Traidcraft Submission to Ministry of Justice’s “Corporate liability for economic crime: call for evidence”

Traidcraft

Traidcraft
• Medium business (50 to 250 staff)
• Other – registered International Development charity.

Traidcraft is one of the UK’s leading fair trade organisations. Our mission is to fight poverty through trade, practising and promoting approaches to trade that help poor people in developing countries transform their lives. Traidcraft was established in 1979 and comprises two operational organisations: the trading company Traidcraft plc and Traidcraft Exchange, an international development charity.

Traidcraft plc sells more than 700 food, household, soft furnishings and clothing products from nearly 100 producer groups based in 30 countries in Africa, Asia and Latin America. It had a turnover of £11.3 million in 2015/16.

Traidcraft Exchange is the UK’s only development charity specialising in making trade work for the poor. Its work spans capacity building amongst producers in developing countries, promoting market access for small producers (including into the UK market), policy development and advocacy. Through its policy work, Traidcraft Exchange seeks to influence government policy and business practice in the North and the South to the benefit of the poor in the developing world. Traidcraft uses the experiences of its sister fair trade company, Traidcraft plc, to improve wider trade practices and to inform our campaigns for trade justice and corporate accountability.

Traidcraft's Justice campaign is calling for people in developing countries who have been harmed by the actions or decisions of British companies as they trade internationally to be able to get justice, and for the companies to be held to account in the UK.

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

NO

1.1 We do not consider that the existing criminal and regulatory framework provides sufficient deterrent to the full range of corporate misconduct, nor does it provide adequate incentives to improve corporate culture and encourage companies to play their part in respecting human rights (by adhering to the UN Guiding Principles on Business and Human Rights) and contributing to the internationally agreed Sustainable Development Goals. Companies have a valuable role to play in society, employing people, making products, providing services which impact on all aspects of our lives. However, business decisions made for the benefit of the company, can sometimes directly or indirectly result in the commission of crimes which harm individuals and communities. These harms can include severe pollution, illnesses, injuries, and even deaths.

1.2 Since companies exist within the same society as individuals it would be reasonable to “impute to corporations social duties including the duty not to offend all relevant parts of the criminal law.”¹ The criminal law would be flawed if companies could not be prosecuted for their role in criminal activity. It is suitable that corporate criminal law is updated so that companies can be appropriately prosecuted and punished, for harms that society considers to be a crime.

1.3 The Business and Human Rights Resource Centre between 2004 and 2014, received 303 allegations of serious harm made against 127 UK companies. This accounted for 13% of allegations they received globally. The vast majority of cases related to allegations of abuse in

other countries, mostly in the global south. Some companies had repeated allegations made against them, sometimes for different subsidiaries or operations. UK corporate malpractice is a cross-sectoral problem. The UK’s extractive sector had the largest proportion (47% of 303) allegations. A breakdown of the most common allegations made against UK businesses found that:

- 27% (82 of 303) concerned environmental abuses affecting human health;
- 22% (67) concerned labour abuses;
- 17% (51) concerned support or complicity for oppressive regimes or groups.²

1.4 Traidcraft’s own research into corporate malpractice in the past ten years by UK companies found 15 instances of very severe harm were caused by 11 companies. If these 15 crimes had occurred in the UK, prosecutions could have been sought under the Corporate Manslaughter Act, the Health and Safety at Work Act and the Environment Act. Most of the companies associated with these serious harms are listed on the London Stock Exchange.

1.5 To deter corporate crimes which are often-connected to economic crimes the following is needed. The points are elaborated below.

a) an updating of the corporate criminal liability regime so that the law is usable, in particular for prosecuting large and complex corporate structures and for prosecuting UK companies for their role in cross border crimes.

b) prosecutors to be operating in a context which incentivises (rather than deters) corporate prosecutions, and

c) for the sanctions at the end of a successful prosecution to command respect.

1.5.1 a) Updating of corporate criminal liability is needed so that i) corporate offences are created that address the current gaps in law in relation to a company’s role in commissioning or benefiting from a crime), ii) prosecutions are not hampered by the identification principle, iii) the burden of evidence is placed on the benefitting company and iv) in cross border cases prosecutors can act upon the decisions taken in UK headquarters which result in criminal acts.

1.5.2 b) Currently the US, Netherlands and Switzerland are more active than the UK in prosecuting companies. We observe that UK’s Code for Crown Prosecutors combined with other practical cost and expediency considerations results in prosecutors only taking forwards a case if i) they consider they will be successful, ii) the costs of the investigation and prosecution are not out of proportion with the harm caused and possible resultant sanction; and iii) if there is a strategic reason (such as setting a precedent) to run the case. This means that in the UK very serious violations go unpunished and undeterred.

The Environment Agency was approached by Amnesty International to investigate Trafigura for illegal dumping of toxic waste in Cote d’Ivoire in August 2006. Despite the Environment Agency acknowledging that, if the allegations were true “a serious offence was committed with a relevant aspect of the conduct taking place within the jurisdiction [UK]” the Agency’s explanation as to why it was not going to investigate is concerning.

“[I]nvestigating the events properly and from the beginning would be a highly onerous, lengthy, labour intensive and expensive task … Trafigura will take any and every available procedural opportunity to challenge steps taken in a further investigation, thus contributing to the anticipated expensive costs … The Agency has limited experience in conducting complex significant investigations … [It] would not have the appropriately skilled and experienced staff to undertake such an investigation.”³ The Environment Agency’s response highlights why well-resourced, litigious companies are difficult to prosecute under the current regime.

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³ Amnesty International “Too Toxic To Touch? The UK’s Response To Amnesty International’s Call For A Criminal Investigation Into Trafigura Ltd”
According to Portsmouth University’s Centre for Counter Fraud Studies, only 0.4 per cent of frauds result in a criminal sanction.\(^4\) This implies there are flaws in the “protocols” which determine how prosecutions are advanced and an insufficiently active prosecution approach.

1.5.3 c) Sanctions have to be sufficient to deter corporate malpractice. For example.
- Until the Groceries Code Adjudicator was able to apply fines of up to 1% turnover, the retailers which were meant to abide by a statutory fair purchasing code\(^5\) did not. Between January 2006 and May 2010 Tesco was on average paying £12,586 per month in county court fines.\(^6\) This compares to their pre-tax profit of £3.128bn on £59.4bn of revenue in the 12 months to 28 February 2009.\(^7\) In 2016 the Groceries Code Adjudicator found that Tesco was guilty of continuing to delay payments in the order of millions of pounds sometimes for two years to its suppliers.\(^8\) The county court fines were an insufficient deterrent as the sums to pay were paltry compared to the savings gained by breaching the law.
- The need to increase the level of the fine was recognised in the recent judgement made by Judge Francis Sheridan to fine Thames Water £20million. “It should not be cheaper to offend than to take appropriate precautions.” “I have to make the fine sufficiently large that [Thames Water] get the message,” “One has to get the message across to the shareholders that the environment is to be treasured and protected, and not poisoned.”\(^9\) Previous water company fines of between 1% and 10% of the Thames Water fine were too small compared to turnover to act as a deterrent.
- Glencore’s Zambian subsidiary has been ordered by Zambian High Court to pay the widower of Mufulira District Commissioner Beatrice Mithi K400,000 [£30,000] in damages. Mithi died from “acute respiratory failure due to inhalation of toxic fumes” from Glencore’s Mopani Copper Mines.\(^10\) This financial consequence for Glencore is too low to act as a deterrent. (See our reply to Question 3.)

These examples and others highlight the importance of corporate criminal penalties being sufficient to command respect and deter corporate malpractice. In addition, decision-makers need to know that the sanctions are inevitable, unavoidable and will be speedily administered.\(^11\)

1.6 There has been progress in deterring poor corporate practice in the field of bribery. The Bribery Act 2010 includes the substantive bribery offence and a secondary ‘failure to prevent bribery’ offence with an adequate procedures defence. This formulation enables a balance between prosecuting offenders and mechanisms that actively promote improved corporate governance, focusing on preventing severe harms from happening in the first place. This model should now be replicated for other corporate crimes, not just economic crimes.

1.7 Wider ‘corporate crimes’ often stem from the same poor management practices and corporate governance failings that allow corrupt and fraudulent practices to go unchecked.

