



Royal United Services Institute  
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EMERGING INSIGHTS

# Corporate Criminal Liability: Lessons from the Introduction of Failure to Prevent Offences

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## EXECUTIVE SUMMARY

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It has long been difficult for prosecutors in the UK to hold corporates to account for criminal behaviour and, in particular, for economic crime-related misconduct. The 'identification doctrine'<sup>1</sup> requires that only the acts of the person who represents the company's 'directing mind and will' can be attributed to a company. At the same time, it is recognised that there are certain types of criminal behaviour that can only be carried out within a corporate structure, and which are carried out for the benefit of that corporate entity.<sup>2</sup> Therefore, it is inherently problematic that it is difficult to bring corporate criminal prosecutions.

The introduction of 'failure to prevent' offences are an attempt to overcome these difficulties. The basis of a failure to prevent offence is simple – to have any defence, an organisation needs to prove that it had 'reasonable'<sup>3</sup> or 'adequate'<sup>4</sup> procedures in place to prevent an individual associated with it from carrying out a criminal activity. The first failure to prevent offence was introduced in relation to bribery in 2010; two further failure to prevent offences followed in the Criminal Finances Act 2017 related to the facilitation of tax evasion.

The offences contained within the Criminal Finances Act, often referred to as the corporate criminal offences (CCOs), were introduced as part of the then-government's commitment that 'tolerance for those who will not pay their fair share of taxes has come to an end'.<sup>5</sup> In the years since the offences came into force, however, there have been no prosecutions, calling into question both the success of the CCO regime and the effectiveness of failure to prevent offences in general.<sup>6</sup>

In light of recent calls for an extension of the failure to prevent regime to broader economic crimes, including fraud and money laundering, this Emerging Insights paper identifies five key lessons that should be learned from the experience of the CCOs to date. It draws on interviews with lawyers, academics and practitioners who were involved in responding to the requirements of the CCOs when they came into force in September

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1. Crown Prosecution Service (CPS), 'Corporate Prosecutions', 12 October 2021, <<https://www.cps.gov.uk/legal-guidance/corporate-prosecutions>>, accessed 22 June 2022.
  2. Robin Lööf, 'Corporate Agency and White Collar Crime – an Experience-Led Case for Causation-Based Corporate Liability for Criminal Harms', *Criminal Law Review* (No. 4, 2020), p. 276.
  3. Criminal Finances Act 2017, Part 3.
  4. Bribery Act 2010, Section 7.
  5. HM Treasury, 'Chancellor George Osborne's Budget 2015 Speech', 18 March 2015, <<https://www.gov.uk/government/speeches/chancellor-george-osbornes-budget-2015-speech>>, accessed 22 June 2022.
  6. Karen Harrison and Nicholas Ryder, *The Law Relating to Financial Crime in the United Kingdom*, 3<sup>rd</sup> Edition (Abingdon: Routledge, 2022), p. 238.

2017 to provide a solid evidence base with regard to some of the practical considerations in implementing any future failure to prevent offences:

1. Any new offences should be accompanied by a robust, comprehensive and evidence-based strategic communication plan from the relevant government body/bodies charged with implementing them to ensure that all corporates understand the relevance of the offence and the potential risks within their business.
2. Good-quality guidance is essential to the successful implementation of any new regime, particularly in articulating expectations about what would or would not be considered reasonable.
3. While failure to prevent offences may be aimed at changing corporate culture more than securing high numbers of convictions, any new offences will still ultimately be judged publicly on their enforcement track record. The lack of enforcement activity in relation to the CCO legislation has rendered it something of a damp squib, as noted by interviewees for this paper, and the need for more resources for the Crown Prosecution Service (CPS) and Serious Fraud Office was a repeated theme in the interviews.
4. Failure to prevent offences should act as a complement to existing regulatory frameworks, and regulators and enforcement authorities should work closely together to impose the most appropriate type of sanctions on corporate wrongdoing.
5. Failure to prevent offences would be best used in conjunction with other (existing) powers, including, but not limited to, the criminal prosecutions of individuals within a corporate.

## INTRODUCTION

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Over the past few years, momentum has been growing for the introduction of a failure to prevent offence relating to economic crime.<sup>7</sup> The Treasury Committee's recent report on economic crime called for the government to act quickly to bring in reforms to corporate criminal liability in order to prevent 'corporate criminals [continuing] to be able to escape prosecution for economic crimes'.<sup>8</sup> Criminal prosecutions of corporates may not always be appropriate, or possible, but the ability to bring such prosecutions is

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7. For example, it was included in the Economic Crime Manifesto produced by the All-Party Parliamentary Groups (APPGs) on Fair Business Banking and on Anti-Corruption and Responsible Tax. See APPG on Anti-Corruption and Responsible Tax and APPG on Fair Business Banking, 'Economic Crime Manifesto', May 2022, <<https://www.appgbanking.org.uk/wp-content/uploads/2022/05/Economic-Crime-Manifesto-1.pdf>>, accessed 22 June 2022.
  8. House of Commons Treasury Committee, 'Economic Crime', Eleventh Report of Session 2021–22, HC 145, 26 January 2022, p. 59.

generally held to be an important weapon in the armoury of law enforcement and supervisors, especially alongside other civil and regulatory measures.<sup>9</sup>

The calls for a change to the way in which corporates are held to account for criminal behaviour are driven by the difficulty of prosecuting large corporates for economic crime-related misconduct. This is due to the principle in UK law whereby only the acts of the person who represents the company's 'directing mind and will' can be attributed to the company, known as the identification principle.<sup>10</sup>

Because of the difficulties of bringing corporate prosecutions under the identification principle, there is precedent for creating specific corporate offences of failing to prevent bribery and the facilitation of tax evasion under Section 7 of the Bribery Act 2010 and Part 3 of the Criminal Finances Act 2017 respectively.

