

ICAEW



BUSINESS AND ECONOMIC CRIME IN AN INTERNATIONAL CONTEXT

A review of international law and practice in relation
to crimes committed by or on behalf of business

MARKET FOUNDATIONS INITIATIVE



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1. INTRODUCTION

This report provides a review of the main types of business crime – that is, crimes which are committed in the course of business, intended to result in an unfair advantage to a business or its owners or employees. A broad analysis is given of the different ways in which such crimes can be defined and enforced in a number of different jurisdictions, taking into account the ambiguities that inevitably arise in any complex interplay between interlocking systems.

The criminal law in any jurisdiction gives a framework defining the boundaries to acceptable behaviour, including in relation to economic activity. Clear and consistent boundaries help to ensure that all businesses are held to the same standards of behaviour, so that business decisions can be made on appropriate economic grounds without the distortions that can result from inappropriate or unfair behaviour. The differences between states as to how the law is defined and interpreted can make it difficult for cross-border commerce to develop with a common understanding of what is acceptable and what is not. The aim of this report is to help develop that understanding and to promote compliance with the law as part of an ethical and sustainable basis for economic development.

2. FACTORS MOTIVATING BUSINESS CRIME

The scope of this report is the discussion of crimes committed by or on behalf of legitimate businesses. Clearly there are risks to businesses in allowing their employees or managers to engage in illegal activity on their behalf, in addition to the normal human aversion to seriously bad behaviour committed by themselves or others. It is in the enlightened and long-term best interest of companies to act both legally and ethically. However, the pressures to commit crimes can be strong. These include:

- **Inadvertent criminality:** many companies seek commercial advantage by operating close to the boundaries of the law. It is generally in the public interest for commerce to be conducted with vigour and enthusiasm, and thus it should not be needlessly constricted nor should the impression be given that governmental authorities will take arbitrary action against activities which are being conducted within the bounds of the law. However, there may be occasions when businesses stray beyond the boundaries into criminal activity because of a misunderstanding of where those boundaries lie, a reluctance to spend time finding out, or because complexities and international variations make it difficult to do so.
- **Target or performance pressure:** pressure on employees or managers to perform well, or achieve targets, may lead them to operate illegally, in order to achieve results, or to appear to do so. This can happen at every level, from salesmen offering bribes to buyers in other firms to achieve greater sales, to the boards of major companies encouraging or being complicit in false accounting in order to mislead financial markets and thus achieve a financing advantage.
- **Imminent collapse:** performance pressure can become particularly acute when a business is in danger of insolvency and management and employees become increasingly desperate and likely to take any possible action (including illegal ones) in an effort to save a business, and their own future with it. The rate at which corporate fraud is committed, as well as the rate at which it is discovered grow quickly during economic downturns.
- **A poor control or ethical environment:** as with any other area of life, criminal activity will be more likely to take place in a business environment where the perpetrators think that their behaviour will be condoned or that they can get away with it without repercussions. Not all such crimes will be committed by individuals for their own direct advantage – some will also be committed for the benefit of a company, and even in the belief that the perpetrators are doing the right thing.

Harsh conditions and strong motivating factors do not make criminality any more acceptable than it would otherwise be. Corporates wishing to prevent such behaviour would do well to introduce a strong and consistent tone from the top and an effective system of internal control. The best interests of a company will be served, and better consistency achieved, if the controls aim not just at simple compliance with the law but also with a principles-based ethical policy, aiming to introduce high standards of integrity throughout the organisation, its service providers and agents. A number of discussions on the importance of ethical policies and their implementation are available, including ICAEW's *Instilling Integrity in Organisations*.¹

¹ http://www.icaew.com/index.cfm/route/158832/icaew_ga/en/Technical_and_Business_Topics/Thought_leadership/Market_Foundations/Integrity

3. CRIME AND OTHER TYPES OF MISBEHAVIOUR

3.1 Identifying crime

In theory, and ideally in practice, crime is that category of misbehaviour that the state considers so serious and undesirable that investigatory and punitive action against it is warranted (and carried out) by the state itself, whether or not separate action is also taken by the victim or any other party directly affected.

The relationships between crime, ethical and legal obligations and different types of legal obligations can be complex, though in a system where the ultimate objective is fairness between individuals, corporate entities and the state, all will have broadly consistent desired outcomes.

Disputes between different parties (individual, corporate or state) which cannot be resolved by discussion between the parties themselves may be dealt with judicially, in civil or commercial courts, or by non-judicial means such as formal and mutually agreed arbitration or mediation. Where a dispute involves one party being the victim of a criminal offence by another, then separate actions may be taken by:

- the state in seeking justice and the rule of law; and
- the victim (or those acting for them) in seeking restitution.

A criminal conviction of the offender will frequently strengthen the case of the victim for the receipt of compensatory damages.