1.8 The UK must have the tools to criminally sanction (through fines and consequential debarments) corporate wrongdoing where appropriate. Failure to do this undermines the efforts of those businesses that are playing a positive role in building sustainable economies with long

\(^6\) Tesco Stores Ltd & Plc had 102 County Court Judgments for non-payment of trade debts Jan 2006 - May 2010 totalling £667,091 a significant proportion of these relate to non- payment of suppliers and breached the statutory fair purchasing code.
\(^7\) https://www.theguardian.com/business/2009/apr/21/tesco-record-profits-supermarket
\(^8\) https://www.gov.uk/government/publications/gca-investigation-into-tesco-plc
\(^9\) https://www.theguardian.com/environment/2017/mar/22/thames-water-hit-with-record-fine-for-huge-sewage-leaks
\(^10\) http://zambia-weekly.com/article/mopani-to-pay-compensation-for-pollution/
term social and environmental benefits. Effective prosecution of corporate crimes is also vital to engender public confidence that companies are not ‘above the law’.

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

**YES**

2.1 The identification doctrine makes the prosecution of large and complex corporate structures extremely difficult and has led to a focus on the prosecution of smaller businesses.\(^{12}\) This creates an essentially unbalanced administration of justice which is at risk of losing public confidence. The perception that large companies ‘get away with it’ ultimately erodes trust in the judicial system.

2.2 Further, the identification doctrine actively discourages sound corporate governance practices. In an effort to shield a company from potential prosecution, information around risk may be deliberately withheld from senior staff and directors (the controlling mind). This is perverse as those responsible for good stewardship of a company need to be able to identify and take appropriate action to mitigate risks.

2.3 The identification principle requires prosecutors to establish who within the most senior management team of a company knew particular actions were taking place. However in complex corporate structures it may be that individuals on the main board of a company were unaware. For example, country directors may withhold information from the main board, and actively take decisions which lead to a crime occurring. In this instance it would be appropriate for the company to be prosecuted under “failure to prevent” since the main board didn’t have in place internal processes to deter corporate wrong doing. In addition the country director should be prosecuted for their criminal actions.

2.4 The Law Commission’s consultation on “Criminal Liability in Regulatory Contexts” (August 2010) described the identification principle as “an inappropriate and ineffective method of establishing criminal liability of corporations.” Government action on this is now long overdue.

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\(^{12}\) This has particularly been observed in relation to tax prosecutions: [http://www.thisismoney.co.uk/money/smallbusiness/article-2426603/Small-businesses-bear-brunt-HMRC-crackdown-tax-evasion-sum-recovered-non-compliance-jumps-31.html](http://www.thisismoney.co.uk/money/smallbusiness/article-2426603/Small-businesses-bear-brunt-HMRC-crackdown-tax-evasion-sum-recovered-non-compliance-jumps-31.html)
Question 3: Can you provide evidence or examples of the identification doctrine preventing a corporate prosecution?

3.1 The limitations of the UK’s corporate liability regime do not only apply to prosecution of economic crime. Companies are capable of committing or ‘omitting to prevent’ a wider range of offences which can result in very serious harms to individuals or large numbers of people. Companies are making decisions in the UK which cause severe injuries, illnesses, pollution, forced evictions and deaths overseas. When allowing serious harms to occur some companies make a calculated gamble knowing that the country where the harm takes place has a weak justice system, or that they might be able to intervene to deter a prosecution, and that if any sanction is imposed it will be small. The benefits of such decisions however flow to the UK. It is therefore remiss of the UK not to deter financial gains which accrue from criminal actions.

3.2 Sometimes economic crimes such as bribes are committed to enable other types of harmful corporate practice, for example to enable a company to flout safety standards, to avoid products standards or to minimise compensation payments to those harmed by their operations. For example, prior to the UK Bribery Act, Traidcraft is aware of a staff member of an Anglo-Kenyan company being asked by their employer to bribe a Kenyan judge to apply a low level fine. The company did not intend to improve their practices, and saw payment of both bribes and fines as part of the cost of doing business. Economic crimes can result from the same management approach which makes decisions leading to wider direct personal harms being caused. In just the same manner that economic crimes may not be brought to the attention of the company’s main board, so wider crimes may not reach the awareness of the main board of a company. For both circumstances a failure to prevent offence is appropriate.

3.3 Sometimes the direct action leading to harm is taken by individuals working in subsidiaries, contractors (such as security providers) and suppliers overseas. So the impact of ineffective oversight is felt in other countries, even though the decision was made in the UK. This lack of extra-territorial reach is a critical impediment alongside the identification principle hampering effective corporate prosecutions.

3.4 Lack of UK criminal prosecutions for serial corporate offenders (companies which had prior knowledge of the severe harms but continued)  

Some companies are ‘serial offenders’. For example the same or similar types of harms continue to occur year after year at the same site after the UK management has become aware of it. Or the same company allows similar harms across several of its operations in different countries, after it has been drawn to the attention of UK management with regards to problems in one of its operations. In both situations, despite being aware of the problems, the UK management fails to change its procedures to avoid being complicit, benefiting from or causing these very severe harms. The lack of improvement in practice is in part due to the fact that there are insufficient mechanisms to hold the company to account. The following are examples of UK businesses which could be considered as serial corporate offenders.

3.5 Acacia mining: Acacia mining is a FTSE 250 company with its head office in London. It operates three mines in Tanzania. In 2009 and 2011 members of the local community where shot in Tanzania by security providers who had a contract with the subsidiary of Acacia mining. People were badly injured and others were killed. These severe harms will have been brought to the attention of UK management of Acacia when a civil court case started in the UK in 2013, if the directors were not already aware before. The civil case was settled out of court enabling compensation to some of the victims to be paid. Further deaths and injuries occurred in 2013 and 2014 implying that Acacia mining’s subsidiary in Tanzania had not chosen to improve how it manages its security providers. A recent Tanzanian government enquiry has heard that in total 65 villagers have been killed and 270 injured at the North Mara gold mine, during the
years the mine has been operated by Acacia. In addition to the alleged assaults associated with Acacia’s operations in Tanzania there have been allegations of pollution, health and safety breaches at the mines. At least 20 people died after a poisonous leak in 2009, and three miners died in 2010 after part of the mine caved in. However there has been no criminal investigation regarding Acacia’s overall responsibility because the Corporate Manslaughter Act does not have extra-territorial application. The need under the identification principle to identify which directors in Acacia mining and its subsidiary knew relevant information would be likely to impede a prosecution. In this case the existence of a ‘failure to prevent’ offence with an adequate procedures defence could have driven improved practice, and potentially could have prevented pollution and deaths.

3.6 The Garment sector has had a poor track record in ensuring safe working conditions for workers in their supplier factories. Due to the lack of transparency about where brands and retailers have been sourcing from and in how much volume, it is difficult to trace which companies have repeatedly been associated with hazardous suppliers.

3.6.1 Edinburgh Woollen Mill, Disney, Ikea and Walmart (which owns Asda George), were sourcing from Tazreen Fashions in the run up to November 2012 when it burnt down killing 112 workers and injuring more than 150 workers. Edinburgh Woollen Mill is a private limited company headquartered in the UK. Disney, Ikea, Walmart’s Asda George and Edinburgh Woollen Mill (which includes Jane Norman, Peacocks, and James Pringle Weavers clothing brands) all have retail outlets in the UK. Walmart had already assessed the factory and had flagged “violations and/or conditions which were deemed to be high risk” at the factory in May 2011. Presumably the corrective actions identified had not been implemented. It is also likely that other companies will have also conducted similar assessments. These audits frequently reside silently in a large data base, and if there are corrective action plans, these are frequently not implemented.

3.6.2 Benetton, Mango, Primark, Monsoon Accessorize, Matalan, and Walmart (Asda George) are some of the brands known in the UK that were sourcing from the factories within Rana Plaza. The Rana Plaza building collapse in April 2013 killed more than 1,000 people. The Rana Plaza tragedy was an unfortunate but predictable disaster when considering the timeline of deaths which have occurred, in Bangladesh’s garment sector.

