
Failure to Prevent – The Future of Corporate Criminal Liability

JANUARY 29, 2018

Since a 1971 dispute over the pricing of washing powder, English law has required that for acts to be attributable to a corporation they must represent the directing mind and will of that organisation¹. The “identification principle” (as it is widely known) has been a significant hurdle for prosecutors attempting to establish that corporations are guilty of criminal wrongdoing.

However, 2018 looks set to be the year when things might change. The increasing drive to create new offences that do not rely on the identification principle, coupled with developments in other jurisdictions and a general clampdown on economic crime, suggest that the identification principle’s days are numbered.

Failure to Prevent

The failure to prevent model sidesteps the identification principle which should, in theory, make it easier to establish corporate criminal liability. It was first introduced into English law by s.7 of the Bribery Act 2010, which creates criminal liability where organisations fail to prevent persons associated with them engaging in bribery on their behalf.

This year saw the introduction of a further failure to prevent offence. As part of the government initiative to tackle offshore tax evasion, the Criminal Finances Act 2017 created two new offences of criminal liability for organisations whose associated persons are criminally facilitating tax evasion.

The crucial element of failure to prevent offences is that they do not inherently change *what* is criminal, but rather *who* is held responsible. They impose criminal liability on organisations in situations where an associated person (for example, an employee, subsidiary or agent) commits a crime while purporting to act on behalf of the organisation.

Proposed Changes

In May 2016, it became clear that the government has bigger ambitions for the failure to prevent offence when it launched a consultation on the introduction of an offence of “failure to prevent economic crime”. The proposed offence would cover a range of economic crimes, such as money laundering, false accounting and fraud, which have been challenging to prosecute under the identification principle.

Addressing the Cambridge Symposium on Economic Crime in September 2016, the Attorney General emphasised that the intention of the consultation was to “*secure a change in corporate culture by ensuring boards set an appropriate tone from the top*” and commented that “*both corporations and individuals are responsible*” when it comes to financial crime.

There have also been clear indications that failure to prevent could be extended beyond economic crime. A recent report issued by the Joint Committee on Human Rights has recommended that the government “*should bring forward legislation to impose a duty on all companies to prevent human rights abuses, as well as an offence of failure to prevent human rights abuses for all companies, including parent companies, along the lines of the relevant provisions of the Bribery Act 2010.*” An extension from financial crime to human rights would likely set a precedent for further development into other areas of law.

International Perspectives

The UK is not unique in moving to a failure to prevent model: other jurisdictions have similar provisions imposing criminal liability on corporations, some far more wide-ranging. For example, under the Spanish Criminal Code it is possible for a corporate entity to be held criminally liable for offences committed on its behalf by legal representatives, officers or employees where the organisation has failed to exercise “due control”, even where the individual who committed the underlying offence cannot be specifically identified. The offences in question range from financial crime to corporate espionage, environmental offences, market manipulation and offences against consumers.

2018 Predictions

It seems to be a matter of not if, but when, we will wave goodbye to the identification principle and move to failure to prevent. Legislative timetables are always long, and it is easy to assume that Brexit will slow down this process ever further. Despite these challenges, the government has recently announced its intention to launch a new National Economic Crime Centre, which will operate within the National Crime Agency as part of a pledge to tackle financial crime. A failure on the part of the government to forge ahead with proposed legislative changes on corporate liability would render this pledge somewhat empty.

¹ *Tesco Supermarkets Ltd v Natrass* [1971] UKHL 1