

UK Financial Crime Crackdown Hints At US-Style Prosecution

By **Mark Taylor**

Law360, London (January 19, 2017, 5:01 PM GMT) -- As the U.K. looks to toughen up on corporate economic crime, lawyers say enforcers are building on similar efforts to tackle bribery and tax evasion with an eye toward U.S.-style prosecutions.

Issuing a call for evidence Friday, the Ministry of Justice is reviewing corporate criminal laws meant to punish and prevent economic crimes such as fraud, false accounting and money laundering.

The consultation asks commenters to consider the inclusion of both vicarious liability and "failure to prevent" offenses in the corporate criminal regime. Vicarious liability, which is used in the U.S., refers to a situation where someone is held responsible for the actions or omissions of another person, but has a limited application in common law. In the U.K., it is most often used in civil rather than criminal matters.

Given these shifting attitudes toward corporate malfeasance, lawyers who spoke with Law360 warned that corporations could be increasingly at risk of criminal prosecution.

"The government is looking to simplify how the prosecuting agencies can prosecute corporates for misconduct by employees or those they are connected to, and looking to give prosecuting agencies greater ability to be able to pursue the corporates," said Michael Ruck, financial services attorney at Pinsent Masons LLP.

Serious Fraud Office Director David Green has repeatedly called for the U.K. to move toward vicarious liability as used by U.S. authorities to prosecute corporations. And Ruck said there has long been talk in the government of having a failure-to-prevent offense, similar to the Bribery Act and new tax evasion laws entering force.

Guy Wilkes, financial services regulatory and enforcement partner at Mayer Brown International LLP, said that "the SFO in particular has long lobbied for changes which will give it 'U.S. style' powers to punish corporates and will be buoyed by its recent success against Rolls-Royce."

Wilkes is referring to the £500 million (\$615 million) deferred prosecution agreement the SFO entered into with Rolls-Royce PLC this week concerning the British manufacturing giant's arms business. It followed a four-year investigation into bribery and corruption, and continues into the conduct of individuals.

Under a so-called DPA, the prosecutor still charges a company with a criminal offense, and the company

has both to admit wrongdoing and pay a fine. But the firm then won't face a trial or possible conviction, avoiding sanctions and reputational damage.

"Look at recent events such as Rolls-Royce or where the Serious Fraud Office has been successful around the failure-to-prevent offense around bribery. It is a step forward for prosecuting agencies in regard to where they are now for them to be able to prosecute corporations for failure-to-prevent offenses," Ruck said.

Prior to the Rolls-Royce case, the SFO has secured two DPAs: in July 2016, with an unnamed company referred to as XYZ, and in November 2015, with a former subsidiary of South Africa-based Standard Bank. The unit, now part of China-based ICBC Ltd., promised to pay \$32.2 million in sanctions after two former employees allegedly paid \$6 million to bribe members of the Tanzanian government in 2013.

Securing more deferred prosecution agreements has been a key policy for the SFO since their introduction in 2014 as part of the Crime and Courts Act.

"At the moment, none of the DPAs settled in the U.K. have been tested in terms of the individuals defending related prosecutions. That in itself may change the complexion on the success of DPAs," said Louise Hodges, partner at Kingsley Napley LLP.

She said the claimed benefits of self-reporting have been championed for some time, and the Minister of Justice's call for evidence only extends that. "The themes coming out of the DPAs that have been settled are that cooperation is key. Part of this is early reporting and reporting of misconduct that may not have been known to the SFO without having conducted such an extensive investigation themselves," Hodges said.

The latest move is part of the government's long-running effort to improve the conduct of corporations — and senior management in particular — after decades of scandal that tarnished the reputation of the City of London.

"Both the Financial Conduct Authority in the U.K. and the Department of Justice in the United States have argued that bringing enforcement actions against corporates has only limited effectiveness and [are] looking to increase the number of actions brought against individuals as a way of improving behavior," Wilkes said. "The FCA's Senior Managers Regime in the U.K. and the DOJ's extension of its policy to hold individuals to account — as set out in the so-called Yates memo in the United States — are examples of this countertrend."

Lawyers say adding the threat of criminal liability will also further spur corporations to root out bad behavior. The U.S. Department of Justice's Yates memo encouraged prosecutors to focus on individual liability in corporate misconduct, and reverberated in courthouses and boardrooms around the country when it was released in 2015.

"The message is going out that while there may be targeted companies that actually face criminal proceedings, the idea is everyone improves their corporate governance to reduce the risk of prosecution," Hodges said.

It may also trigger a more general discussion of whether the criminal justice system should be used to punish corporations, Hodges added.

"One of the options is better regulation, and whether the regulatory framework is more appropriate to resolve some of these issues," she said. "The business sector may be much more open to better regulation and legislation related to corporate governance rather than wider corporate criminal offenses or liability."

While the Financial Conduct Authority, Britain's financial watchdog, has been vocal on promises to ease the burden on beleaguered money laundering reporting officers and compliance professionals, lawyers believe the rhetoric coming from the government and agencies such as the SFO runs counter to that.

For banks and financial firms, the call for evidence, open until March 24, is earlier in the process than a formal consultation, but lawyers said was significant for firms to note the general direction of travel.

"Of course, the primary purpose of a criminal regime is to deter wrongdoing; however it is difficult to see how an individual would be better motivated by the prospect of their employer being prosecuted rather than themselves personally," Wilkes said. "There may also be a concern that the SFO, if focused on obtaining multimillion-pound settlements and deferred prosecution agreements with corporates, will allow the individuals primarily responsible for wrongdoing to slip through the net."

It is also overlapping with a piece of legislation currently making its way through Parliament, the Criminal Finances Bill, which contains provisions to punish the failure to prevent tax evasion.

"It would be an ongoing signature of creating corporate offenses in relation to liability in relation to individuals connected with them; we have had bribery, tax evasion, we then have economic crime and fraud, you can see that chain," said Ruck. "The Criminal Finances Bill and the current call for evidence both illustrate the desire to make the criminal prosecution of corporates easier."

--Additional reporting by Alex Davis, Melissa Lipman, Cara Mannion, Brian Amaral and Ed Beeson.
Editing by Mark Lebetkin and Sarah Golin.