



Taxing Matters

The complicated question of corporate criminal liability

Alice	<p>Hello, and welcome to Taxing Matters, your one stop audio shop for all things tax brought to you by RPC. My name is Alice Kemp and I will be your guide as we explore the sometimes hostile and ever-changing landscape that is the world of tax law and tax disputes. Taxing Matters brings you a fortnightly roadmap to guide you and your business through this labyrinth. In case any of you miss any crucial information or just want some bedtime reading, there is a full transcript of this and indeed every episode of Taxing Matters on our website at www.rpc.co.uk/taxingmatters.</p> <p>As some of you may be aware there have been rumblings of dissatisfaction from some members of the public, politicians, the business community and the legal profession over the complicated question of the criminal liability of corporations. So, the Law Commission launched a consultation to seek views on whether, and how, the law relating to corporate criminal liability can be improved so as to appropriately capture and punish criminal offences committed by corporations, their directors and senior management.</p> <p>Here to explain more about this ambitious and laudable aim is David Allan. David is a barrister of over twenty-years' experience and a former senior crown advocate for the Crown Prosecution Service with experience in financial and organised crime. David is also a criminal law reform lawyer with the Law Commission working on the corporate criminal liability project and, for his sins, was also on the Law Commissions confiscation project.</p> <p>David, welcome to Taxing Matters!</p>
David	<p>Thank you Alice, it's lovely to be here!</p>
Alice	<p>So, for most of our listeners when they think of the criminal law they might be thinking of, sort, of shadowy figures doing nefarious deeds and bank robberies, how does this all relate to corporations?</p>
David	<p>Well, That's a very good question. I suppose the bottom line is that criminal offences do seem to be sort of brought into existence by corporations; people who commit criminal offences are sometimes working for corporations, They're sometimes senior managers of corporations, or sometimes even chief executives of corporations and when those offences are committed by someone working for a corporation - or, maybe an agent of a corporation acting for its benefit and from which it has actually benefitted - the questions start to arise about, well, maybe the corporation should be prosecuted for the offence.</p>
Alice	<p>Seems like a reasonable suggestion! So, how does that work in practice at the moment?</p>
David	<p>Well the problem with it - and you talk about men in shady corners - let me put it another way, one of the, sort of, central tenets of the criminal law is that people are not guilty of criminal offences unless they have 'guilty minds' and the difficulty with corporations is they don't have minds. So how do you find someone guilty of a criminal offence who hasn't got a mind?</p> <p>The law of corporate criminal liability, as we call it, and our project, is really centred around that question of, "how do you find someone to have a guilty mind, or treat someone as having a guilty mind and, therefore, guilty of very many criminal offences, if they don't actually have a mind?"</p> <p>The way that that's answered at present - to come to your question is - in English law, under the common law, what is called the identification principle. That is to say, "let's identify the corporation with certain people within that corporation". So, if certain people within the corporation have a 'guilty mind', if they acted dishonestly, if they acted with an intent to benefit themselves, if they acted in the knowledge that what happened wasn't true, then let's say the corporation had that 'guilty mind' - let's say it was dishonest, it knew that it wasn't true. So, that's what's called the "Identification principle" and that's a central part of the current criminal law in England and Wales; the idea that in certain circumstances you identify the guilty mind of an individual with the guilty mind of the corporation.</p> <p>And the second way that the law generally address is this - what it has done in the past - is by what is called "Strict liability offences". Which is to say, "okay, never mind what the central tenets or maxims of the criminal law are, we're going to create, for our purposes, certain offences where you don't have to have a 'guilty mind'</p>

you just have to do something and we all know that corporations can do things without any difficulty because they can act through their employees or through their agents - acting within their ostensible authority". So, some offences are strict liability offences, for example, many environmental protection offences, many, sort of, regulatory offences that, typically, just have fines and maximum penalties. That's the second way the law deals with corporations - to have these offences that don't have mental elements so you don't have any problem with the fact that the corporation doesn't have a mind.

Perhaps the third way - and this is a sort of relatively recent innovation, it's probably just really been going since 2010 depending on how you define it - is to have what is called "Failing to prevent offences". They're really just the sort of offences that I've just been talking about - offences without a mental element - but with a defence of being able to show that you did try and prevent it. So, the classic one is bribery. Under section 1 of the Bribery Act 2010 someone is guilty of an offence if they bribe someone else, okay, that's section 1, standard criminal offence: bribing somebody else. But, section 7 of the Bribery Act is the "Failing to prevent" offence and it is a criminal offence for companies only - individuals can't be guilty of it - and what it says is "If an associated person to a corporation" or a company for our purposes "bribes another person, the company is also guilty of bribing the other person". It's that simple in section 7, but there is a defence and the defence is for the company to show that it had adequate precautions, or reasonable procedures - the precise wording varies depending on the different act - but it's essentially to have reasonable procedures in place to have attempted to prevent that bribe happening. So, that is an example of a "Failing to prevent" offence in the 2010 Act.

