House of Commons Public Bill Committee

Economic Crime and Corporate Transparency Bill

Call for Evidence

Peters & Peters Solicitors LLP Response

21 November 2022

1. Peters & Peters Solicitors LLP is a law firm specialising in business crime and civil litigation. Our cases often concern acting for corporates or individuals in business crime investigations undertaken by the SFO, the FCA, HMRC and the Police. A number of our staff formerly worked for the SFO, FCA and CPS. We comment on the sections of the Bill most relevant to the work that we do.

Part 1: Companies House Reform (clauses 1 to 98)

2. We welcome the proposed tightening of the Companies House process. However, it does not seem that the new information powers (sections 1092A and 1092B of the Bill) would allow Companies House to make independent enquiries beyond the identities of directors and persons of significant control ("PSC") put forward on paper. This is a potential gap which could be exploited by shadow directors and persons controlling the identified PSC. It also means that there remains a significant due diligence burden on businesses which must remain alive to the risk of an entity's ultimate beneficial owner ("UBO") being different from the person(s) identified for the purpose of corporate registration.
3. To reduce the scope for exploitation and minimise the due diligence burden, Companies House should seek express assurances from the relevant company, directors and PSCs that there are no shadow directors or other individuals controlling the identified PSC. Companies House should adopt and promote a 'whistleblowing' process by which businesses can inform Companies House where they have reasonable grounds to believe that persons other than those identified on Companies House are acting as shadow directors or are the real PSC/UBO.
4. Companies House should be provided with the resources to investigate such reports and its pre-existing and proposed investigative powers should be reviewed to consider if they are adequate for conducting such investigations. The efficacy of the reforms is, of course, dependent upon proper resourcing.

Part 4: Crypto assets (clauses 141 and 142)

5. We welcome the clarity in respect of the application of criminal and civil asset recovery powers to crypto assets.

6. However, we repeat our concerns regarding the use of civil asset recovery powers, in particular the account freezing and forfeiture regime (Part 5, Chapter 3B of Proceeds of Crime Act 2002) in general.[1] These concerns extend to the new crypto asset specific regime.
7. We regularly encounter situations where investigators pursue account freezing orders ("AFOs") based on an improperly broad interpretation of what constitutes "recoverable property", or with an apparent disregard for the general exception in section 308(1)(b) of POCA (for persons who obtain recoverable property in good faith, for value and without notice that it was recoverable property). This can cause serious irremediable prejudice to innocent parties. We have experience of clients having to close their businesses as a result of such AFOs. The low threshold for obtaining AFOs, inadequate understanding of the legal framework by investigators in applying for orders and insufficient scrutiny by magistrates in granting them facilitates this improper use. Obtaining AFOs should not be a law enforcement objective in and of itself.[2]
8. Increasingly, we see investigators using AFOs in support of ongoing criminal investigations. In practice, this involves the investigator obtaining an AFO, which may be challenged by the respondent, but without pursuing the criminal investigation with appropriate rigour. The investigator is then happy to enter a civil settlement without any related criminal proceedings being initiated subsequently. Whilst the regime caters for this procedurally, the willingness of investigators to enter civil settlement is at odds with section 2A of POCA and the Secretary of State's Guidance (28 June 2021): "*reduction of crime is in general best secured by means of criminal investigations and criminal proceedings*". [3] The judiciary has repeatedly endorsed this statement; criminal proceedings should take precedence which will generally best serve the public interest.[4] We are also concerned that the benefit sharing mechanism in the Asset Recovery Incentivisation Scheme ("ARIS") may be factor into the decision whether to pursue civil asset recovery or criminal investigation followed by confiscation. The

[1] As submitted in our response to the House of Commons Justice Committee's Call for Evidence on the Government's Fraud strategy, paragraph 36.a.
[2] As was suggested in the Government's Economic Crime Plan: Statement of Progress, April 2021 paragraph 5.4
[3] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1001245/June_2021_amended_s.2A_guidance_.pdf
[4] *R (Director of ARA) v Jia Jin He* [2004] EWHC 3021 (Admin) at paragraph 13; *SOCA v Olden* [2010] EWCA Civ 143 at paragraph 17.

former results in a much larger share of the forfeited amount accruing to the investigative agency.

9. The expansion of these regimes to cover crypto assets expands the scope for abuse of these powers. We strongly encourage the Secretary of State to monitor the use of civil asset recovery orders (especially account freezing and forfeiture orders) and engage independent review to evaluate whether they are properly being used in compliance with the Guidance, or if they are now used – as we perceive in our work – as a preferred option to criminal investigations and prosecutions.

