Ministry of Justice

Corporate Liability for Economic Crime

Call for Evidence: Government Response

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Ministerial foreword

Economic crime covers a range of serious offences including fraud, corruption, bribery, false accounting and money laundering. These crimes are deeply harmful to individuals, communities, law-abiding companies and the economy. In this increasingly complex landscape, we must remain vigilant to ensure that the UK continues to foster a fair and open environment from which companies can safely conduct business.

As Justice Secretary, I am proud of our world class and internationally renowned court system which enables highly complex crimes to be prosecuted. This includes working with the City of London Corporation on the creation of a new courts facility in the City of London. The flagship court will tackle fraud and related economic crime, including the expanding area of cyber-crime, whilst also hearing other cases. The Ministry of Justice is committed to keeping the law pertaining to economic crime under review. This involves ensuring it is fit for purpose and provides law enforcement agencies with effective enforcement tools.

With this in mind, we launched a Call for Evidence on options for reforming corporate liability for economic crime. The Call for Evidence examined whether there is a case for reform to ensure that the law in this area is fit for purpose. Responses were submitted from a wide range of stakeholders who expressed many different views on the existing legal frameworks. The findings of the Call for Evidence do not provide a conclusive evidence-base on which to justify reform but raised important questions about the operation of the identification doctrine.

In order to make a deeper assessment of the issues highlighted by the Call for Evidence, the Government asked departments, regulators, law enforcement and prosecution agencies to contribute further evidence, particularly in relation to challenges faced when using the identification doctrine to prosecute large corporate bodies. This work was conducted thoroughly, but we were unable to draw decisive conclusions regarding whether, and how, our approach to corporate liability for economic crimes can be strengthened.

We need conclusive answers to the important questions raised by these two evidence gathering processes and in order to ascertain a comprehensive understanding of the potential options and implications of reform the Government will be commissioning an expert review of the identification doctrine by the Law Commission. A Law Commission review comes at an opportune time and will be able to take into consideration more recent developments since the closure of the Call for Evidence. This includes the commencement of new corporate criminal offences in the Criminal Finances Act 2017; the expansion of the Senior Managers & Certification Regime in the financial services sector; the Money

Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 which have each improved the governance of firms to which they apply and the recent judgments in the SFO case against Barclays, and Barclays Bank PLC.

Further details on the outcomes of the Call for Evidence, the work undertaken since and next steps are provided in this paper. I would like to express my gratitude to all those who took the time to submit their comprehensive and considered responses on this important issue.

Rt Hon Robert Buckland MP
Lord Chancellor & Secretary of State for Justice

Introduction

1. Tackling economic crime is a key priority for this Government which is committed to exploring ways to improve the response to this type of offending. Government recognises that public trust in business has been eroded in recent years by the disclosure of a small, but high profile, number of fraudulent, dishonest and harmful activity by corporate bodies.

2. Since 2010, there has been extensive – and ongoing – implementation of measures, including post-crisis regulation of the financial services sector, criminalisation of benchmark manipulation (through the Financial Services Act 2012), and legislating to establish the first public register of company beneficial ownership in the G20. The Government has also implemented some of the world's strictest legislation on bribery through the Bribery Act 2010, which for the first time made it a criminal offence in the UK for a company to 'fail to prevent bribery' and introduced a specific offence of bribery of a foreign public official. The Act was described by the House of Lords Committee in 2019 as a 'exemplary piece of legislation'.

3. Furthermore, the Government's plans for co-ordinating its response to corruption and economic crime both at home and abroad were set out at the landmark international Anti-Corruption Summit it hosted on 12 May 2016. This summit sought to galvanise a global response to tackling corruption by agreeing a package of actions to deal with issues such as corporate secrecy, government transparency, the enforcement of international Anti-Corruption law, and the strengthening of international institutions. It was the first summit of its kind to bring together world leaders, business and civil society to agree a package of practical steps to expose corruption, punish those responsible and support those affected by it.

4. In December 2017, the Government went on to launch its Anti-Corruption Strategy, which provides the framework for its domestic and international priorities on corruption; and details the policies and actions being taken forward to tackle it up to 2022. The Prime Minister has also appointed an Anti-Corruption Champion to lead on and monitor the progress of the individual actions being taken forward by Departments.

5. The National Economic Crime Centre (NECC), a multi-agency centre based in the National Crime Agency (NCA), has been established to coordinate and task the UK's response to economic crime including high level fraud and money laundering. The NECC works with its partner organisations, including the Financial Conduct Authority (FCA); HM Revenue and Customs (HMRC); City of London Police; the Home Office; the Serious Fraud Office (SFO); and the Crown Prosecution Service (CPS).