<table>
<thead>
<tr>
<th>Date</th>
<th>Name and location of factory</th>
<th>Type of disaster</th>
<th>Deaths</th>
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<tbody>
<tr>
<td>May 2004</td>
<td>Omega and Shifa Apparels, Dhaka</td>
<td>Fire / Human crush</td>
<td>8</td>
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<td>Jan 2005</td>
<td>Shan Knitting &amp; Processing, Narayanganj</td>
<td>Fire</td>
<td>22</td>
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<tr>
<td>April 2005</td>
<td>Spectrum Sweaters, Savar</td>
<td>Building collapse</td>
<td>62</td>
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<tr>
<td>Feb 2006</td>
<td>KTS Textile Industries, Chittagong</td>
<td>Fire</td>
<td>54</td>
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<td>Feb 2006</td>
<td>Phoenix garments, Dhaka</td>
<td>Building collapse</td>
<td>19</td>
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<tr>
<td>Feb 2006</td>
<td>Jamuna Spinning Mill, Gazipur</td>
<td>Fire</td>
<td>6</td>
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14 http://www.minesandcommunities.org/article.php?a=9336
15 http://www.minesandcommunities.org/article.php?a=10002
16 https://www.theguardian.com/world/2012/nov/25/bangladesh-textile-factory-fire
21 Justice We Mean Business http://www.traidcraft.co.uk/media/df3b6c09-d665-417c-9625-24668d118af2 sourced from ‘Last Nightshift in Savar’, Doug Millar, pub McNidder & Grace 2012, updated by Traidcraft and Labour behind the Label
### Table

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<tr>
<td>Feb 2010</td>
<td>Garib &amp; Garib Newaj, Gazipur</td>
<td>Fire</td>
<td>21</td>
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<tr>
<td>Dec 2010</td>
<td>Ha-Meem Group Sportswear factory, Ashulia</td>
<td>Fire</td>
<td>26</td>
</tr>
<tr>
<td>Dec 2011</td>
<td>Eurotex garment factory, Dhaka</td>
<td>Boiler explosion followed by crush</td>
<td>2</td>
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<tr>
<td>Nov 2012</td>
<td>Tazreen Fashions, Dhaka</td>
<td>Fire</td>
<td>123</td>
</tr>
<tr>
<td>Jan 2013</td>
<td>Smart Fashions factory, Dhaka</td>
<td>Fire</td>
<td>7</td>
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<tr>
<td>April 2013</td>
<td>Rana Plaza, Savar</td>
<td>Building collapse</td>
<td>1,130</td>
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<tr>
<td>May 2013</td>
<td>Tung Hai Sweaters Ltd, Dhaka</td>
<td>Fire</td>
<td>7</td>
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<tr>
<td>Oct 2013</td>
<td>Aswad Composite Mills, Gazipur</td>
<td>Fire</td>
<td>7</td>
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Total deaths in Bangladesh Garment factories between 2004-13 is 1,494

3.6.3 Hazardous working conditions also exist in other “cheap” garment supplier countries. For example 280 died in a garment factory fire in Karachi, Pakistan, in September 2012.

3.6.4 Unfortunately it appears that retailers and brands are still sourcing from hazardous factories. More recently on 3 February 2016 a fire broke out on the 7th floor at the Matrix Sweaters factory in Gazipur, Bangladesh at around 7.30 am killing at least four workers. Fortunately most of the 6,000 workers had not yet arrived, preventing a much greater loss of life. 72 different hazards had previously been identified in a 2014 audit of the factory, which supplies H&M and others. It is assumed that mitigation measures had not been put in place to address the hazards identified two years earlier.

3.6.5 Very little, if any of the output from Bangladesh’s Ready Made Garment sector, which has had such a poor track record of safeguarding workers, is for domestic market. This makes this sector a very stark example of where there is an out-dated cross border corporate criminal justice system, in contrast to the vibrant reality of international trade.

3.6.6 UK retailers, who purchase clothes for re-sale in their shops, recognize that they would have no products to sell if it was not for the work of their suppliers. The retailers and brands recognise their responsibilities in relation to how they select and purchase from their suppliers, and the consequential effects their decisions can have on working conditions. It is for these reasons that they join voluntary initiatives like Ethical Trading Initiative or Sedex. Many retailers and brands have for years been gathering data on the safety of factories supplying them, but it is clear that they have not acted sufficiently on this information to deter fatal outcomes.

3.6.7 There has been no criminal investigation of UK-linked companies purchasing regularly from hazardous factories for their role in relation to Corporate Manslaughter or in relation to injuries caused by Health and Safety lapses. The offence of “aiding and abetting” a crime [by a supplier], nor the Corporate Manslaughter Act, nor the UK’s Health and Safety regulations have extraterritorial application. Whilst some staff in retailers are tasked to gather audit information, different staff are tasked to purchase as cheaply as possible from (potentially hazardous) suppliers. The directors of clothing retailers and brands are known for not wanting to become aware via a paper trail of “Pandora’s box” of problems in their supply chains. In this context the identification principle is positively driving UK directors to deliberately ensure that they are not aware of the risks in their supply chains. If the UK corporate criminal justice system is not updated then UK companies will continue to source from potentially fatal factories. In this case the existence of a ‘failure to prevent’ model with an adequate procedures defence could have driven improved practice. UK companies already have some of the relevant procedures in place to identify risks. But they are inadequately incentivised to prioritise concrete actions to address these risks, and are continuing to purchase from hazardous factories.
3.7 Associated British Foods (ABF) is listed on FTSE and its headquarters are in the UK. Illovo, Africa's biggest producer of sugar cane is a wholly-owned subsidiary of Associated British Foods. ABF has held a majority stake in Illovo since 2006.

Illovo has been accused of being associated with land conflicts in Zambia (2001 onwards), Malawi (2008) and Mali (2008-2012). The land conflicts include land grabs and insufficiently compensating evicted communities. Zambia Sugar, is 82% owned by Illovo group, and it made profits of $123 million between 2007 and 2013 but had paid “virtually no corporate tax” in Zambia. It could be argued that both of these examples – accusations of land grabs and accusations of tax evasion – can be linked to a common management approach that prioritises keeping costs low.

In many jurisdictions it is a criminal offence to steal land and property. However, UK legislation covering theft including Theft Act 1968 does not have extra-territorial reach. The role of UK-linked businesses associated with these types of theft should be investigated, and where crimes have been committed - prosecuted. The Criminal Finances Bill which is currently passing through Parliament may establish a criminal offence, which could be used if Associated British Foods continued to avoid paying tax in the future. A prosecution of ABF in relation to their alleged non-payment of correct tax would not address ABF's alleged land rights violations.

3.8 Extractives sector also includes several businesses which might be considered as serial offenders.

3.8.1 BHP Billiton includes the FTSE-registered BHP Billiton Plc, and is the world's largest mining company. BHP Billiton has been associated in Colombia, and Mozambique with poor Health and Safety practices and pollution which has lead sometimes to deaths. The identification principle, is particularly problematic in contexts where assets are jointly owned, as in the case with Colombia’s Cerrejón Coal Mine. In this case the existence of a ‘failure to prevent’ model with an adequate procedures defence could have driven improved practice, avoiding very serious pollution, injuries, illnesses and deaths.

3.8.2 Rio Tinto is listed on FTSE. Its global headquarters and Rio Tinto Plc is based in London. Its operations are associated with very serious injuries, pollution incidents and deaths in

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27 [http://uk.reuters.com/article/uk-abf-tax-idUKBRE91908C20130210](http://uk.reuters.com/article/uk-abf-tax-idUKBRE91908C20130210)

28 BHP Billiton is a co-owner with Glencore Xstrata of Cerrejón Coal Mine, Colombia where the mine’s poor work and safety conditions have led to serious public health issues and even fatalities (26 deaths from 2009 to 2011). The mine is also reportedly responsible for river contamination and other environmental violations. Colombians who have attempted to protest against the mine have been threatened, some even murdered. Sources London Mining Network and FIAN

29 In Mozambique, BHP Billiton operates the Mozal Aluminum smelter. It started its operations in August 2000, before approval of the company’s Environmental Impact Assessment Report (EIAR) and Environmental Management Plan was given. Since its operations began, it is alleged that it has violated several Mozambican and International laws and regulations, mainly regarding labour, environment, and human rights. An environmental impact audit reported a lack of compliance with the country’s legislation and against the company’s own environmental management plan. Soil and water contamination, air pollution, deforestation, forced removals of local communities, and an unsafe living environment are some of the problems that have arisen as a result of the project. Source Justica Ambiental, Mozambique, 2011 to 2012

Indonesia, Madagascar, Mongolia, and Mozambique. The Guardian reported that Indonesian Human Rights Commissioner Natalius Pigai is alleged to have observed that the operators of the Grasberg mine [which includes Rio Tinto], "had the ability to prevent [deaths of 33 gold miners in May 2013] from happening but didn't". "The lack of effort jeopardised the lives of others. The gravity of this case is serious." There have been no UK investigations.