In November 2020, the UK government asked the Law Commission to examine whether the current legal framework in the UK was sufficient to adequately deal with misconduct carried out either by or for a company, and to provide options as to how the failure to prevent offences could be extended to wider economic crime.<sup>11</sup> While there is no single definition of economic crime and it potentially includes a broad range of offences, much of the discussion has been on the role of corporates in facilitating fraud and money laundering.

The Law Commission published its response on 10 June 2022. While it rejected the idea of a broad failure to prevent economic crime offence, the Commission did include an option for widening the scope of failure to prevent offences with the introduction of a failure to prevent fraud offence as well as consideration of other areas where there might be merits in considering a similar framework (human rights abuses, computer misuse and treatment of vulnerable individuals). The Commission also provided a number of other options relating to the identification doctrine and a potential civil regime; however, this paper focuses specifically on the options relating to a criminal corporate offence of failure to prevent fraud.<sup>12</sup>

In addition to the options that it presented with regard to potential new failure to prevent offences, the Law Commission also set out some underlying legal principles for any new offences.<sup>13</sup> This paper aims to complement these

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9. Spotlight on Corruption, 'The UK's Corporate Crime Rules – Why Urgent Change Is Needed', <<https://www.spotlightcorruption.org/the-uks-corporate-crime-rules-why-urgent-change-is-needed/>>, accessed 29 August 2022.

10. CPS, 'Corporate Prosecutions'.

11. For an overview of the consultation, see Law Commission, 'Corporate Criminal Liability', <<https://www.lawcom.gov.uk/project/corporate-criminal-liability/>>, accessed 22 June 2022.

12. Law Commission, 'Corporate Criminal Liability: An Options Paper', 10 June 2022, p. 111.

13. *Ibid.*, para. 8.91.

principles by identifying practical learnings that should inform how any such offences should be implemented.

When discussing any extension to the failure to prevent regime, commentators often point to the alleged positive impact of the Bribery Act 2010 on corporate culture.<sup>14</sup> There has been less consideration, however, of the impact of failure to prevent the facilitation of tax evasion offences, often known as the corporate criminal offences (CCOs). To date there have been no prosecutions under Part 3 of the Criminal Finances Act 2017, and this lack of prosecutions means that ‘the success of the current enforcement regime is open to serious question’.<sup>15</sup> This paper seeks to understand the impact that the CCOs have had, and how this should inform the introduction of any further failure to prevent offences.

## METHODOLOGY AND STRUCTURE

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The findings in this paper are based on a literature review carried out between February and June 2022 and a series of semi-structured interviews carried out online between March and June 2022. Following the research, two virtual meetings were held with government officials to validate the findings.<sup>16</sup> The initial findings from the research were presented and feedback was integrated into this paper.

In total, 15 experts from the private sector, public sector and academia were interviewed. Interview subjects were selected based on their known experience and expertise with the CCOs and white-collar crime and to get a range of views from across different sectors, including those sectors identified as higher risk for committing offences under the CCO legislation, such as financial services, legal and tax advisory. Individuals who had authored academic papers, journal articles and/or other types of grey literature were included within the interview sample. It should be noted that the majority of research interviews were conducted prior to the release of the Law Commission’s review of corporate criminal liability, which was published on 10 June 2022.

The literature review included policy documents relating to both the Criminal Finances Act and the Bribery Act; among these were government guidance issued in relation to each act, as well as academic articles and grey literature, including industry and corporate blogs. Relevant literature was

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14. See, for example, Jane Larner and Francesca Bonner-Evans, ‘Ten Years of the Bribery Act – a Success?’, Linklaters, 2 July 2021, <<https://www.linklaters.com/en/insights/blogs/businesscrimelinks/2021/july/the-rule-of-ten/ten-years-of-the-bribery-act-a-success>>, accessed 26 July 2022.
  15. Harrison and Ryder, *The Law Relating to Financial Crime in the United Kingdom*, p. 238.
  16. These included representatives from HMRC, the Home Office, HM Treasury, the CPS and the Serious Fraud Office.

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To date there have been no prosecutions under Part 3 of the Criminal Finances Act 2017

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initially identified through keyword searches, with some additional material shared by some of the interviewees. While the lack of enforcement of the offences is one of the drivers of this research, it also presents a challenge as it limits the amount of literature available in relation to the effectiveness and impact of the offences and/or any legal judgments relating to them. Therefore, this paper draws on the practical experiences of those involved in responding to the requirements of the legislation within their own (and other) organisations. It aims to answer three questions:

1. What has been the impact of the introduction of the failure to prevent the facilitation of tax evasion offences on corporations?
2. Five years on from the introduction of the offences, what is the current state of play?
3. How could an analogous failure to prevent economic crime offence be implemented in the UK?

