



Law Commission
52 Queen Anne's Gate
London
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By email: enquiries@lawcommission.gov.uk

31 August 2021

Dear Sir, Madam

Re: Corporate Criminal Liability: A discussion paper

We are writing on behalf of the British Private Equity and Venture Capital Association (“BVCA”), which is the industry body and public policy advocate for the private equity and venture capital industry in the UK. With a membership of over 750 firms, we represent the vast majority of all UK based private equity and venture capital firms, as well as their professional advisers and investors. Between 2015 and 2019, BVCA members invested over £43bn into nearly 3,230 UK businesses, in sectors across the UK economy ranging from heavy infrastructure to emerging technology. Companies backed by private equity and venture capital currently employ 972,000 people in the UK and the majority of the businesses our members invest in are small and medium-sized businesses.

We welcome the opportunity to respond to the Law Commission’s consultation on Corporate Criminal Liability. Rather than respond to each of the detailed questions in the consultation, we would like to set out some key points that are of significance to our members and would specifically affect private equity and venture capital firms and the UK-based companies in which these firms invest. We would like highlight these matters which would require further detailed consideration ahead of any steps to reform the law being taken. We note that this Consultation is more of a call for evidence rather than a consultation on any specific provisional proposals. To the extent there are any specific provisional proposals for reform, we would welcome a full consultation and the opportunity to respond in detail.

Impact on investment in the UK

The UK is a global hub for private equity and venture capital and our investor base includes pension funds, insurance companies, sovereign wealth funds and corporate investors. However, today’s investors are mobile, work remotely and generally jurisdictionally agnostic and so, given the current climate, there is a genuine concern that reform could have a negative impact on investment in the UK, particularly if it were not implemented appropriately and proportionately.

As noted in the Consultation, under the current law, a company may be held liable for crimes committed within the organisation if at least one of the directors or senior officers who carry out management functions and speak and act as the company (i.e. the ‘directing mind and will’ of the company) has the relevant criminal intent.

There is currently no exhaustive list of functions making up the ‘directing mind and will’ of a company. To determine which officers fall within this definition, the company’s structure and constitution have to be considered, as do the day-to-day actions and responsibilities of each officer in question. It is ultimately a question of fact in each case. That said, companies and their advisors can look to precedent to help evaluate the likelihood of any individual making up the directing mind and will of the company. It is also clear that the those who can represent the ‘directing mind and will’ are (currently) appropriately limited.

For companies facing criminal prosecution, this is important. Companies can only, properly, assess the case against them and make plea and other settlement decisions if there is a degree of certainty over how the courts will determine which individuals make up the 'directing mind and will' of the company, and that it is not appropriate (in offences which are not strict liability offences) to extend that to a large number of natural persons who do not have an active role in the overall management of the company.

We recognise that, as stated in the Consultation, there is concern that the current law renders too narrow a definition of the 'directing mind and will', particularly in the context of large companies, which makes it disproportionately difficult to prosecute large companies for crimes committed in their names by relatively senior managers, for the company's benefit. However we think it would be very difficult to broaden the scope of who might be regarded as the directing mind and will of a company without extending the reach of employees and managers considerably, effectively creating a form of vicarious liability which would be inappropriate in a criminal context.

For an unregulated sector this would effectively require companies to self-regulate and assess whether their procedures are adequate, which would be disproportionately burdensome and costly. It would certainly discourage smaller companies from entering many sectors, defeating one of the purported policy aim of reform which is directed at larger corporate structures. Extending corporate liability on a wholesale basis to include all "failures to prevent" or to extend it so as to amount to strict vicarious liability would be a dramatic change to the law that is wholly unwarranted and would lead to multiple unintended consequences that affect the broader economy.

Any formulation to broaden the scope of the 'directing mind and will' must be capable of being applied to the myriad of different kinds and sizes of corporate entities that operate in the UK. The challenge here would be to draft a clear formulation, or set of factors, that works in all contexts, and that provides certainty to companies over the identity of their directing minds. A lack of certainty is bad for business and law enforcement alike. Making it harder for companies and prosecutors to be sure of the case against the company could well lead to longer investigations, more contested trials and greater costs for all involved.

We also consider that, as has been done in the case of specific offences, if there are particular concerns around a particular crime (as has been done in the case of bribery or the facilitation of tax evasion) the policy aim of encouraging good corporate practice may be better served by having a specific "failure to prevent" offence with appropriate defences or specifically identifying the corporate attribution principles for such offence. This would need to be done on an offence-by-offence basis, with extensive consideration given to how a defence (such as "adequate procedures") would be structured appropriately for that specific offence. This would give some certainty to companies enabling them to effectively regulate that specific behaviour.

In order to promote investor, business and consumer confidence, economic growth and to reduce costs of compliance, it is crucial that the UK adopts a consistent, coherent and co-ordinated approach to enforcement and any reform in related legislative areas. Some of the unintended consequences that might arise as a consequence of an extension to corporate criminal liability are set out below.

Lack of investment and professionalism

Private equity and venture capital firms are long-term investors, typically investing in unquoted companies for around three to seven years. This is a commitment to building lasting and sustainable value in business.

A key role of the private equity and venture capital industry in the UK and recognised building blocks to creating sustainable value for investors is the professionalism of private companies through, among other things: (i) the implementation of good corporate governance (including anti-bribery and corruption and ESG policies); and (ii) the appointment of experienced directors to the boards of portfolio companies.

At the portfolio company level, broadening the scope of corporate criminal liability may well result in responsible investors shying away from investing in difficult businesses in difficult markets or sectors – precisely the companies that are in need of private investment. Certainly this would be the case if the scope were broadened such that liability for the actions of a portfolio company could potentially attach to the investor. If a portfolio company is found liable for a crime, the investor will in any case suffer loss through depreciation in the value of their investment and, potentially more broadly, by way of damage to the investor's reputation and negative impact on its ability to raise funds necessary to continue to operate as an investor. This suggested broadened approach would be particularly inequitable, for example, where the ownership of the portfolio company has changed hands since the offence was committed.

Flight of talent

If the scope of corporate liability for crime is broadened such that it may increase the personal risk for directors, managers and investment professionals, this could result in an increasing number of talented individuals not wishing to submit themselves to this level of risk and discourage investment in UK business.

One advantage of the UK corporate governance structure is the combination of executive and non-executive directors. It is important for good governance to have independent, investment professionals on company boards. Non-executive directors, in particular, would likely be reluctant to submit themselves to an increased level of personal liability or risk if they could be found liable for actions of which they have no knowledge or only fleeting awareness.

Cost

Any increased compliance burden will have a direct cost impact on UK businesses. The resulting impact on investment interest in UK companies should be considered in the context of the perceived mischief which any proposed reform is seeking to address.

The BVCA would of course be willing to discuss this submission with you further - please contact Ciaran Harris (charris@bvca.co.uk) at the BVCA.

Yours faithfully,



Amy Mahon

Chair, BVCA Legal & Accounting Committee