In many jurisdictions, there are also complex systems of regulation, governing a range of activities which are capable of causing particular harm to the economy, society, or various sections of it. Regulatory bodies can be formed, which are analogous to professional bodies in the way they can impose standards and discipline over a regulatory population of individuals and businesses. Typically, even for state regulation, regulatory infringements are punished by administrative means – in the UK described as civil rather than criminal law. However, in some cases the most serious or persistent failure to comply with regulatory requirements can also be punished by criminal means.

3.2 Crimes which are not enforced

All but the most orderly of jurisdictions will have criminal offences which remain unrepealed and therefore still in force, but which are no longer enforced or even known about by the huge majority of the population which is in theory still bound by them. An extreme example would be that until a few decades ago, there was still a statute in force in Scotland which required every lord of that jurisdiction to hunt the she-wolf and her whelps at least three times a year. A once good public protection statute was pointless several hundred years after wolves had become extinct in Scotland and the nature and responsibilities of the aristocracy had very radically changed.

Less clear cut can be a casual approach to compliance with written law, whereby both the population to which the law applies, and the authorities which are there to enforce it, have a mutual understanding that what is actually required is something very different to what is laid down in statute. So, in some states, where tax inspectors anticipate that every tax return they receive is in some degree misstated, their performance may be judged by the degree to which they can negotiate an increase in the tax payable from the unrealistically low level which would be the logical result of the information they initially receive.

In many jurisdictions, also, the extent to which the criminal law is enforced depends to a large extent on whether police and other law enforcement authorities have sufficient resources to do their job, and the crime involves a policy priority (formal or informal) of their government. In the UK, for example, whether a known or suspected crime is prosecuted will depend both on whether the evidence available is strong enough that a conviction is likely to be achieved, and also whether a prosecution is considered to be in the 'public interest'.² Although clear statutory guidance is available on how the public interest should be interpreted, this still lends a measure of uncertainty as to how individual 'criminal offences' will be considered. In addition, police forces may decide themselves not to collect evidence or to lay criminal charges, so that the prosecution service is not in a position to make their own judgement on public interest grounds. On occasion, whether or not a criminal investigation is completed, and a criminal prosecution is made, will depend on the willingness of the victim to make a strong case for it to be done.

Such inconsistencies and anomalies result in a number of problems including:

- costs and difficulties borne by those trying to comply with the full extent of their legal obligations when the consensus of the society concerned is that this is neither necessary nor desirable;
- the possibility that basically ethical businesses may leave themselves open to unexpected and arbitrary enforcement in areas where they believe that they are acting within acceptable cultural norms; and
- uncertainty affecting decisions at all levels, from government policy to business planning, because they are made against a fundamentally unclear and unstable background.

There is also a risk of the most ethically sound businesses, which would be the most desirable in economic and social terms, being disadvantaged, at least in the short term.

² See http://www.cps.gov.uk/publications/code_for_crown_prosecutors/index.html

4. ISSUES AND COMPLEXITIES IN A SMALL WORLD

4.1 Difficulties in understanding foreign criminal law

General

Language and translation difficulties are a substantial, though not the only, difficulty for people of different cultures in understanding each others' law. There is an understandable tendency to assume that the law with which one is brought up represents an acceptable norm, which can make adapting to new environments difficult.

Translation is made more difficult by the tendency for people and communities to use language to their own advantage, as well as the tendency for language to change over time. For example:

- Euphemisms can be used to obscure discussions about illegal activities or to make them appear more acceptable. Common crimes such as murder and theft have produced very large numbers of synonyms, including colloquialisms and slang terms. The extent and nature of some common commercial behaviours can also be obscured by such developments.
- Governments can also sometimes confuse matters by their use of language in a difficult or confusing way. This may be through acceptance of a euphemism that has gained general use, or for policy reasons.

Some particular examples of terms in common use with more than one meaning, or where language has been deliberately misused are given below. There are likely to be more, and more will emerge over time.

Trust law and anti-trust legislation

A particularly difficult case of the development of language is in US 'anti-trust' legislation. Dictionary definitions of 'trust' in most versions of spoken English are written in terms of fidelity, and worthiness of being relied upon – the ability to trust others to do right and act in accordance with their commitments is an essential element of efficient economic systems. But in the context of US criminal anti-trust law, the behaviour being proscribed is a criminal anti-competitive cartel – effectively, a group of commercial organisations acting together in their mutual interest, which cheats customers, suppliers or others by manipulating prices or other trading conditions. It might be that the use of the word 'trust' to describe a criminal cartel was the result of partners in such a cartel describing their activities by the use of a euphemism that was later accepted as normal usage in the US. The outcome is frequent confusion in other jurisdictions.

This is particularly difficult in that in many common law jurisdictions trusts are a frequently used and flexible way of structuring and preserving assets and enterprises, which have a long legal history, with clear if sometimes complex requirements and characteristics. Rather than having their own legal personality, as is the case with companies or continental European foundations, trusts are a legal arrangement without a separate legal entity. The property that forms the assets of the trust is under the legal ownership of a number of trustees, who administer the assets on behalf of beneficiaries who may range from a single individual to a great number of people. This kind of arrangement is used very extensively in the UK and many other common law jurisdictions, for such purposes as protecting the inheritance of young children or the disabled, for the management of many non-profit making clubs and societies, or the management of huge charitable trusts.