In responding to these questions, this paper first provides a brief overview of the drivers for the introduction of the CCOs in the Criminal Finances Act 2017 and a summary of the relevant offences. It then examines the impact that the introduction of the offences had when they came into force in September 2017, and the key difficulties that organisations faced in implementing 'reasonable procedures'. The paper then outlines the potential reasons for the lack of enforcement to date and the impact that this has had. Finally, it provides the arguments for an extension of the failure to prevent regime. Throughout the paper, some key learnings for any broader failure to prevent offence are set out.

## WHY WAS THE CCO LEGISLATION INTRODUCED?

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The UK's legal framework has long been criticised for the difficulty encountered in holding corporates to account for criminal behaviour 'even when plainly committed on their behalf or for their benefit'.<sup>17</sup> For a company to be held liable for a criminal offence, it is necessary to prove that the offence was committed by an individual representing the company's 'directing mind and will' and that the individual had criminal intent.<sup>18</sup> This is known as the 'identification principle' or 'identification doctrine'. Individuals meeting this definition are generally held to be a small number of the most senior staff and/or directors.

In recent years, this doctrine has become even more restrictive with the failed prosecution of Barclays senior executives in connection with allegations of fraud in the bank's 2008 recapitalisation. The judgment in this case held that an individual had to 'have been delegated full responsibility and autonomy'

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17. Lööf, 'Corporate Agency and White Collar Crime – an Experience-Led Case for Causation-Based Corporate Liability for Criminal Harms', p. 276.

18. CPS, 'Corporate Prosecutions'.

in order to represent the 'directing mind and will' of the company.<sup>19</sup> In other words, the presence of a board of directors, or similar, responsible for holding a senior executive to account would isolate that individual from being considered the 'directing mind and will'. This, it is claimed, does not reflect the 'decentralised and fragmented decision-making processes of modern large and multinational companies'<sup>20</sup> and is unfair to smaller organisations, who it may be easier to prosecute as an individual representing the 'directing mind and will' can be more readily identified.<sup>21</sup>

Because of the difficulty in bringing corporate criminal prosecutions, three offences of failure to prevent have been introduced. Failure to prevent offences are strict liability offences (in other words, there is no need to prove criminal intent), and the only defence is that the organisation had adequate<sup>22</sup> or reasonable<sup>23</sup> procedures in place to prevent the offence from occurring. In 2010, the Bribery Act introduced a corporate offence of failure to prevent bribery. This was followed in 2017 by the Criminal Finances Act, which brought in two offences relating to the failure to prevent the facilitation of tax evasion.<sup>24</sup>

The offences apply where 'a relevant body fails to prevent an associated person *criminally* facilitating the evasion of a tax', either in the UK or overseas.<sup>25</sup> There are three stages to the offence:

1. A taxpayer (either an individual or a legal entity) engages in criminal tax evasion.

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19. For an overview of the judgment, see Patrick Rappo, 'Barclays SFO Trial: Is Corporate Criminal Liability Dead?', DLA Piper, 24 March 2020, <<https://www.dlapiper.com/en/belgium/insights/publications/2020/03/barclays-sfo-trial/>>, accessed 22 June 2022.

20. Lööf, 'Corporate Agency and White Collar Crime', p. 276.

21. APPG on Anti-Corruption and Responsible Tax and APPG on Fair Business Banking, 'Economic Crime Manifesto', p. 17.

22. Bribery Act 2010, Section 7.

23. Criminal Finances Act 2017, Part 3. The defence under the Criminal Finances Act requires an organisation to have 'reasonable' prevention procedures in place rather than 'adequate' prevention procedures, as per the Bribery Act 2010. This is because it is acknowledged in the guidance related to the Criminal Finances Act that it may be reasonable for an organisation to have no prevention procedures in place.

24. One offence relates to the facilitation of domestic tax evasion and one to the facilitation of foreign tax evasion. For the purposes of this paper, no distinction has been made between the two offences as the defences are the same.

25. HMRC, 'Tackling Tax Evasion: Government Guidance for the Corporate Offences of Failure to Prevent the Criminal Facilitation of Tax Evasion', 1 September 2017, para. 1.1, <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/672231/Tackling-tax-evasion-corporate-offences.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/672231/Tackling-tax-evasion-corporate-offences.pdf)>, accessed 22 June 2022. Emphasis in original. The offence applies only to legal persons.

2. The tax evasion is criminally facilitated by an ‘associated person’ of the relevant body.<sup>26</sup>
3. The relevant body failed to prevent the ‘associated person’ from committing the criminal facilitation (in other words, the relevant body failed to have reasonable prevention procedures in place).

