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## The House of Lords' Report on the Bribery Act 2010: A Glimpse Into the Future of Economic Crime?

MARCH 21, 2019

On 14 March 2019, the Select Committee on the Bribery Act 2010 published its Report in which it makes a number of conclusions and recommendations.<sup>1</sup> The Committee was given the task not only of conducting post-legislative scrutiny of the Bribery Act 2010, but also of considering deferred prosecution agreements ('DPAs') as they relate to bribery and how they have affected the conduct of companies both to prevent corruption, and in the investigation of corruption once it is uncovered. In conducting its review, the Committee received evidence from an impressive range of witnesses, including, amongst others, the President of the Queen's Bench Division, the Director of the SFO, and the Minister of State for Security and Economic Crime.

### *Corporate Criminal Liability*

There are two aspects of the Committee's report that are worth considering in detail. The first relates to corporate criminal liability. The Committee considered whether English and Welsh law ought to adopt the vicarious liability model of corporate criminal liability that exists in the United States, whereby a corporate can be vicariously liable for criminal offences that are committed by its employees and agents. Under English and Welsh law, a corporate can generally only commit an offence if the prosecution can prove that someone sufficiently senior within its hierarchy – known as its 'directing mind and will' – possessed the *mens rea* of the offence in question (a notable exception to this being of course the Bribery Act 2010, under which a company can be held criminally liable for 'failure to prevent' bribery).

The Committee received mixed views from witnesses on this subject. It concluded that there are arguments for amending the law, but that as this was a matter that went beyond the Bribery Act 2010, it made no recommendations. In examining this question, the Committee noted how, in January 2017, the Government published a call for evidence seeking views on whether the 'failure to prevent' model of offence that is found in section 7 of the Bribery Act 2010 ought to encompass other economic offences, such as fraud and money laundering.<sup>2</sup> As the Committee pointed out, despite this call for evidence closing in March 2017, its findings have yet to be published. The Committee expressed the hope that the Government will soon reach a conclusion on whether to extend the 'failure to prevent' offence to encompass other economic crimes.

The length of time that has passed since the call for evidence closed suggests that reforming the law of corporate criminal liability is not high on the Government's list of priorities. The evidence given to the Select Committee by the Minister of State for Security and Economic Crime suggests, however, that there may now be greater political appetite for reform:

*"The Solicitor-General and I are pretty keen that we explore further the failure to prevent in broader economic crime. We had a call for evidence and we are waiting for the MoJ to publish its response to the call for evidence. We raised it at the last inter-ministerial government meeting on it."*

In his evidence before the Treasury Select Committee, which recently published a report on economic crime, the Solicitor-General stated that one of his goals is to enhance the UK's reputation for being a responsible jurisdiction within which to conduct economic activity.<sup>3</sup> He explained that one way of achieving this aim is to enact an offence of failing to prevent economic crime.

If the 'failure to prevent' model is to be expanded to encompass other offences, then a decision must be made as to which version of the model should be adopted. There are two types of failure to prevent offence in English and Welsh law. The first example, which is found in section 7 of the Bribery Act 2010, imposes liability upon a corporate only if the employee who committed the substantive bribery offence did so with the intention of obtaining or retaining business or some other advantage for the corporate. The second example is found in sections 45 and 46 of the Criminal Finances Act 2017. These offences criminalise a corporate that fails to prevent an employee or agent from committing a foreign or domestic tax evasion facilitation offence. In contrast to the offence in section 7 of the Bribery Act 2010, these offences do not require the prosecution to prove that the employee or agent committed the tax evasion facilitation offence with the intention of benefiting the corporate. If the Government intends to enact more 'failure to prevent' offences, then a policy decision needs to be made about which version of the offence to adopt. The choice that is made will determine whether a corporate is criminally liable for failing to prevent offences that are committed by employees purely for self-enrichment rather than with the aim of benefiting the corporate. Many corporates might balk at being held criminally liable for failing to prevent offences that were committed not for their financial benefit, but solely for their employees' gain.

#### *Deferred Prosecution Agreements*

The second noteworthy point relates to DPAs. A recent press release published by Transparency International suggested that DPAs may be seen as a way of resolving cases without the need to undertake the onerous task of prosecuting individuals.<sup>4</sup> In light of these comments, the Committee concludes that the DPA process, far from being an alternative to the prosecution of individuals, makes it all the more important that culpable individuals should be prosecuted.

This sentiment is all very well, but what the Committee does not consider is the complex relationship between DPAs and the criminal liability of individuals in practice. With the DPA regime still in the relatively nascent stages in the UK, there are thorny issues in this area that have yet to be ironed out. For example, a DPA will most likely be approved by the court long before the trial of any individuals takes place. A DPA must include a statement of facts relating to the alleged offence. This

statement of facts may include assertions about the criminal conduct of the corporate's employees, who may subsequently be charged and stand trial. What is the position if the former employees are acquitted after the DPA has been approved by the court? Must the statement of facts be amended to remove any references to their having engaged in criminal conduct? Sir Brian Leveson considered this issue with reference to the DPA he approved between the SFO and Tesco in April 2017, and concluded that he had no jurisdiction to alter or modify the terms of either the DPA or the statement of facts, even when the individuals in question had been acquitted at the direction of the trial judge on the ground that there was no case for them to answer.<sup>5</sup> He also made the observation that the DPA addressed the potential criminal liability of Tesco and did not address whether liability of any sort attached to Tesco's employees or former employees.

The outcome of *SFO and Tesco Stores Ltd* suggests that the DPA regime was not drafted with sufficient sensitivity to the potential criminal liability of individuals. This is surprising, given that, as a result of the 'directing mind and will' doctrine mentioned earlier, the corporate's criminal liability is premised upon the criminal liability of its senior employees. Sir Brian Leveson's observation that the DPA did not address the liability of any employees of Tesco is unlikely to assuage the applicants' sense of grievance given the assertions that are made within the statement of facts that is appended to it. As the number of DPAs increases, the courts will encounter these difficult issues with increasing frequency.

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<sup>1</sup> Available at [www.parliament.uk/business/committees/committees-a-z/lords-select/bribery-act-2010/](http://www.parliament.uk/business/committees/committees-a-z/lords-select/bribery-act-2010/).

<sup>2</sup> Available at [www.gov.uk/government/consultations/corporate-liability-for-economic-crime-call-for-evidence](http://www.gov.uk/government/consultations/corporate-liability-for-economic-crime-call-for-evidence).

<sup>3</sup> Available at [data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/treasury-committee/economic-crime/oral/92136.html](http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/treasury-committee/economic-crime/oral/92136.html).

<sup>4</sup> Available at [www.transparency.org.uk/press-releases/lack-of-individual-prosecutions-rolls-royce-bribery-case/](http://www.transparency.org.uk/press-releases/lack-of-individual-prosecutions-rolls-royce-bribery-case/).

<sup>5</sup> *SFO and Tesco Stores Ltd* [2019] EW Misc 1 (CrownC). Available at [www.bailii.org/ew/cases/Misc/2019/1.html](http://www.bailii.org/ew/cases/Misc/2019/1.html).

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