6. Following the Financial Action Task Force's (FATF's) evaluation of the UK's anti-money laundering and counter-terrorist financing (AML/CTF) regime in 2018, the ECSB was additionally established to bring together the public and private sectors and drive an effective joint response to the threat presented by economic crime. In July 2019, the ECSB approved the publication of the Economic Crime Plan.

Criminal law and the Call for Evidence

7. The Government keeps UK law under review to ensure a robust legislative framework and that corporate bodies are properly held to account for criminal activity that takes place within them, or by others on their behalf. Following concerns that parts of the criminal law may not be fit for purpose and were hindering successful prosecution of corporate bodies for economic crime, the Government sought to establish whether there was a case for change by conducting a Call for Evidence.

8. Our Call for Evidence on corporate criminal liability for economic crime was launched in January 2017 and ran for three months until the end of March 2017. It sought views from industry and the public about whether there was a case for change to the current regime. It focused in particular on gathering new evidence and examples to understand the extent of the reported problems with criminal offences designed to punish and prevent economic crimes such as fraud, false accounting and money laundering. It asked for new factual examples that may illustrate the extent to which the common law 'identification doctrine' (this is the test for attributing fault to a corporate where it can be shown that an individual in the corporate had the 'directing mind or will' behind an offence) is deficient, particularly in the context of prosecutions against large modern companies; it also canvassed a number of alternative options for proceeding if it was decided that reform was needed.

9. In summary, the Call for Evidence set out five possible options for reform as follows –

   i. ***Legislate to replace the current common law rules*** – this option envisages legislation that, for example, might establish corporate criminal liability in economic crime cases arising from complicity of persons from a much broader range of functions within a corporate management structure than the identification doctrine.

   ii. ***A new form of vicarious liability along the lines of the US model*** – this option would make a corporate body guilty, through the actions of its employees, representatives or agents, of the substantive economic crime offence without the need to prove the existence of a directing mind at the corporate centre.

   iii. ***A new strict liability offence along the lines of the existing section 7 of the Bribery Act 2010 (failure to prevent model)*** that provides for guilt of a separate offence of failing to prevent a substantive offence rather than the substantive offence itself, without the need for intent on the part of the company. Section 7 provides that it is a defence for the organisation to prove that it had adequate procedures in place to prevent persons associated with it from bribing.

iv. ***A variant of the failure to prevent model (that is, option iii)*** in which the prosecution is required to prove not only the occurrence of the predicate offence but also the failure on the part of the management of the company to prevent the offence by, for example, failing to put in place any procedures designed to prevent such offending. That is, option iv would place the burden of proving a lack of adequate procedures on the prosecution, rather than the burden of proving the existence of adequate procedures on the defence (as is the case with option iii).

v. ***Investigate the scope for further regulatory reform*****.** The recent reform in the regulated financial service sector, seeking to deter misconduct through increased individual accountability at senior management level, may be applicable more widely. This would require a sector by sector assessment.

10. To help establish a consensus on each of the options, the Call for Evidence sought views on 16 different questions – which included whether to extend the innovative 'failure to prevent' offence model that already applies to bribery and tax evasion offences, to other forms of economic crime.

11. The Call for Evidence was an important step in the wider work continuing across Government and we are grateful to all those who took the time to respond to it.

Summary of responses

12. 62 responses to the Call for Evidence (CfE) were received from a wide variety of stakeholders. Respondents included law firms, the financial services sector, bodies representing trade, industry and commercial interests, civil society organisations, police organisations, prosecuting agencies, individuals, academics and Parliamentarians.

13. Many of those who responded answered the sixteen questions online using the citizenspace analysis tool, whilst some submitted their views by email or post. To facilitate a full analysis of all the responses received, submissions made by e-mail or post were subsequently uploaded to the citizenspace tool. This ensured we could give as clear an indication as possible of the percentage of positive or negative responses to each of the sixteen questions. However, the percentages provided are indicative only as there were inconsistencies in the way some questions were approached by individual respondents – with either full or partial answers provided or views of more general relevance expressed.

14. The next section of the paper provides further detail on the individual responses received to each question. In general, clear concerns were expressed about the current law. However, those views were not supported by sufficient new evidence that companies are not currently being held responsible for economic crimes undertaken by their employees. Some of the material submitted as evidence for reform concerned matters of significant public concern, such as business practices that raise human rights or environmental issues, but these lay outside the scope of this CfE. Other unusable material concerned bribery or the facilitation of tax evasion cases which are both areas of economic crime law that have been reformed already through the Bribery Act 2010 and Criminal Finances Act 2017. Responses also referenced the cases of manipulation of benchmarks (such as LIBOR and Euribor). The making of false or misleading statements in relation to benchmarks was addressed through the Financial Services Act 2012, which criminalised such actions. Certain other responses concerned investigations in progress from which no conclusions could be drawn.

