

Gordon Brown's charter for corporate criminals

David Whyte explains why the government's new Compliance Code opens the door to corporate crime.

Last December Tony Blair pulled the plug on a Serious Fraud Office investigation of BAE Systems for alleged bribery of Saudi Arabian government officials. Blair's decision dramatically ripped the mask of political neutrality away from the criminal justice system to reveal very clearly how one law can apply to the rich and another to the poor. Statements from the government, the SFO and the Lord Advocate explicitly denied that "economic considerations" had featured in the decision to drop the case. The British denied any connection between their decision to end the criminal investigation and the Saudi government's decision to suspend contract negotiations for 72 BAE Typhoon Eurofighters until the outcome of the investigation was known. Officially, this was not about British national economic interest, but about "national security and our highest priority foreign policy objectives in the Middle East" (as if the two 'interests' could be quite easily disaggregated). Amid the government hyperbole, the tension between economic interest and the rule of law came to the fore in BBC commentary and in the comment pages of the national press in a way that only happens occasionally. This was one of those all too rare moments when the relationship between politics, economy and law was discussed openly in the public domain.

In a process that is on the face of things unrelated to the BAE Systems case, the government has more recently signalled its intention to introduce a set of reforms that would allow "economic considerations" to be legitimately and openly factored into corporate crime enforcement. This policy is captured in a 'Compliance Code' that was published in May 2007 (HM Government, 2007). The document is a proposed code of practice for regulators that is intended to apply to regulatory agencies across the full range of corporate crimes, including fraud, bribery, crimes against the environment, health and safety crimes and crimes against consumers. According to the Code, "[r]egulators should recognise that a key element of their activity will be to allow or even encourage economic progress", and that "[t]hey should only adopt a particular approach or tool if the benefits justify the costs." In short, the Code is intended to ensure that regulatory interventions positively enhance the economic prospects of those they regulate. Exactly what this will mean in practice remains to be seen, but the principle that it establishes will create new and untenable conflicts of interest for inspectors.

Although there has been precious little public debate about the Compliance Code, there has been opposition from the organisations that have picked it up on their radar. The Food Standards Agency (FSA), for example, in opposing the "economic progress" clause in the Code has noted that "[t]he FSA has a single, overriding statutory objective – the protection of public health" and notes that the Code is likely to hamper

this role by giving "undue weight to economic progress". (FSA 2007) The Centre for Corporate Accountability has called the Code "a charter for corporate criminals." (CCA, 2007)

The Compliance Code is being introduced on the back of the Hampton Review of Regulatory Inspections and Enforcement, initiated and led by the Treasury under Gordon Brown. The Hampton Review was the product of a pro-business de-regulation agenda that has lasted at least a quarter of a century. The 'Regulatory Impact Unit' that is currently pursuing this agenda with full political support at cabinet level continues the work of its predecessors, the Tories' 'De-regulation Unit' and Labour's 'Better Regulation Unit'. The de-regulation agenda is now institutionalised at the heart of the new Department for Business, Enterprise and Regulatory Reform which replaces the old DTI. This is no Orwellian newspeak. What you see in the DTI's new corporate identity is what you get: a no nonsense dose of pro-business propaganda that gives formal support to the decriminalisation of corporate offending.

Following the publication of the Hampton Review, Gordon Brown promised that a that new risk-based or "targeting" approach would transform the basis of corporate regulation in UK and that this would involve a *carte blanche* one-third cut in inspections. Many of Hampton's key recommendations were subsequently put on a statutory footing by the Legislative and Regulatory Reform Act 2006. The Act itself was framed by the language of 'regulatory burdens' and 'red tape', a language that juxtaposes economic considerations as a counter-balance to investigation and enforcement. Thus, section one of the Act creates a new power for a Minister of the Crown to make an order that removes from legislation a "regulatory burden", defined in the Act as a "financial cost", an "administrative inconvenience" or "an obstacle to efficiency, productivity or profitability".

