Corporate Crime Reform: A comparative guide

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Keen listeners will recall that we recently spoke with David Allan of the Law Commission about their consultation on the law of corporate crime in the UK. Joining us today to dive a little deeper into that discussion is Dr Robin Lööf.

Robin is a barrister at Fountain Court Chambers who has recently returned to the independent Bar after eight years as an employed barrister at the UK offices of a US firm. Robin, as well as a barrister in the UK, is a qualified advocate of the Paris Bar and, just in case that wasn't enough, as well as French, he also speaks fluent Italian and Swedish - and German and Spanish under protest!

Robin, welcome to Taxing Matters!

Robin Thank you very much Alice.

Alice So, the law commission's consultation about their potential to reform the law of corporate criminal liability has been launched and, in fact, closed recently. Do you think that the law actually needs to be altered, or is it working as it was intended to do?

Robin Just to give you the headline on this first of all, I think the law should be altered but I, at the same time, find it hard to say whether it is actually working as intended. I think it might be important, just to clarify, as David might have made clear from the previous podcast, that the Law Commission's remit is to consider the general regime for corporate criminal liability and so there is no intention to reconsider any of the various special statutory regimes that exist.

Of particular interest perhaps for keen listeners to this podcast is that there is no effort to, for instance, amend the Criminal Finances Act of 2017. So, looking then at the general regime, in very high level overview, the rules are that a company will be criminally liable if an individual, who can be described as the directing mind and will of the company, commits an offence whilst acting on its behalf and when we're talking about an individual who is a directing mind and will, we are talking about someone who will count effectively as one of the senior most officers, or director of a company.

Way back when the courts elaborated this principle - in the late 19th early 20th centuries - the rational was that, as a rule, criminal guilt requires a guilty mind and so that means that the individual or person committing an offence needs to do so with some form of intentional knowledge. But, obviously, a company being a legal construct does not have a mind and so the courts felt that there needed to be an individual whose mind could effectively be deemed to be that of the company. Only, in the court's reasoning, a very senior person would then do.

So, against that background, what do I think? It seems to me that companies, albeit that they are legal constructs, they do cause harm which sometimes amounts to harm in the criminal law and that the criminal law is there to protect against and I also think that corporate decision making - by that I mean the dispersal of information and responsibilities within companies - is such that it makes little sense and is often highly artificial to have as a condition of corporate criminal liability that a single very senior representative was intentionally, or knowingly, involved in causing that harm. So that would be my reasoning for looking at this basic rule of corporate criminal liability again.

Alice That's a really interesting point. So, you also practice in France - as well as in the UK - and you've been involved in matters of considering corporate criminal liability in both of those jurisdictions, plus Italy, and they

all take a very different approach to this fundamental question. So, how does the corporate criminal liability work in, for example, France, the US and Italy?

Robin Well, let's begin with France then. France has a superficially similar system to ours. There is an article in the French criminal code which states that companies are guilty by virtue of the criminal acts committed on their behalf by their organs or representatives. The difference, however, is the way in which the French courts apply and have applied this provision. The result is that in practice French law on corporate criminal liability is rather more flexible than our system and so, French corporate criminal liability is wider than it is in the UK.

Alice And what about the US?

Robin Effectively American corporate criminal liability applies civil principles of vicarious liability. They, effectively, took the rules on corporate civil liability from English common law and applied that, more-or-less, straight across to American corporate criminal liability and, effectively, what this means is that: any individual who commits an offence whilst acting on behalf of a company will render that company criminally liable along with him or her. So, it's a very simple rule but it's also very strict.

Alice And much broader than is contemplated by the current formulation of the English law, for example?

Robin Much, much broader. In the US, colloquially, you will say that if a receptionist at the headquarters of a multi-billion, hundred thousand plus employee, company pays a bribe to someone handing over a parcel that, technically, will make the company liable. This is not the case in England.

Alice And in practice does it?

Robin In practice it doesn't. In theory it does, in practice it wouldn't because of prosecutorial discretion.

Alice And what about in Italy, how does it work there?

Robin Italy is interesting because, technically, it does not have corporate criminal liability. What there is, is a system of corporate administrative liability for criminal offences committed on their behalf. Now effectively - and I simplify, grossly - if the offending was made possible by deficiencies in the company's systems and corporate control, or compliance framework, the company's held liable for a long list of criminal offences committed on their behalf by individuals.

This liability, - albeit that it's, technically, administrative - is actually enforced by prosecutors in the criminal courts. The difference with criminal liability is, perhaps, not that great in practice, it's certainly not how it's seen to a company which, effectively, finds itself on trial - often alongside individuals - who are charged with criminal offences.

Alice So, does that apply in practice in a similar way to a failure to prevent-style offence would in the UK?