15. There was no clear consensus from respondents on what corporate liability offence should be created if the identification doctrine was replaced. Equally, some responses disclosed significant opposition to reform given the potential adverse impact of new criminal liability on growth and competition. Others questioned whether there was a need for further criminal sanctions at all in the already heavily regulated financial services sector. In general, however, although a range of divergent and often conflicting views were expressed, there was no new or significantly persuasive evidence submitted by the CfE respondents to support the case for a change to the law.

Responses to specific questions

16. As noted earlier, the percentages given below are indicative of the numbers of participants that responded to each question. Because some respondents did not offer a view on every question, or submitted more than one view in response to one question, totals will not always be equal to 100%.

Question 1
Do you consider the existing criminal and regulatory framework in the UK provides sufficient deterrent to corporate misconduct?

17. There was a strong response rate to this question with a total of fifty-nine responses received. A slim majority (52.5%) did not believe that the existing criminal and regulatory framework in the UK provides sufficient deterrent to corporate misconduct. These respondents highlighted what they perceived to be deficiencies in both the criminal and regulatory regimes. Some highlighted that these deficiencies result in huge costs to the UK economy. Further minority views included that the framework is not understood by small and medium sized enterprises (SMEs) and that enforcement of the law is weak. It is important to recognise that since the closure of the CfE a number of changes have been made to the criminal and regulatory frameworks the impacts of which respondents to this CfE were unable to consider.

18. 30.5% of responses said that the criminal law and/or the regulatory regime in the UK was a sufficient deterrent to corporate misconduct. Some responses specifically highlighted that the regulatory regimes in sectors other than the financial service sector were sufficient.

Question 2
Do you consider the identification doctrine inhibits holding companies to account for economic crimes committed in their name or on their behalf?

19. There was a strong response to this question with a total of fifty-eight responses received. A significant majority (75.9%) agreed that the identification doctrine inhibits holding companies to account for economic crimes committed in or on their behalf. Many of these respondents emphasised the difficulty associated with applying the doctrine to large and multi-national companies.

20. Some respondents commented that the identification doctrine acted as a disproportionate burden on small and medium sized companies because it may be easier to identify and prove complicity on the part of senior managers. Interestingly, 10.3% of respondents suggested that although it may inhibit holding companies to account, the identification doctrine should remain the legal mechanism for corporate criminal liability.

Question 3
Can you provide evidence or examples of the identification doctrine preventing a corporate prosecution?

21. The purpose of this question was to elicit examples where economic crimes have allegedly been committed by a corporation but the identification doctrine has prevented prosecution. There was a good response rate to this question, with a total of forty-nine responses received. However, more than half of the respondents (57%) were unable to provide an example. Some respondents did refer to knowledge of cases where the identification doctrine inhibited a prosecution but confidentiality and/or legal professional privilege prevented them from being disclosed.

22. Some of the evidence provided by respondents was disregarded because, although they did provide useful illustrations of how the identification doctrine operates, they did not involve crimes that fall within the definition of economic crime and were therefore out of scope for this CfE. A particular example of this was submitted on the Regis paper company case. Although this case provides a good example of the operation of the identification doctrine, it concerned breaches of pollution regulations, not economic crime.

23. Some respondents applied a definition of economic crime to any activity associated with the operation of a business and therefore submitted examples where companies had not been prosecuted for a range of different offences such as vehicle emissions rigging; low safety standards and hazardous working conditions overseas that cause severe injuries, deaths or life-threatening pollution as evidence for reform. Again, whilst these are matters of serious public concern they are out of scope for this CfE.

24. Further responses that have also been disregarded are those which were under investigation, or where a lack of prosecution may not necessarily be related to the operation of the identification doctrine.

25. Where examples of economic crime cases were provided, responses tended to comment on prominent cases, which have received significant commentary from stakeholders already, rather than provide examples of prosecution decision making. This included manipulation of benchmarks including LIBOR and EURIBOR, the case of fraud involving former employees of the Halifax Bank of Scotland (HBOS) in 2017, and the 2005 SFO investigation into systematic fraud involving the Sweet and Maxwell publishers.