The CCOs were borne out of the government’s efforts to take action against corruption, particularly in the wake of the Panama Papers, which revealed the extent of global tax evasion and the role of the lawyers and professional services firms who facilitated it.<sup>27</sup> The offences were first introduced in the March 2015 Budget amid a raft of measures aimed at tackling tax evasion, with the then chancellor of the exchequer, George Osborne, claiming that ‘this country’s tolerance for those who will not pay their fair share of taxes has come to an end’.<sup>28</sup> The Act received Royal Assent on 27 April 2017, and the two offences came into force on 30 September 2017.<sup>29</sup> As at 13 May 2022, no prosecutions have been brought and charging decisions are yet to be made in seven live investigations; 69 opportunities for investigation and/or prosecution have been rejected to date.<sup>30</sup>

## IMPACT OF THE FAILURE TO PREVENT THE FACILITATION OF TAX EVASION OFFENCES ON CORPORATIONS

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Guidance issued by HM Revenue and Customs (HMRC) in September 2017 provides the starting point for organisations to understand what they need to do and ‘the types of processes and procedures that can be put in place’, which would likely constitute ‘reasonable procedures’ in the case of any

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26. A person is ‘associated’ with a relevant body if that person is an employee, agent or other person who performs services for or on behalf of the relevant body.
  27. HM Government, ‘PM: Companies to Be Liable for Employees Who Facilitate Tax Cheating’, press release, 11 April 2016, <<https://www.gov.uk/government/news/pm-companies-to-be-liable-for-employees-who-facilitate-tax-cheating>>, accessed 22 June 2022; Nana Ama Sarfo, ‘News Analysis: U.K. Targets Criminal Facilitation of Tax Evasion’, Hogan Lovells, 5 September 2017, <<https://www.hoganlovells.com/en/publications/news-analysis-uk-targets-criminal-facilitation-of-tax-evasion>>, accessed 22 June 2022.
  28. HM Treasury, ‘Chancellor George Osborne’s Budget 2015 Speech’, 18 March 2015, <<https://www.gov.uk/government/speeches/chancellor-george-osbornes-budget-2015-speech>>, accessed 22 June 2022.
  29. HMRC, ‘Number of Live Corporate Criminal Offences Investigations’, 30 June 2022, <<https://www.gov.uk/government/publications/number-of-live-corporate-criminal-offences-investigations/number-of-live-corporate-criminal-offences-investigations>>, accessed 8 July 2022.
  30. *Ibid.*

potential prosecution.<sup>31</sup> HMRC guidance is supplemented, in some cases, with sector-specific guidance published by industry bodies.<sup>32</sup>

The reasonable procedures defence is modelled around six principles:

1. Risk assessment.
2. Proportionality of risk-based prevention procedures.
3. Top-level commitment.
4. Due diligence.
5. Communication (including training).
6. Monitoring and review.<sup>33</sup>

These principles are not binding, but the guidance states that ‘prevention procedures put in place by relevant bodies to prevent tax evasion from being committed on their behalf should be informed by the ... principles’.<sup>34</sup>

Given that the regime is principles-based rather than prescriptive, the guidance is an important tool in helping organisations to understand what they might need to consider when assessing their level of risk and putting in place appropriate procedures. This was also noted by the Law Commission, which stated that ‘several stakeholders [who responded to the consultation on corporate criminal liability] also highlighted the importance of guidance in helping companies to understand their obligations, and what might constitute reasonable procedures’.<sup>35</sup>

Practitioners interviewed for this paper were in general agreement that the CCO legislation had some impact when it was first introduced, particularly within large financial services institutions, although the impact on other sectors and/or smaller organisations was more limited.<sup>36</sup> This is in line with the findings of research from Ipsos MORI, published in March 2019, which found that 74% of businesses had not heard about the Criminal Finances Act, although awareness was much higher within larger businesses (58% had heard of it) and financial and insurance firms (58% had heard of it).<sup>37</sup>

31. HMRC, ‘Tackling Tax Evasion’, p. 4.

32. For example, UK Finance has published guidance for the financial services sector. See UK Finance, ‘Guidance for the Financial Services Sector on the Corporate Criminal Offences Within the Criminal Finances Act 2017’, 2 February 2018, <<https://www.ukfinance.org.uk/policy-and-guidance/reports-publications/guidance-financial-services-sector-corporate-criminal-offences-within-criminal-finances-act-2017>>, accessed 27 July 2022.

33. HMRC, ‘Tackling Tax Evasion’, section 2.

34. *Ibid.*, p. 15.

35. Law Commission, ‘Corporate Criminal Liability: An Options Paper’, para. 8.38.

36. Author interview with senior financial crime officer at a global bank, 29 April 2022; author interview with tax adviser in the financial services sector, 4 May 2022; author interview with private sector tax consultant, 13 May 2022.

