

24 March 2017

Roderick Macauley  
Ministry of Justice Criminal & Civil Law Policy  
3.22 3rd Floor  
102 Petty France  
London SW1H 9AJ

## **AFME Response to the Ministry of Justice's Call for Evidence on corporate liability for economic crime**

Dear Sir / Madam,

1. The Association for Financial Markets in Europe (AFME) welcomes the Ministry of Justice's (MoJ) call for evidence on the issue of corporate liability for economic crime. AFME represents a broad array of European and global participants in the wholesale financial markets. Our members comprise pan-EU and global banks as well as key regional banks, brokers, law firms, investors, and other financial market participants. We advocate stable, competitive, sustainable European financial markets that support economic growth and benefit society.

### **2. Introduction**

- 2.1. We would start by reiterating that AFME and its members are committed to combatting economic crime. To this end, our members place an enormous emphasis (and commit considerable resources) on seeking to detect, disrupt and prevent organised criminals and terrorists from availing themselves of the UK's financial sector. Our members are also committed to ensuring that their businesses are compliant and operate within the law.
- 2.2. That said, AFME has considerable concerns as regards the unbalanced burden that the introduction into the UK of a new strict liability offence of failing to prevent economic crime, or the introduction of vicarious liability, would place on the financial services sector.
- 2.3. The measures proposed appear to be inconsistent with the Department for Business, Energy and Industrial Strategies recent publication "Cutting Red Tape-Review of the UK's Anti Money Laundering and Counter Financing of Terrorism Regime".
- 2.4. At this stage, we have chosen not to answer each specific question but, rather, to provide a general commentary on the MoJ's proposals and to answer those specific questions of particular relevance to our members' businesses.

### **3. Financial services regulation**

- 3.1. Our members are already subject to significant oversight with respect to financial crime compliance in the form of the financial regulatory framework and the existing legal framework around preventing economic crime. As well

as being subject to the existing economic crime legal framework that applies across all sectors of EU industry, our members are subject to:

- The FCA's Handbook rules on preventing financial crime (in particular Principle 3 of the FCA's Principles for Businesses and the SYSC (Senior Management Arrangements, Systems and Controls) rules; and
- The Senior Managers' and Certification Regime (SMCR).

3.2. Our members are currently preparing for the imminent implementation of the 4<sup>th</sup> and 5<sup>th</sup> Anti-Money Laundering Directives, as well as the new UK-specific corporate criminal offence of failing to prevent the facilitation of tax evasion.

3.3. Financial services firms are therefore already subject to an enormous amount of regulatory scrutiny and oversight, with compliance and oversight measures having increased substantially in the very recent past. Financial services regulators (including the FCA) have the power to impose significant fines and other disciplinary measures on financial institutions for wrongdoing (both at a corporate and an individual level).

3.4. It is accepted that there have been significant cases of breaches across the industry over recent years, and that large fines and material disciplinary measures have been rightly levied on financial institutions as a result. However, it is our members' strong view that existing regulatory controls in place on the financial services industry are adequate, and that in the event of failings the financial services industry itself will be held to account by virtue of the extensive existing regulatory and legal framework.

3.5. Whilst we accept that the level of regulatory oversight that the financial services sector is subject to is not replicated across all sectors of industry, we do not believe that the answer to this is to impose vicarious liability or to introduce a strict liability offence of failing to prevent economic crime. We refer above the Government's own publication "Cutting Red Tape" and suggest that the introduction of yet another offence is quite the reverse of this. It is our members' view that more could be done instead to raise the standards of other sectors' corporate governance and compliance standards before contemplating the introduction of new criminal offences across the board.

3.6. For these reasons, we support option 5.

#### **4. Other matters**

4.1. If, contrary to our suggestion above, the government is minded to introduce another criminal offence, we would take this opportunity to provide a specific comment on the possible inclusion of (i) the common law offence of conspiracy to defraud; or (ii) the money laundering offences at sections 327 to 333 of the Proceeds of Crime Act 2002 (POCA), in the list of proposed offences which fall within the definition of "economic crime".

4.2. With regard to (i) the common law offence of conspiracy to defraud, this is a notoriously ambiguous and malleable offence. There have been repeated Law Commission recommendations that it be abolished. It often appears to

criminalise conduct which may not have been obviously criminal when it was undertaken, or to criminalise conduct simply because it involves more than one person – when the same conduct would not amount to an offence if undertaken by one person acting alone. It would not be realistic, or fair, to expect companies to be in a position to design procedures to effectively prevent all persons associated with them from engaging in conduct which might be capable of being construed as a conspiracy to defraud.

- 4.3. With regard to the money laundering offences at sections 327 to 333 of POCA, it is not clear to us what steps a commercial organisation could reasonably take to seek to prevent others from engaging in money laundering, and/or that all corporates should be subject to a legal requirement to take such steps. The existing POCA offences – along with the Money Laundering Regulations 2007 and applicable aspects of the financial services regulatory regime – are sufficient to identify, deter and punish money laundering.

## **5. Going forward**

We have a long history of openly and constructively engaging with various bodies with respect to regulatory and legislative changes that may impact the financial services sector. We would be happy to meet and discuss your proposals in more detail.

Yours faithfully,

Will Dennis

Head of Compliance