26. In the LIBOR/ EURIBOR cases a significant number of respondents referred to examples of action by the US authorities against financial institutions in circumstances where the UK authorities were not able to do so, or that the fines imposed in the US were much higher (e.g. Barclays – $460m; RBS – $475m; Deutsche Bank – $2.1bn and UBS – $4.66bn). There were, however, significant regulatory fines levied by the

FCA, or its predecessor the Financial Services Authority, against UK financial institutions for LIBOR/EURIBOR misconduct (e.g. Barclays – £56.3m; RBS – £87.5m; Deutsche Bank – £227m and UBS – £160m). The Financial Services Act 2012 additionally established new criminal offences relating to benchmark manipulation, providing a further deterrent and means of enforcement for any subsequent instances of behaviour of the type that led to the manipulation of LIBOR and EURIBOR.

Question 4
Do you consider that any deficiencies in the identification doctrine can be remedied effectively by legislative or non-legislative means other than the creation of a new offence (option 1)?

27. There was a good response to this question and a total of fifty-five responses were received. Most respondents (61.8%) expressed the view that deficiencies in the identification doctrine could not be effectively remedied by legislative or non-legislative means, other than the creation of a new offence.

28. The 23.6% of respondents who argued that deficiencies could be remedied effectively by means other than the creation of a new offence outlined a variety of ways in which legislative and non-legislative means could be used. Examples included legislating to create new principles for attribution of corporate liability to replace the common-law identification doctrine; strengthening and harmonising the current regulatory and enforcement tools; and introducing further regulation as an alternative to amending the criminal law. Minority views included a suggestion that the judiciary could issue a Practice Direction for trials that would allow evidential presumptions to be made as a means of overcoming the evidential problems associated with the doctrine; and that Government should consider creating a duty on companies to report suspected economic crime. It was suggested that this last idea could complement the existing reporting obligations for those in the financial service sector and create a level playing field for all businesses regardless of sector.

Question 5
If you consider that the deficiencies in the identification doctrine dictate the creation of a new corporate liability offence which of options 2, 3, 4, or 5 do you believe provides the best solution?

29. Before outlining the preferences respondents selected and the commentary they provided, a short explanation of option two, three, four and five, is provided below.

30. Option 2 outlined the creation of a **strict vicarious liability** offence. This would make the company guilty, through the actions of employees, representatives or agents, of a substantive offence. There would be no need to prove any fault element such as knowledge or complicity at the corporate centre.

31. Option 3 discussed the creation of a **strict direct liability** offence. Under this offence, a company would be guilty not of the substantive offence, but of a separate offence akin to a breach of statutory duty to ensure that economic crime is not used in its name or on its behalf. It was the Government's view that to incentivise economic crime prevention as part of good corporate governance, a due diligence defence (that is, where the company can prove that it had in place adequate procedures designed to prevent persons associated with the company from undertaking the conduct in question) would be required under such an offence. Option 3 was therefore the most aligned to section 7 of the Bribery Act 2010.

32. Option 4 explored the concept of making the **failure to prevent an element of the offence** (rather than the existence of adequate procedures a defence)**.** This model takes the principles of option 3, but places the burden of proof in relation to the failure to prevent the offending behaviour onto the prosecution. Under a straightforward "failure to prevent" model (such as option 3, or section 7 of the Bribery Act 2010), the burden is on the defence to prove that there were adequate procedures in place. This would require the prosecution to not only prove that the predicate offence occurred, but also that it occurred because of management failure and/or systemic inadequacies in the mechanisms that the company relies on to prevent the predicate offences from occurring.

33. As outlined previously, there had been significant reform in the regulation of the financial service sector to deter misconduct before the CfE was published. Therefore, option five put forward the possibility of **investigating regulatory reform on a sector by sector basis**, with a focus on the lessons to be learned from the experience of strengthening the regime for financial services which may be applicable more broadly.

34. There was a very good response rate to this question, with fifty-six answers provided. There was no clear consensus from respondents on which corporate liability offence should be created if the identification doctrine was replaced. No single option gained support from more than half of respondents. As highlighted previously, respondents could provide more than one answer to each question in the CfE, therefore the percentages provided below equal more than 100% to reflect the fact that respondents may have selected more than one preferred option.

35. 46.4% of respondents selected the strict direct liability offence outlined in option 3. This was expressed as a preference because the model was clear, would effectively encourage good governance and could be applied generally.

36. 39.3% of respondents expressed a preference for option 4. A large proportion of these respondents felt it was important that the burden of proving failure to prevent the commission of the predicate offence should rest with the prosecution.

37. 25% of respondents preferred the possibility of regulatory reform on sector by sector basis as described in option 5. More than half of these respondents chose this option because they believed it would allow for a more nuanced and targeted approach.