The other well-known "Failing to prevent" offence is in the 2017 Criminal Finances Act which relates to facilitating tax evasion by another. So, again it's a criminal offence to facilitate tax evasion but its another separate criminal offence that can be committed by companies-only if a person associated to that company facilitates tax evasion and the company doesn't have in place reasonable measures to show that it tried to prevent that sort of offence taking place.

So, that's how the current law tends to work. The identification principle, generally. Strict liability offences in certain categories and more recently these new kind of offences that are, sort of, strict liability - if someone else does it you're guilty that's it - but with the defence of, 'unless you can show that you took reasonable measures to prevent it happening'.

Alice

So, we've got three reasonably clear ways of attributing liability to corporations but there have been these rumblings of dissatisfaction, so, what exactly are the dissatisfactions?

David

Well, the dissatisfactions, I guess, are twofold. Generally this idea that that identification principle' that I talked about, you know, how well does it actually work? Because it comes down to which people within the company are going to be the people that you are going to identify their 'guilty minds' with the company's 'guilty mind' - and that's been a big bone-of-contention. But over the years the courts have said in many decisions, "Well, okay, it's the people who were the directing mind and will of the company", or 'DMW' is the acronym, so the 'directing mind and will of the company'. Now, in a small company that's pretty obvious there might only be one director or a couple of directors, those people are going to be the "directing minds and will", the other members of the company probably won't be. When you get to big companies, international companies, companies that have subsidiaries, companies that have different business units and so-on and so-forth, then trying to work out who the 'directing mind and will' is, is a vexed question.

In the case of the SFO against Barclays - which really culminated in 2018 as far as the bank was concerned - all these issues came to a head because in that case the SFO, at the time, felt that they had evidence that the chief executive of Barclays and the finance director of Barclays were both guilty of a conspiracy to defraud, I should say that neither of them were convicted. The CEO was acquitted and the CFO was never prosecuted on grounds of ill health. but they prosecuted Barclays Banks by saying, "look, it's the chief executive, so, if he's got a 'guilty mind' in relation to this then you must have as the bank". But the trial judge threw-out the case against the bank without even putting it in front of a jury. He said there is no evidence that the chief executive was the directing mind and will of the bank for these purposes.

That case is the background to the recent issues of people saying, "well, for goodness sake, if the chief executive can't be the directing mind and will of a company then who can be? How can we prosecute companies, particularly big companies for criminal offences?" That's the first part of the current issue and the second part of the current issue is people are also saying, "that 2010 Bribery Act with that failing to prevent offence and it, section 7, that's working pretty well". The SFO have had now twelve deferred prosecution agreements - about which I believe your firm has particular knowledge of the final two - and in those deferred prosecution agreements they have obtained significant amounts of money for the public purse and these are not exclusively but often through failure to prevent offences against corporations and particularly under the Bribery Act.