3.8.3 Glencore is listed on FTSE since 2011. London is the headquarters for its oil and gas business, and its registered office is in Jersey. Glencore is associated with severe environmental, Health and Safety harms in Colombia, DRC, Peru, and Zambia, which have sometimes resulted in deaths. There have been no investigations.

3.8.3.1 In Zambia Glencore is accused of evading tax, and causing serious pollution from its Mopani copper mine, and associated smelting plant. These allegations came to light in 2011 when the European Investment Bank (EIB) stated “Due to serious concerns about Glencore’s governance which have been brought to light recently and which go far beyond the Mopani investment, the President of the EIB has instructed the [EIB] services to decline any further financing request from this company or one of its subsidiaries.

3.8.3.2 The company profile compiled by Reuters in advance of Glencore’s 2011 Initial Public Offering cites Zambian officials who consider that pollution from Glencore's Mopani mines was causing acid rain and health problems in an area where 5 million people live. Smelting operations release sulphur dioxide and other pollutants which have severely affected residents with various skin, eye and respiratory diseases. Despite pollution concerns being well known Mufulira District Commissioner (DC) Beatrice Mithi died on 31 December 2013. In 2016 the Zambian High court found toxic fumes from one of Glencore’s copper plants in Zambia caused the acute respiratory failure of Mithi. The Glencore subsidiary was ordered to pay 400,000 Zambian kwacha (£30,000) in damages to the widower of Beatrice Mithi. The presiding Judge found that “By emitting sulphur dioxide into the environment exceeding statutory limitations [Mopani Copper Mines, a subsidiary of Glencore] breached its duty of care owed to her [Mithi] and the community.”

3.8.3.3 Corporate profiles written before Glencore's IPO listing on the FTSE in 2011 will have drawn attention to the company’s UK management about the severe levels of pollution occurring at their Zambian copper mines, if they were not already aware of the pollution before. Despite a town with a significant population living down-wind of the pollution it appears Glencore’s UK management allowed the pollution to continue. The severe respiratory problems and deaths caused were predictable and preventable. The same cost-saving approach which resulted in Glencore evading tax owed in Zambia is presumably

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32 It is claimed Indonesian human rights commissioner Natalius Pigai found that the operators of the Grasberg mine [which includes Rio Tinto], owned with US company Freeport, "had the ability to prevent [deaths of 33 gold miners in May 2013] from happening but didn't". "The lack of effort jeopardised the lives of others. The gravity of this case is serious." https://www.theguardian.com/business/2014/apr/15/rio-tinto-heavily-blamed-protesters-mine-worker-deaths
34 Associated Press, 30 March 2016 Thousands Rally in Mongolia Over Foreign Mining Concessions
37 http://www.bbc.co.uk/news/business-13620185
38 http://www.reuters.com/article/us-glencore-idUSTRE71O1DC20110225?pageNumber=2
behind Mopani’s failure to operate its assets safely.

3.8.3.4 However there has been no UK criminal investigation because the Corporate Manslaughter Act and the UK’s environmental regulations do not have extra-territorial application. The identification principle could hamper holding Glencore UK (the parent company) to account for actions of the Zambian subsidiary. In this case the existence of a ‘failure to prevent’ model with an adequate procedures defence could have driven improved practice. Mithi’s death, other pollution related deaths and ongoing severe respiratory problems experienced by individuals living in the town of Mopani could have perhaps been prevented.

3.8.4 Central African Mining & Exploration Company (CAMEC) was a UK based company listed on AIM operating between 2002-2009. There are allegations of corporate malpractice in relation to its operations in both DRC and Zimbabwe.

3.8.4.1 Analysis of US Department of Justice and Securities and Exchange Commission’s documents associated with the American hedge fund Och-Ziff, combined with other reports allege serious corporate malpractice in relation to corruption, wider corporate crime, and breaching sanctions related to Zimbabwe.41 42

3.8.4.2 There has been no UK criminal investigation into CAMEC nor CAMEC’s senior managers for a) “aiding and abetting” serious assault of individuals in Zimbabwe, b) their role in conducting business which is likely to have contravened sanctions, and c) bribery.

3.9 Lack of UK criminal prosecutions for severe human rights harms committed by UK linked companies in one off events.

3.10 Following are examples of very severe harms occurring on a single occasion. A corporate offence with an adequate procedures defence could ensure appropriate systems are put in place to prevent such incidents from occurring in the future.

3.11 Lonmin is a mining company listed on London Stock Exchange and Xstrata, which has its registered office in the UK, owned 24.9% stake in Lonmin between 2008 and 2013.

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41 SEC Papers https://www.sec.gov/litigation/complaints/2017/comp-pr2017-34.pdf set out that
  o “DRC Mining Company had used the funds invested in [DRC Mining Company] in April 2008, including funds from Och-Ziff, to make a $100 million “loan” to an entity affiliated with the ruling political party of Zimbabwe, which was embroiled in a contested presidential election at the time.” In June 2008 individuals in Och Ziff became aware of “bank records demonstrating that the mining company Och-Ziff had just invested in had paid 4 arms into zim[babwe], and rented boat from china.”
  o “in 2008, the U.S. Department of the Treasury’s Office of Foreign Assets Control (OFAC) designated the DRC Mining Company Executive as a “regime cron[y]” of the Zimbabwean government. OFAC froze his assets and placed him and several entities affiliated with him on the sanctions list for “logistical support for large-scale mining projects in Zimbabwe that benefit a small number of corrupt senior officials there.”
  o “Och-Ziff conducted a due diligence investigation focusing on the DRC Mining Company Executive who Baros had met on his trip to Zimbabwe and the DRC. The investigation revealed that in Zimbabwe the executive was considered “an influential and dangerous man;” that he was wanted in South Africa for various crimes including fraud, tax evasion, and bribery; and, that he had been linked to the illegal acquisition of state assets, arms trafficking and bribery in the DRC.”

South African newspaper article on 10 August 2008 reports “On April 11 CAMEC, then chaired by Edmonds, “agreed to advance to Lefever an amount of $100-million by way of a loan to enable Lefever to comply with its contractual obligations to the government of the republic of Zimbabwe”. Unusually, although the corporation was to repay the $100-million, it went straight to the Zanu-PF government.” https://mg.co.za/article/2012-08-10-00-the-investor-who-saved-mugabe

Telegraph 15 June 2008 reported “critics of Edmonds, 57, who is chairman of CAMEC, question whether part of the $120m (£60m) payment that CAMEC made earlier this year for platinum rights in Zimbabwe - and a further $100m loan - have been used to pay for a massive arms cache from China: semi-automatic rifles, guns and bullets that may soon be used against Zimbabwe’s impoverished population if the situation turns ugly in the run-up to the new presidential elections on June 27” http://www.telegraph.co.uk/finance/newsbysector/energy/2791649/Business-and-morality-Is-Phil-Edmonds-right-to-trade-with-Robert-Mugabe.html

3.11.1 Lonmin’s activities since 2004 in Marikana have been associated with environmental damage, injuries and deaths. 34 Lonmin’s workers were killed by the South African Police and Lonmin Security Guards on August 16th 2012.\(^{43}\)

3.11.2 However there has been no UK corporate criminal investigation to assess where the decisions took place and whether adequate procedures were in place to avoid pollution, injuries, and deaths. The Corporate Manslaughter Act and the UK’s environmental regulations do not have extra-territorial application.

3.12 **Identification principle hampering the prosecution of a company for a crime despite individual prosecutions.** There have been prosecutions of middle ranking staff members for crimes within companies, where the staff member acted to advantage the company. In several of these cases neither the company, nor more senior managers have been prosecuted, despite the crime essentially being committed to benefit the company. In these situations individuals might have been scapegoated, whilst the primary beneficiary, the company goes unpunished. The following are examples in which the identification principle is likely to have played a role in the decision which led to a company not being prosecuted.