Some trusts have undoubtedly been used for illegitimate purposes, such as to obscure the real ownership of assets for purposes of tax evasion or other criminal activities. However, the huge majority provide an easily formed and readily understood means of ensuring that assets are under the control of people who can be trusted (backed by the operation of the law) to use them for the benefit of a defined group of people who are unable to do so themselves, or for whom it would be impractical.

Civil law

'Civil law' is a phrase used in a number of contexts, usually in contrasting one system of law with another. Three examples are given below.

Civil law jurisdictions and common law jurisdictions

Most European, and many non-European jurisdictions fall broadly into one of these categories. Civil law jurisdictions have a code of law which in theory at least is self-contained and complete. This originated in the Napoleonic Code, and has been retained and adapted by many of the European nations which were once conquered by the French General Napoleon, a couple of hundred years ago, or by countries colonised by those nations. Common law jurisdictions, by contrast, have a system of law which has been built over the centuries by judges following (so far as they can) not only the statutes of their Parliament or legislature, but also the precedents set by previous judicial decisions. These systems are radically different in theory and practice, the first being a 'top down' system of law, with the second being a 'bottom up' system. However, both have proved themselves to be serviceable and robust, persisting in many jurisdictions long after the original reason for their introduction has passed.

Civil law and criminal law

These are the terms used in the UK, and some other jurisdictions, to distinguish between the justice dispensed by the criminal courts, which is intended to punish wrong doers and deter others from wrong doing, and those that in contrast are intended not to punish individuals but to right wrongs through restitution (the payment of damages) and by settling questions of law between differing parties. This distinction between these two systems of law is in theory clear, although in some cases both systems can be brought into force in relation to a single unlawful action. In addition, some public or indeed private authorities can levy sizeable fines under a civil system of justice which are difficult to see in terms that are other than punitive, including 'punitive damages' in the US. Legitimate businesses and their owners and managers will tend to prefer civil settlement – fines and restitution only – of their wrongdoing rather than criminal settlement, as the stigma associated with civil fines is less, and there is no question of imprisonment.

Civil law and military or religious law

In this context, civil law is the body of law which is assembled by non-military governments, and which applies to the population as a whole. In some states, and for some periods of their history, a separate system of law has applied to members of an established religion or to the armed forces. Sometimes, military law (also sometimes described as martial law) can take over from civil law, for example after a military coup. And some states adopt religious law as their system for general application, as for example in those Islamic states which use Sharia law as their general system. The most important manifestation of religious law, in a commercial context, is the law relating to Islamic finance.

Tax fraud, evasion, avoidance and planning

Tax evasion is the deliberate and criminal defiance of the tax laws of a jurisdiction, to lessen the amount of tax paid. Tax avoidance is the careful arrangement of one's affairs to avoid paying tax, but which remains within the boundaries of the law.

Tax law in any jurisdiction is notoriously difficult to write in a way that ensures that its effects are fair and consistent, that it raises enough money to achieve its aims but which also promotes social objectives such as encouraging investment and minimising burdens on the poor. This can lead to very complex systems of tax law, which by their nature can lead to opportunities for tax avoidance which are very substantial, and unforeseen by the governments putting the legislation into place. Such avoidance schemes can be seen by tax authorities and national governments as highly undesirable, and even as unethical. Many tax-payers, by contrast, would argue that the criterion for the payment of tax is the actual law and that it is up to governments to legislate effectively and promptly remove loopholes which have been used.

Nevertheless, governments and tax authorities sometimes attempt to stigmatise tax avoidance in a way that is difficult to justify in relation to behaviour which is deliberately designed to remain within the bounds of the law. This has led companies which are considering the structure and ordering of their transactions in a way which is efficient for tax minimisation, as well as for management and financing purposes, to describe this as tax planning rather than tax avoidance.

Some jurisdictions treat tax evasion as a misdemeanour, rather than as a serious criminal offence, and take no action to prevent or report foreign tax evasion carried out through or with the assistance of their financial or legal systems, believing that it is not part of their responsibilities to enforce the tax regimes of other states. This is difficult for jurisdictions with tax systems that they believe to be fair and equitable, but that they see as being undermined by tax evasion with the consent or connivance of other jurisdictions. One of the ways that they have responded is to point out that sophisticated transnational tax evasion almost always includes fraud with illegal benefits being obtained through the deliberate misstatement of financial information. Tax fraud sounds more dramatic, and better expresses the seriousness with which they view these crimes.

There has been considerable confusion about the use of these terms, which is not surprising, given the way in which the boundaries between them have been blurred, both by criminal tax evaders and governments attempting to control tax avoidance by non-legislative means. It is therefore wise to be open to the possibility that they have been used inaccurately in any context.

