

Response ID ANON-T4H4-3DAH-4

Submitted to **Corporate liability for economic crime: call for evidence**

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About you

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Association of British Insurers

The issue to be addressed

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

Not sure

Please type your response in the text box:

Regulation in the financial services sector generally provides a good benchmark for dis-incentivising corporate misconduct through improved compliance, particularly at senior management level, as is evidenced by the FCA Senior Managers' Regime.

In recent years there have been several high profile cases of corporate misconduct in the banking sector. However, the FCA has used existing powers to impose punitive fines on companies, which has shown to positively affect the behaviours of these institutions and act as a sufficient deterrent.

While the FCA has a robust infrastructure in place, particularly in comparison to other sectors, it is perhaps a little early to fully assess its impact in practice. We note that the FCA did not hold any individual senior manager accountable in the high profile cases involving Barclays Bank and Deutsche Bank AG . As such, it might be prudent to allow the regime to senior manager to bed-down fully before reaching any firm conclusions.

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

Yes

Please type your response in the text box:

We believe the identification doctrine does prove an obstacle for holding companies criminally liable where there has been collective failure to prevent corporate crime. However, we suggest the main issue with the identification doctrine is at the prosecution stage, as it can be difficult in some cases to identify the 'directing mind and will of the company', particularly in larger companies where responsibilities are decentralised. It is not evident that the identification doctrine sufficiently disincentivises good corporate governance.

In the financial services sector, the regulator has sufficient power in principle to hold companies accountable even where the identification doctrine cannot. The FCA has the ability to apply sanctions to both companies and individuals with management responsibility for insufficient controls to prevent corporate misconduct. Additionally, the FCA can limit the activities of firms and individuals limiting ability to operate in particular markets or hold positions of responsibility within the sector. In exercising its regulatory powers, the FCA should adopt a consistent approach irrespective of the size or corporate profile of the firm.

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

Please type your response in the text box:

No.

Please only upload standard file formats, such as Word or Excel. Files should be no larger than 5mb.:

No file was uploaded

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 (Option 1)?

Please type your response in the text box:

Taking learning from the regulatory regime in the financial services sector may address some of the deficiencies in the identification doctrine. The FCA's Senior Managers' Regime, for instance, holds key decision makers accountable if they fail to prevent wrongdoing.

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?

Option 4

Please type your response in the text box:

Option 4 would be preferable as the burden should be placed on the prosecution to prove that the company did not take adequate measures to prevent misconduct. This option would protect management where the offence is not caused by the failure of managers to implement adequate measures to deter misconduct.

The introduction of a new liability offence that was not subject to a due diligence defence would not incentivise companies to implement good corporate governance practices.

6 Do you have views on the costs or benefits of introducing any of the options, particularly impacts on competitiveness and growth?

Please type your response in the text box:

Implementing new regulation or legislation can cost firms' time and resources, particularly if new requirements conflict with existing obligations. From the options presented in the paper, both 4 and 5 are less costly options. Firms' should have many of the controls and procedures in place already to prevent financial crime, but this needs to be part of a documented framework.

The cost burden of implementing new regulation is heightened if major competitor jurisdictions fail to apply similar measures. Should a new legislative offence be introduced, in the interest of fairness, sanctions should be applied equally across different sectors, both private and public. In contrast to the public sector, authorised financial services providers already work within a credible, robust regulatory framework that ensures firms have effective systems and controls to prevent economic crime.

The impact of the proposals upon competitiveness and growth would depend on the strength of any causal link between the quality of regulation and economic growth.

7 Do you consider that introduction of a new corporate offence could detract from individual accountability?

No

Please type your response in the text box:

The introduction of a new corporate offence would not detract from individual accountability if the offence made provision for senior managers' responsibilities to prevent economic crime. The FCA can hold both corporate entities and individuals in financial services to account.

8 Do you believe new regulatory approaches could offer a better alternative, in particular can recent reforms in the financial sector provide lessons for regulation in other sectors?

Yes

Please type your response in the text box:

The regulatory framework in the financial services sector provides a good benchmark from which other sectors, both public and private, can take learning. In particular, other sectors need to develop the resources and mechanisms to be able to supervise and enforce regulation, as has been seen in the financial services sector.

Regulation and the approaches taken to prevent economic crime would benefit from greater sharing of information between law enforcement and the private sector, as this would allow organisations to tailor their systems and controls effectively to mitigate actual, rather than theoretical, risks. For example, there is little hard evidence that money laundering took place in most of the situations where the FCA has taken action against firms for inadequacies in their AML systems and controls. This is leading to an environment where systems and controls are managed to meet the expectations of the regulator, rather than to mitigate real economic crime risks evidenced by actual offences being committed.

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

Yes

Please type your response in the text box:

Although no example comes to mind, in situations where an 'accountable manager' has either deliberately colluded in the commission of financial crime, or demonstrated clear 'wilful blindness' to allow such an offence to take place, then a purely regulatory response may not be adequate and exposure to criminal prosecution may be required to reflect the gravity of such offences.

The Bribery Act model of a corporate failure to prevent

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

Yes

Please type your response in the text box:

As highlighted in our response to question 5, the introduction of a failure to prevent model would be preferable as it encourages due diligence and incentivises

firms to put measures in place to prevent misconduct.

11 If your answer to question 10 is yes, would the list of offences listed below, coupled with a facility to add to the list by secondary legislation, be appropriate for an initial scope of the new offence?

Yes

Please type your response in the text box:

The offences listed, coupled with a facility to add to the list by secondary legislation, appears to be an appropriate approach.

Please type your response in the text box:

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

Please type your response in the text box:

If a new criminal offence were to be created then there should be adequate compliance and governance models in place to mitigate the threat of any new offence from occurring. Under the failure to prevent model, senior managers' should be incentivised to ensure that their business has robust measures to discourage any criminal offence from occurring, to protect management from prosecution.

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

Yes

Please type your response in the text box:

Extraterritorial jurisdiction

14 Do you consider that it would be appropriate for any new form of corporate liability to have extraterritorial reach?

Not sure

Please type your response in the text box:

At this stage, we do not have a defined view as to whether any new offence should have extra territorial reach. The arguments in favour and against appear finely balanced and must be carefully considered and weighed.

Please type your response in the text box:

Corporate criminal liability reform and the regulated financial services sector

15 Is a new form of corporate liability justified alongside the financial services regulatory regime?

No

Please type your response in the text box:

We support the view from MoJ that any extension to corporate criminal liability should not impede the effectiveness of the financial services regulatory regime. Neither should it increase compliance costs without bringing any substantive benefit to the public.

Please type your response in the text box:

The financial services sector has a robust regulatory regime in existence and should be used as a benchmark for any new form of corporate liability. Provided the requirements of a new corporate liability offence are similar to the FCA regime, then this should mitigate any friction between the two models and it will be easier for financial services businesses to comply with.

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?

Please type your response in the text box:

While the FCA must ensure that it adopts a consistent approach to supervision of and enforcement against corporate crime, its regime acts in principle as a sufficient deterrent and incentivises companies and individuals to comply with regulation.

Any additional prevention procedures should be benchmarked against existing FCA regulation so that businesses do not have to comply with two compliance models that would be out-of-kilter with each other, and thereby impose unnecessary potential costs on businesses, including the costs of taking advice, carrying out risk assessments, adjusting corporate governance programmes and implementing new measures.

Complimentary compliance models will ensure that companies have robust mechanisms in place to mitigate any risks of criminal misconduct. The burden is then placed on the prosecution to prove that the company had not taken adequate steps to prevent unlawful misconduct from occurring.