37. Ipsos MORI Social Research Institute, ‘Evaluation of Corporate Behaviour Change in Response to the Corporate Criminal Offences’, Research Report 529, March 2019, p. 4, <<https://assets.publishing.service.gov.uk/government/uploads/>

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HMRC guidance is an important tool in helping organisations to understand what they might need to consider when assessing their level of risk

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Interviewees had praise for HMRC's willingness to engage with industry, particularly in the lead-up to the introduction of the offences and on an ongoing basis,<sup>38</sup> with a number of roundtables and webinars hosted jointly with the private sector to explain aspects of the guidance and how the offence worked in practice.<sup>39</sup> New public-private partnerships, such as the Tax Crime Alliance between HMRC and professional advisers, were also cited as examples of good practice.<sup>40</sup> However, as one interviewee commented, if, as stated by HMRC,<sup>41</sup> one of the objectives of the CCOs was to change corporate behaviour, the overall lack of awareness means that they cannot be considered a success.<sup>42</sup>

One of the key challenges identified by those involved in responding to the requirements of the CCO legislation at the time of its introduction was ownership within an organisation, both in terms of where within a business the risks of facilitating tax evasion were likely to emerge and the responsibility for the corresponding mitigating controls.<sup>43</sup> One interviewee described the internal discussions around ownership as 'heated'; another described the CCOs as a 'hot potato' which nobody wanted to own.<sup>44</sup> While the starting assumption for a number of organisations was that the offences were tax-related, and therefore should be owned by the tax function within an organisation, over time most organisations have settled on a model whereby the financial crime/compliance/legal function owns the response, with the tax function acting as a key stakeholder.<sup>45</sup>

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system/uploads/attachment\_data/file/781334/Evaluation\_of\_corporate\_behaviour\_change\_in\_response\_to\_the\_corporate\_criminal\_offences\_\_HMRC\_research\_report\_529\_.pdf>, accessed 7 June 2022.

38. Author interview with senior financial crime officer at a global bank, 29 April 2022.
39. See, for example, BDO LLP, 'Corporate Criminal Offence Webinar – Preparing a Defence', 7 September 2017, <<https://www.youtube.com/watch?v=c1G5blGhyZo>>, accessed 21 June 2022.
40. Greg Mailer and Harry Travers, 'TAX: An Introduction to UK-Wide', Chambers and Partners, <<https://chambers.com/content/item/4186>>, accessed 16 September 2022.
41. HMRC, 'Number of Live Corporate Criminal Offences Investigations'.
42. Author interview with academic working in the field of economic crime, 20 May 2022.
43. Author interview with representative of HMRC, 30 March 2022; author interview with senior financial crime officer at a global bank, 29 April 2022; author interview with tax adviser in the financial services sector, 4 May 2022; author interview with private sector tax consultant, 13 May 2022.
44. Author interview with tax lawyer, 20 May 2022; author interview with economic crime lawyer, 20 May 2022.
45. Author interview with senior financial crime officer at a global bank, 29 April 2022; author interview with tax adviser in the financial services sector, 4 May 2022.

The debate around ownership is an example of a wider issue that some interviewees highlighted about a lack of understanding of aspects of the CCOs when they were introduced, in particular some of the technical aspects around the territorial scope<sup>46</sup> and the ways in which the offences could manifest themselves.<sup>47</sup> This view was echoed by other interviewees who expressed the view that companies were not always able to grasp how the facilitation of tax evasion risk might arise within their operations, and that the focus was too often on the underlying tax evasion rather than the facilitation.<sup>48</sup>

### Key Learning 1

Any new offence should be accompanied by a robust, comprehensive and evidence-based strategic communication plan from the relevant government body/bodies charged with implementing any new offences to ensure that all corporates understand the relevance of the offence and the potential risks within their business. Communications should also be aimed at senior individuals within an organisation; where it was felt that an organisation had responded well to the CCO requirements, this was because there was sufficient senior management oversight of and engagement with implementation measures.

*Source: Author interview with senior financial crime officer at a global bank, 29 April 2022.*

This lack of understanding of some aspects of the CCOs may suggest that the guidance provided by HMRC was not adequate. This is reflected in the fact that interviewees had mixed feelings about the quality of the guidance, which has been described as varying 'between unhelpfully specific and unhelpfully vague'.<sup>49</sup> Some interviewees felt that the guidance was sufficiently granular, whereas others felt that it was at too high a level and required organisations to make assumptions about what might or might not be considered reasonable. One important area to note is that the guidance is clear that it might be reasonable in some circumstances not to have any prevention procedures in place;<sup>50</sup> however, the guidance does not provide any concrete examples of the circumstances in which this would be the case. Several interviewees pointed out that the lack of enforcement cases to date meant that the guidance had not yet been 'tested'<sup>51</sup> and that it was therefore difficult to judge its robustness, particularly when it came to the proportionality of procedures.

46. Author interview with tax adviser in the financial services sector, 4 May 2022.

47. Author interview with tax lawyer, 20 May 2022; author interview with economic crime lawyer, 20 May 2022.

48. Author interview with barrister specialising in corporate crime, 12 May 2022; author interview with lawyer specialising in corporate crime, 13 May 2022.

49. Harry Stratton, 'Guilt by Lottery: Criminal Failure to Prevent Facilitation of Tax Evasion Under the Criminal Finances Act 2017', *Journal of Criminal Law* (Vol. 86, No. 1, February 2022), p. 34.