	<p>So, that's got some people saying, "that's working so well in relation to bribery that, if we're going to have a criminal offence against a corporation of, as I say, failing to prevent - as we call it: bribery - then why leave it at bribery? I mean, why not fraud, why not false accounting, why not money laundering? People commit those offences while working for corporations, or when they are associated with corporations, why don't we widen the scope of these new kind of offences that we have been creating and roll out what appears to be a successful model?"</p> <p>So, those are the two sorts of central issues: concern about the identification principle and the feeling that failing to prevent offences against corporations are working well and should be expanded.</p>
Alice	<p>So, what are the kinds of questions that are coming up and that you're seeking to answer with this consultation?</p>
David	<p>Well, speaking of questions, we've got thirteen questions in our discussion document available on our website law commission and corporate criminal liability will bring it to you very quickly.</p>
Alice	<p>And we have a copy of that linked in the show notes so if you just go back to the page you started listening to this from you will be able to find the document there.</p>
David	<p>Yes, it's a 90 page document, but the questions are at page 71 - and they are also on another website that we'll come to, no doubt, later - but essentially the questions are asking stakeholders, which just means people who are interested in corporate criminal liability, questions such as, "does the identification principle work?" Some senior barristers with a lot of experience in this area had said the identification principle works fine; there is not a problem with it, or, if there is, it's a flexible thing and there's nothing that works better.</p> <p>So, that's one question we're asking "Is there a problem with the identification principle?" and for those who feel that there is, we're asking further questions such as, "okay, well, what should we do about it? Should we introduce further failure to prevent offences along the lines that I've described? Should we try and adopt something that is used in other countries?" For example in Canada and Australia they have something similar to the identification principle but they have a statutory definition of, 'who is going to be the kind of people that their mind can be identified with the company?' "Should we adopt the American system, where the Americans say criminal law is just going to operate the same way as the civil law?" Under the civil law a company is vicariously liable for any "civil wrongs" - any "torts", as we call them - or breaches of contract committed by their employees, we're also going to say that the corporation is liable under the criminal law for any crimes committed by its employees acting in the course of their employment and if it is for the company's benefit.</p> <p>So, that's other questions that we're asking, maybe we should just adopt one of those systems, or at least adapt it for our purposes? We're also asking specifically - and this may be of interest to your listeners - "what might be the consequences on companies be of any of these changes: Of expanding the identification principle, of introducing this idea of vicarious liability, or of introducing certain new failure to prevent offences?" And we have some other questions, such as, regarding the sentencing of companies - how should that work? - and the provisions in English law which provides for certain particular avenues of criminal responsibility for company directors if the company is found to have committed a crime.</p> <p>So, that's the sort of brief summary of those thirteen questions in our discussion paper .</p>
Alice	<p>In terms of the failure to prevent offences there are already a couple of them in the law, so what would the proposed extensions be?</p>
David	<p>No one is quite certain but anyone who says we should have further failure to prevent offences usually includes within that fraud; that's the one thing that keeps getting included. Some people say, "look, everything that is in the 2013 Act which brought in deferred prosecution agreements for certain offences, all those offences should be included", but whatever should be included, people seem to say it should be fraud. That's significant because - the facilitation of tax evasion - it's probably only a minority of companies that are involved in doing people's tax affairs, or are in a position where they might facilitate tax evasion. It's also probably only a minority of companies, perhaps a small minority of companies, that operate overseas jurisdictions where corruption is a particular problem and, therefore, there is a danger of them becoming involved in bribery, but every company in the UK, large or small, sends out invoices and almost all companies in the UK tenders for contracts, or tells people this is what they're going to promise if you give them a contract. So, every company in the UK, therefore, is facing the possibility that they might get caught up in a fraud. Someone within their company might dishonestly over-invoice a client, or someone might promise something that they know the company is not going to deliver and - subject to various caveats - either of those might be fraud offences.</p> <p>So, that's why, if this was extended to fraud, then offences that, at present, directly concern, perhaps, a minority of companies - perhaps, big or established financial services companies - could, on the face of it,</p>

