

## Criminal justice: How best to stop economic crime

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Speaking at the 35th annual Cambridge International Symposium on Economic Crime, Robert Buckland QC MP, the Solicitor General for England and Wales, and David Green QC, Director of the SFO, addressed the question, “*Preventing and controlling economic crime in the modern world—whose responsibility and are they really up to it?*”

### *Whose responsibility?*

The Solicitor General’s answer was pragmatic and unequivocal. Economic crime can only, he opined, be properly tackled by a coordinated response from, and based on cooperation between, the criminal justice system (including law enforcement agencies) and the private sector, because “*addressing economic crime is no single body or person’s sole responsibility.*”

Throughout his speech, the Solicitor General highlighted those new initiatives and tools that are helping to encourage a joined-up, cooperative approach between the private sector and the criminal justice system, including:

- The introduction of Deferred Prosecution Agreements (“DPAs”). Whilst acknowledging that they are a welcome prosecutorial tool, his speech majored on the DPA regime’s ability to align the private sector with the criminal justice system by avoiding the need for lengthy and costly trials, helping to prevent repeat offending through the use of corporate monitors and the implementation of anti-corruption compliance measures and encouraging companies to self-report wrongdoing to the Serious Fraud Office (“SFO”);
- Changes that have been made to the Suspicious Activity Reporting regime by the Criminal Finances Act 2017, allowing regulated companies to provide critical intelligence to law enforcement agencies;
- The setting up of the Joint Fraud Taskforce by the Home Secretary last year (building on the success of the Joint Money Laundering Intelligence Taskforce formed in 2015), which brings banks, government and law enforcement agencies together in a new partnership working collectively to tackle fraud, including, for example, by identifying and closing bank

accounts linked to fraud; and

- H.M. Treasury's plan to create a new Office for Professional Body Anti-Money Laundering ("AML") Supervision, hosted by the Financial Conduct Authority, to improve the oversight of the AML supervisory regime and ensure the 22-professional body AML supervisors (with responsibility for, amongst others, the legal and accountancy industries) provide effective and consistent standards of supervision.

#### *Reform of corporate criminal liability on the horizon?*

The Ministry of Justice's call for evidence on the potential reform of corporate liability for economic crime closed on 24 March 2017. Notably, the Solicitor General left those listening to his speech in no doubt as to his view that the 'failure to prevent' offence under section 7 of the Bribery Act 2010 should be extended to other financial crimes, such as money laundering, false accounting and fraud.

Describing the 'identification doctrine' that currently applies to economic crime (other than the offences of failure to prevent bribery and failure to prevent the criminal facilitation of tax evasion) as having, "*made it difficult to attribute criminal liability to large corporations where one cannot demonstrate the 'controlling mind' of the individuals involved*" and one which effectively, "*incentivises a company's board to distance itself from the company's operations*", the Solicitor General went further, alluding to the dire implications of a situation where, "*weaknesses in our current law*" result in foreign jurisdictions holding British companies to account where ours has not.

So what, then, is the solution? The Solicitor General stressed the positive effects that have followed the introduction of the section 7 'failure to prevent' offence, including putting, "*companies of all sizes on a level playing field*"; helping to secure a change in corporate culture by ensuring boards set an appropriate tone from the top; prompting companies to review and overhaul their compliance systems; and, with its greater threat of conviction, encouraging companies to cooperate with law enforcement, whether by increasing the likelihood of a company initially self-reporting wrongdoing or subsequently agreeing to enter into a DPA.

On this, the Solicitor General is aligned with David Green, the Director of the SFO (for whose superintendence, as part of the Attorney General's office, the Solicitor General is ultimately responsible), who has been calling for an extension of the 'failure to prevent' offence to other economic crimes, together with an adequate procedures style defence, for several years.

Both the Solicitor General and the Director of the SFO will be aware, however, that we have been here before. As long ago as 2010, the Law Commission made suggestions for reform of the identification doctrine as part of a wider consultation. We can but hope that the Solicitor General's comments reflect a broader desire for reform of corporate criminal liability within the Government, rather than yet another false dawn.

#### *SFO—a progress report*

Delivering his sixth and final speech to the Cambridge Symposium, David Green was bullish. A year

ago, at the same event, the question of whether or not the SFO was “*really up to it*” was open to debate and Green asked his audience to “*be patient—I have to be*”.

By contrast, his 2017 speech was assured, assertive, and designed to dispel any lingering doubts over the SFO’s competency as an organisation. Green rattled through a lengthy catalogue of the SFO’s recent achievements: two additional deferred prosecution agreements; a conviction rate by defendant of 89.5% in the 2016 to 2017 financial year; 14 new investigations; 43 individual and corporate defendants charged and awaiting trials; and a successful challenge to claims of legal professional privilege made by ENRC. He also pointed out the positive conclusions drawn by the OECD’s Working Group on Bribery about the SFO, and in particular the Roskill model under which the SFO operates. Finally, Green showed that the SFO could be not just effective, but also profitable, with a net contribution of £460m to the UK Treasury over the past four years—equivalent to around £1 million per member of SFO staff.

*Is the SFO’s future secure?*

When the topic of the speech turned to “looking ahead”, however, Green’s tone became somewhat defensive. This is understandable: in addition to the usual criticisms about its effectiveness more generally, the SFO are operating in the shadow of Prime Minister Theresa May’s Conservative Party manifesto pledge to “*incorporate*” the SFO into the National Crime Agency (“NCA”). As Green pointed out, this is an unhelpfully vague proposition, which could mean anything “*from closer co-ordination through to the break up of the Roskill model and outright merger*”. Faced with this uncertainty, Green’s closing remark was defiant: “*The SFO is confident, in good shape, attracting excellent staff, and well able to deal with the kind of case for which it was intended*”.

Given the SFO’s recent financial and investigative successes, it is safe to say that the trend for the SFO—and therefore, for Green’s legacy—has been broadly positive. However, the UK Government has so far remained silent on its manifesto pledge to abandon the SFO as we currently know it. Indeed, despite praising the work of the SFO over the past year at the Cambridge Symposium, the Solicitor General failed to end speculation about its future. Whether or not the Government shares Green’s confidence in the viability of the SFO as an independent agency therefore remains to be seen.

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