3.13 **HBOS** Serious organizational failings were identified by a Bank of England report into why HBOS failed.\(^{44}\) Individuals who had worked in the “impaired assets” division were convicted in January 2017 of fraudulent trading, corruption and money laundering.\(^ {45}\) No action was taken against the company (now part of Lloyds); despite a corporate culture that allowed excessive risk taking.\(^ {46}\)

3.14 **Phone hacking** Nine individuals have been convicted out of the twelve people the Crown Prosecution Service (CPS) prosecuted in connection with phone hacking. Despite phone hacking being undertaken by employees to advantage their employers’ businesses, the companies involved have not been prosecuted. In December 2015, the CPS stated that because of corporate liability laws it could not mount a successful prosecution against the News Group Newspapers in the phone hacking scandal. The CPS statement reads: “The law on corporate liability in the United Kingdom makes it difficult to prove that a company is criminally liable if it benefits from the criminal activity of an employee, conducted during their employment. The company will only be liable if it can be proved that the individual involved is sufficiently senior, usually close to or at board level, to be the ‘controlling mind and will’ of the company. Unlike other countries, the principles of vicarious liability or poor corporate governance, which are matters that are easier to prove, play no part in establishing corporate criminal liability. The present state of the law means it is especially difficult to establish criminal liability against companies with complex or diffuse management structures.”\(^ {47}\)

3.15 **G4S:** In March 2014, the CPS unsuccessfully attempted to prosecute three G4S employees for the death of Jimmy Mubenga, an Angolan deportee. The CPS considered whether G4S, as a company, should be prosecuted for an offence under “both common law (law developed by the courts over time) and under the Corporate Manslaughter and Corporate Homicide Act 2007. To prove corporate manslaughter at common law, the CPS would require evidence capable of establishing beyond reasonable doubt that a ‘controlling mind’ in the corporation – such as the chief executive officer – was personally guilty of manslaughter by gross negligence. A prosecution under the 2007 Act would require proof to the criminal standard that the way in which G4S’s activities were managed or organised was a cause of death and

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43 Environmental damage caused by exceeding the limits of emission of dust, sulphur dioxide, and calcium sulphide, and water pollution. On August 16th 2012, 34 Lonmin’s workers were killed and 78 were injured by the South African Police and Lonmin Security Guards. [https://ejatlas.org/conflict/lonmin-south-africa](https://ejatlas.org/conflict/lonmin-south-africa)


45 [https://www.ft.com/content/41494c6c-e70b-11e6-967b-c88452263daf](https://www.ft.com/content/41494c6c-e70b-11e6-967b-c88452263daf)

46 [http://www.telegraph.co.uk/finance/newsbysector/banksandfinance/9135277/The-HBOS-horror-story-is-a-grim-read.html](http://www.telegraph.co.uk/finance/newsbysector/banksandfinance/9135277/The-HBOS-horror-story-is-a-grim-read.html)

47 [http://www.cps.gov.uk/news/latest_news/no_further_action_to_be_taken_in_operations_weeting_or_golding/](http://www.cps.gov.uk/news/latest_news/no_further_action_to_be_taken_in_operations_weeting_or_golding/)
amounted to a gross breach of a duty of care towards the deceased. Additionally, this offence would only be made out if it could also be proved that the way in which G4S’s activities were managed or organised by its senior management was a substantial element in the gross breach." It is clear that the CPS ‘way activities are managed and organised’ test which is a version of the identification principle hampered a corporate prosecution in this instance.

3.16 Volkswagen: When the emissions testing scandal first came to light VW’s management attempted to claim that the malpractice was solely down to two rogue individuals which had created the emissions cheating software. This type of knee jerk response is caused by directors wishing to evade a corporate prosecution. Later on 10th December 2015 VW managers admitted the scandal was the result of systematic failures and a culture that ‘tolerated’ rule breaking and misconduct by employees. In January 2017, Volkswagen pleaded guilty to ‘emissions rigging’ and paid in the US a criminal fine of $2.8 billion and additional civil fines of $1.3 billion. Despite 1.2 million UK vehicles being affected by Volkswagen’s use of illegal software to mask emission of nitrogen oxides, no UK investigation has been opened. The UK is facing legal action from the EU Commission as of December 2016 for failing to make Volkswagen comply with the law. The fact that a major company’s culture allowed rules to be broken, implies that the company did not expect law breaking to be punished. This is a damming criticism of current corporate criminal justice system.

3.17 LIBOR rigging. Criminal action in the UK has only been taken against individuals who claimed during trial that their colleagues and superiors knew of their actions. The Attorney General identified LIBOR as one of the cases which the UK was not able to conduct a criminal prosecution because of the identification doctrine, noting the “clear implications for the reputation of our justice system”.

3.18 Links between economic crimes and wider human rights violations undertaken to advantage corporate interests.

Human traffickers generates substantial profits, which need to be ‘laundered’, before the money can be used freely. According to the International Labour Organization (ILO) in May 2014 there are “an estimated 21 million victims are trapped in modern-day slavery. Of these, 14.2 million (68%) were exploited for labour. Of these 7.1 million (50%) forced labour victims work in construction, manufacturing, mining, or utilities; and 3.5 million (25%) forced labour victims work in agriculture. Human trafficking earns profits of roughly $150 billion a year for traffickers.” There are examples of the money earnt from trafficking of human beings being laundered through businesses running banks, money wire/transfer, auction houses, on-line games, casinos or prawn brokers dealing in high-value items. Businesses in these sectors which are negligent in relation to deterring money laundering are potentially complicit in the perpetuation of human trafficking. However it is unlikely that directors of a bank, for example, are personally are aware when hundreds of bank accounts are opened by an individual to launder money. So in this case the use of the identification principle, in relation to anti-money

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48 http://blog.cps.gov.uk/2014/03/death-of-jimmy-mubenga-charging-decisions-following-inquest.html
laundering would be an inappropriate hurdle to prove, before a business laundering money was prosecuted. Instead a failure to prevent offence would lead to improved systems being put in place and hopefully would therefore play an important role in preventing human trafficking. This is a clear example of severe human rights violations (forced labour) going hand in hand with economic crime (money laundering) and demonstrates the difficulty of separating the two strands which stem from the same management failings.

3.19 **Gaps in both economic and wider Corporate Criminal offences**
The examples above not only highlight problems with the identification principle, but also highlight where the UK law is missing corporate criminal offences, in relation to a company commissioning or benefiting from direct physical harms to individuals which advance a business’ interests. For example there is currently no corporate offence when a UK company’s decisions effectively aid or abets serious assaults which occur overseas.

The following example of an economic malpractice also highlights a gap in corporate criminal offences.

3.20 In November 2015, the SFO was forced to drop its case against *Olympus* after the “*Court of Appeal judgment made in February 2015, which ruled that English law does not criminalise the misleading of auditors by the company under audit*”

3.21 Careful consideration needs to be given in relation to how *new* corporate criminal offences are drafted, particularly with regard to how companies should be culpable when the company benefits when harms are perpetrated by one individual on another.

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57 [https://www.sfo.gov.uk/cases/gyrus-group-limited-olympus-corporation/](https://www.sfo.gov.uk/cases/gyrus-group-limited-olympus-corporation/)
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?

4.1 The common law identification doctrine (Option 1) does need to be amended through primary legislation.

4.2 It is also our view that a series of new offences are required to address wider corporate malpractice.

4.3 A ‘failure to prevent serious crimes’ offence accompanied by a schedule listing specific economic crimes would be a good starting point. To address wider corporate malpractice new corporate offences should also to be specified as highlighted by some of the examples above. Otherwise these serious corporate criminal offences could be proposed in future primary legislation.

4.4 The Corporate Manslaughter Act is also overdue review. The liability regime (which is a hybrid) needs to be re-thought and the scope of the Act needs to be amended to allow for extra-territorial application.

4.5 Severe cross border violations, which would be subject to UK environmental or Health and Safety regimes if the harms occurred in the UK, also need to be considered. Either for inclusion in a schedule associated with new “serious corporate criminal” offence. Or by revising legislation which the Health and Safety Executive and the Environment Agency enforce.
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?

