

Fairer rules for prosecuting companies for fraud and money laundering:
Financial Services Bill amendment

This briefing is for amendment **NC4** for the Financial Services Bill - ‘**Facilitation of economic crime**’ (see wording below).

The amendment

It would create a new corporate criminal offence for facilitating or failing to prevent economic crime. The specific economic crimes covered by the proposed amendment are money laundering, fraud, and false accounting. The new offence would be applicable to companies or bodies regulated by the Financial Conduct Authority (FCA). If accepted, it would mean that not only could corporations be held to account and fined for facilitating or failing to prevent economic crimes, so too could the directors or employees involved.

Failure to prevent offences are already in place for bribery and tax evasion and have been proven to be an effective way for holding companies to account and improving corporate behaviour.

Introducing this corporate criminal offence for money laundering, fraud and false accounting would

- ❖ create consistency in how the UK tackles economic crimes,
- ❖ establish a level playing field between small and large companies when it comes to prosecution of these crimes,
- ❖ ensure the UK is on a more equal footing with its international allies, and
- ❖ build greater public confidence in how the UK tackles economic crime, particularly fraud in public procurement.

The problem

The current rules for holding large companies and financial institutions to account for economic crime are unfair, ineffective, and undermine good corporate governance:

- Prosecutors have repeatedly asked for the laws on fraud, false accounting and money laundering to be strengthened in line with laws for bribery and tax evasion.¹
- The Treasury Select Committee last year described the situation as “*wrong, potentially dangerous and weaken[ing] the deterrent effect a more stringent corporate liability regime may bring.*”²
- 75.9% of those who responded to that consultation said that current rules inhibit holding companies to account.³

Urgent reform is needed more than ever, and only legislation by Parliament can change this.

¹<https://www.independent.co.uk/independentpremium/business/sfo-lisa-osofsky-uk-serious-fraud-office-economic-crime-us-fbi-b485236.html>

²<https://publications.parliament.uk/pa/cm201719/cmselect/cmtreasy/2010/201002.htm>

³<https://consult.justice.gov.uk/digital-communications/corporate-liability-for-economic-crime/results/corporate-liability-economic-crime-call-evidence-government-response.pdf>

The evidence

Examples where prosecutors could not bring companies to book for corporate wrongdoing include:

1. Barclays 2008 financial crisis fraud case - a recent court judgement, released in January 2020, dismissed a case against Barclays Bank for fraud and set the bar for bringing a corporate prosecution even higher. This means there will be fewer than ever corporate prosecutions for financial crime going forward.⁴
2. The LIBOR and FOREX rate-rigging scandal - no corporate criminal prosecutions were brought in the UK despite individuals being prosecuted stating that their managers knew what they were doing.⁵ In comparison, the US brought criminal enforcement actions against 12 banks for the same wrongdoing and imposed £3.4 billion in criminal fines.⁶
3. SERCO defrauding the Ministry of Justice – despite benefitting from and organising the fraud, the parent company could not be part of a Deferred Prosecution Agreement because of the current rules, so the agreement had to be made with a subsidiary.⁷
4. Olympus false accounting case - in 2015 the SFO had to drop its false accounting case against the Japanese camera maker and its UK subsidiary because the Court of Appeal ruled that it is not illegal for companies to mislead their auditors under current rules.⁸

How the amendment would fit with steps the government is taking

- The 2015 Conservative Party manifesto committed to make it a crime where companies fail to put in place measures to stop economic crime. The government legislated to do this for tax evasion. It subsequently opened a consultation about what to do in relation to other economic crime. That consultation closed three and half years ago.
- In November, the government announced its response to the consultation which was for the Law Commission to look further at the UK's corporate crime rules.⁹
- Under the timetable for the Law Commission, legislation to change the rules would be unlikely to come before Parliament before 2023 at the earliest. Furthermore, there's no guarantee that the Law Commission review will result in any change – less than 25% of such reviews in the past decade have led to legislation.¹⁰
- Introducing an immediate “failure to prevent economic crime” offence would complement this longer-term review by the Law Commission - a broad and specialised review that is looking at corporate crime rules across the board - and allow the UK to

