
- bribery
- fraud
- false accounting
- a number of offences under the Financial Services and Markets Act 2000
- a number of financial offences under the Terrorism Act 2000, and
- money laundering

These proposals, in contrast to those within the ECCT Bill relating to the 'failure to prevent', also apply to inchoate offences. Therefore, if a 'senior manager' was party to a conspiracy to bribe, for example, the company would also be guilty.

It should be noted that, as drafted, these proposals apply to all companies irrespective of their size. They contain no requirement that the 'senior manager' committed the offence with the intention that it would benefit the company. Nor is it necessary to show that the company failed to take reasonable steps to prevent them from committing the offence, or even that the company should have been aware that the offence was being committed.

Amendment 104(3) provides a limitation as to jurisdiction:

> 'Where no act or omission forming part of the relevant offence took place in the United Kingdom, the organisation is not guilty of an offence under subsection (1) unless it would be guilty of the relevant offence had it carried out the acts that constituted that offence (in the location where the acts took place).'

During the bill's report stage, the government clarified that:

> '…criminal liability will not attach to an organisation based and operating overseas for conduct carried out wholly overseas simply because the senior manager concerned was subject to the UK's extra territorial jurisdiction, for instance because that manager is a British citizen. "Rather, this will apply to those offences which" …wherever they are committed, can be prosecuted against individuals or organisations who have certain close connections to the UK.'

It is of note that these provisions specifically include' …a body incorporated outside the United Kingdom'.

This 'senior manager' approach already exists for corporate manslaughter offences. How has that worked in practice? Has it resulted in holding larger organisations criminally liable?

The inclusion of senior managers within the remit of the ECCT Bill appears to have been influenced by the offence of corporate manslaughter, contained in the Corporate Manslaughter and Corporate Homicide Act 2007 (CMCHA 2007). The offence of corporate manslaughter is committed where the way in which an organisation's activities are managed or organised causes a person's death, and amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased. The way in which the organisation's activities are managed or organised by its senior management must be a substantial element of its breach of duty.

Senior management is defined as the persons who play significant roles in (i) the making of decisions about how the whole or a substantial part of its activities are to be managed or organised or; (ii) the actual managing or organising of the whole or a substantial part of those activities. However, the failings of senior management do not of themselves have to amount to a gross breach of the duty of care. The assessment of grossness relates to the failings of the organisation as a whole.

It appears that Amendment 104(1) of the ECCT Bill will adopt the same definition of 'senior manager' as the CMCHA 2007, given that the CMCHA 2007 provides the only existing example of the parameters used when deciding how a corporate can be held criminally liable for the actions of their senior management.

Although the wider concept of attributing corporate criminal liability to senior management is welcome news to prosecutors, it may not lead to a spike in criminal prosecutions and convictions because the impact of the corporate manslaughter offence has been limited. CMCHA 2007 came into force in 2008 and there have been relatively few prosecutions since and even fewer convictions. However, this may be attributable to the multiple elements of the offence that need to be proved by the prosecution, which involves high evidential thresholds. In reality, prosecutors often seek to charge health and safety offences under the Health and Safety at Work Act 1974 which are quasi-strict liability and easier to prove to the criminal standard than the multi-faceted offence of corporate manslaughter.

The expansion of the senior manager approach was one of the suggestions made by the Law Commission in its options paper on the reform of corporate criminal liability. Are there any drawbacks to this approach and if so what are they?

As with all criminal law reform, it is the detail that will matter and the development of case law. It is, however, perhaps worth considering the larger picture in respect of these proposals.

If enacted these proposals will mean that a company, which is an entirely independent legal entity, may be at risk of a criminal conviction in respect of an offence in which only a single senior manager was involved, and over which the company's board had no effective means of control.

This is not unique in English criminal law, BA 2010, s 7 has the same effect; however, that legislation only bites if the company did not do all that could reasonably be expected of it to prevent the bribery which took place. There is no similar safeguard envisaged here.

It is anticipated by the government that these proposals will lead to more corporate prosecutions. These will, potentially, be in circumstances where the board of directors may have no knowledge whatsoever of the offence and may be in no position to provide any real defence at all. Whether they 'stand or fall', will depend entirely upon the position of the 'senior manager'.

As in all things, money inevitably plays a part here. Far larger financial penalties can be extracted from companies than individuals. In an environment where prosecutors are being judged, at least in part, by their 'cost-effectiveness', there will always be an incentive to prosecute corporates. Moreover, following episodes such as the LIBOR scandal, in which it was felt that many of the corporates involved escaped lightly, there remains a public desire to see companies held to account for such misconduct, and for meaningful reparation to be secured from them.

While it is widely accepted that there should be a mechanism to remove the financial benefit which has accrued to a company through the dishonesty of others, including its own staff, it is open to question whether these proposals will provide that mechanism or, indeed, whether such an outcome can, or should, be achieved through the criminal courts.

In the meantime, with this lower threshold signalling a new era of significantly increased corporate criminal exposure, we can expect the prosecution agencies to feel more capable of taking on more serious and complex fraud prosecutions against corporates. That is likely to drive an attendant pressure on companies to promptly investigate allegations of misconduct, and to consider prompt self-referrals in appropriate cases, in order to avoid such a prosecution. In turn, we can expect this change, alongside the expansion of the failure to prevent fraud offence, to drive a sustained and significant increase in the volume of DPAs being struck over the coming years.

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