38. 10.7% of respondents chose the strict vicarious liability offence in option 2. Some of these respondents also questioned whether an element of such an offence would include an intended benefit for the company (i.e. the company would need to have benefited from the actions of its employees). This was not explored in the CfE but would most likely, along with a 'due diligence' type defence of the kind anticipated for Option 3, be necessary under a strict vicarious liability offence.

39. Further to this, there were clearly preferences and opinions which respondents did not feel were reflected by the five options provided in the CfE, because some respondents took the opportunity to suggest other measures that they considered necessary in this area of the law. 12.5% urged changes to be made to the law to allow the courts to consider disqualifying directors of companies convicted of economic crime or subject to a Deferred Prosecution Agreement without proof of individual guilt. 7.1% wanted to see the review of corporate liability expanded beyond economic crime to embrace, for example, human rights abuses, labour exploitation and environmental damage overseas.

Question 6

Do you have views of the costs or benefits of introducing any of the options, particularly impacts on competitiveness and growth?

40. There was a good response to this question, with a total of fifty-five responses being received. Some respondents (34.5%) felt that reform of the law would have a potentially adverse impact on competitiveness and/or growth, although again the response to this was not conclusive because this view only accounted for just over a third of respondents. A smaller proportion of respondents (16.4%) held the view that reform would have a beneficial impact on competitiveness and/or growth.

41. 32.7% of respondents highlighted that reform would create increased compliance costs. Although, 32.7% also expressed the view that any additional costs created would be necessary and would be manageable for companies.

Question 7

Do you consider that introduction of a new corporate offence could detract from individual accountability?

42. There is a discrepancy between the text of this question in the online questionnaire, (set out above) and the wording of the question in the published CfE which reads, "do you consider that introduction of a new corporate offence could have an impact on individual accountability." We apologise for the anomaly; all responses have been interpreted as a response to the question as worded above in bold.

43. There was a good response to this question, with fifty-six responses received. The majority (67.9%) of respondents did not consider that the introduction of a new corporate offence would detract from individual accountability. Many of these respondents highlighted the likelihood that a new offence would improve individual accountability, result in more individual prosecutions, subject the activities of individuals to closer monitoring and lead to individuals who fail to implement prevention measures facing adverse consequences.

44. Those who responded that a new corporate offence could detract from individual accountability (21.4%) highlighted that there was a risk that the prosecutors would target the entities as a default and some expressed that there may be fewer individual prosecutions. Other views included that a new offence may risk reluctance on part of senior managers to assume responsibility for at risk areas; there is a risk that companies seeking Deferred Prosecution Agreements will “scapegoat” individuals; individual liability will become a bargaining chip in corporate plea discussions; and a new offence would jeopardise the operation of the Senior Managers & Certification Regime in the financial service sector.

Question 8

Do you believe new regulatory approaches could offer a better alternative, in particular can recent reforms in the financial sector provide lessons of regulation in other sectors?

45. There was a strong response to this question, with fifty-nine answers received in total. However, the CfE responses did not provide clarity on whether new regulatory approaches could offer a better alternative or if recent reforms in the financial service sector could provide lessons for other sectors.

46. 33.9% of respondents indicated that regulatory approaches could not offer a better alternative and many commented that regulations in the financial service sector could offer no lessons. The exact same proportion of respondents (33.9%) also indicated that regulatory approaches could offer a better alternative. These responses tended to consider that regulation is a feasible alternative and highlighted the valuable lessons the financial service sector could provide to other sectors. Again, it is useful to remember that the regulatory approach has been reformed and expanded since the closure of the CfE therefore responses to this question may vary in the current context.

Question 9

Are there examples of corporate criminal conduct where a purely regulatory response would not be appropriate?

47. There was a good response rate to this question, with a total of fifty-three responses received. A significant majority of respondents (73.6%) felt that there were examples of corporate criminal conduct where a purely regulatory response would not be appropriate. Respondents highlighted that a purely regulatory response would not be

appropriate for serious offending, some highlighted that sanctions should be attributed to specific offences, or where any of the offences listed in Part 2 of Schedule 17 to the Crime and Courts Act 2013 were committed for the benefit of a company.

48. Other minority views provided that a criminal sanction would be appropriate in circumstances including where; (a) there is systemic misconduct, which involves abuse of trust or which impacts on vulnerable persons or large sectors of society; (b) there was a corporate culture that envisaged, condoned or encouraged the relevant conduct by employees; (c) managers connived in the offending; (d) there was deliberate conduct on the part of an employee which was designed to benefit a company; (e) the misconduct represented a serious moral breach; (f) a company had deliberately set about a course of criminal conduct for its own profit; and (g) where a company is established as a vehicle for fraud.