⁴ <https://www.ft.com/content/f666b592-5a4b-11ea-abe5-8e03987b7b20>

⁵ <https://www.businessinsider.com/alleged-ubs-citi-libor-rigger-tom-hayes-all-the-way-to-the-ceo-2015-7?r=UK>

⁶ <https://drive.google.com/file/d/1BGhhq2XdA8hrsZDeO0g6arDWC4ImHMby/view>

⁷ <https://fulcrumchambers.com/the-importance-of-co-operation-and-proportionality-in-securing-a-dpa-serious-fraud-office-v-serco-geografix-ltd/>

⁸ <https://www.ft.com/content/8c57044e-87c9-11e5-90de-f44762bf9896>

⁹ <https://www.lawcom.gov.uk/law-commission-begins-project-on-corporate-criminal-liability/>

¹⁰ Research by Spotlight on Corruption, from the Law Commission's Implementation table: <https://www.lawcom.gov.uk/our-work/implementation/table/>

immediately close gaps in the law that currently leave it vulnerable to fraud and money laundering.

- The 'failure to prevent' model is a tried and tested model, and the government can undertake extensive and detailed consultation with the private sector in the process of drawing up guidance which must accompany the legislation.

Benefits of the amendment

The immediate introduction of a failure to prevent economic crime offence would:

- **Create greater fairness for how large and small companies are held to account before the criminal law**

Equality before the law is a fundamental principle of the rule of law. Right now, small companies face a far greater risk of being prosecuted, while larger companies are beyond the reach of prosecutors for economic crimes like money laundering and fraud.

The UK has a burgeoning fraud crisis arising from the COVID-19 pandemic – with estimates that up to £30 billion could be lost to the public purse from the COVID loan schemes,¹¹ and £3.5 billion from the furlough scheme.¹²

There is a real danger that prosecutors will go after small actors who engaged in COVID related fraud, but large companies will get away with it. This damages trust in the justice system, in enforcement bodies, and in the government's ongoing response to COVID.

- **Bring the UK in line with emerging international standards on corporate crime**

The UK could fall even further behind international corporate crime standards if it doesn't take urgent action.¹³

In 2018, the global money laundering watchdog, FATF noted that the UK's ability to prosecute large companies for money laundering "*remains limited,*" and questioned if the UK's prosecution of large actors for money laundering reflected "*UK's threats, risk profile and national AML policies.*"¹⁴

The UK is already well behind the US, which routinely imposes serious criminal enforcement penalties for money laundering. Between 2008-2018, the US imposed nearly £3 billion in criminal fines on New York based banks, and a further £6 billion in regulatory penalties. By comparison, the UK imposed just £260 million in regulatory penalties on London based banks.¹⁵

¹¹ <https://www.nao.org.uk/press-release/investigation-into-the-bounce-back-loan-scheme/>;
<https://www.gov.uk/government/publications/beis-annual-report-and-accounts-2019-to-2020>;

¹² <https://www.theguardian.com/uk-news/2020/sep/16/watchdog-warns-over-furlough-and-government-contracts>

¹³ <https://www.lawcom.gov.uk/law-commission-begins-project-on-corporate-criminal-liability/>

¹⁴ <https://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-United-Kingdom-2018.pdf>

¹⁵ <https://drive.google.com/file/d/1BGhhq2XdA8hrsZDeO0g6arDWC4ImHMby/view>

From December 2020, under the EU's 6th Anti-Money Laundering Directive,¹⁶ EU countries have to hold companies to account under the criminal law for money laundering where there is a lack of supervision or control. The UK decided not to opt-in but the government admitted it would have had to change its corporate crime rules if it had it chosen to do so.¹⁷

UK companies operating in the EU will now operate to a higher standard abroad than at home. This risks making the UK more attractive for money laundering and undermining its reputation for integrity.