The Compliance Code brings the government's renewed neo-liberal crusade to the day-to-day work of inspectors by formalising the economic considerations that have always informally acted to constrain law enforcement. Economic context is always present in the regulatory process as part of what Hawkins calls the 'frame'; the sets of beliefs and values that shape inspectors' "prosecution-mindedness" (2003: 53). For inspectors in the UK offshore oil industry, for example, awareness of the implications of shutting down a major oil production facility for the integrity of the national economy is intrinsic to their worldview and has an important bearing upon how they deal with management and take decisions about enforcement (Whyte, 2006). Although it is most obvious in the industrial sectors that are regarded as significant to the stability of the national economy, the idea that inspectors should internalise a logic of minimal economic disruption can be found in the

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There is limited capacity for regulatory intervention

philosophies that underpin most regulatory agencies in the UK.

Whilst it was specifically concerned with health and safety crime, the well known debate between Keith Hawkins and Frank Pearce and Steve Tombs captured this point. The normative point of contention in this debate revolved around the most appropriate means of securing the legal compliance of corporations. However, the substantive claim that inspectors tend to adopt an approach that is characterised by negotiation, bargaining and consultancy – as opposed to strict enforcement of the law – was never at issue. The new model of regulatory compliance that is inscribed in the Compliance Code moves the ‘de-regulation’ agenda on significantly. The aim of the Code is to replace a logic of minimal economic disruption with a logic of encouraging economic progress. The principle that it seeks to inscribe in the day-to-day work of regulators is therefore not merely a model of ‘compliance’ regulation as set out in the Hawkins/Pearce and Tombs debate. In the compliance model, the constraints placed upon regulators were ‘informal’ whereby under-enforcement resulted largely from the way that ideology constructed the boundaries of intervention. The new model constrains regulation in a much more formal way.

It is a shift that, in the context of the UK’s grossly under-funded regulatory agencies, is likely to undermine further the regulatory zeal with which inspectors can enforce the law. There are currently just over 1,000 inspectors employed by the Environment Agency and 1,600 inspectors employed by the Health and Safety Executive. To put this in context, there are now 16,000 community support officers – more than six times the combined total of HSE and Environment Agency inspectors – employed by police forces in the UK. Although there is a lack of reliable data to indicate trends in enforcement activity in many spheres of corporate crime, key regulatory bodies charged with controlling social harms indicate major reductions in inspection activity and related enforcement activity in the

10 years that Labour has been in power. Attacks on resources have been experienced particularly acutely in local authority food hygiene, trading standards and environmental protection, and national regulatory authorities responsible for meat inspection, environmental protection and health and safety at work. Whilst individual employees are undoubtedly subject to new forms of invasive surveillance, the gaze is invariably downwards and the socially harmful activities of corporations generally escape scrutiny. Workplaces in the UK can on average expect a visit from the Health and Safety Executive less than once every 20 years. The average wait for an inspector to call is likely to be lengthened considerably by a combination of budget cuts and the demands of Prime Minister Brown’s so-called risk-based approach.

The Compliance Code represents a concerted attempt on the part of government to deflect the regulatory gaze further away from corporations and to limit the capacity for regulatory intervention. If it is implemented in the way that Brown has envisaged, the result will be to further disempower regulatory inspectors. The Code formalises the regulatory compliance in a way that may well encourage the ‘economic progress’ of some sections of British business. In so far as it will reduce further prosecution and enforcement of corporate crime, this is indeed a charter for corporate criminals. ■

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References

- CCA (2007), ‘A Charter for Corporate Criminals’ – safety charity responds to Cabinet Office’s draft Code of Practice for Regulators, Press Release, 28 August, http://www.corporateaccountability.org/press_releases/2007/aug20compliancecode.htm.
- FSA (2007), *Letter from FSA chair to Executive Chair of Better Regulation Executive*, 2 August, <http://www.food.gov.uk/multimedia/pdfs/breletter070802.pdf>.
- Hawkins, K. (2003), *Law as last resort: prosecution decision making in a regulatory agency*, Oxford: Oxford University Press.
- HM Government (2007), *Regulators’ Compliance Code: Draft Code of Practice laid before Parliament under section 23(4) of the Legislative and Regulatory Reform Act 2006 for approval by resolution of each House of Parliament*, London: Cabinet Office Better Regulation Executive.
- Whyte, D. (2006), ‘Regulating safety, regulating profit’, in Tucker, E. (ed.) *Working disasters: the politics of recognition and response*, New York: Baywood.