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Time to plug the gaps in corporate criminal law

Britain is 100 years behind other countries when it comes to tackling non-financial crime by employees, writes Sir Edward Garnier, QC

The Brief team
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As the UK turns its attention to building trade links around the world and prepares for a future outside the EU, the need to maintain a reputation for the highest standards of business integrity is paramount.

The UK led the world in the field of corporate crime with the Bribery Act 2010, which introduced the innovative offence of “failure to prevent” bribery. More recently the Criminal Finances Act 2017 introduced a corporate offence of failure to prevent facilitation of tax evasion.

Companies can now be prosecuted for not having in place systems to prevent a predictable crime, here or abroad. This approach has proved effective. We have now seen the first prosecutions under Section 7 of the Bribery Act, in addition to offences dealt with through deferred prosecution agreements.

Part of the beauty of the "failure to prevent" approach is that it focuses the company's attention on the right processes to prevent the commission of a crime. It has led to a marked change in the corporate response to bribery and corruption and had an important preventive effect.

Companies incorporated in Britain and abroad benefit from the UK's sophisticated and lucrative consumer, business and capital markets. Unfortunately, a minority of companies operating from the UK have been associated with allegations of forced evictions, unacceptable labour standards and even beatings and deaths in developing countries.

When an individual steals, injures or kills in the UK, there is no problem in principle, assuming a sufficiency of evidence, in prosecuting them for that crime. When a company commissions or benefits from a crime committed by an employee, subcontractor or third party, British law is weak. These gaps in corporate criminal law need to be addressed so that companies can be prosecuted effectively.

At present our law requires prosecutors to satisfy the "identification principle", which essentially determines whether the person in question was the directing mind and will of the company and thus capable of fixing the company with criminal liability for the act or omission of that identified individual. The difficulty in satisfying the "identification principle" has led to cases where individuals but not their employers have been charged, for example in the phone-hacking scandal.

The need to prove this principle, developed in the 19th century when most English companies were run by fewer than half a dozen people, is plainly an inhibiting factor when prosecutors are considering cases involving large, complex companies with international and country boards, operating around the world. The US recognised that the identification principle was unworkable in a modern economy before the First World War. We are more than 100 years behind.

A further gap means that companies cannot be prosecuted here for harms suffered abroad — including deaths and life-threatening injuries — but directly attributable to their failure to manage their operations in and from Britain.

Clearly we need legislation that will make a real difference and deter crime. The approach taken in the Bribery Act and the Criminal Finances Act has proved its worth. Surely it is now time to take the next step and extend this type of legislation to non-financial allegations.

Given the prime minister's clear indication that no company should consider itself above the law, the government's awaited response to the call for evidence on economic crime provides a timely opportunity to announce the extension of this now-proven and effective regime with a more modern and practical approach to corporate crimes.

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