- **Encourage stronger corporate governance and protect market integrity in the UK**

The government recognised when it brought in new laws for bribery and tax evasion that the current rules incentivise senior managers to turn a blind eye to wrongdoing.¹⁸

66.7% of those responding to the 2017 consultation on corporate crime rules for economic crime thought that corporate liability reform would result in improved corporate conduct – only 13.3% said it would not.¹⁹

Failure to prevent offences have been shown to incentivise companies to put in place procedures that prevent economic crime and help to reduce the enormous costs these crimes impose on society. This is potentially one of the most significant ways in which the private sector can contribute to the fight against economic crime.

- **Bring offences like fraud and money laundering in line with bribery and tax evasion.**

Fraud, false accounting and money laundering impose just as serious costs to society as bribery and tax evasion. Money laundering costs the UK more than £100 billion a year,²⁰ and fraud costs £193 billion.²¹

Given that bribery and tax evasion usually involve an element of money laundering and often fraud, it is inconsistent to have different models of corporate liability operating for different economic crimes.

The failure to prevent offence has been recognised in post-legislative scrutiny as a “*particularly effective*” one by the House of Lords. Furthermore, corporate fines for the failure to prevent bribery offence have netted the UK Treasury £1.3 billion. By comparison, the SFO has brought in £199.3 million in criminal fines from corporate fraud offending.

¹⁶ https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2018.284.01.0022.01.ENG

¹⁷ <https://publications.parliament.uk/pa/cm201617/cmselect/cmeuleg/71-xxix/71-xxix.pdf>

¹⁸ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/672231/Tackling-tax-evasion-corporate-offences.pdf

¹⁹ <https://consult.justice.gov.uk/digital-communications/corporate-liability-for-economic-crime/results/corporate-liability-economic-crime-call-evidence-government-response.pdf>

²⁰ <https://www.nationalcrimeagency.gov.uk/news/national-economic-crime-centre-leads-push-to-identify-money-laundering-activity>

²¹ <https://www.experian.co.uk/blogs/latest-thinking/identity-and-fraud/fraud-costs-uk-economy-193-billion-year-equating-6000-lost-per-second-every-day/>

Amendment wording:

To move the following Clause—

“Facilitation of economic crime

(1) A relevant body commits an offence if it—

(a) facilitates an economic crime; or

(b) fails to take the necessary steps to prevent an economic crime from being committed by a person acting in the capacity of the relevant body.

(2) In subsection (1), a “relevant body” is any person, including a body of persons corporate or unincorporated, authorised by or registered with the Financial Conduct Authority.

(3) In subsection (1), an “economic crime” means—

(a) fraud, as defined in the Fraud Act 2006;

(b) false accounting, as defined in the Theft Act 1968; or

(c) an offence under the following sections of the Proceeds of Crime Act 2002—

(i) section 327 (concealing, etc criminal property);

(ii) section 328 (arrangements, etc concerning the acquisition, retention, use or control of criminal property); and

(iii) section 329 (acquisition, use and possession of criminal property).

(4) In subsection (1), “facilitates an economic crime” means—

(a) is knowingly concerned in or takes steps with a view to any of the offences in subsection (3); or

(b) aids, abets, counsels or procures the commission of an offence in subsection (3).

(5) In proceedings for an offence under subsection (1), it is a defence for the relevant body to show that—

(a) it had in place such prevention procedures as it was reasonable in all circumstances for it to have in place;

(b) it was not reasonable in the circumstances to expect it to have any prevention procedures in place.

(6) A relevant body guilty of an offence under this section shall be liable—

(a) on conviction on indictment, to a fine;

(b) on summary conviction in England and Wales, to a fine;

(c) on summary conviction in Scotland or Northern Ireland, to a fine not exceeding the statutory maximum.

(7) If the offence is proved to have been committed with the consent or connivance of—

(a) a director, manager, secretary or other similar officer of the relevant body, or

(b) a person who was purporting to act in any such capacity,

this person (as well as the relevant body) is guilty of the offence and liable to be proceeded against and punished accordingly.”

Member’s explanatory statement

This amendment would make it an offence for a relevant body authorised or registered by the Financial Conduct Authority to facilitate, or fail to prevent, specified economic crimes.

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