Question 10

Should you consider reform of the law necessary, do you believe that there a case for introducing corporate failure to prevent economic crime offence based on the section 7 of the Bribery Act 2010?

49. There was an extremely strong response to this question, with a total of sixty-two responses being provided. A slim majority of respondents (51.6%) believed that there is a case for introducing corporate failure to prevent economic crime offences based on section 7 of the Bribery Act 2010. These respondents felt that such a model is clear and proportionate and encourages good governance whilst providing both a deterrent and a realistic threat of prosecution. Reference was also made to the fact that the model is familiar to businesses, prosecutors, defence practitioners and judges.

50. A considerable number of respondents (35.5%) did not believe that there was a case for introducing a section 7 based offence, and many expressed the view that reform of the law was not necessary. These respondents also emphasised that the case for a section 7 offence was not made out, that the failure to prevent model was not suitable for economic crimes other than the facilitation of tax evasion and bribery and that an offence would create excessive administrative burdens for businesses.

Question 11

51. The CfE outlined that;

"If a new corporate failure to prevent economic crime offence proves to be the best option for reform, the scope of the relevant predicate offending will need to be considered. In these circumstances the Government's starting position is that the offence should initially apply to a short list of the most common serious economic crime offending, which could be added to if necessary by secondary legislation. This list could compromise:

- The common law offence of conspiracy to defraud;
- The offences at section 1 of the Fraud Act 2006;

- The offence of false accounting at section 17 of the Theft Act 1968;
- The money laundering offences at section 327 to 333 of the Proceeds of Crime Act.”

Question 11 of the CfE, therefore asked respondents:

If your answer to question 10 is yes, would the list of offences listed above, coupled with a facility to add to the list by secondary legislation, be appropriate for an initial scope of the new offence?

52. There was a good response rate for this question, with a total of forty-eight responses being received. A slim majority of respondents (52.1%) considered that the list of offences provided in the CfE was appropriate for an initial scope of a new offence. 39.6% specifically indicated that a facility to add to the scope of a failure to prevent offence by secondary legislation was the right approach. Although, 10.4% did not feel that a facility to add to the scope of a failure to prevent offence by secondary legislation was appropriate, 6.3% of respondents also considered that money laundering offences should be excluded.

53. 8.3% of answers suggested that the list of offences was not appropriate for the initial scope of a new offence.

Question 12

Do you consider that the adoption of the failure to prevent model for economic crimes would require businesses to put in place additional measures to adjust for the existence of a new criminal offence?

54. There was a very strong response to this question, with a total of sixty-one responses being received. A significant majority of respondents (75.4%) agreed that the adoption of the failure to prevent model for economic crimes would require businesses to put in place additional measures to adjust for the existence of a new criminal offence. There were varying opinions as to how these additional measures would manifest themselves. Some highlighted that additional measures would result in significant costs, which may disproportionately affect SMEs, others noted that such costs may be created due to inconsistency with the Senior Managers & Certification Regime. Respondents also suggested that government should produce guidance, which may help reduce costs to businesses. Respondents also highlighted that costs could be mitigated by allowing businesses to build on existing measures and that companies in the regulated financial service sector would be less likely to have to put in place new measures.

Question 13

Do you consider that the adoption of these measures would result in improved corporate conduct?

55. There was a very strong response rate to this question, with a total of sixty responses received. The majority of respondents (66.7%) highlighted that the adoption of failure to

prevent measures would result in improved corporate conduct. Reasons for this included that an increased threat of prosecution improves conduct; and the evidence provided by the introduction of section 7 of the Bribery Act 2010.

56. 13.3% did not consider that the adoption of these measures would result in improved corporate conduct. These respondents provided a range of reasons for this including; (a) there is no evidence that such measure would result in improved conduct; (b) a new liability is unlikely to require further measures in large multi-national companies; (c) a new offence is the wrong option and could have a negative impact; (d) reform could undermine the risk-based approach that already exists within the UK's anti-money laundering regime; (e) and that any new measures would create a risk of flight of talent due to increased personal risk for senior management or directors.

Question 14
Do you consider that it would be appropriate for any new form of corporate liability to have extraterritorial reach?

57. There was a good response to this question, a total of fifty-four answers were submitted. Close to half (48.1%) of the respondent felt that extraterritorial jurisdiction (ETJ) would be appropriate for a new form of corporate liability, particularly considering the international nature of modern business practise. The 29.6% of respondents who answered "No" highlighted that the ETJ would increase the administrative and cost burden and questioned whether there was an evidential basis for ETJ.

Question 15
Is a new form of corporate liability justified alongside the financial services regulatory regime?

