Fountain Court CHAMBERS

Quarterly Commercial Crime Newsletter:

COMMENTARY

Reform of Corporate Criminal Liability – Considerations in view of the Law Commission Options Paper

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Introduction

On 9 June 2021 the Law Commission published a discussion paper on corporate criminal liability. This document launched the consultation phase of a project which will culminate in an Options Paper offering Government advice on "alternative options for an appropriate, principled, basis for attributing criminal liability for activities undertaken by and on behalf of non-natural persons."

At the heart of this process is the question whether to reform or replace the classic keystone of corporate criminal liability in English law, the identification doctrine. To wit, under the identification doctrine, non-natural persons can be held criminally liable if a person who can be qualified as its "directing mind and will" commits an offence with the requisite *mens rea* whilst acting on its behalf.

Following a consultation phase which closed on 31 August, the Law Commission is now working on the Options Paper which it aims to present to Government by the end of the year. Members of Fountain Court's Commercial Crime team here present a summary of arguments in favour of three broad options previously contributed as part of the Law Commission consultation process.

The case for the status quo

Richard Lissack QC

Why should the criminal law concern itself with companies? There are strong conceptual, practical as well as policy reasons why it should not and, *a fortiori*, that it should not further extend its reach over corporate conduct.

The fundamental purpose of the criminal law is to meet societal demands for retribution, deterrence and, often, rehabilitation. This evidently requires the target to be one on which these objectives can operate but, as Lord Hoffman said in *Meridian*, "*There is in fact no such thing as the company as such*". Corporate liability for offences requiring an element of fault will always be parasitic on the culpability of human agents. Attributing this criminal culpability to a fictitious entity distorts the nature of criminal law to no apparent benefit.

That companies are not proper targets of the criminal law is further illustrated by the fact that corporate prosecutions tend to be concerned with very historic conduct. The company subject to a prosecution is in most instances very different to the same company at the time of the alleged offending. The legal continuity of the corporate form hides the fact that all beneath it is different: shareholders, officers, employees. However, the criminal law punishes the company here and now, affecting the current stakeholders who had nothing to do with the criminalised conduct.

From a more practical perspective, prosecutions of companies, particularly if alongside individuals, is almost invariably counterproductive.

It overcomplicates proceedings, using up a disproportionate amount of the finite resources of the court system and are, consequently, very expensive for the state to pursue. What is more, as the *Barclays* case illustrates, criminal proceedings against companies delay regulatory action which serve to uphold the rules of the particular market concerned, as well as civil claims which seek to compensate the victims of the alleged misconduct.

We have also seen that high profile prosecutions of companies gamble with the standing of the criminal justice system. A failed, high-profile prosecution of a major company knocks public trust in the law and the criminal justice system. By contrast, the odd conviction does not register or merely serves to underline perceived inadequacies of the legal system where it fails to secure one.

With the Bribery Act 2010 having effectively solved the issue of perceived corporate impunity for corruptly obtaining business, the focus of the debate is on misconduct in the financial sector. Here it seems clear that the practical effects the proponents of legal reform seek can be achieved much more effectively by regulatory action. Entities are often more willing to concede regulatory than criminal failings; not least because they in principle do not adversely impact on individuals facing criminal trial to whom management may feel loyal. The tangible consequences for the entity of a regulatory violation are the same as following a criminal conviction: a financial penalty and, possibly, some form of remedial order.

Another benefit of a regulatory over a criminal approach is that the former merely represents enforcement of rules of business regulated entities have to comply with in any event.

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If, on the other hand, the reach of the criminal law is extended because of the perceived transgression of largely already regulated entities, *all* companies have to shoulder the associated compliance costs.

Finally, it is of course tempting to think that a decision to reform corporate criminal liability will bring this long-raging debate to an end. It is, however, doubtful that proposing reform or replacement of the identification principle will achieve this. Rather, the likelihood is that the debate will merely shift to what the rules of attribution should be, as well as the merits or demerits of the approach finally chosen, all the while continuing to bypass the more fundamental issue of the proper ambit of the criminal law in relation to non-natural persons.

The case for a "regulatory track" for corporate enforcement

Robin Barclay QC

Whether or not the law on corporate criminal liability is reformed, the criminal justice system is often not an appropriate venue for dealing with alleged corporate wrongdoing. The rules of procedure and evidence, as well as the delays associated with criminal proceedings, make the criminal court a cumbersome venue for determining issues around corporate responsibility for the criminal acts of individuals on their behalf and what form of reparation should be made. Creating the possibility for prosecutors to divert criminal proceedings to a "regulatory track" would not only allow for a more flexible and responsive system but would also unburden the already over-stretched criminal courts.