4.2 Inconsistencies in and conflicts between law in different jurisdictions

Occasionally, there will be actual and acknowledged conflicts between the laws of different jurisdictions even where those jurisdictions are allies and frequent trading partners. These can arise, for example, where one jurisdiction introduces crime prevention measures that conflict with another jurisdiction's understanding of the rights and freedoms of individual citizens. An example arose in recent years when the United States attempted to require extensive personal details of all air travellers flying to the US, as an anti-terrorism measure. European jurisdictions with constitutional restrictions on personal information being held by the state refused to allow this information to be given. This issue has now been resolved, but only after considerable discussion, and demonstration of goodwill on both sides.

More frequently, inconsistencies will arise because of cultural and historical differences, rather than because of distinct and clear differences of principle or intent. Major long-established jurisdictions can have sophisticated and very extensive systems of law which are lacking in jurisdictions which have historically found them unnecessary or which have lacked the resources to put them in place or enforce them once they are included on the formal list of statutes.

5. ENFORCEMENT ISSUES

5.1 The international context

As noted earlier, the extent to which criminal legislation is enforced can radically affect the way in which it is interpreted by those who are in principle bound by it, including businesses. This can be a particular problem for cross-border business, where questions arise as to whether home or host state norms should be followed. This has, over recent years, led to an increase in international law enforcement efforts, both by individual states seeking to enforce their law extraterritorially and by international agreement.

5.2 Extraterritorial enforcement by some states

The US in particular interprets its domestic legislation in a way which leads to effective enforcement against many other states, individuals and businesses. This can be carried out in a number of ways and with a number of implied justifications, for example:

- US citizens are still bound by US criminal law wherever they are located. This can occasionally leave US citizens with difficult judgements to make if they are located in a host jurisdiction where the law diverges from their home law.³
- Foreign companies listed on US stock exchanges are bound by US commercial and securities law, whether or not they are also listed on a home stock exchange and carry out a majority of their business elsewhere.
- Some US offences, such as wire fraud can be prosecuted against any organisation using the US currency transfer system for moving the proceeds of the offence, wherever the offence is committed, or wherever the victims are located.
- Through the operation of extradition treaties, suspects can be transferred to the US for trial when the victim is located in the US. In principle such treaties are symmetrical, with those suspected of crimes in the treaty partner country as easily transferred there for trial, but in the case of the UK, much concern has been raised that in fact it is much easier and more common for suspects to be transferred to the US than in the other direction.
- The US can put considerable political and/or economic pressure, for example on some small states to amend their legislation to make it consistent with US legislation and US national interests.

This extraterritorial enforcement by the US can have many international advantages. For example, the US Foreign Corrupt Practices Act has been effective in drawing attention to, and taking action against, the widespread use of bribery by international businesses based not only in the US but in other jurisdictions. US anti-trust legislation has also been effective in reducing the damage caused by international anti-competitive and abusive trading cartels.

However, extraterritorial enforcement can also have a number of disadvantages, such as a lack of international consensus in how such enforcement is carried out, and perceived prioritisation of the US national interest. At its extreme, this can be seen as the inappropriate use of its power by the US. For example, some US citizens can imply that much of their law should apply throughout their 'backyard', by which they mean all the independent Caribbean nations. It should be noted, though, that even the most powerful nations can be influenced by discussion and logic.

³ An example of this is sanctions law, where the US sanctions regime is more extensive than that imposed by UN or other international requirements. US citizens who cannot avoid the issue may have to choose between complying with their home country law or with anti-discrimination legislation in their host country.

5.3 International agreements and conventions

A more desirable way of tackling cross-border and other international crime is through the operation of international agreements and conventions. However, in legal terms these will have limited effectiveness unless they are fully enshrined in the law of the relevant jurisdictions and are enforced.

There are a number of codes of conduct for multinationals, including those issued by the United Nations, the OECD and the International Labour Organisation. They are well developed and influential and have a lot of moral authority. However, they do not have the force of law.

In contrast, there are two sets of international requirements which have been adopted widely in the laws of individual jurisdictions, and are subject to 'mutual evaluation' procedures which help to ensure that both the way in which they have been enacted, and how they are enforced, will give full effect to the internationally agreed requirements. These are the OECD Convention on the Bribery of Foreign Public Officials and the Financial Action Task Force (FATF) Recommendations for combating money laundering and terrorist financing. Although they are described as Recommendations, FATF undertakes mutual evaluation in a way which strongly assumes that all of them should be applied in the law of all their members. These are considered below, in sections 6.1 and 6.2.

It can be a long process for international conventions to be agreed, and it can take even longer for them to be implemented in jurisdictions which have in theory signed up to them. For example, the UK has only recently passed anti-bribery legislation which fully implements the OECD Convention, and it will not be brought into force until spring 2011. Despite its vigour in applying its own law on an extraterritorial basis, the US is not compliant with all the FATF Recommendations, having failed to introduce anti-money laundering systems and procedures requirements for lawyers and accountants – perceived 'gatekeeper' professions which give their clients access to the financial system.

