

**ICSA: The Governance Institute  
Response to Ministry of Justice call for evidence on Corporate Liability for Economic Crime**

**Question 1: Do you consider the existing criminal and regulatory framework in the UK provides sufficient deterrent to corporate misconduct?**

No

**Question 2: Do you consider the identification doctrine inhibits holding companies to account for economic crimes committed in their name or on their behalf?**

Yes

**Question 3: Can you provide evidence or examples of the identification doctrine preventing a corporate prosecution?**

No, not readily.

**Question 4: Do you consider that any deficiencies in the identification doctrine can be remedied effectively by legislative or non-legislative means other than the creation of a new offence?**

No. This course of action would amount to 'tinkering' to provide a short-term solution.

**Question 5: If you consider that the deficiencies in the identification doctrine dictate the creation of a new corporate liability offence which of options 2, 3, 4 or 5 do you believe provides the best solution?**

On balance, we consider that Option 4 is the preferred option. Option 5 is a possible option but does not appear to cover organisations engaged in an unregulated sector.

**Question 6: Do you have views on the costs or benefits of introducing any of the options, including possible impacts on competitiveness and growth?**

Organisations are already adopting compliance programmes for the Bribery Act which is consistent with Option 4. The incremental costs of compliance would not be that great.

**Question 7: Do you consider that introduction of a new corporate offence could have an impact on individual accountability?**

Yes. There is a risk that the default option in any prosecution will be to target the corporate entity. This should be discouraged and individual offenders should still be held to account.

**Question 8: Do you believe new regulatory approaches could offer an alternative approach, in particular can recent reforms in the financial sector provide lessons for regulation in other sectors?**

No. We don't consider that sector based regulation is appropriate. Sector based regulation could be supplemental but there should be a consistent underlying legislative approach across all sectors.

**Question 9: Are there examples of corporate criminal conduct where a purely regulatory response would not be appropriate?**

No

**Question 10: Should you consider reform of the law necessary do you believe that there is a case for introducing a corporate failure to prevent economic crime offence based on the section 7 of the Bribery Act model?**

Yes. This would be the preferred route. The Bribery Act model is clear and proportionate.

**Question 11: If your answer to question 10 is in the affirmative, would the list of offences listed on page 22, coupled with a facility to add to the list by secondary legislation, be appropriate for an initial scope of the new offence? Are there any other offences that you think should be included within the scope of any new offence?**

Yes. As an Initial scope, the offences listed are appropriate. The scope could be extended later if warranted.

**Question 12: Do you consider that the adoption of the failure to prevent model for economic crimes would require businesses to put in place additional measures to adjust for the existence of a new criminal offence?**

No. As compliance programmes should already include provision for the Bribery Act, the additional measures should not be excessive.

**Question 13: Do you consider that the adoption of these measures would result in improved corporate conduct?**

Yes. Boards are likely to have an increased level of awareness due, in part, to the elevated reputational risk.

**Question 14: Do you consider that it would be appropriate for any new form of corporate liability to have extraterritorial reach? Do you have views on the practical implications of such an approach for businesses?**

No. It is not clear that extraterritorial application is appropriate in all instances. The case for such an approach in the Bribery Act was accepted. However, each of the 'Economic Crimes' will need to be assessed to determine if extraterritorial reach is required and proven to be necessary rather than applied by default.

In addition, where Extraterritorial Reach is deemed to be appropriate for particular Economic Crimes, care will need to be taken to ensure that the UK businesses are not prosecuted for an action which would be a breach in UK law but would be permitted in a foreign jurisdiction. For example, there remains such an inconsistency between the provisions of the UK Bribery Act which prohibits facilitation payments whereas the US Foreign Corrupt Practices Act is not so restrictive.

**Question 15: Is a new form of corporate liability justified alongside the financial services regulatory regime. If so, how could the risk of friction between the operation of the two regimes be mitigated?**

Yes it is as it provides a consistent approach across all sectors. Criminal liability must have primacy over the financial services regulatory regime. Only once a decision has been taken not to proceed with a criminal prosecution should the FCA become involved.

**Question 16: What do you think is the correct relationship between existing compliance requirements in the financial services sector and the assessment of prevention procedures for the purposes of a defence to a criminal charge?**

First and foremost, compliance regimes must focus on prevention of a criminal charge. Any specific requirements of the financial services regulatory regime are additional obligations.

**23 March 2017**