OPTION 3

5.1 We propose that MoJ as a priority pursues Option 3 “Strict (direct) Liability offence.

5.2 It would be useful to replicate the Bribery Act 2010 which has section 1 a substantive offence of bribery, and in section 7 a failure to prevent bribery offence. This approach covers both the acts and omissions of corporate actors. So, for example, prosecutors can use Section 1 when they have sufficient evidence to prove that a company or an individual committed the substantive offence (i.e., an act). Section 7 (which equates closely to Option 3 and 4) can be used when prosecutors do not have sufficient evidence to prove that the company committed the substantive offence but can prove that the company failed to take adequate measures to prevent that offence being committed (i.e., an omission).

5.3 Separately we see a need for Identification principle to be revised. Since this is potentially complex, it may take more time than passing new legislation which creates a new corporate offence as set out by Option 3.

5.4 The implementation of the Bribery Act significantly improved the attention businesses paid to deterring bribery in their activities, and prompted appropriate policies to be put in place within companies.

5.5 We are in support of Option 3 because it focuses as this Call for Evidence states on the “failure to exercise supervision over the conduct of those pursuing a company’s business objectives.” We agree this more accurately reflects the nature of a company’s culpability. An Option 3 style offence would be particularly effective at promoting good corporate governance and accountability at all levels in companies that have de-centralised decision-making structures, or in businesses operating in a network of business relationships, as in the case of supply chains.

5.6 In recognition of the UK’s significant business interests associated with overseas operations, it would be appropriate to include an extra-territorial dimension in any new offence (based on Option 3). Otherwise corporate malpractice which benefits a company will be driven overseas, rather than deterred altogether. The Bribery Act also makes provision for a prosecution to be conducted in the UK if a bribe is paid overseas. Likewise if very severe harms occur overseas which benefit the UK-linked company then it would be appropriate for the company to be prosecuted in the UK under a new corporate criminal offence.

5.7 We consider that it is appropriate for the onus to be on the defendant company to prove that it had adequate procedures in place. Particularly since in most cases the company has the relevant information. Provision of evidence is often a practical barrier which impedes corporate prosecutions. So where a serious violation has occurred, which the company was under an obligation to prevent, it should be incumbent on the company to demonstrate it took all reasonable steps through its policies, procedures and incentive structures to deter crimes from occurring.

5.8 Traidcraft has been consulting with other civil society organisations, prosecutors, and legal experts since 2015 as part of its Justice Campaign to improve corporate criminal legal liability for wider human rights violations. Traidcraft would be interested to collaborate with others in advancing thinking on the design and practical considerations in relation to improving legislation on cross border corporate crimes.
Question 6: Do you have views on the costs or benefits of introducing any of the options, including possible impacts on competitiveness and growth?

6.1 Modernising corporate criminal law will deter malpractice. This would lead to more responsible and sustainable businesses operating in society. Investors, employees, customers, consumers, and pensioners would have greater trust in the UK businesses they interact with. Currently people are justifiably concerned that businesses they interact with may be associated with serious human rights violations. More than 20,000 UK citizens signed a petition asking “the government to update the law so that large UK companies can be prosecuted for the most serious cases of causing harm abroad.”

6.2 The costs of putting additional procedures in place on top of those already required under the Bribery Act would be minimal and would be outweighed by the improvements compliance would make to management processes.

6.3 Leading companies already undertake Human Rights Due Diligence as proposed by the UN Guiding Principles on Business and Human Rights. These activities provide a substantial part of the adequate procedures defence that companies would need to have in place for a failure to prevent wider corporate crime offence. We would welcome more businesses gathering relevant information from a Human Rights Due Diligence assessment. This would then improve the information that management decisions were based upon, resulting in serious human rights violations being avoided in a company’s operations or in how they contract with others.

6.4 Improved information about a company’s impacts on suppliers, local community, environment, employees and customers will improve the ability of directors to fulfil their director’s duties. Currently some aspects of director’s duties appear to be overlooked in practice.

6.5 Updating the UK’s corporate criminal justice system to take account of UK businesses’ cross border impacts is vital for international relations. Deficiencies in corporate criminal accountability in relation to serious assault have enabled UK companies to be associated with human rights violations and breaches of sanctions. In 2008 “William Hague, led the call from politicians in Britain for China to suspend arms sales to Zimbabwe, saying the international community must speak with one voice. “The Mugabe regime continues to deny the right of the people of Zimbabwe to choose their leaders. To supply arms to it at time when opposition activists are being intimidated and attacked, not only sends the wrong signal, but will harm the reputation of China.” However, it is alleged that the purchase of those arms, was only possible due to the manner in which CAMEC, a UK based company, purchased a Zimbabwean platinum mine. (See response to Question 3 for CAMEC example.) Lack of action to address

http://www.traidcraft.co.uk/campaign-blog-entry/20000-strong-justice-matters-petition-handed-in-at-10-downing-street

The Companies Act 2006 172 Duty to promote the success of the company
(1)A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to—
(a)the likely consequences of any decision in the long term,
(b)the interests of the company’s employees,
(c)the need to foster the company’s business relationships with suppliers, customers and others,
(d)the impact of the company’s operations on the community and the environment,
(e)the desirability of the company maintaining a reputation for high standards of business conduct, and
(f)the need to act fairly as between members of the company.

http://www.legislation.gov.uk/ukpga/2006/46/part/10/chapter/2/crossheading/the-general-duties

possible malpractice by CAMEC, whilst chastising the Chinese, undermines international relations.

6.6 The UK law needs to be revised to enable prosecutors to convict and deter poor practice by UK businesses. Otherwise government’s “Business is Great”61 international marketing slogan encouraging businesses to set up in the UK will ring hollow.

61 http://www.greatbusiness.gov.uk/
Question 7: Do you consider that introduction of a new corporate offence could have an impact on individual accountability?

7.1 It will depend how corporate criminal liability evolves and whether active steps are taken to make appropriately linked punishments of individuals.

7.2 There is a need to achieve a correct balance between prosecuting companies and relevant individuals within a company. We are in favour of prosecuting companies, who are beneficiaries of the very severe crimes discussed in this consultation, through a new corporate liability offence based on Option 3. Formulating a new corporate offence needs to be the priority. There is also a need to prosecute individuals at an appropriately senior level within a company who have acted in a manner which has resulted in severe harms.

7.3 The directors of CAMEC Phillipe-Henri "Phil" Edmonds and Andrew Groves both had strong connections to Zimbabwe, and if allegations are true, it is possible that they were personally involved in malpractice. (See case study in Qu 3.) However neither has been disqualified as directors according to Companies House, despite their possible associations with bribery, sanctions busting and very severe human rights violations. Andrew Groves is currently director of Sable Mining Africa. If the allegations against CAMEC are true, as are allegations about the involvement of its directors in malpractice, it is inappropriate that the financial assets gained through such malpractice remain the personal assets of the individuals concerned.

7.4 One option for consideration would be to review how directors are disqualified. If directors were subject to a personal consequence for a breach of their director’s duties or if their company is convicted of a criminal offence (based on Option 3) this would provide a strong incentive towards improved risk management processes. It is an appropriate sanction that relevant individuals are disqualified for failing to put suitable procedures in place. Failure to put in place adequate procedures is also likely to contribute to a breach of director’s duties. The director’s duties obligations which relate to a company’s impacts on communities, employees, environment, customers and suppliers, as well as standards of high ethical practice, are currently unenforceable. (see Traidcraft’s submission to BEIS’ recent Corporate Governance consultation.)

7.5 It is accepted that the proceeds of crime should not be retained by those found guilty. Hence the use of confiscation orders. In instances of corporate crime, consideration needs to be given as to what should be the appropriate financial sanction applied to directors of companies during the time period when their company was found guilty of committing a criminal offence. The formulation of an appropriate sanction, including for ex-directors, would contribute to improving individual accountability, and the desire of directors to avoid their company committing crimes. Reforms in relation to the powers of the Crown Courts in relation to adjusting property rights and confiscation could be helpful in this regard.

7.6 If, as a result of corporate malpractice, individuals have suffered serious harms which mean that they are no longer able to earn a living for themselves and their families, it is appropriate that they are compensated. It should be considered whether a new corporate offence based on Option 3 might include compensation payments to those harmed. The Modern Day Slavery Act provides for compensation or reparation payments as appropriate and could be used as a model.

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62 http://moneymetal.org/index.php/Phil_Edmonds
65 http://www.cps.gov.uk/legal/h_to_k/human_trafficking_and_smuggling/#a14
Question 8: Do you believe new regulatory approaches could offer an alternative approach, in particular can recent reforms in the financial sector provide lessons for regulation in other sectors?