6. SPECIFIC CATEGORIES OF ECONOMIC AND BUSINESS CRIME

6.1 Bribery and corruption

Corruption is the misuse of a person's position to commit crimes, which can include theft, extortion and a number of other crimes, including the soliciting of bribes. Corruption is not limited to public officials. Trusted company employees can also take bribes to dishonestly advantage a particular customer or supplier, or to steal company assets. However, corruption can be particularly damaging when public officials are involved.

Bribery is the offering or paying of illegal inducements, usually in exchange for an unfair and illegitimate advantage. It is international concern about the paying of bribes to foreign public officials that has led to the development of a strong international consensus on the prevention of the payment of bribes internationally, in the form of the OECD Convention on the Bribery of Foreign Public Officials. The Convention requires OECD member countries to introduce criminal offences for the payment of bribes by any of their citizens and corporations, to public officials in whichever jurisdictions they are based or wherever the bribe is paid. This has introduced an element of enforced extraterritoriality into the law of many jurisdictions – the home state law applies to its citizens, even in the absence of the relevant host state law. However, perceptions of economic domination by more powerful states are mitigated by the consensus agreement of the Convention by many jurisdictions together, and by the fact that the main benefits accrue to host nations, not the home states of the corporations which expect to benefit from the payment of bribes.

The OECD Convention has brought a lot of consistency to international definitions of bribery, but there are still a number of elements of it where there may be variations in the way that it is implemented in different jurisdictions. These include an unclear approach to facilitation payments, which are discouraged but not forbidden under the current draft of the Convention. These are small payments to induce a public official to carry out their normal function – that is a payment to do their job as they should, as opposed to a payment to neglect to do their job, or to do it inappropriately. It is generally recognised, however, that even facilitation payments are very socially damaging in any jurisdiction, as they promote a cultural acceptance of bribery in a way that tends to lead to the spread of corruption, undermining legitimate governance and the rule of law. Some jurisdictions, including the UK, have already introduced legislation which will effectively make the payment of facilitation payments a criminal offence by their nationals in any jurisdiction, as well as the payment of more significant bribes.

Some states find it difficult to introduce and maintain the kind of clear, principled and consistently applied system of raising tax revenue that enables government and other public functions to be carried out in an orderly way. In such states it has been known for it to be tacitly accepted that junior public officials will raise sufficient funds through facilitation fees to give themselves a reasonable income. However, such an approach means that the level of 'fees' raised lacks any transparency, and is likely to impact different organisations and individuals unfairly – including those who cannot reasonably expect to bear such impositions, such as the very poor. A better solution is for jurisdictions to introduce clear and transparent laws governing the circumstances in which public officials can legitimately charge fees and to whom. In that way, a level of democratic accountability is introduced and the chances of injustice, to different commercial businesses as well as to individual citizens, is reduced.

A jurisdiction in which it is practically impossible to conduct business without the use of facilitation payments runs the risk that as the prohibition on such payments extends globally, fewer international businesses will be prepared to do business in that state. There is, therefore, increasing urgency for less developed states to raise their transparency and introduce written law covering the payment of fees to public servants, where they are appropriate.

6.2 Money laundering

Money laundering is the illegal handling of the proceeds of one or more criminal offence, with the objective of obscuring its origins so that it can be enjoyed by the offenders, or used to further more crime. It is a crime which requires other crimes to have been committed – in the UK described as ‘predicate offences’. It represents a vital support function to most organised crime and terrorism and is, therefore, among the most important of the crimes addressed in this report.

Money laundering may be committed by commercial concerns, mostly at the smaller end of the scale, as a side business to their legitimate activities. For example, cash businesses, such as retail shops or clubs and restaurants, can add illegal funds to their normal takings for banking purposes, and refund them in more apparently legitimate form to the original criminal, after taking a profit margin. Larger entities, such as financial institutions, can turn a blind eye to suspect funds, in order to maximise their business.

This has been recognised by the international community as sufficiently important an issue that it has been internationally agreed that money laundering should be universally recognised as a crime in its own right, covering the proceeds of serious crime committed not only domestically but also internationally. Further, regulations should introduce specific requirements on financial institutions and certain trades and professions (including lawyers and professional accountants) to minimise the possibility of inadvertently engaging in money laundering activity, and to report any suspected laundering activity to their law enforcement authorities.