58. There was a good response to this question with fifty-six respondents answering this question. 48.2% of respondents expressed the view that a new form of corporate liability is justified alongside the financial service regulatory regime. However, many commented that the success of such an approach would require cooperation and consistency between regimes and advised that duplication should be avoided.

59. 30.4% answered "No" to this question, reasons included the difficulties in harmonising the regimes and that a new criminal liability offence in the financial service sector would have an adverse impact on the existing regulatory regime.

Question 16
What do you think is the correct relationship between existing compliance requirements in the financial service sector and the assessment of prevention procedures for the purpose of a defence to a criminal charge?

60. There was a good response to this question, with a total of fifty-three responses received. A variety of views were given about how existing compliance requirements in the financial service sector and the assessment of prevention procedures for the

purpose of a defence to a criminal charge should relate. A large proportion of respondents (47.2%) expressed the view that consistency and clarity between the distinct regimes is important, and many (28.3%) outlined that the regulatory compliance should be a relevant factor in any assessment of prevention procedures in criminal law.

61. 18.9% suggested that the distinction between the two regimes must be very clear, 18.9% were also of the view that there needs to be clear and consistent guidance concerning the relationship between the elements of a criminal offence and regulatory requirements. 11.3% commented that the relationship between the assessment of prevention procedures for the criminal law and the regulatory requirements must be such that it does not result in burdensome and costly measures on the part of firms in the sector. 7.5% expressed the view that regulatory compliance of itself should provide a defence of a criminal charge.

Conclusion and Plan of Action

62. The evidence submitted to the Call for Evidence was therefore considered inconclusive by Government, as it had produced no new significant examples that clearly illustrated the extent of the reported problems with economic crime law and the identification doctrine. There was equally no convincing majority on a preferred way ahead. Some respondents supported further-reaching reform to the UK's legal framework for corporate liability than solely in respect of economic crime. These respondents typically supported potential corporate offences in relation to human rights abuses, environmental damage and telephone hacking but provided no direct evidence on economic crime. Ultimately, therefore, the Government was not persuaded that a sufficient evidence base had been provided on which to make immediate legislative change to the criminal law in relation to economic crime.

63. The Government concluded that the arguments for and against any new corporate criminal liability offences would need to be broadened and a fuller assessment made of the likely impacts of this on business before a final position could be reached. The Government therefore commissioned further work that would seek to make a deeper assessment of the perceived 'enforcement gap'; more clearly define the scope of any potential new offence and guidance; and seek a better assessment of the impact of the existing 'failure to prevent' offences for bribery and tax evasion.

64. A number of departments, regulators, law enforcement and prosecution agencies were invited to contribute to the further evidence gathering process. In particular, they were asked to provide further details that illustrated the challenges faced by some agencies in prosecuting large corporate bodies for economic crime – particularly fraud and false accounting – due to the 'identification doctrine'.

65. This work made it apparent that the implementation of the Bribery Act 2010 has already had a significant impact on corporate culture, by incentivising senior managers of large corporate bodies to institute effective anti-bribery policies and procedures.

66. It was also established that the criminal and regulatory regimes are more developed in relation to anti-money laundering (through the Proceeds of Crime Act 2002 and the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 ("the 2017 Regulations") than is the case for fraud and false accounting. Alternative means of redress are available against firms within the money laundering regulated sector, although these will often be civil rather than criminal.

67. Separately, multiple relevant reforms have been in the process of being fully implemented since the original CfE closed, and therefore the impacts of these

measures are yet to be fully realised. These include the 2017 Regulations, the failure to prevent tax evasion offences within the Criminal Finances Act 2017, and the Senior Managers & Certification Regime (SM&CR).

68. The 2017 Regulations and subsequent amendments introduced a number of new requirements on relevant businesses, and changes to some of the obligations found under the existing regime. They broadly apply to financial institutions, including money service businesses, and to those sectors that are seen as 'gatekeepers' to the financial system including auditors, legal advisers, insolvency practitioners, estate agents and tax advisers, and require the possession of policies, procedures and controls in place to mitigate and manage effectively the risks of money laundering and terrorist financing. If a person contravenes a requirement imposed on them by the 2017 Regulations, they are guilty of an offence, punishable by imprisonment of a term not exceeding two years, a fine, or both. Although these Regulations were commenced in June 2017, relevant firms updated their internal controls to reflect the new requirements from later in that year. The regulations were also updated in January 2020 to implement the EU's 5th Anti-Money Laundering Directive and make other technical changes. As such (and given the length of time that money laundering investigations take) we anticipate that more evidence will be available in 2022 as to how the requirements of the 2017 Regulations have driven behavioural change within regulated firms; and how supervisory and law enforcement authorities are enforcing those requirements in practice.