50. HMRC, 'Tackling Tax Evasion', p. 24.

51. Author interview with private sector tax consultant, 13 May 2022.

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It was also felt that carrying out a robust risk assessment was one of the hardest aspects of implementing reasonable procedures

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Underpinning an organisation's response to the CCOs should be a risk assessment. This is the first principle of reasonable procedures, as outlined above, and provides the evidence base for any prevention procedures (or the decision not to put any further prevention procedures in place). The guidance states that the purpose of this is to assess 'the nature and extent' of an organisation's exposure to the risks of criminal facilitation of tax evasion, and that the risk assessment should be documented and kept under review.<sup>52</sup> This area of the guidance drew particular criticism from some of the interviewees, with one interviewee referencing the extent to which it draws on existing guidance about anti-money-laundering (AML) risk assessments without specific consideration of the different ways in which the facilitation of tax evasion risks may materialise, the need for different types of controls and the lack of evidence to support the identification of risks.<sup>53</sup> Several practitioners with experience in carrying out CCO risk assessments felt that there was a lack of clarity over how detailed a risk assessment was expected to be, in terms of both its breadth and its depth.<sup>54</sup>

Notwithstanding these criticisms, the importance of the risk assessment as a tool for structuring an organisation's response was acknowledged by most interviewees.<sup>55</sup> It was also felt that carrying out a robust risk assessment was one of the hardest aspects of implementing reasonable procedures, with many of the other implementation activities, such as training or updating policies, being reasonably straightforward.<sup>56</sup>

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52. HMRC, 'Tackling Tax Evasion', p. 16.

53. Author interview with financial crime consultant, 22 April 2022.

54. Author interview with private sector tax consultant, 13 May 2022; author interview with tax lawyer, 20 May 2022; author interview with economic crime lawyer, 20 May 2022.

55. Author interview with private sector tax consultant, 13 May 2022; author interview with financial crime consultant, 22 April 2022.

56. Author interview with private sector tax consultant, 13 May 2022; author interview with tax lawyer, 20 May 2022; author interview with economic crime lawyer, 20 May 2022.

## Key Learning 2

Good-quality guidance is essential to the successful implementation of any new regime, particularly in articulating expectations about what would or would not be considered reasonable. While it is understandable and indeed desirable that the guidance should not be prescriptive, more clarity around how to carry out a sufficiently robust risk assessment, including how risks are likely to arise within a corporate, would be beneficial, especially in the absence of examples in case law. Guidance on risk assessments is particularly important for those organisations outside the regulated sector which are not required to carry out AML risk assessments and therefore may lack relevant experience and/or expertise. It may also be useful for the government to carry out a national assessment of the risks, akin to the UK's National Risk Assessment of Money Laundering and Terrorist Financing, in order to help corporates to identify and assess the risks that they face and to provide evidence as to which types of corporates and sectors are particularly vulnerable.

## WHAT IS THE CURRENT STATE OF PLAY FOR CCOs?

It is impossible to consider the impact of the CCOs more broadly without considering the lack of enforcement activity. As noted, five years on from their introduction, there have been no prosecutions under the CCO regime and a large number (69) of potential opportunities and/or investigations have been rejected.<sup>57</sup> HMRC has always made it clear that the number of investigations should not be considered the 'sole measure of success' and that the intent of the legislation was to 'drive behavioural change and ... [reduce] the opportunity for facilitation to occur in the first instance'.<sup>58</sup>

While some organisations took steps in 2017–18 to understand their CCO risks and put in place mitigating procedures, experts consulted for this paper, including practitioners and academics, felt that momentum had stalled and interest in the offences, particularly at a senior level, had waned over the years.<sup>59</sup> Examples of this given by the experts consulted included risk assessments not being kept up to date and little consideration being given to the facilitation of tax evasion risks during the design of new products and services.<sup>60</sup> With one exception, interviewees for this paper cited the

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57. HMRC, 'Number of Live Corporate Criminal Offences Investigations'.

58. *Ibid.*

59. Author interview with financial crime consultant, 22 April 2022; author interview with tax adviser in the financial services sector, 4 May 2022; author interview with economic crime lawyer, 13 May 2022; author interview with tax lawyer, 20 May 2022; author interview with economic crime lawyer, 20 May 2022; author interview with academic working in the field of economic crime, 20 May 2022; author interview with tax consultant, 1 June 2022.

60. Author interview with tax adviser in the financial services sector, 4 May 2022.

lack of enforcement activity related to the CCOs as the main reason for the diminishing interest in the offences.<sup>61</sup>

While those consulted in the research broadly accepted the difficulty involved in bringing criminal cases (one interviewee was ‘disappointed but not surprised’ at the lack of prosecutions),<sup>62</sup> some interviewees cited long-standing issues with prosecutorial resources and capacity as the main reason for the lack of activity.<sup>63</sup> This can be seen as symptomatic of a wider trend in recent years for reduced numbers of criminal prosecutions by HMRC<sup>64</sup> as well as the UK’s lacklustre efforts at broader financial crime enforcement.<sup>65</sup>

### Key Learning 3

While failure to prevent offences may be aimed at changing corporate culture more than securing high numbers of convictions, any new offence will still ultimately be judged publicly on its enforcement track record. The lack of enforcement activity in relation to the CCO legislation has rendered it something of a damp squib, as noted by interviewees for this paper, and the need for more resources for the CPS and Serious Fraud Office was a repeated theme in the interviews.

