Senior manager attribution: a new liability?

Michelle de Kluyver, Nichola Peters & Harriet Territt discuss whether the Economic Crime & Corporate Transparency Bill creates a new breed of corporate criminal liability in the UK

IN BRIEF

- The introduction of a statutory test for corporate criminal liability is potentially a game-changer; making it easier to prosecute larger businesses in the UK.
- This article highlights key elements of the proposed law, including its extraterritorial reach, and explores the absence of statutory defences as well as the potential impact on Deferred Prosecution Agreements (DPAs).
- Business owners, senior managers and legal professionals alike need to understand the implications and consider what measures can be put in place to mitigate potential risks.

One of the most significant changes to the landscape of corporate criminal liability for a generation looks likely if the Economic Crime and Corporate Transparency Bill (the Bill) is passed in either its current or similar form. The Bill makes a significant change to the common law identification doctrine in response to longstanding calls to address perceived deficiencies in current law.

The government has characterised its reforms as placing the identification doctrine on a statutory footing, thereby providing legislative certainty, as well as extending it to ensure the conduct of senior management is within scope of attribution. An alternative view is that it creates a new breed of corporate criminal liability—senior manager attribution liability—which needs to be carefully considered and planned for in operations. Such a view is also consistent with the Bill's aim to enable the prosecution of larger businesses, which are considered harder to prosecute under the current model.

What is the scope?

At the time of writing, the provisions can be found at clauses 195 to 197 of the Bill. Together, these provisions replace the common law 'directing mind and will' test with a 'senior manager' test, for the offences currently listed at Sch 12 to the Bill. The government is committed to widening the list of offences. Per commitments in the Government's Economic Crime Plan 2, this will be extended to all other criminal offences when further suitable legislation is produced. The current list comprises those offences traditionally categorised as economic crimes (fraud, bribery, money laundering) and others, such as contravention of the general prohibition against carrying out regulated activity without authorisation under s 23 of the Financial Services and Markets Act 2000 (FSMA 2000). The list of relevant offences for these purposes should not be confused with the list of economic crimes (current Sch 11), which contains offences which can only be committed by corporates or, for that matter, the listed offences in current Sch 13, (relevant to the failure to prevent fraud offence).

Extraterritorial reach

The provisions will apply to corporates incorporated in the UK but can attach to businesses incorporated overseas, where there is a relevant UK nexus to the underlying offence. It is important to note that criminal liability will not attach to a corporate based and operating overseas for conduct that is carried out wholly overseas, simply because the senior manager concerned has a UK nexus (for example, because the manager is a British citizen). Overseas organisations will therefore be at risk if any or all of the criminal conduct took place in the UK or, for those offences where there is extra-territorial jurisdiction, the relevant jurisdictional test can be met.

Expanding the scope of the common law identification doctrine

Corporates, although having legal personalities, have no minds of their own. To be liable for a criminal act 'its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation' (*Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705).

This principle has become known as the identification doctrine: a legal test currently used to attribute (most forms of) criminal conduct to corporations. At its heart, it requires the prosecution to point to a natural person whose acts or omissions form the conduct (*actus reus*) and who has the necessary mental state (*mens rea*) to render it criminal. It is relevant only to fault-based offences, ie those which require proof of *mens rea*.

There is currently a lack of precision, clarity and predictability as to who may count as the directing mind and will. This has caused issues for prosecutors attempting to prosecute corporates. The common law position usually requires one or more members of the board to have the requisite involvement and mental state. The commercial reality, particularly in a large corporate, is that other levels of management, such as financial controllers, marketing executives and others, may be involved in the relevant conduct and have the relevant mental state, but their acts and knowledge will not be attributed to the corporate.

The identification doctrine also operates in a way that seniority, such as being a statutory director, is not sufficient. In one leading case, the court found that, despite their seniority, the states of minds of two key directors (the chief executive and chief finance officer) could not be attributed to the corporate since neither had the requisite authority to act as its directing mind and will in respect of certain transactions. It has therefore become necessary for prosecutors to provide evidence of the ambit of any delegated authority to do the acts in question, before they can assert that relevant individuals represented the directing mind and will of a company.

Need for change

The identification doctrine is widely viewed by prosecutors as a hindrance to prosecuting larger companies. The same is not true for smaller companies, since it is easier to prove the scope of a director's authority to bind the organisation. The disparity between the ability to prosecute larger and smaller companies (the unequal playing field) is one of the key drivers of the current changes.

What the reforms are designed to achieve

The government's two stated aims (placing the identification doctrine on a statutory footing for economic crimes and providing certainty that senior managers are in scope of attribution) will, the government believes, facilitate more successful prosecutions of corporate defendants for economic crime offences. It hopes that the extension of attribution liability to senior managers will mean that prosecutions will in future be available where they have not been in the past.

Who is a senior manager for these purposes?

The new provisions do not define who is a 'senior manager' but instead introduce a new test to be applied in any factual context to determine whether the person in question is a senior manager. This involves a consideration of their roles and responsibilities, their managerial influence and whether they play a significant role in decision-making within the corporate. Job titles are irrelevant. The focus of any assessment will therefore be on the decision-making power of the senior manager in question and how it was applied in the context of the commission of the alleged offence. It will be necessary to wait and see, as the offence beds in, how the term 'significant role' is interpreted and what represents a 'substantial part' of a corporate's business (these are terms used in the current draft). This lack of certainty is in stark contrast to the senior managers' regime, which operates in the financial services sector, where the senior management functions are prescribed in detail.

