SCOPE OF PROPOSED NEW OFFENCE OF FAILING TO PREVENT ECONOMIC CRIME

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Legal Briefings

This week has seen a flurry of press reports which appear to suggest that individual directors could be held personally liable for the acts of company employees under the proposed new criminal offence of failing to prevent fraud or economic crime, however, we understand that this is unlikely to be the case and that the scope of the new offence will focus solely on extending corporate liability.

In May David Cameron announced a proposed new offence of failing to prevent economic crime. Writing in the Guardian he stated that "… *in addition to prosecuting companies that fail to prevent bribery and tax evasion, we will consult on extending the criminal offence of* '*failure to prevent*' *to other economic crimes such as fraud and money laundering so that firms are properly held to account for criminal activity that takes place within them*". There was no indication at this stage that the government intended to introduce additional personal liability for directors within the scope of an offence of failing to prevent fraud or economic crime committed by company employees.

Following a summer of upheaval in government there were no further announcements relating to the proposal until the Attorney General addressed the Cambridge Symposium on Economic Crime last week and stated that the government would ".. *soon consult on plans to extend the scope of the criminal offence of a corporation 'failing to prevent' offending beyond bribery to other economic crimes, such as money laundering, false accounting and fraud*." He went on to say that "*[o]ur current system of limited corporate liability incentivises a company's board to distance itself from the company's operations. In this way, it operates in precisely the opposite way to the Bribery Act 2010, one of whose underlying policy rationales was to secure a change in corporate culture by ensuring boards set an appropriate tone from the top*" and concluded by stating "*[w]hen considering the question 'where does the buck stop?' and who is responsible for economic crime, it is clear that the answer is to be found at every level, from the boardroom down. Both corporations and individuals are responsible.*"

Although these comments have subsequently been reported as evidence of the government's intention to push ahead with legislation which could result in individual directors being prosecuted for offences carried out by staff, we understand that this reporting is wide of the mark. Whilst the government will launch a consultation regarding a proposed new offence of failing to prevent economic crime and fraud, the purpose of the proposed offence will be to hold companies rather than company directors liable for the offending of employees. Recent reporting has also suggested that the proposed offence will appear in the forthcoming Criminal Finances Bill (which is also likely to include the new offence of failing to prevent facilitation of tax evasion), but again we understand that this is unlikely to be the case, particularly as a consultation is yet to be launched.

The proposed new offence will be of significant importance to companies from both a liability and compliance perspective. Whilst we are still no closer to knowing the details of the proposed offence or a timetable for the consultation, given its potential significance it will be important to engage with the consultation process in due course.

Although these particular reforms are focussed on corporate liability, there is, of course, a broader drive to hold individuals accountable in the event of criminal conduct or regulatory breaches at their companies, and there are existing mechanisms to do so. As the Attorney General's comments to the Cambridge Symposium indicate, the question is not one of having to choose between targeting either companies or individuals, but rather of ensuring that the criminal law has the tools to enable action to be taken against both. This is entirely consistent with recent developments in the US, one year on from the so-called "Yates memo" (which set out key steps to enable Department of Justice attorneys "to most effectively pursue the individuals responsible for corporate wrongs"), and developments in the regulatory arena, following the introduction of the Senior Managers' Regime. For both companies and individuals, compliance remains more important than ever.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

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