WILMERHALE

Plans to Reform Corporate Criminal Liability Shelved by UK Government

SEPTEMBER 29, 2015

On 28 September 2015, the Government announced, via a written response to a Parliamentary question, that it has abandoned plans to reform the rules governing corporate criminal liability in the UK.

The justification offered by the Government for its decision not to extend section 7 of the Bribery Act to other acts of financial crime, and also not to reform the rules of corporate criminal liability more generally, is that "*there have been no prosecutions under the model Bribery Act offence* [section 7] *and there is little evidence of corporate economic wrongdoing going unpunished.*"

The Government should be cautious to read too much into the fact that there have been no prosecutions under section 7 of the Bribery Act. The Bribery Act does not have retrospective application and therefore only applies to conduct undertaken after 1 July 2011. Conduct amounting to an offence under section 7 can, by its very nature (that is serious, complex and multi-jurisdictional), take a long time to come to light and then once it does, can take several years for the SFO to successfully investigate and prosecute. We only have to look at the delayed, but ultimately profound, impact of the 1977 Foreign Corrupt Practices Act in the US for a prime example of a lengthy time lag between statutory reform and subsequent effective prosecutorial activity.

That the UK's legal framework for corporate criminal liability needs reform is beyond dispute. As long ago as August 2010, the Law Commission described the identification doctrine (the existing legal doctrine which sets out that for a company to be guilty of a criminal offence it must be established that someone who can be described as its "directing mind and will" was involved in committing the offence) as, "*an inappropriate and ineffective method of establishing criminal liability of corporations*" (The Law Commission, Consultation Paper No195, Criminal Liability in Regulatory Contexts, paragraph 5.84). The Government's decision then to abandon reform in this area will be greeted with surprise and disappointment.

This is likely to be particularly true for those with high hopes for the fledgling Deferred Prosecution Agreement (DPA) regime. Speaking less than three weeks ago at the Cambridge Economic Crime Symposium, the Director of the SFO made plain his view that a shift away from the identification doctrine towards a US style principle of vicarious liability was necessary to make DPAs mainstream:

"*Until that is done, a corporate might conclude that if the prosecution of a company is so difficult under our law, why should they agree to a DPA?*"

This is a critical question and one that is likely to continue to hobble the DPA regime for as long as it continues to sit awkwardly in an unhelpful legal landscape. For this reason, and many others that fall outside the scope of this article, the Government may well be persuaded to revisit its decision in the future.

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