These international standards are agreed, and enforced through mutual evaluation, by FATF, which was founded in 1989 to examine money laundering at national and international level, and to recommend measures to combat it. From roots in a small number of well developed countries, there has been growth not only in the number of member countries of FATF itself and ‘FATF-like regional bodies’, but also in the scope of the predicate offences covered by anti-money laundering procedures. From an initial concern with drug trafficking and the organised crime cartels which tend to deal in drugs, the FATF Recommendations now cover all serious crime and funds intended for terrorism as well as the proceeds of past crimes. Bribery and corruption are an acknowledged source of criminal proceeds which need to be laundered in the hands of the bribe-receivers and in response the FATF Recommendations have been strengthened to require special procedures to be adopted for ‘politically exposed persons’, defined as foreign public officials and their close family or associates.

6.3 Corporate fraud

Fraud is the gaining of an illicit advantage through deception and in particular the manipulation of financial information or accounting records. The word ‘fraud’ has been used in this context for many years and it has been used in many contexts, but an exact internationally recognised definition is less easy to determine. For example, the US has differing definitions of fraud in separate states, but also additional federal offences of ‘wire fraud’, which cannot apply unless telephone or other electronic communications media are used, and ‘mail fraud’ where the postal services are used for fraud across state boundaries.

The UK has moved in the last decade from a position where the lack of a single definition of fraud in the law caused considerable confusion. Recently, the UK has passed and brought into force the Fraud Act 2006 which defines the criminal offence of fraud widely and in exact terms. The primary offence includes any gain obtained by:

- false representation;
- failure to disclose information which is legally required to be disclosed; and
- abuse of position by any person who occupies a position in which he is expected to safeguard, or not to act against, the financial interests of another person.

Even with this very wide definition, though, legislators have found it necessary to introduce a number of other fraud offences, covering specific situations, to protect the public in those circumstances.

The most clearly defined fraud offence, in international terms, is financial statement fraud where a corporate entity’s annual accounts are deliberately misstated for some purpose or another. With the growth of internationally accepted requirements for financial statements, including International Financial Reporting Standards, it is becoming more difficult for companies to argue that their misstatements arise from anything other than fraudulent intent.

Other offences which come within the UK definition of fraud, but which may be separately defined in other jurisdictions, include market manipulation and insider dealing. They involve the use of market dominance or selective access to information used to manipulate price movements in capital markets, enabling unfair profit making or loss avoidance.

6.4 Cartels and other competition offences

Cartels are illegitimate agreements whereby business enterprises that are assumed to be competing with each other, with the effect of giving the customer or supplier a fair market price, in fact conspire with each other to fix prices to give them each a share in a monopoly profit. This lacks integrity in any jurisdiction, representing an unfair profit, and is being formally added to the list of specific criminal offences in a growing number of jurisdictions. In others, it may come within the definition of 'fraud', as it depends for its success on the victims being unaware that the market in which they are trading has been distorted, and so an element of concealment is necessary.

In the meantime, the US vigorously enforces its 'anti-trust legislation' (in UK English, anti-cartel legislation) against companies discovered to be participating in a cartel which affects US markets, and where it can use one of the methods of extra-territorial enforcement outlined above.

Illegal cartels can be difficult to detect, so some jurisdictions have extensive 'whistleblowing' arrangements, where the first member of a cartel to inform to the authorities on the others, receives comparatively lenient treatment compared with the remaining members. This may include immunity from prosecution for a criminal breach of the law. As with other business crimes, however, a better protection from the risk of criminal liability is to ensure that systems of control are sufficiently strong that no crime is committed for or on behalf of the business.

6.5 Corporate tax evasion

Businesses as well as individuals can evade taxes, as well as avoid them. For multinational companies, it is a natural part of tax planning to try and ensure that taxable profits are made in lower tax jurisdictions, in preference to high tax jurisdictions. National governments are torn between the benefits of attracting business to their jurisdiction with low corporate tax rates, and efforts to collect the greatest amount of tax, in the fairest way, in order to achieve all those purposes for which national funds are required. Very complex anti-avoidance provisions can be introduced into legislation, but still leave considerable leeway for businesses to minimise tax paid by arranging their affairs in one way, rather than in another. Many boards of directors would argue that it is not possible to say which elements of an often extremely complex tax code were not intended to apply as written – the exact legal interpretation is the only realistic interpretation to take. And since the duty of boards of directors is to act in the interests of their shareholders and owners, within the law, it is correspondingly their duty to take such advantage of the terms of the law as are available to them.

Nevertheless, some tax avoidance schemes depart so far from normal commercial practice that they are transparently put in place solely to avoid tax that would otherwise be due, with no other commercial effect. As with most other commercial matters on the edge of the law, an ethical judgement may need to be made as well as a legal one. As with other ethical matters, a useful tool is to consider whether the action being taken is one that the business would be prepared to defend in the public domain, or whether the general public reaction would be that it is unacceptable, with consequent unacceptable reputational damage.

However, in strict terms of criminal law, the distinction needs to be retained, that the criminal offence of tax evasion only occurs where specific laws are broken and tax which is legally due is not paid.

