Proposed New UK Corporate Offence Dropped: Failure to Prevent Economic Crime

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The UK Anti Corruption Plan, which was published in December 2014 under the 2010 to 2015 Conservative and Liberal Democrat coalition government brings together, for the first time, all of the United Kingdom’s activity against corruption in one place. It sets out the actions that government will take to: make it harder for criminals in the UK to use corruption to carry out their crimes; strengthen the integrity of institutions across the public and private sectors; stamp out bribery and corruption and raise global standards. Within the Plan, the Ministry of Justice examined whether a new crime of “corporate failure to prevent economic crime” might be warranted. In connection therewith, the Ministry also stated that it would undertake a review of the rules on establishing corporate criminal liability more widely. The plan was considered “ground breaking” by international anti-corruption bodies, and the United Kingdom was commended for recognising the threat corruption poses to the UK’s economy and society and that corruption is not an issue that occurs only overseas.

However, on the 28 September 2015 (prior to the Ministry’s entry into a Deferred Prosecution Agreement with Standard Bank plc and the successful conviction of the Sweet Group plc), UK Justice Minister Andrew Selous announced that “the UK has corporate criminal liability and commercial organisations can be, and are, prosecuted for wrongdoing…. Ministers have decided not to carry out further work at this stage as there have been no prosecutions under the model Bribery Act offence and there is little evidence of corporate economic wrongdoing going unpunished.”

Prosecutors have always had difficulties attributing guilt to corporate bodies under UK law. The application of the “identification principle” in establishing corporate liability in the United Kingdom means that a company can be convicted of any criminal offences only if the prosecution can show that the wrongdoer was also the “controlling mind” of the company. This is a significant hurdle with large companies and is not a requirement in other countries, such as the United States. However, the recent conviction of the Sweett Group for a section 7 offence bears out the Justice Minister’s assertion that companies can be and are prosecuted.

The proposed new offence would arm regulators with a specific offence for which they could prosecute companies that fail to implement adequate procedures that would prevent economic crime and fraud from being carried out by their employees and agents. Attorney-General Jeremy Wright QC confirmed that “the evolving nature of economic crime means we need to continue to find and develop new ways to expose and combat it.” The Ministry of Justice said that it wanted to assess whether more pressure should be put on businesses to go further in implementing changes to their policies and procedures to target offences other than bribery. The new offence would complement the existing offence under section 7 of the Bribery Act 2010 of failing to prevent bribery.

Economic crime has been at the centre of increased governmental and judicial focus in the United Kingdom in recent years. In October 2014, the sentencing guidelines for corporate bodies found guilty of offences of fraud, bribery and money laundering came into force. The guidelines provide courts with the opportunity to impose much higher fines than had been previously levied in the United Kingdom. In 2014, Deferred Prosecution Agreements (DPAs) also became available to certain prosecutors, thereby encouraging companies to self-report...
crimes under the Bribery Act 2010 and avoid a criminal conviction. The first successful DPA was entered into with Standard Bank plc in November 2015. The first successful prosecution for a section 7 offence occurred in December 2015, with the Sweet Group plc entering a guilty plea for the company’s failure to prevent bribery. The sentencing took place in February 2016, and the Sweet Group plc was ordered to pay £2.2m in fines.

In light of the way in which prosecutions are moving under the Bribery Act 2010, the recent DPA and successful prosecution under section 7, it is unclear whether further consideration will be given to the potential offence of failure to prevent economic crime. David Green, Director of the Serious Fraud Office (SFO), has said that he believes further work is required. He said in January 2016 that “existing legislation makes it difficult to prove criminal liability at the top of big companies... and the lack of corporate charges since the financial crash of 2008 is undermining public confidence.” In the meantime, it appears that the SFO and the National Crime Agency will continue to exercise their powers under the Proceeds of Crime Act and the Bribery Act, although given the increasing number of corporate scandals, it may be that the Ministry of Justice that will revisit these proposals at some point in the future.

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