NO

8.1 Regulatory approaches can provide a complementary rather than an alternative approach. The sectoral nature of most regulatory approaches means that they are insufficient to address the range of harms that companies, whether directly or through omission, can be complicit in.

8.2 The UK’s regulatory approach regarding both environmental harms and health and safety are clear and helpful, and apply to all sectors, but fail to address the cross-border nature of much corporate business activity.

8.3 The danger of taking a sectoral approach to deterring corporate malpractice, is the likely inconsistency which might result. Some companies which are large corporate groups operate in many sectors. If a sector by sector regulatory approach is adopted it might drive corporate malpractice within large corporate groups into the least regulated business areas.

Question 9: Are there examples of corporate criminal conduct where a purely regulatory response would not be appropriate?

YES

9.1 Serious criminal malpractice by companies should be dealt with under criminal law. The perceived and actual gaps in accountability by companies compared to how individuals are prosecuted for severe malpractice needs to be addressed. Otherwise individuals with dubious motives, will set up corporate entities to perpetrate harms, and evade prosecution. Regulatory regimes can complement but not substitute for modernising UK’s corporate criminal justice system.
Question 10: Should you consider reform of the law necessary do you believe that there is a case for introducing a corporate failure to prevent economic crime offence based on the section 7 of the Bribery Act model?

YES

10.1 Please see answers provided to Question 5 which set out why Option 3 provides the most suitable basis to draft a corporate criminal offence. Introducing a corporate failure to prevent economic crime offence based on the Bribery Act’s section 7 model is a necessary next step. We are acutely aware of the breadth of serious harm that business can cause if focused purely on short-term gain and poorly managed. Traidcraft considers that reform should not be limited to economic crime only, but instead the Government should actively consider how to draft effective legislation that covers the range of crimes which a company can commit or ‘fail to prevent’.

The following points set out different aspects of the Bribery Act which are worth replicating when considering how a law to prosecute wider corporate criminal offences is drafted.

10.2 A prosecution is only considered once a serious crime has occurred. The company’s directors and senior management team will therefore aim to deter the crime from occurring in the first place. This is a more appropriate and targeted formulation of law, compared to the reporting requirements which we see in the Companies Act and Modern Slavery Act. These can distract the company from the priority of deterring the harm and instead effort is put into producing a report.

10.3 The Bribery Act offence recognises that it can be in the interests of employees, and associated businesses and agents to commit an offence for the benefit of the company, in spite of corporate policies. In many of the examples given in the response to Question 3 it can be seen that the individuals involved in causing the direct harm to people are not directly employed by the parent company. However it is appropriate to hold to account the company based in the UK if that is where the benefits accrue, from the actions of subsidiaries, agents, suppliers and other business associates.

10.4 In recognition of the UK’s significant business interests associated with overseas operations, it would be appropriate to include extra-territorial dimension in any new offence (based on Option 3). Otherwise corporate malpractice which benefits a company will be driven overseas, rather than deterred. The Bribery Act also makes provision for a UK prosecution if a bribe is paid overseas. Likewise if very severe harms occur overseas which benefit the UK company then it would be appropriate for the company to be prosecuted in the UK under a new corporate criminal offence. This is particularly important for harms which are recognised as crimes both in the UK and overseas e.g. assaults and fatalities. The UK government already has reciprocal cooperation agreements in place in relation to extraditing individuals so that they can attend a murder trial in another country. It is anomalous that UK companies are currently insufficiently deterred for their role in commissioning or benefiting from circumstances where people are killed in another country.

10.5 The benefit of the adequate procedures defence is its preventative rather than punitive approach. It actively encourages companies to take ownership of the risks faced in their operations and put in place mechanisms to prevent harm from taking place. This is necessary so that company staff, and workers in associated businesses are not involved in causing severe human rights violations or economic crimes to benefit the business. There are numerous good practice methods of assessing risks, and addressing risks. However companies have not previously prioritised human rights due diligence processes. Once the Bribery Act was passed, businesses prioritised evolving policies appropriate to their organisation’s exposure to risk to reduce likelihood of bribery occurring. A similar improvement in practice is also needed in relation to reducing companies’ complicity in criminal acts. An
adequate procedures type defence would lead to improved accountability at different levels within a company, and in its business networks.

10.6 The positive cross-border effects of the bribery prosecutions are also noticeable. In countries where prosecutions of powerful individuals are difficult, information put into the public domain as a result of a prosecution elsewhere is helpful. The Serious Fraud Office’s prosecution on 22 December 2014 of a UK company, Smith and Ouzman Ltd, generated public pressure in Kenya. Although none of the implicated Kenyan electoral commissioners have been prosecuted, all of the implicated commissioners are no longer in their roles.

Question 11: If your answer to question 10 is in the affirmative, would the list of offences listed on page 22, coupled with a facility to add to the list by secondary legislation, be appropriate for an initial scope of the new offence? Are there any other offences that you think should be included within the scope of any new offence?

YES

11.1 Traidcraft is in support of a new Corporate Failure to Prevent Serious Crime offence based on Option 3. We would not limit corporate criminal law reform just to economic crimes, given the inter-relationship between economic and wider crimes, and the severity of the direct harms which UK-linked businesses’ activities have been associated with.

11.2 The facility to add to the list by secondary legislation is an appropriate mechanism. The provision for this possibility needs to be foreseen, by not limiting primary legislation only to economic crimes.

11.3 Serious ‘non-economic’ crimes that would be appropriate for consideration to add to the list include slavery offences, child labour, sexual crimes, serious environmental pollution and causing serious injury. These are all serious cross border crimes which unscrupulous businesses are able to benefit from, but where UK’s criminal justice system is currently inadequate.

11.4 In addition the Corporate Manslaughter Act is in urgent need of view to improve the liability regime and its applicability to deaths overseas.

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?

YES

12.1 Companies are already required to have procedures in place to prevent the commission of Bribery offences. The adoption of a ‘failure to prevent economic crime’ offence would widen the scope of those procedures but would not in our opinion place a significant additional burden.

12.2 If a failure to prevent corporate crime offence was more broadly drafted, the impact on different companies will vary. Some companies already have strong human rights due diligence mechanisms in place. However some companies will need to update their policies and procedures so that they are not open to prosecution. We would welcome a business sector which deterred serious harms, rather than was silently complicit or actively benefiting from such violations.

12.3 The benefits of such legislation in providing a focus and incentive to improve management processes would be extremely valuable in relation to better implementation of the duties directors are supposed to fulfil, under the 2006 Companies Act.59
Question 13: Do you consider that the adoption of these measures would result in improved corporate conduct?

YES

As has been seen with the impact of the Bribery Act, we would expect an improvement in corporate conduct. Business practices will improve if the following three precursors are in place.

a) Corporate criminal liability laws are usable, sufficiently comprehensive and appropriate to modern corporate structures. As opposed to laws which do not cover the right range of offences or which are unusable for prosecuting for some types of business structures.

b) Prosecutors are operating in a context which incentivises (rather than deters) corporate prosecutions, and

c) That the possible sanctions at the end of a successful prosecution command respect and deter poor practice rather than being seen as a small cost of doing business.

See earlier comments made in response to Question 1.

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

YES

14.1 It is our view that it is essential that any new form of corporate liability has extraterritorial reach due to the extensive participation of UK companies in international markets.

14.2 Recognising the potential severity of health and safety breaches Australian law has extraterritorial reach. The Australian Work Health and Safety Act (WHSA) 2011 already imposes obligations on employers to take all reasonably practicable steps to identify, assess and control risks to those who work for them – this includes contractors. Section 12F also expressly states that the extra-territorial provisions of the [Australian] Criminal Code Act 1995 will also apply to WHSA 2011. This means that employers may be criminally liable for failure to meet their legal duties of care, even when the offence is committed outside Australia, where the offender is an Australian citizen or a body incorporated under Australian Commonwealth (federal) or State law.66

14.3 The UK’s Health and Safety at Work Act 1974, and environmental legislation, such as Resource Management Act 1991 (RMA), already include strict liability for substantive offences caused in the UK. There is a logic in applying semi-strict liability for a secondary (failure to prevent) offence (Option 3) in circumstances where there is the same corporate malpractice in the UK which results in a very severe injuries, illnesses and deaths occurring overseas.