A related area which was highlighted by both practitioners<sup>66</sup> and academics<sup>67</sup> was the lack of engagement of other regulators, primarily the Financial Conduct Authority (FCA), with the CCOs. While the offences apply to all corporates with a UK nexus, financial services organisations are inherently higher risk.<sup>68</sup> It was felt that the FCA, as the main regulator for the financial services industry, could have done more to encourage compliance within its supervised population, both as part of its regular supervisory activities and in cases in which a potential breach of the CCOs may be indicative of wider financial crime control failures. It was noted that, historically, HMRC has been reluctant to share information with the FCA,<sup>69</sup> although this appears

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61. *Ibid.* The exception was an interviewee who was part of the compliance function of a global bank, who stated that there were a number of international drivers for the procedures that the bank had put in place and that therefore the lack of enforcement in the UK was not significant in the global context.
62. Author interview with financial crime consultant, 22 April 2022.
63. Author interview with barrister specialising in corporate crime, 12 May 2022; author interview with lawyer specialising in corporate crime, 13 May 2022.
64. David Sleight, ‘HMRC Fails to Deliver on Pledge to Increase Criminal Prosecutions by End of 2020, FOI Request Reveals’, Kingsley Napley, 21 December 2020, <<https://www.kingsleynapley.co.uk/insights/blogs/criminal-law-blog/hmrc-fails-to-deliver-on-pledge-to-increase-criminal-prosecutions-by-end-of-2020-foi-request-reveals>>, accessed 22 June 2022.
65. Author interview with academic working in the field of economic crime, 20 May 2022; interview with lawyer specialising in corporate crime, 13 May 2022.
66. Author interview with financial crime consultant, 22 April 2022.
67. Author interview with two academics working in the field of economic crime, 20 May 2022.
68. HMRC, ‘Tackling Tax Evasion’, p. 17.
69. Author interview with academic working in the field of economic crime, 20 May 2022.

to have improved in recent years, with one individual with experience of HMRC explaining that there is far more information and intelligence passed between HMRC, regulators and other law enforcement agencies both domestically and internationally than ever before.<sup>70</sup>

#### Key Learning 4

Ultimately, the effectiveness and impact of any new offence, particularly in the regulated sector, will depend on the interaction between it and existing regulatory frameworks. This means that there should be significant roles for the FCA and HMRC (among others) in ensuring that their regulated populations comply with the requirements and in reinforcing the need for cultural change. Failure to prevent offences should act as a complement to existing regulatory frameworks, and regulators and enforcement authorities should work closely together to impose the most appropriate type of sanctions on corporate wrongdoing.

It is interesting to note that one area where an ongoing impact can be seen is within mergers and acquisitions. Three interviewees discussed how considerations of tax evasion facilitation risks now appeared as part of tax due diligence during the acquisition process, with target companies often asked about the procedures that they have in place to comply with the CCOs. Two of the interviewees were aware of transactions that had almost fallen apart as a result.<sup>71</sup> This was perhaps not one of the intended consequences of the regime, but it does provide a useful example of the wider impact of failure to prevent offences on business practices.

## HOW CAN AN ANALOGOUS FAILURE TO PREVENT ECONOMIC CRIME OFFENCE BE IMPLEMENTED?

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While a narrow majority of respondents to the Law Commission's consultation were not in favour of extending the failure to prevent regime,<sup>72</sup> this view was not reflected among those interviewed for this paper who had experience in implementing the CCOs. Notwithstanding any specific criticisms of the CCO legislation, the failure to prevent model was generally seen as a positive development, with some practitioners expressing the view that it should be extended across other types of economic crime; one referred to it as a potential 'game changer'.<sup>73</sup>

Although any kind of broad failure to prevent economic crime offence was ultimately rejected by the Law Commission in favour of a more limited

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70. Author interview with tax consultant, 1 June 2022.

71. Author interview with tax lawyer, 20 May 2022; author interview with economic crime lawyer, 20 May 2022; author interview with tax consultant, 1 June 2022.

72. Law Commission, 'Corporate Criminal Liability: An Options Paper', para. 8.19.

73. Author interview with financial crime consultant, 22 April 2022.

The failure to prevent model was generally seen as a positive development; one practitioner ... referred to it as a potential 'game changer'

offence relating to fraud,<sup>74</sup> the Commission did find 'that there is a stronger case in principle for introducing failure to prevent offences relating to economic crime than for most other areas of crime'<sup>75</sup> and that, without any reforms to the identification doctrine, there was a 'compelling'<sup>76</sup> case for the introduction of further failure to prevent offences. In particular, the Commission stated that the failure to prevent offences may be appropriate 'where it is deemed desirable to impose a positive duty on a company to take steps actively to prevent the commission of offences by its employees and agents'<sup>77</sup> and that '[i]t may also be that "failure to prevent" more accurately represents the culpability of companies where employees offend but the company does not encourage their offending'.<sup>78</sup>