Robin I need to be slightly careful because, of course, there are differences but, I think, people familiar with the regime under the two failure to prevent offences in the UK would find great similarities between the Italian system and the UK one.

Alice Of course, these systems are very, very different from the UK and over and above their treatment of corporate criminal liability, what are the features that you think that the UK could adopt from any of those systems?

Robin There is little that is inherently incompatible in the way any of these systems work from an English perspective. In particular, the US system is one which many think should be adopted in England and, in fact, it's one of the systems that the Law Commission expressly addresses and discusses in its discussion paper. I would have thought that it will feature as one of the alternatives, one of the options that the Law Commission will present in its options paper - which should be published by the end of the year. In relation to the French system then, as I said the reason it is, should I say, more flexible and in practice broader than the English system is mainly because of the way French courts have interpreted their criminal code. Many of these flexibilities could be introduced into the English system. It could also be said that English courts have not taken opportunities that they had to introduce similar flexibilities. I think what would be difficult to transpose - in relation to the Italian system - is the structural framework, in the sense you would have criminal enforcement of administrative liabilities. That would sit very uncomfortably within the English judicial system. But, if we ignore taxonomy issues, the Italian system is, effectively, a generalised Bribery Act-type structure where companies can escape liability by proving that they did have strong compliance frameworks in place.

Looking at all of this together I think the main differences that you have between the English system and the alternatives that we have discussed, is not so much the theoretical rules of how corporate liability is defined, but it's in the general operation of the criminal justice systems in these countries as a whole. In particular,

more or less resources being dedicated to investigating and prosecuting corporate offending and the way that criminal investigations and trials are carried out obviously makes a huge difference.

The more effective corporate enforcement is perceived to be, broadly speaking, the less pressure there is to reform corporate criminal liability rules. Again, it's quite interesting to look at debates in these various countries. The US, as we've said, both have strict rules and very active enforcement. The extent that there are calls for reform, they are more often to make it more difficult to hold companies liable. In France there have been some recent suggestions that the law, maybe, should be reformed but nothing like the ferocity of the debate that we have had here for decades now.

Alice That's how the systems operate, in theory and in practice, but what are the positives and negatives that you can draw out of each of them?

Robin It's trite, but I think the basic point is that, all other things equal - and perhaps we should come back to that - the broader the regime for corporate criminal liability, the greater the risk companies run of being criminally convicted. Whether that, in and of itself, is a good thing or a bad thing depends on your philosophical perspective on the extent to which companies should be held liable for criminal offences. But what I think I can say is objectively incontrovertible is that companies as a rule seek to limit the risk of being held criminally liable. This results in systems being put in place to prevent companies being held criminally liable. So what we have seen, in this jurisdiction and in others, is that changes in the law that make it easier to pursue companies for offending committed in the course of their activities, have led to sometimes drastic improvements in compliance frameworks. Most recently, perhaps, the Bribery Act in the UK and the reforms in France had that effect in relation to bribery prevention. Equally, following the Criminal Finances Act, 2017, we saw an uptick in tax compliance frameworks for professional services firms in particular. All-in-all, what we have seen - taking the corruption field as an example - is that certain practices, such as using sometimes quite shady middlemen, have significantly reduced and this is generally seen as being very positive.

Obviously, worth pointing out is that compliance and compliance systems and compliance staff are things that cost money and companies are unequally able to bear that comfortably. From a more practical perspective then, what the effects we can see of changing the law is that, some people might say that changes in regulation can have the same effect, that you can achieve the same sort of compliance improvements by regulating companies more strictly and having, effectively, administrative enforcement. As an example of that you can see the development of financial regulation, in particular, in the UK over the past couple of decades. It's also said by some that, because in general the only penalties that can effectively be imposed on a company are financial - whether that be getting money for the exchequer, or compensating victims, or competitors that have been harmed by shady dealings - all this can be achieved in civil and/or regulatory proceedings without any need to, effectively, dress this up in criminal clothes. Added to that is the argument that the criminal justice system is already creaking at the seams dealing with regular crime, for want of a better phrase, that adding the additional burden of these huge and often cumbersome investigations and proceedings is not, perhaps, the best idea from a resources perspective.

Alice You've mentioned there that where there are active and well financed investigators - and there is an appetite for embarking on investigations - that there is a greater degree of satisfaction within that jurisdiction for the regulation as it stands. With that in mind, will these reforms do what we want them to or are we barking up the wrong tree and we should in fact be looking to further resource the enforcement agencies, or better equip our investigators?

Is this all looking at the wrong end of the spectrum?

Robin First of all, again from a practical perspective, I think what you are effectively wanting me to say is absolutely right in the sense that, it is simply a fact that - whatever the rules - we have for corporate criminal liability. If there aren't enough resources dedicated to investigating and prosecuting offences involving corporates, it won't matter that much.