	<p>become the concern of companies up and down the country. Fraud is one of the most reported offences to the authorities and, therefore, that is the significance of it, and if that did happen, then, depending on what the law was, those companies would be in the position that, if one of their employees commits that offence, the company is guilty of the offence and is facing criminal sanctions unless they can show - if this was the law again- [that they] took reasonable procedures to have prevented that happening and that's why I think this might be particularly important for companies in the UK.</p>
Alice	<p>And to what extent would the concern around the compliance burden shifting to companies be taken-into-account in any of the proposals that are made?</p>
David	<p>Yeah, excellent point. We've got a number of questions specifically aimed at that and the government have said to us specifically - and its recorded in our terms of reference - when you're looking at this, we want you to look specifically about what impact this might have on business and give us some advice about that.</p> <p>In order to do that we are really dependent on businesses, such as the people listening to your podcast telling us, "I'm a business person, this is my business and I can tell you - this is going to be the impact on me of what you've got in mind". We're having meetings with businesses, we've got a meeting tomorrow in fact with a number of General Counsel from FTSE100 companies and representatives of other business organisations, but we are really dependent on businesses coming to us and telling us, "this is going to be the effect on us", yes it is of considerable concern to us. I'll just say there are a number of schools of thought on it. Some people say all that we're asking to do is for companies to identify risks of their employees committing crimes. Now even if they didn't have criminal liability for that, if your employee over-invoices the customer, at the very least you are already facing some sort of breach of contract, or civil claim by your customer. If your employee sends out something that is fraudulent, again, you're probably going to face some sort of civil liability, let alone damage to your reputation. So, all we're asking companies to do is to identify the kind of risks they should be identifying anyway and to take the kind of steps that they are probably trying to take anyway to do that.</p> <p>So, that's one point of view. The other point of view is, "well that might be okay for big companies who have got compliance departments and so on, but for small companies this might be an issue and this might represent a compliance burden as you put it. Particularly if the guidance relating to it is going to be high level or, you know, fairly sort of limited, then companies might be in difficulties a) complying with it; and b) ultimately, because it may be in the lap of a jury. Whether the jury are satisfied that the company has shown that they have these reasonable procedures or not and even if there is a risk assessment then, has it been updated properly? Did it have the right things in it? All those sorts of things mean, according to this other school of thought, there might be significant compliance burdens for companies.</p>
Alice	<p>And how does someone get involved if they want to?</p>
David	<p>If they wanted to get involved then what they need to do is to respond to our consultation before the 31st of August of this year, which is when it closes and the best way to respond to the consultation is to go onto either the "Law commission" website or go straight to the website that we've got. The way to find it is to look for 'consult.justice' and then 'law commission' and 'corporate criminal liability' and that website has one page where you put in your details and all you need to put in is your name and whether you are acting in a personal or on behalf of an organisation and then that will take you through to the second page and the second page is all these thirteen questions which has got a free textbox under each one, and just fill in the boxes that you are interested in. Maybe you're interested in the consequences of failure to prevent offences? Maybe you're interested in sentencing? Maybe you're just interested in directors' liability? Just pop-in some response to those boxes, hit submit and that's it. You can put in your email address if you want to receive a confirmation that your submission has been accepted, otherwise just go to that website and tell us what you think about these issues!</p>
Alice	<p>And so, what is the next step after the consultation is closed?</p>
David	<p>Well that's a very good point because we've been tasked by five government departments to look into this area of law, that's the Ministry of Justice, the Home Office, the Department for Business Energy and Industrial Strategy, HM Treasury and the Attorney General's Office (who supervise the Crown Prosecution Service and the SFO). We've been asked by all of them to produce an options paper. So, that's what we've been asked for and that's what we're producing and that is due at the end of this year. So, that will be options to reform the law in this area and that's likely to include a number of options reforming the identification principle, introducing failure to prevent offences and, no doubt, other options as well. Then it's a matter for the government, what steps they want to take after receiving that options paper.</p> <p>We have a protocol with the government and just for those who don't know what exactly the "Law Commission" is: the Law Commission is a sort of quasi-government agency. That's to say, we are civil</p>

servants, I'm a civil servant, we're part of the Ministry of Justice but we don't have a Minister at our head, we have a number of Law Commissioners who are selected and then given five year fixed terms which can be extended up to ten years. But its that absence of a Minister at our head which gives us the independence, the idea being that we provide independent assessments of the law and how it might be reviewed and we provide those to government and that's what we are doing here.

So, government departments have asked us to look into this from our independent point of view. We're providing that report to the government and the protocol between law commission and central government is that they provide a preliminary response to our reports within six months and a final response within twelve months. That might lead to legislation by the government incorporating some or all of our proposals, or other government action may be reforming certain guidelines. Or, they might say, "sorry, it's of interest, thanks very much for it, but we don't want to take it forward at this time'.

Another possibility, in particular in this case, is they say, "well, thanks for these options. Now, we're interested in this option, this option and this option so, please, go away again and flesh that out and tell us a bit more about how we might implement that and what the effect of those options might be ". So, all of those are possibilities. AsI say, the options paper is due at the end of this year and then after that it's really in the government's hands, but there is a possibility, at least, of us doing further work on it.

Alice

So, that's all we've got time for in this week's episode. Tune in next time for a deep delve into why HMRC knows more than you think with Jay Sanghrajka of Price Bailey.

Thank you so much to David Allan for sharing his insights on how this corporate criminal liability question has arisen and what the developments are likely to be. You can contact the Law Commission by email at ccl@lawcommission.gov.uk, or on twitter: [@law_commission](https://twitter.com/law_commission).

If you have any questions for me, or any topics you'd like us to cover in a future episode, please do email us on taxingmatters@rpc.co.uk. We'd love to hear from you.

As ever, a big thank you goes to Josh McDonald who does all the work pulling each episode together. Our music is from musical genius Andrew Waterson who also produces each episode; and, of course, a big thank you to all of our listeners for joining us.

A full transcript of this episode, together with our references, can be found on our website www.rpc.co.uk/taxingmatters

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