The system would be based on the regulatory enforcement model which has been used successfully by the Financial Conduct Authority (and its predecessor the Financial Services Authority) for over twenty years. Following a determination that a matter passes the evidential test in the Code for Crown Prosecutors, and that it is suitable for the regulatory track, the prosecutor would issue a Warning Notice. This would not only set out a draft basis for the entity's responsibility, but also a proposed list of financial orders and any other remedial steps deemed appropriate. The suspect entity would be invited to make representations and negotiations could ensue. At the end of this phase, if agreement is reached, a notice of agreement would be issued. If no agreement is reached, or agreement is reached only in part, the prosecutor would issue an enforcement notice. The suspect entity would have the option of appealing against all or some aspects of an enforcement notice to a tribunal, subject to appeal on points of law to the High Court.

The advantages of such a reform are manifold. A regulatory track would cater well for the broad category of cases where there is little or no corporate culpability in a traditional sense, but where the criminal law makes an entity liable for the criminal activities of others acting on its behalf and/or to its benefit. The system would be inherently flexible and proportionate, able to accommodate all types of economic crime by companies of all sizes. The range of sanctions and remedial orders would be adaptable to the needs of justice in

each case, as well as any need for public protection. Finally, particularly where there is little or no dispute about the facts, cases should be able to be resolved much quicker than is currently the case.

The regulatory track would release both the Prosecutor and suspect entity from the current shackles and anxiety concerning whether the case merits a DPA or prosecution in the public interest. It would provide incentives for early and agreed settlement for the entity concerned, but, at the same time, avoid the potentially greater cost and all-round risk of a corporate trial by lay jury. Instead, disputes would be resolved by a specialist tribunal, knowledgeable and experienced in dealing with commercial organisations and risk management policies and procedures.

The scheme would respect due process, as well as the rights of the suspect entity and those of any third parties. By hiving off the corporate proceedings from the prosecution of individuals, steps could be taken by both the prosecutor and/or the tribunal to manage any serious risk of injustice to the individuals through stays, reporting restrictions, and other measures.

The creation of a regulatory track would provide prosecutors and suspect companies with greater flexibility in resolving issues of corporate liability for criminal wrongdoing, freeing up the criminal courts to focus on those rare instances where there is genuine corporate culpability.

The case for reform

Dr Robin Lööf

The fundamental issue with current rules on corporate criminal liability, and in particular the identification doctrine, is that it is derivative on individual culpability. This is why the law needs reform. A reassessment of the two conceptual pillars which tend to support arguments against corporate criminal liability *per se*, and, consequently, any suggestion of extending it demonstrates this.

The first of these is the observation that non-natural persons can only act through individual (human) agents. While accurate in some sense, considering corporate agency through this lens risks distorting reality by assuming that because a corporate act can be broken down into acts by individual agents, it follows that corporate acts are merely the sum of such individual acts. That is a fallacy.

In fact, many commercial acts can only, as a matter of law or commercial practice, be accomplished by non-natural persons. For instance, most public procurement contracts can only be entered into by companies and, even more starkly, the provision of financial services, in all its diversity, is exclusively predicated on the activities of non-natural entities.

In addition, and independently, corporate structures are capable of amplifying the nature and scope of acts to well beyond that which could be accomplished by individuals acting for themselves. For instance, no individual could leverage her- or himself to the extent that a company can.

As there is a broad category of acts that are uniquely “non-natural”, by their nature and / or by virtue of their scale, it would follow that there is such a thing as corporate agency, independent of individual agency. To say that a company “acts” is no mere shorthand for a collection of acts by individuals.

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The second pillar of opposition to corporate criminal liability is that criminal liability presupposes moral culpability which can only with some artificiality be ascribed to non-natural persons. Also broadly correct, this observation is taken too far if it is used to suggest that moral culpability is the *only* proper concern of the criminal law. The prevention of social harm *per se* is also part of its remit as can be illustrated by the fact that the criminal justice system deals with individuals who lack moral discernment. Such individuals are not (in civilised societies) *punished* for criminal harms they cause, but they are not spared sometimes severe consequences imposed under the criminal law.

If the criminal law can provide protection and redress for society and victims from criminal harm caused by individuals absent culpability, it is not much of a leap to apply the same logic to companies.

This is even more so given that the often dispersed nature of corporate decision making results in social harms proscribed by the criminal law (public officials being bribed, markets or investors misled, criminal proceeds laundered, *etc.*) being caused by corporate acts without any individual intending it.

Once the uniqueness of corporate agency and its contingent link with moral culpability are recognised, the question becomes whether the causing of criminally proscribed harms by corporate (often profitable) activities should be a matter for the criminal law. In light of the unique nature and scale of criminal harms that non-natural persons can cause, a compelling case can be made not only that it should, but also that corporate criminal liability should be reformed to sever the link with individual culpability.

ABOUT THE AUTHORS

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Richard is a nationally and internationally recognised leader in the fields of international banking and financial services, anticorruption legislation (including the Bribery Act), commercial fraud, health and safety, public inquiries and regulatory breaches.

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