CITY OF LONDON LAW SOCIETY – CORPORATE CRIME AND CORRUPTION COMMITTEE

REFORM TO THE IDENTITY DOCTRINE: RESPONSE TO HOME-OFFICE PAPER

MAY 2023

Introduction

1. The views expressed in this paper are those of the City of London Law Society ("CLLS"), Corporate Crime and Corruption Committee ("Committee").

2. The CLLS represents more than 18,000 solicitors through individual and corporate membership, including some of the largest law-firms in the world. The Committee is made up of senior, specialist practitioners, who have a particular focus on economic crime matters.

3. The views expressed by the Committee are not necessarily those of any individual member, or member-firm. Committee-members are selected on an individual basis, and it is entirely possible that individual members or firms may take positions which are distinct from one another or those of the Committee.

Consultation Process

4. The Committee Chair learned of this consultation late on 28 April 2023. A response was requested by 5 May 2023. In the time allowed, it has not been possible for the Committee to meet or exchange views, save by means of an email poll. The time limitation is also likely to have prevented people who were on holiday or had work commitments from participating. In fact, some responses were received later than the requested submission date and this submission has been delayed until the next working day, Tuesday 9 May, in order to accommodate these. It follows that responses are not as detailed as they might have been, nor has there been the range of consultees that might otherwise have been available.

Initial Feedback

5. There is a **diversity of opinion** about the proposal to reform the identity doctrine. There was a slim majority of respondents who were in favour. However, we do not consider this to be of significance given the much smaller-than-average number of respondents, due to lack of notice. In the circumstances, this paper cannot be said to reflect a settled view of the Committee as a body. We pass on the remarks and views of consultees for the benefit of the Home Office.

6. Of those **in favour**, more than one opinion was that the present conception of the identity-doctrine, as expressed in *Tesco v Nattrass*, is no longer appropriate to the business practices of today. It is recognised that, within many organisations, powers of decision are frequently delegated to senior managers who are not members of the board of directors or likely to meet the strict "directing mind and will " test. However, these managers will have been given a great deal of operational autonomy to decide on the organisation's approach to particular topics.

Whether the organisation is liable should not depend so heavily on contingent factors such as the official status from time-to-time of such individuals.

7. Of those **against**, more than one objection was to the apparent lack of clarity in the definition of "senior manager" and/or "high managerial agent" without the existence of significant case law to define these categories. There is the potential for the judiciary to interpret these categories more broadly than might be intended.

8. Other views included the fact that, despite the wider definition, Canada and Australia have not had many successful prosecutions, which could suggest that there is no indication the prosecution rates would be significantly better under a revised definition.

9. Another view was that the "senior manager" threshold would still not capture common criminality by lower-ranking employees and agents, so that companies could still organise themselves to avoid liability for senior management.

10. Lastly, at least one objection was less to the principle but to the piecemeal approach which this process seemed to indicate (i.e. tacking identity doctrine reform onto the ECCT Bill at a late stage), and the attendant risk of un-intended consequences as regards drafting and/or dovetailing with other legislation.

11. There was one topic on which the respondents were unanimous, which was the desirability of including potential offending by corporate under the proposed extended identity principle (i.e. on the basis of the acts / mens rea of a "senior manager") within the ambit of **Deferred Prosecution Agreements**, as provided by the Crime and Courts Act 2103, Schedule 17.

12. We note that the Home Office paper mentions restricting the relevant offences to those mentioned in Schedule 17 of the 2013 Act (at least initially). Given that the penalties for corporate offending are restricted to the financial plane, it is in the public interest for there to be an option, in the right case, for an offending organisation to make appropriate restitution but avoid a conviction, so as to protect the interests of innocent stakeholders, such as employees, creditors, market-counterparties and investors.

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