6.6 Usury and riba

Usury is the exploitation of borrowers by the lending of money at extortionate rates of interest. It has been prohibited as a religious and social offence in both the Judaic system of law and in Christianity, though it has fallen out of use as a crime in Christian and Jewish jurisdictions with the growth of financial regulation, which has taken its place in ensuring that financial institutions work in a properly regulated market and do not oppress borrowers.

Riba is similar to usury, in Islamic law. However, unlike the Judeo/Christian concept of usury, riba is still an important concept, taken seriously not just by individual Muslims, but also by those jurisdictions that aspire to follow Sharia law. Riba is a theological concept, taking its authority from sacred texts and specifically the Koran. It gives rise to an absolute ban on charging interest and cannot be amended or reduced in its effect with changes in social and financial practice, as appears to have happened with the similar concept of usury. However, Sharia compliant products can be used in the place of non-Sharia compliant loans, such as monetary advances that are remunerated by a share of profits earned, or other permitted means, rather than by interest. Financial institutions supplying these products typically employ a Sharia board – a committee of well-qualified individuals with knowledge in both financial and theological matters to provide rulings on the exact parameters of compliant products.

To date, it is not completely clear that a global consensus has emerged across all schools of Islamic thinking as to the exact parameters of riba and other Islamic prohibitions. Nor may such parameters ever be completely clear, in the absence of any single absolute authority on theological matters in Islam.

In the meantime, it is incumbent on all financial institutions to ensure that they comply with the law of their own jurisdiction, staying within local regulations for the prevention of lending at extortionate interest rates, any relevant theological requirements for financial products, and also contractual obligations to their customers and others.

6.7 Environmental and employment crimes

Environmental crimes are those actions which damage the local or global ecological system, in contravention of the criminal law, such as illegal logging or waste disposal. Employment crimes are the equivalent, in terms of employment matters, and include the exploitation of child labour, illegal immigrants or slaves.

Environmental and employment matters are among those where requirements and conditions vary most widely between jurisdictions, and where local law can be unclear or relatively undeveloped – although almost all jurisdictions are likely to have basic laws criminalising the most serious violations, such as slavery.

A lot of environmental and employment requirements will be likely to be imposed as a regulatory matter, rather than a matter for the criminal law, but it is important that they are enforced. Where regulatory requirements are poorly developed or enforced it makes it more likely that very serious incidents will occur, with significant social or environmental damage.

One of the issues that needs to be considered by individual jurisdictions, is the means by which businesses themselves can be held to account either for regulatory breaches or for serious violations with criminal liability. It is easier for governments and jurisdictions to cope with serious environmental or employment adverse incidents, if the mechanisms are in place to ensure that corporations, not just their local managers and employees, can be held to account.

In the meantime, as with all ethical and legal matters, individual businesses need to guard their reputations for decent and legitimate behaviour. Where international businesses depend upon compliance with written and enforced local environmental and employment law, without also taking into account global norms, they may find that their compliance with host state norms may lead to severe reputational damage on the global stage.

6.8 Smuggling and exchange control violations

Smuggling is the illicit movement of goods from one jurisdiction to another, to evade tax or because the import or export of the goods is not permitted. Drug trafficking is the most extensive form of smuggling currently prevalent, certainly in terms of value. Legitimate businesses are unlikely to knowingly engage in drug trafficking. However, they could well try to evade taxes by smuggling goods past customs where import duties are high and easy to evade.

Exchange control violations are the monetary equivalent of the smuggling of goods. In recent decades there has been a steady shift for developed economies to move to a free trade system, where all exchange control requirements are removed, and pressure may also be placed on less developed economies to work on the same basis. However, there is increasing recognition that exchange control protection, as well as some limitation of imports, may be an important tool in the improvement of less well developed economies and thus a legitimate requirement for some individual jurisdictions to impose.

Businesses should respect exchange control laws of the jurisdictions where they do business, as for any other legitimate and fair local laws.

6.9 Intellectual property theft and other information infringements

Intellectual property violations can be summarised as the unauthorised use of privately-owned information, including scientific or technological developments, designs, artistic work or performances. Such violations can include industrial espionage (including where illegal access or hacking into computer systems are involved), copyright piracy and the sale of counterfeit goods.

The right to physical private property serves the interests of economic progress and a stable society, by promoting the interests of citizens to work hard to acquire and maintain property, thus increasing general economic growth. Similarly, the right to private ownership of intellectual property promotes the production of new designs, inventions, works of art and performances, for which there would be scant reward if the proceeds of use of the property were a freely distributed public good. However, it is noticeable that while the theft of goods is a heavily enforced crime in most developed jurisdictions, the use of other people's intellectual property is mainly enforced privately, and by civil means, with little use of criminal sanctions.

Private rights to intellectual property are available in the form of:

- Patents – the registration of a new invention, which grants the inventor monopoly rights to use or licence others to use it, thus rewarding the effort of invention.
- Copyright – restrictions on the copying of written material, films, designs, computer programmes and recordings of performances.
- Trademark or brand registration – to reduce the opportunities for counterfeit goods to be passed off as branded goods.

