Is a cheque book better than a defence statement?

There has recently been a subtle movement away from the traditional approach deployed by the State to tackle economic crime and its consequences. Whilst the criminal justice system is wheeled out and deployed in the more serious or headline capturing cases, there appears to have been a concerted attempt by the government to impose economic penalties and fines upon individuals and companies involved in financial misfeasance through the civil or regulatory route and thus sidestepping the more traditional criminal one.

Whether that manifests itself in the government implementing into statute Deferred Prosecution Agreements (more civil than criminal in its ethos); increasing the role and enhancing the powers of the Financial Conduct Authority or encouraging the settlement of personal or corporate tax evasion through international tax treaties or civil contractual agreements with the HMRC, the reality is that the approach adopted by the government is clearly policy led to move the emphasis away from perceived costly and time consuming criminal litigation with no guarantee of success, to an environment where individuals and companies are encouraged to 'settle' their disputes with the relevant regulator or the government directly, once an appropriate fine and/or penalty is imposed to reflect their purported culpability and alleged subsequent contrition.

The alternative option presented to the relevant individual or company if they do not wish to engage with this new regulatory regime, is for them to run the gauntlet of a protracted criminal process, incurring significant costs along the way, with an unknown and uncontrollable result at the end of the process which is compounded by the draconian powers of restraint and confiscation if the result is unfavourable. Factor in the all pervading power of negative publicity and it becomes obvious why the individual or company from a purely self interested perspective are attracted to this non criminal route being advocated by the government and readily accede to it.

The problem is of course whilst this may be a superficially attractive solution in the present economic climate for the government and its regulators in the sense that it keeps public expense down, whilst simultaneously being an effective means of raising money for an impecunious State and, on the other hand, being equally attractive to the individual or company under investigation to resolve their problems as expeditiously as possible, the wider difficulties for society and the justice system as a whole cannot and should not be ignored.

In advancing policies of this nature to resolve serious financial wrongdoing, there is an inherent risk that a two tier system of criminal justice is going to be created as a natural consequence of it whereby on one hand City Financiers, Bankers and Major Multi-National Corporations are perceived, rightly or wrongly, to be able to "buy" their way out of prison on the basis that they are too "big" to be prosecuted or jailed. Whilst meanwhile on Main Street, "blue collar" criminals will face the full force of the normal sentencing powers of the court with the resultant draconian powers of the confiscation regime being applied to them rigorously and unsparingly.

The positive to take from these developments however is that it at least requires us to revisit the fundamental questions as to what the justice system is for and whom does it purport to serve? If one loses sight of the key constitutional principles that underpin our criminal justice system, we run the risk that the two tier system will become an embedded reality quite quickly, where the size of your bank balance is more important than punishing you for what you've done and the consequences that have befallen others as a result of your illegal actions. Deterrence will be replaced by debt recovery and resentment and isolation will grow in its wake.

A more structured inclusive system of dealing with complex financial crime within the existing criminal justice system must be found in order to address the short term economic gains that are a natural occurrence of the regulatory regime and which is inevitably clouding the wider public interest in punishing wrongdoers regardless of their identity or status.

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