Part 5: Miscellaneous (clauses 143 to 157)

Money laundering and terrorist financing

10. We welcome the exceptions for exiting and paying away which we hope will reduce the volume of poor quality, unnecessary and duplicative Suspicious Activity Reports ("SARs") and Defence Against Money Laundering reports ("DAML"). We note the threshold of £1,000 is low and propose that a monitoring programme is put in place to consider whether this threshold can be increased in due course.
11. We welcome the provisions for mixed-property transactions which should reduce tipping-off risks for regulated businesses. The exemption is likely to increase the compliance burden, though, as regulated businesses will need to make judgment calls on whether – and what proportion – of the property is distinguishable as criminal from non-criminal property. In practice, the exemption may not materially reduce the volume of DAMLs where regulated businesses consider the costs of complying with the exemption outweighs the benefits of reducing the tipping-off risks. Its efficacy should be monitored.
12. The extension of intelligence sharing between regulated entities should improve efficiency in the system.

SFO pre-investigation powers

13. We welcome the extension of the pre-investigation powers to all SFO cases. The previous distinction between international bribery and corruption and the remainder of the SFO's caseload was arbitrary. Exercising these 'section 2 powers' is resource intensive and we question whether the SFO has sufficient resources to utilise them.

14. In this regard, we take this opportunity to repeat our concerns about the SFO more generally.[5] Any real improvement in its performance is dependent upon proper funding, the recruitment of quality leaders, and the recruitment and long-term retention of talented investigators and prosecutors. These expanded pre-investigation powers could facilitate a more robust and pro-active SFO, but it underlines that any expanded caseload requires proper resourcing.
15. It is galling to learn from the SFO's Chief Capability Officer that it is "*running at a permanent vacancy of between 20% and 25%*"[6] – indicating that the SFO holds little appeal as an employer.
16. Our concerns in this regard are exacerbated by media reports over the summer suggesting that the SFO may be required to reduce its headcount by up to 40%.[7] This would completely undermine any efforts to improve the SFO's performance, especially at a time when the SFO seems to be committed to implementing change off the back of the recommendations of Sir David Calvert-Smith and Brian Altman KC, and where the SFO is a net positive contributor to the Treasury. We endorse the evidence of the SFO's Chief Capability Officer that protections for the SFO's legal costs would be welcome.[8]
17. Fraud is the most prevalent crime in the UK and most remain a priority for law enforcement, spearheaded by an effective premier counter-fraud agency.

Failure to prevent economic crime offence

18. We note that the former lord chancellor, Sir Robert Buckland KC MP, recently suggested that a failure to prevent economic crime offence would be added to the

[5] As set out in our response to the House of Commons Justice Committee's Call for Evidence on the Government's Fraud strategy.
[6] As per Michelle Crotty's evidence to the House of Commons Justice Committee earlier this year. Oral Evidence: The Work of the Serious Fraud Office HC 664, Wednesday 19 October 2022, Q34.
[7] https://www.cityam.com/staff-cuts-in-crime-agencies-would-completely-undermine-uks-fight-against-oligarchs-campaigners-warn/#:~:text=%E2%80%9CThis%20investment%20would%20more%20than,drop%20from%205%2C687%20to%203%2C412 (accessed 21 Nov 2022).
[8] Public Bill Committee, Economic Crime and Corporate Transparency Bill, Transcript of Second Sitting, Tuesday 25 October 2022, Q113.

Bill.[9] We further note that the Committee has been asking witnesses about such an offence.

19. Whilst a failure to prevent offence would make it easier to secure corporate convictions, we question its appropriateness and endorse the observations of Professor Jason Sharman which he gave in oral evidence to the Committee.[10] The purpose of criminal law enforcement is fundamentally to penalise people for knowingly (or, where appropriate, recklessly) committing an act which amounts to an offence. As a matter of principle, economic crime offences should be treated no differently; they should require a *mens rea* of, for example, dishonesty. The identification doctrine already achieves this; a corporate can only be liable where a directing mind and will of the company holds the requisite *mens rea*. In our view, the SFO's fundamental complaint about the identification doctrine is that it makes it difficult to hold corporates criminally culpable; it should be. It is telling that, of the SFO's 12 DPAs, no individuals have been convicted. In our view, this indicates that companies are being held criminally culpable for actions committed by employees which the SFO cannot prove amounted to criminal offences. This should be the purview of civil or regulatory enforcement.
20. A failure to prevent economic crime offence would significantly expand the scope and purpose of criminal law. It should not be adopted lightly, and it should be given proper Parliamentary time for debate. On any view, it would therefore be inappropriate to 'tack on' to this Bill.
21. Moreover, from our experience of the SFO's cases, we consider that its focus on the reform of corporate criminal liability distracts from the real issues that face the SFO (and the UK's economic crime enforcement agencies more generally) - primarily, inadequate funding.

[9] https://www.lawgazette.co.uk/law/new-failure-to-prevent-offences-on-the-way-former-lc-predicts/5113908.article accessed 15 Nov 2022.
[10] Fourth Sitting, 27 October 2022. Q270.