69. The Criminal Finances Act 2017 introduced two new failure to prevent offences in respect of the facilitation of UK and foreign tax evasion offences. These offences only came into force in September 2017, meaning that firms spent a period of months after that implementing the "reasonable procedures" necessary to avail themselves of the statutory defences. As is the case in relation to the 2017 Regulations, the timing of the implementation of these offences mean that the costs to firms of implementing the necessary procedures are not yet available. It is equally not yet possible to fully assess how this offence has driven behavioural changes within firms, or the utility of these offences to law enforcement authorities.

70. The SM&CR seeks to improve conduct and culture in the financial services sector by ensuring that senior individuals can be held accountable for misconduct, with enforcement powers acting as a deterrent. A key aspect of the regime requires that senior managers in firms be approved by the regulators, have a clear statement of their responsibilities, and face a duty to take reasonable steps to prevent misconduct in their areas of responsibility. As per section 36 of the Financial Services (Banking Reform) Act 2013, the SM&CR also introduces a criminal offence for senior managers of UK banks, building societies and PRA-designated investment firms for reckless decisions that cause an institution to fail. The SM&CR was introduced in March 2016 for banks, building societies, credit unions and PRA-designated investment firms and was extended to PRA- and FCA-regulated insurers in December 2018. In December 2019 it

was extended to all other authorised under the Financial Services and Markets Act 2000 and regulated by the FCA. The ongoing implementation of the SM&CR throughout the financial services sector means it remains a reform in progress, and further time is needed to see its full impact. However, the FCA carried out a stocktake report in 2019 into the implementation of the SM&CR and found that firms note a stronger tone and ownership from the top, and that the regime was having an impact on the mindset of senior managers.

71. In recent months the judgments in the SFO case against Barclays, and Barclays Bank PLC, gave an interpretation of the identification doctrine which suggests there may be limitations in bringing corporate prosecutions. However, given the absence of sufficiently strong evidence on a clear way forward, and the need to take account of the other recent reforms described above, the Government has concluded that at this time, it is not appropriate to proceed with immediate legislative reform. Instead, because of the highly complex nature of the laws concerned and the implications of any future change, the Government is commissioning the Law Commission to undertake a detailed review of the identification doctrine, with a particular focus on economic crime.

72. The Law Commission is a statutory body, and is under a duty to keep the law under review, and receive and consider any proposals for reform. The aim of the Law Commission is to ensure that the law is fair, modern, simple and cost-effective. Importantly, it is also in a good position to provide an independent assessment of the issue. The Commission’s work is also extremely well respected within Government, Parliament and amongst external stakeholders.

73. It is envisaged that the review itself would, in the first instance, set out the problems with the current law, and consider options for reform. The Law Commission will be able to draw on domestic and international models and identify the most effective and viable options for reform. This would reflect the need to ensure proper accountability of corporations which engage in criminal conduct, without imposing disproportionate burdens upon business. The Law Commission’s work would therefore focus on providing a practical and considered route to law reform. It is currently estimated that the Law Commission’s scoping work will take between 12 and 15 months and be run as a cross-team collaboration by the Criminal Law and Commercial & Common Law Commissioners. Further details and the full terms of reference will be finalised in due course, but will be announced by the Law Commission in the usual way once agreed.

74. By the time the Law Commission’s scoping work is complete, recent Government measures taken to strengthen the UK’s response to economic crime (such as through the 2017 Regulations and Criminal Finances Act 2017) and the regulatory framework within the financial services sector will be better embedded. This should allow a more robust evidence base to establish: (a) how they have driven culture change within firms; (b) how they have been enforced by law enforcement, prosecutors and

supervisors; and (c) what costs they have imposed on businesses. An evaluation of these measures, alongside the results of the Law Commission review, will then inform any future decision on reform of the UK's legal regime for corporate liability.

Consultation principles

The principles that Government departments and other public bodies should adopt for engaging stakeholders when developing policy and legislation are set out in the Cabinet Office Consultation Principles 2018:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/691383/Consultation_Principles__1_.pdf

Annex A – List of respondents

1. There were a total of 62 responses received to the Call for Evidence, some wished to remain confidential. The responses came from legal firms (26), stakeholders in the financial services sector (8), civil society organisations (8), individuals (5), academia (4), bodies representing trade, industry or commercial interests (4), police organisations (3), Parliamentarians (2) and prosecuting agencies (2).

Alternative format versions of this report are available on request from Ministry of Justice, Criminal Law Policy Team, 102 Petty France, Westminster, London SW1H 9AJ.