Acting within the actual or apparent scope of their authority

In its 2022 Options Paper setting out options for legal reform of the identification principle, the Law Commission preferred a model of attribution based on concepts of engaging in, authorising or permitting the relevant conduct, rather than limiting liability to those senior managers acting within the scope of their authority because the latter model could be subject to misinterpretation or limit criminal liability for holding companies. Yet it is this formula that has been adopted in the draft legislation. The new test will not require proof of consent or connivance on the part of the senior manager before the corporate will be liable.

There is no definition of 'actual or apparent scope of authority', but guidance may be drawn from the concept of agency.

Aids, abets, counsels or procures

The provisions anticipate that lower-ranking employees could undertake the conduct that amounts to the offence. The definition of 'relevant offence' includes references to aiding, abetting, counselling or procuring the commission of a listed offence, as well as conspiracy and attempt. The government wanted to capture those instances where a senior manager commissions or encourages a lower-ranking employee to do their 'dirty work'.

Is the conviction of a senior manager a condition precedent to liability?

There is no suggestion that the conviction of a senior manager is a condition precedent to corporate liability via senior manager attribution liability. This is in line with the current common law position, where a corporate can be liable where the prosecutor proves that a relevant individual had committed the relevant conduct with the necessary *mens rea*, without a need for the individual to be convicted of the offence (see, for example, *R v A, X and Y* ([2016]).

Defences, strict & vicarious liability and other provisions

In relation to strict or vicarious liability offences, the senior manager attribution liability regime will (in theory) be irrelevant. Whether an offence creates strict or vicarious liability depends on whether there is a mental element in the offence and/or whose 'liability' the offence is predicated on. In relation to vicarious liability, prosecutors can rely on the acts or omissions of any employee to hold corporates vicariously liable. This is most often seen in the regulatory sphere. Successful prosecutions for strict liability offences do not turn on whose conduct and mindset 'counts' as the corporate's and so the application of the identification principle is unnecessary.

Some strict liability offences are directed specifically at corporates due to how the offence is itself framed. The corporate criminal offences of failure to prevent bribery and failure to prevent the criminal facilitation of tax evasion are examples, as is contravening a relevant requirement under The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (SI 2017/692) (MLRs). These dedicated corporate criminal offences are intentionally excluded from the list of relevant offences in Sch 12. These offences provide for reverse onus of proof type defences, where defendants can absolve themselves of liability by demonstrating that they took steps to prevent the offence from occurring.

As currently drafted, the new senior manager attribution liability regime does not contain any statutory basis to defend or avoid liability for the organisation where the actions of the relevant senior manager are caught.

Some strict liability offences do, however, appear on Sch 12. Two key examples are contravening the general prohibition and the financial promotions restriction under FSMA 2000. There is an existing provision to attribute liability to officers of the corporate entity or partnership on a strict liability basis subject to the defence that the accused can show they took all reasonable precautions and exercised all due diligence to avoid committing the offence (s 400, FSMA 2000), but this defence is a high bar. It is difficult to predict what additional material benefits the senior manager attribution liability regime gives to prosecutors for these offences, yet there is no suggestion that they will be removed from the schedule before the Bill concludes its journey through Parliament.

What is the impact of these reforms likely to be?

The reforms are, as described, intended to make it easier to prosecute larger and more complex companies for the improper actions of the individuals within them. However, the prosecuting authorities will still face a number of hurdles.

In the past, concerns have been raised that prosecutors focus exclusively on the corporate at the expense of bringing prosecutions against individuals and these provisions do little to address those concerns. Also, the evidential hurdles to effectively prosecuting corporates, such as, obtaining evidence from abroad, managing the disclosure process effectively and the time it takes to bring such prosecutions to court remain. The recent decisions by the Serious Fraud Office to cease long-term, high-profile investigations of two corporates do not appear to be based on any suggestion that the agency was hindered by the application of the identification principle. In one case, insufficient admissible evidence was cited as the reason for closing the case, whereas, in the other, the reason given was one of public interest (ie, the application of the second limb of the Code for Crown Prosecutors test). In reality, there are myriad factors which inform any decision to prosecute a company, not simply the ease with which liability may be attributed.

How might this impact how DPAs are negotiated?

One outcome of these reforms will likely be the agreement of a greater number of deferred prosecution agreements (DPAs). This is due, in part, to what we predict will be a perception of greater corporate criminal liability risk due to the expansion of the law to take into account the acts or omissions of senior managers. In this respect alone, the new law will represent a significant boost to the prosecutor's toolbox.

These new provisions may also have an impact on how and when DPA negotiations are entered into as prosecutors and corporates alike engage with the realities of more conduct being caught in the wider legislative net.

Reducing liability risk

While the concepts of corporate criminal and accessorial liability are not new, what is new is combining them in the statutory expression of liability. The Bill contemplates that conduct of senior decision makers, including those who do not undertake the conduct themselves but instead aid, abet, counsel, or procure the commission of an offence, will count as the conduct of the company. This statutory formulation enables prosecutors to point to evidence of delegation, layering of responsibilities, or subordinates being tasked with undertaking unlawful activities as evidence of a relevant corporate criminal offence having been committed. This requires businesses to consider how best to protect the corporate and its employees beyond just cascading measures designed to protect directing minds.

We know from our experience of working with clients to reduce their risks that having an effective compliance program in place and taking a proactive approach to remedial action are both key to successfully mitigating corporate criminal liability risk.

This legislation prompts widening the scope of such measures to incorporate staff at lower levels: whether that be in the form of training; rolling-out new policies or guidance; and implementing checks, balances, transparency and internal accountability.

It will be essential to ensure that relevant decision makers and their reporting lines are identified, governance processes around decision making are scrutinised and risks identified. This will give those with governance responsibility the necessary visibility to identify and mitigate those risks.

It should be noted that the commencement timeline for these provisions is tight and, on the current drafting, they will be automatically brought into force within two months of Royal Assent. **NLJ**

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