In the UK we are, I would say, unfortunately in the position where far too little resources are being spent on the criminal system in general, let alone those aspects of it - dedicated to police investigations units or the prosecution service or the SFO - that deal with business related offending. If I can have one thing out of reforming the law and more resources I would definitely go for more resources. Having said that, the two things aren't necessarily linked in the sense that it is of course better to have better legislation. We could talk about how good we are at enforcing it in our next podcast perhaps.

Alice So thinking specifically about the compliance burden which some of these options bring to bear on companies, what impact would these reforms have on businesses and would it be a disproportionate impact on say, for example, small and medium enterprise, or would it bite even harder on large businesses.

Robin It's difficult to be too granular about this. The reason, I think, that we are unlikely to see for instance a strong recommendation of adopting the US system - so the system is very strict vicarious liability where companies are, effectively, on the hook for any misbehaviour by any member of staff - is that it does not incorporate any express intent to improve compliance frameworks.

In the US, as a matter of practice, a company's financial penalties will generally be reduced - and sometimes by a lot - if the offending occurred despite strong compliance systems, but it's not like the system under the Bribery Act, or the Criminal Finances Act where a company can effectively avoid liability entirely by proving that they had a strong compliance framework. It is a widely held view - and I think that's right in light of what we discussed earlier about the effect that these new laws had when they were brought in on compliance frameworks - that that type of legislation actually works.

So, to the extent that there will be a reform, my guess is that it will somehow incorporate this feature - effectively giving some kind of express incentive to improving compliance, and the sense that there is great momentum towards some form of expansion of the failure to prevent structure that was used in the Bribery Act and the Criminal Finances Act.

The likelihood is that, to the extent that there is a reform here, it will involve, effectively, placing a greater compliance burden on companies. Given that we are talking about the general law, that will involve placing a greater compliance burden across the board. In theory, that burden should fall differently, or unequally, on companies according to the size and nature of their operations. In the guidance that we have proportionality is already a factor when assessing the adequacy of the compliance framework, but there is arguably - and I would say that it is the case - insufficient guidance out there to enable companies - and in particular companies that aren't perhaps financially able to hire professional and specialist advisors - small and medium companies to be able to make difficult decisions on what exactly they should do in particular circumstances and which aspects of their compliance framework that they should strengthen and where that would be disproportionate.

Now having said all that I think there will be additional costs. To take an example, I could imagine that if there was a reform in this direction again that more and perhaps smaller companies may find themselves having to hire a full-time compliance officer. That could be one of those threshold effects on some companies who, until now, have been able to content themselves with having a part-time compliance officer, or combined that role with head of legal, etc.

Alice So, what advice would you have for businesses who are concerned about the impact of these potential reforms?

Robin The first thing I would say is that there is no cause to panic right now. I don't think it is likely that this or any government will want to increase the compliance burden on companies in the immediate future. The economy is in a generally perilous state and I think this is not a reform that the government would wish to add to businesses at the moment. In due course, if there is then reform, I think companies need also to consider the synergies that they can achieve by, effectively, adapting their existing compliance framework that they have currently targeting, say, corruption. It's not going to require a massive overhaul of compliance systems to make them also fit for purpose, to prevent fraud for instance. So, obviously there would be some costs but I think the change will be one of degree, rather than the complete overhaul that we saw occurring after the Bribery Act, for instance.

Alice If the decision was yours and you were deciding what option you were going for, for the reform of the corporate criminal liability of the UK, which one would you pick?

Robin The one that I would pick is not one that is actually on the table for discussion it would seem. I would be in favour of a system where companies are held criminally liable for criminal harms that are caused by their operations and the big difference with the systems that I envisage, with the current regime, is that I would be in favour of corporate liability that is, actually, independent of the criminal liability of an individual. I think that is one of the main difficulties that we have currently, not only with the way the law is designed in theory, but also how it works and how it relates to enforcement activity; and in particular DPAs.

Having said that, I think there should be defences where the law effectively deems that a company's operations did not cause the harm, such as where it was occasioned despite a strong working compliance framework. So, in reality, if you are asking me what the system that I would be in favour of out of the ones that are likely to be on the table, I think it would make sense to go for an expansion of the failure-to-prevent-model given that it is one that we are now familiar with, it's now one that companies are able to navigate and that their advisors would be relatively familiar with as well.

Alice Unfortunately, that's all we have time for in this week's episode. You can get in touch with Robin via Fountain Court's website, on LinkedIn or on Twitter, his handle is @r_loof. That's L O O F.

If you have any questions for me or for Robin, or any topics you'd like us to cover in a future episode, please do email us on taxingmatters@rpc.co.uk. We'd love to hear from you.

As ever, a big thank you goes to Josh McDonald who does all the work pulling each episode together. Our music is from musical genius Andrew Waterson who also produces each episode; and, of course, a big thank you to all of our listeners for joining us.

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