The most widespread commercial violations of information law are committed by small businesses in jurisdictions without easy ways for foreign corporations to enforce their intellectual property rights. This can lead to very widespread copyright 'piracy', with the original publisher or artist unable to profit from their work to the degree otherwise available. To date, the most notable examples of this appear to have been dealt with by discussions at a government level, followed by more or less agreed action.

Given the level of concern expressed publicly, especially by the entertainment and media industries, this would appear to be an area of international law which may well change. International agreement over the extent to which product originators should be rewarded for their endeavour, and how the related law should be enforced, appears to be well overdue.

Without clearer international agreement and enforcement, there must be a danger that true originality in a commercial context will be reduced, as the market reward earned for it is too low. Clearer and more transparent intellectual property transfers would also help to control social harms which can be associated with some intellectual property violations. For example, the sale of poor quality counterfeit drugs has been implicated in the widespread development of resistance of infection to legitimate drugs.

7. GENERAL CATEGORIES OF ECONOMIC AND BUSINESS CRIME

7.1 Political and religious crimes

Most systems of criminal law are introduced by government for the purposes of ensuring the safety of their populace and the stability and fairness of society. However, some societies have introduced other criminal offences which are not justified on that basis, but rather are the outcome of a particular religious or political belief system. These can be difficult to understand by those who do not share that belief system, and in some cases may act against the long-term interests of the society concerned and make it difficult for it to integrate into the mainstream of global society or undertake commerce in a fully effective way.

For example, some societies do not recognise private property, including those exercising some forms of fundamental Christianity or absolute communism. This is an extreme form of recognition of fairness between individuals. However, except in the smallest of societies, this can result in a failure of individuals to work hard in the best interests of the common good, or to take good care of the property held in common, under which they expect to benefit little on a personal basis. Such societies have tended not to last for longer than a generation or two, or when they have grown beyond a certain size. This report assumes that legislation against theft, and other similar legislation intended to preserve private and corporate property rights, are a fair and general feature of criminal law, fully consistent with a mainstream interpretation of good ethics.

In other societies, a ruling elite, absolute monarch or dictator might introduce elements of the criminal law which are aimed at preserving the status quo, rather than for the safety or fairness of society. Such laws may include, for example, imposing severe restrictions on the production and dissemination of information, however accurate, which is critical of current rulers or which is perceived to be to their discredit or disadvantage. Such laws can be difficult to reconcile with ethical requirements for objectivity and integrity.

However, it should be noted that most religious and political belief systems have the good of their societies at heart, and can assist individuals in acting ethically and with integrity.

7.2 Regulatory and administrative crimes

Most jurisdictions have a number of regulatory or administrative laws which apply to specific groups of persons, or to a large number of people but only for specific purposes. Regulatory provisions can be very extensive in highly developed jurisdictions, covering a large number of types of industry and commerce. Examples include:

- the provision of banking, insurance and other financial services;
- the preparation and supply of food products, to ensure health and hygiene;
- the supply of medicinal products, to ensure effectiveness and safety;
- waste management services, for environmental protection;
- public and private transport, to ensure the safety of passengers and other road users; and
- legal and professional services.

Such regulatory provisions are most frequently enforced through civil rather than criminal means, although serious violations may be punishable in the criminal courts. The introduction of a criminal offence for very serious violations can have the advantage of ensuring that business management take the regulatory provisions more seriously than they would be likely to do if there were only civil or administrative enforcement.

7.3 Corporate offences and offences for individual directors or managers

It is characteristic of almost all businesses, and especially large corporations, that ownership and management are divided from each other, and may be widely spread. Decisions can be made by boards of directors, individual chief executive officers, or managers far lower down in the corporate hierarchy, which can have very widespread effects and may include criminal acts. Identification and prosecution of the specific individual or individuals who are culpable in a particular criminal offence can be difficult, and even where they are convicted and punished, this can be an inadequate punishment for the corporate entity and its senior management.

In order to fully reflect culpability and to provide adequate deterrence to future criminal activity, it may be best to have specific criminal offences which can be prosecuted at all of the following levels:

- specific individuals, who have themselves committed criminal offences, whether on their own behalf or on behalf of their employer or a business for whom they have acted as an agent;
- legal persons, such as companies and legal arrangements such as partnerships, on whose behalf a criminal offence has been committed and which have no procedures or controls in place to prevent the illegal activity; and
- individual managers, who have consented to, or connived at, an illegal activity within their business.

In the UK, as an example, in recent years political concern has been expressed over the difficulty of bringing corporate concerns to account for serious failings. Research is being conducted over general changes which could be made to the law on corporate liability, but in the meantime specific clauses have been introduced into specific statutes with particular application to business crime. These have included recent legislation on:

- corporate manslaughter where health and safety lapses are so severe that they have led to the death of individuals; and
- bribery where a business entity can be found guilty of having had bribes paid on its behalf, and as a result be liable for substantial fines.

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