14.4 More than 50% (by market value) of the London Stock Exchange are businesses which are incorporated outside of the UK67. The exceptional access to capital in London, which attracts businesses to list, is in part due to good corporate governance expectations which increase

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67 Of the 2,282 companies listed on London Stock Exchange (FTSE, AIM & PSM) on 31st November 2016 more than 700 companies were incorporated outside of the UK (and they have an aggregate market value of £2,249,000 million which is ~51% of the total market value).
shareholders’ willingness to invest in companies. Deficiencies in UK’s corporate criminal law undermine the UK’s reputation for good corporate governance. Businesses seeking to operate to higher standards of business conduct are undermined if competitors in the UK market are essentially able to subsidise their activities through criminal acts.

14.5 Both businesses incorporated overseas and UK-incorporated businesses conduct a significant proportion of their activities overseas, and are dependent on international markets. Businesses with offices and operating in the UK (irrespective of where they are incorporated) can be party to cross border crimes, with decisions or omissions occurring in UK offices which have effects all over the world. It no longer makes sense for the UK to limit itself jurisdictionally in such a manner that companies operating in the UK cannot effectively be held to account in the UK for decisions made in the UK to benefit that company, even if their impact is elsewhere in the world.

14.6 If the new offence did not have extra-territorial application, this would create unequal UK consumer, business and capital markets, between those businesses solely operating in the UK, and those businesses with overseas operations and business associates. Businesses which had subsidiaries or suppliers in countries with weak justice systems, to suppress costs would be able to cross-subsidise their operations. Extra territorial application of the new offence, would enable business to compete in UK markets fairly on the basis of the characteristics of their products and services.

14.7 There are cross border benefits from extra-territorial application of a new offence. The scale and profitability of the UK’s markets means that businesses will continue to participate in the UK market, and so revise their processes to comply with the proposed corporate criminal offence. This will contribute to driving up standards internationally.

14.8 In instances where there are cross border harms perpetrated by foreign investors there is a limbo situation in countries with weak justice systems. Sometimes there is a nexus between political, judicial and business elites which mean that companies are rarely prosecuted. Or a developing country government is fearful of prosecuting an overseas investor for fear of deterring future investment, or the costly and complicated court process which may ensue. The resultant situation is that corporate malpractice goes undetected and UK linked businesses are able to profit from this situation. If the UK passed a Corporate Failure to Prevent Serious Crime offence, then individuals in countries with weak justice systems concerned with corporate malpractice, would now have an additional option to report malpractice to UK authorities, in circumstances where a UK company was the perpetrator or benefiting from a crime and where the responsibilities were in the UK or the decisions were taken in the UK.

14.9 When developing the recent criminal tax evasion offence HMRC has already recognised that the UK should be able to prosecute to create a level playing field in relation to overseas tax evasion. “Mirroring the approach to jurisdiction adopted by the inchoate offences created by the Serious Crime Act 2007, we believe that corporations with a presence in the UK should be obliged to take reasonable steps to prevent their agents being complicit in criminal tax evasion, wherever that tax is evaded. We do not consider that corporations should escape criminal liability just because the tax evaded is levied abroad. If the evasion of tax is a crime in the foreign jurisdiction then corporations should take reasonable steps to prevent their agents becoming complicit in the criminal evasion of those taxes. The new offence would therefore criminalise a UK Firm B for failing to prevent its agents from facilitating the evasion, though we recognise that the preference will remain for a prosecution to be brought in the jurisdiction where the tax loss occurred.”

68 HMRC’s Criminal Tax Evasion Consultation paper [at 3.17]
14.10 The UK has already built up experience and chosen to prosecute crimes by individuals where key evidence is overseas. For example.
- Faryadi Zardad, who was living in Streatham, was convicted in a UK court on 18th July 2005 for crimes committed in Afghanistan. Evidence from Afghan witnesses was heard in the court via a video link from the UK embassy in Kabul. The Old Bailey jury found Zardad guilty of Conspiracy to Torture and Conspiracy to take Hostages. 69
- An investigation by the Metropolitan Police Service’s Proceeds of Corruption unit (POCU) resulted in Nigerian politician James Ibori being jailed after pleading guilty to 10 offences relating to conspiracy to launder funds from Delta State, substantive counts of money laundering and one count of obtaining money transfer by deception and fraud. The Met estimates he embezzled approximately £157 million of Nigerian public funds. He was extradited to the UK from Dubai on 15 April 2011 ahead of his trial and sentencing at Southwark Crown Court in April 2012. 70
These experiences indicate that the UK has expertise to gather evidence in cases of cross border crimes and prosecute in the UK.

14.11 Where UK authorities have run a successful prosecution for crimes which have extraterritorial reach, this has resulted in positive outcomes in the ‘other’ country. See our response in Question 10 which includes positive effects in Kenya resulting from information about Serious Fraud Office’s prosecution of Smith and Ouzman Ltd.

14.12 The practical implication of a new corporate offence would be for businesses which had not already done so to conduct human rights due diligence assessments and act on those findings so that they would be able to better manage their business activities.

Question 15: Is a new form of corporate liability justified alongside the financial services regulatory regime. If so, how could the risk of friction between the operation of the two regimes be mitigated?

YES

15.1 Companies which are subject to the financial regulatory regime have not been criminally prosecuted for crimes.

15.2 Barclays, Coutts, Deutsche Bank and HSBC have been fined by the FSA or the FCA for money laundering, but have not been subject to any criminal prosecutions. HSBC has been criminally prosecuted in other countries for money laundering.

15.3 FOREX: The UK’s Serious Fraud Office (SFO) opened a criminal investigation into FOREX wrongdoing, but closed it in March 2016 saying there was not enough evidence to continue with a prosecution despite there being reasonable grounds to suspect the commission of offences involving serious and complex fraud. Legal commentator, Alison McHaffie of CMS was quoted saying that the case showed: “the difficult job SFO has in demonstrating criminal activity by individuals for this type of market misconduct and without a change in the law on corporate criminal responsibility. This means it is always easier to impose regulatory fines against the firms themselves rather than criminal prosecutions.” 71

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71 http://www.telegraph.co.uk/business/2016/03/15/serious-fraud-office-ends-foreign-exchange-probe-but-admits-wron/
15.4 **LIBOR rigging.** Criminal action in the UK has only been taken against middle-ranking staff.\(^{72}\) The UK's FCA imposed fines on four out of the five companies that the US imposed fines upon. The fines imposed by the FCA were modest compared to the business' size. The largest UK Libor fine of £227m was applied to Deutsche bank (which in 2015 earned 33,530m Euros in revenue). This UK regulatory fine equates to less than 1% of the company's turnover. Whilst US fines of $2.1bn applied to Deutsche bank comprising of criminal and regulatory fines equates to approx. 6% of turnover.

15.5 The effect of companies only being subject to regulatory action is that the sanctions appear to be weaker than criminal sanctions, and provide fewer deterrents to corporate wrongdoing.

15.6 It is possible to operate both a financial services regulatory regime, and prosecute corporate crimes in parallel as witnessed by the US. To avoid friction between the two approaches, it is essential that the offences which are considered to be crimes are deterred in both regimes. The objective of both approaches needs to be to ensure that the malpractice does not occur. Secondary regulatory objectives of allocating responsibility, putting in place procedures, fulfilling reporting obligations, should not undermine the over-riding objective of deterring malpractice.

15.7 The need to evolve a more consistent approach between corporate criminal law and the regulatory regime in just one sector, should not be used to delay addressing the deficiencies in the UK's criminal law, associated with using the “identification principle” as the test to trigger corporate prosecutions.

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

16.1 The adequate or reasonable procedures defence which companies may rely on under a new corporate criminal offence are unique to each company and will need to evolve. The purpose of the procedures is to deter the corporate malpractice in the first place, and so they need to be appropriate to each business’ context. Procedures need to be fit for purpose relation to a company's corporate structure, its relationships with business associates, intrinsic hazards associated with their products or services and other factors. The compliance requirements of the financial sector may contribute some of the procedures which would contribute to an adequate or reasonable procedures defence.

16.2 Whilst there is a regulatory regime evolving in the financial sector, other sectors have no such regulatory regimes. Since wider corporate crimes are occurring in a range of sectors, including extractive, agricultural, food, and services sectors, the UK corporate criminal justice system needs to be applied across a range of sectors in an even handed manner.

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