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THE ECONOMIC CRIME AND CORPORATE TRANSPARENCY BILL – GOOD NEWS FOR VICTIMS?

As the [Economic Crime and Corporate Transparency Bill](#) awaits final amendments prior to Royal Assent after the summer recess, thoughts now turn to the practical impact that the Bill will have once it becomes law. One point of particular interest will be the extent to which victims will find it easier to seek and receive compensation. This is particularly relevant in relation to two of the new proposed measures, namely (a) the widening of the definition of what constitutes the 'directing mind and will' of a company to include 'senior managers' and (b) the introduction of a new corporate offence of failing to prevent fraud or money laundering carried out by the company's employees and other associated persons.

As for the first of these measures, companies at present can, generally, only be held criminally liable for the wrongdoing of their staff if the requisite mental state for the offence can be attributed to the 'directing mind and will' of the company. Conventionally, this has been taken to mean the Board (or at least some members thereof). This has long since been a bugbear of the Serious Fraud Office and other prosecuting agencies, which complain that the bar is set too high. In practice, they say, if the Chief Executive and/or other directors cannot be directly linked to the offending, a prosecution of the company is out of reach.

Under the new proposals, set out in clauses 195-7 of the current version of the Bill, the definition of the 'directing mind and will' of the company would be extended to include so-called 'senior managers', defined as someone who *"plays a significant role in (a) the making of decisions about how the whole or a substantial part of the activities of the [business] are to be managed or organised, or (b) the actual managing or organising of the whole or a substantial part of those activities."* If, in the course of their employment, such individuals commit one of the economic crimes identified in the Bill (which include fraud, bribery and money laundering) the company may be prosecuted too.

In principle, this is good news for victims if it makes the prosecution of companies more accessible. After all, companies are more likely to be able to pay out compensation than individual offenders. Before cracking open the champagne, however, there are one or two sobering realities to confront. The first is how easily (or not) the prosecution will be able to prove, to the criminal standard, that the individual in question was a 'senior manager'. One can easily foresee scope for argument over whether a particular individual had a 'significant' role in decision making and/or whether this affected a 'substantial part' of the business.

Even if this hurdle can be overcome, such that the company is convicted, matters do not end there for victims. Historically, the courts have reserved compensation orders for cases where the sums to be paid can swiftly and easily be calculated. In any case involving prosecution under these new provisions, matters are likely to be more complicated than that, not least because of the size of the companies generally involved. If the loss becomes difficult to assess, or if for example issues of causation arise, the criminal courts may well be unwilling to order compensation and leave victims to pursue their losses by other means instead (although, of course, if there has been a criminal finding

of wrongdoing on the part of the company, then a civil claim is likely to be significantly easier to pursue).

Another downside of relying on the criminal compensation route to satisfy losses, rather than alternative or parallel civil proceedings, is that criminal compensation will necessarily be contingent on a conviction, which, particularly in prosecutions which result in trials, might not result for five or more years post any offending conduct. If victims want to realise quicker justice, it may well be significantly swifter on the civil track. Moreover, the days where civil trials were inevitably postponed pending the conclusion of related criminal trials due to interests of justice fears have come to an end.

The second new provision in the draft Bill is the proposed offence of 'failure to prevent fraud or money laundering', set out in cl.198 and 206. In short, this states that a company will be criminally liable if a person associated with it (usually an employee) commits a fraud or money laundering offence (ie. an offence under ss.327-9 of the Proceeds of Crime Act 2002), intending to benefit either the company or any person to whom the company, via the employee, provides services (ie. a client). Under cl.198(3)-(4) and cl.206(2)-(3), the company will only avoid this outcome if it was the intended victim of the fraud, or if it can prove that it had reasonable measures in place to avoid the fraud being committed (or indeed if it was not reasonable to expect it to have such measures in place).

Again, where does this leave victims? There is no reason why, in principle, a claim could not be made for compensation against a company on its conviction under these provisions. Such claims would be governed by s.133 of the Sentencing Act 2020, which requires only that the victim's loss 'results from' the offending. If the company has unreasonably (and therefore criminally) failed to prevent the fraud or money laundering from occurring, this test appears on the face of it to be met.

As before, however, there is a question mark over the tangible benefits of all this from the perspective of victims. The first issue which arises is how often these new provisions are likely to be deployed in practice. Similar offences for failing to prevent the facilitation of tax evasion were introduced in the Criminal Finances Act 2017 but have been used sparingly (if at all) since then. Whilst the range of offending covered by cl.198 & 206 of the new Bill is wider, thereby providing greater scope for prosecution, it is unclear how often the authorities will choose to take on large corporate defendants, which usually will be well resourced to defend themselves.

Secondly, there is no guarantee of conviction even if charges are brought. Although the 'failing to prevent' offence is technically one of strict liability, the availability of the statutory defences puts matters in a different light. Most well organised companies will by now have in place policies and procedures designed to limit the scope for fraud or money laundering committed by their employees. Companies in certain sectors, for example the regulated financial services sector, will be required to have such systems. The mere existence of some such policies may well be sufficient to deter prosecutors from bringing a case. This will be especially so if any challenge to the lawfulness of the reverse burden defences in cl.198(4) and 206(3)) succeeds, such that the onus on the company to prove its defence is 'read down' under the Human Rights Act 1998 and the European Convention on Human Rights as being evidential only in nature.

Thirdly, the same issues arise as above in terms of compensation. If the calculation of the payments is anything other than obvious and straightforward, the criminal courts may be unwilling to engage with them.

It is too early to conclude whether the measures, when enacted, will materially improve the prospects of victims looking to recover their losses. Whilst it would be an exaggeration to say that the new Bill is a false dawn for victims, it is by no means a panacea for all the ills previously faced by them. It will be interesting to see how things develop in due course should these proposals be enacted, both in terms of the deployment of the new provisions and the outcomes which result.

Pondering the wider implications of these two proposals to broaden the ability of prosecutors to pursue corporates, it is notable that the individuals who thereby expose the corporates to this enlarged risk of liability are also likely to find themselves subject to the enhanced scrutiny of investigators and prosecutors. After all, if their guilt cannot be proved, whether by conviction or otherwise, the case against the corporates will fail.

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