The failure to prevent model is not without its criticisms, however. The Law Commission acknowledges that "[f]ailure to prevent" – which suggests negligence rather than direct culpability – will not always best reflect the nature of the offending'.<sup>79</sup> Others have suggested that 'recasting the liability of the corporate as FTP [failure to prevent] rather than causing the harm, it arguably also fails to deal with corporate criminal harms on its own terms'.<sup>80</sup> If one of the aims of introducing corporate criminal liability is to drive cultural change<sup>81</sup> and implement good corporate governance,<sup>82</sup> consideration needs to be given to the behaviour of individuals within an organisation. One practitioner interviewed for this paper remarked that it was 'not helpful'<sup>83</sup> that the Deferred Prosecution Agreements entered into under the Bribery Act 2010 also did not result in criminal charges for any individual members of senior management. As one commentator has pointed out: 'This highlights a key problem in financial crime – that there is no sense of individual culpability among employees of large international organizations.'<sup>84</sup> This illustrates a broader issue with the principle of failure to prevent offences: they can be seen as a compromise between corporate and individual liability. The importance of individual accountability more broadly has been recognised with the introduction of regulatory regimes, including the Senior Accounting

74. Law Commission, 'Corporate Criminal Liability: An Options Paper', para. 8.103.

75. *Ibid.*, para. 8.95.

76. *Ibid.*, para. 7.31.

77. *Ibid.*, para. 2.4.

78. *Ibid.*, para. 8.12.

79. *Ibid.*, para. 2.3.

80. Lööf, 'Corporate Agency and White Collar Crime'.

81. Kate Langley, 'The Future of UK Corporate "Failure to Prevent" Offences?', PwC, 6 August 2019, <<https://pwc.blogs.com/legal/2019/08/the-future-of-uk-corporate-failure-to-prevent-offences.html>>, accessed 22 June 2022.

82. HMRC, 'Tackling Tax Evasion', p. 3.

83. Author interview with tax consultant, 1 June 2022.

84. Diana Johnson, 'What Are the Merits of Taking a Hybrid Regulatory Approach Toward the Enforcement of Corporate Financial Crime in the United Kingdom and United States of America?', *Journal of White Collar and Corporate Crime* (Vol. 3, No. 1, January 2022), p. 29.

Officer regime and the Senior Managers and Certification Regime, although there have been some criticisms of the effectiveness of the latter.<sup>85</sup>

### Key Learning 5

The need for greater individual accountability was identified by both practitioners and academics in the field during this research, especially as awareness has grown that the CCOs are primarily a conduct offence requiring someone associated with an organisation to knowingly do something wrong. Interviewees felt that any regime of individual accountability would have to be clearly defined but that it could act to focus the attention of senior individuals on issues related to economic crime. There is, therefore, an argument that failure to prevent offences would be best used in conjunction with other (existing) powers, including, but not limited to, the criminal prosecutions of individuals within a corporate.

*Sources: Author interview with tax lawyer, 20 May 2022; author interview with economic crime lawyer, 20 May 2022; author interview with academic working in the field of economic crime, 20 May 2022; author interview with senior financial crime officer at a global bank, 29 April 2022.*

## CONCLUSION

It seems likely that the debate around corporate criminal liability will rumble on for some time. The Law Commission's 2022 review provides a number of options for reform and, in the words of one expert, makes it 'clear that failure to prevent offences in principle are here to stay'.<sup>86</sup> This paper, therefore, has aimed to provide a solid evidence base with regard to some of the practical considerations in implementing any future failure to prevent offences.

One of the common themes from all the experts consulted for this paper was the need for there to be robust and effective communications behind any new offence, supported by good-quality guidance. In particular, the guidance should focus on how organisations should carry out their own risk assessments and provide them with evidence to guide their identification of the risks.

It has long been acknowledged that the UK's laws and regulations relating to economic crime are sound, but that enforcement has been, and continues to be, a problem.<sup>87</sup> The research conducted for this paper, and academic literature on this subject, shows this to be as much the case in relation to

85. Bryce Elder, 'FCA Rejects Criticism over Manager Misconduct Investigations', *Financial Times*, 1 April 2022.

86. Sam Dean, comment on LinkedIn post, 2022, <<https://www.linkedin.com/feed/update/urn:li:activity:6940921591606218752?commentUrn=urn%3Ali%3Acomment%3A%28activity%3A6940921591606218752%2C6940932662039638016%29>>, accessed 11 July 2022.

87. Kathryn Westmore and Helena Wood, 'The UK's AML Regulatory Regime: An Exercise in Eternal Patience', *RUSI Commentary*, 5 July 2022, <<https://rusi.org/>

the existing failure to prevent offences as for other areas of economic crime. More resourcing and better cooperation between regulators and authorities is therefore vital to the success of any future offences.

Finally, failure to prevent offences should not be considered in isolation. Corporate criminal prosecutions are, in themselves, only one element of the wider regulatory landscape. Criminal action against individuals is also generally seen as a more effective deterrent than corporate prosecutions: 'Unless individuals involved in the wrongdoing can properly be brought to account for their conduct, then there is no deterrent effect for future offending.'<sup>88</sup> There is no doubt that failure to prevent offences could be a useful tool in the arsenal of law enforcement, but they should be accompanied by an increased focus on holding individuals to account.

## ABOUT THE AUTHOR

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[explore-our-research/publications/commentary/uks-aml-regulatory-regime-exercise-eternal-patience>](#), accessed 22 June 2022.

88. Jonathan Pickworth, 'Serious Fraud Office Needs a Complete Overhaul', *The Times*, 16 June 2022.

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