Law Commission
Reforming the law

Corporate Criminal Liability

A discussion paper

09 June 2021

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The Law Commission – How we consult

About the Law Commission: The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law. The Law Commissioners are: The Rt Hon Lord Justice Green, Chair, Professor Sarah Green, Professor Nicholas Hopkins, Professor Penney Lewis, and Nicholas Paines QC. The Chief Executive is Phillip Golding.

Topic of this consultation: This project concerns the criminal liability of legal persons, such as companies and limited liability partnerships. At present such legal persons usually may only be convicted of a criminal offence if is an offence without any fault element, sometimes known as a "strict liability" offence, or because an individual or group of individuals who are very senior within the organisation has the necessary fault element. We are asking whether the law should be reformed in this regard. We also ask a series of related questions about the criminal liability of corporations for economic crime, and about the individual liability of directors and senior managers for offences committed by corporations.

Geographical scope: This consultation applies to the law of England and Wales.

Duration of the consultation: We invite responses from 9 June to 31 August 2021.

We would appreciate responses using the online response form available at https://consult.justice.gov.uk/law-commission/corporate-criminal-liability.

Otherwise, you can respond:

1. by email to enquiries@lawcommission.gov.uk; or

2. by post to Corporate Criminal Liability, Law Commission, 1st Floor, 52 Queen Anne's Gate, London, SW1H 9AG. (If you send your comments by post, it would be helpful if, whenever possible, you could also send them electronically).

Availability of materials: The discussion paper is available on our website at https://www.lawcom.gov.uk/project/corporate-criminal-liability/

We are committed to providing accessible publications. If you require this discussion paper to be made available in a different format please email enquiries@lawcommission.gov.uk or call 020 3334 0200.

After the consultation: We will analyse the responses to this discussion paper, which will inform our options for reform to Government, which we will publish in an options paper.

Consultation Principles: The Law Commission follows the Consultation Principles set out by the Cabinet Office, which provide guidance on type and scale of consultation, duration, timing, accessibility and transparency. The Principles are available on the Cabinet Office website at: https://www.gov.uk/government/publications/consultation-principles-guidance.

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Consultation responses are most effective where we are able to report which consultees responded to us, and what they said. If you consider that it is necessary for all or some of the information that you provide to be treated as confidential and so neither published nor disclosed, please contact us before sending it. Please limit the confidential material to the minimum, clearly identify it and explain why you want it to be confidential. We cannot guarantee that confidentiality can be maintained in all circumstances and an automatic disclaimer generated by your IT system will not be regarded as binding on the Law Commission.

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We list who responded to our consultations in our reports. If you provide a confidential response your name will appear in that list. If your response is anonymous we will not include your name in the list unless you have given us permission to do so.

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Chapter 1: Introduction

INTRODUCTION

1.1 Non-natural persons, such as companies, charities and local authorities, are capable of committing criminal offences. Although data is imperfect, in the year to September 2020, there were over 5,000 convictions of non-natural persons, representing around 0.6% of all convictions.[1] Many of these are for regulatory offences such as breaches of environmental or trading regulations which are often created with corporations in mind.

1.2 However, corporations are also capable in principle of committing serious criminal offences, such as manslaughter or fraud. They may also be accessories to crimes which can only be committed by natural persons – for instance by encouraging or procuring the commission of an offence.

1.3 Applying the criminal law to corporations can give rise to difficulties. The first complication is that companies do not "act" except through other people – their directors, managers, employees and agents.

1.4 The second is that while some offences are created solely or principally with corporations in mind, most criminal offences were created initially or primarily with natural persons in mind, and frequently include a mental element that is premised on the actor having a single "mind".

1.5 These complications give rise to a series of related questions. Whose acts should count as the acts *of* the company? For whose conduct should the company be criminally liable? How should elements which the criminal law treats as fundamental to liability – such as intent, recklessness, knowledge and dishonesty – be applied to non-natural persons?

1.6 There is no simple answer to these questions. Corporations exist because they are seen as fulfilling an important economic and social function, and accordingly they are given rights that go with legal personality, and their members are shielded from personal liability. At the same time, the operations of organisations can give rise to the risk of social harms. Staff employed within organisations may have incentives, often unintended, to break the law in pursuit of their own and/or the organisation's interests. The challenge for the law is to strike an appropriate balance between ensuring that companies can be held responsible for wrongdoing that they or their representatives engage in, and not imposing unreasonable economic or regulatory burdens, or fixing companies with unjustifiable legal liabilities.

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[1] Ministry of Justice, Criminal Justice system statistics quarterly, September 2020, Table Q5.1. In the year to September 2020, there were 880,513 offenders convicted in courts in England and Wales, of which 875,090 were classed as (natural) "persons". These figures need to be treated with caution. According to the Ministry of Justice (see footnote 2 in Table 5.1), ambiguity in the status of small business owners can lead to corporate defendants being recorded as receiving sentences only available to natural persons, such as community or custodial sentences. It is possible that some natural persons may have been incorrectly recorded and even a tiny error rate could have a substantial impact on the much lower number given as being convictions of non-natural persons.

1.7 The general rule for attributing criminal liability to companies in England and Wales is the 'identification principle' or 'identification doctrine'. This states that where a particular mental state is a required element of the offence, only the mental state of a senior person representing the company's "directing mind and will" can be attributed to the company. In practice, this is limited to a small number of directors and senior managers, which restricts the scope of criminal liability, because the individuals who might commit the wrongdoing are not always senior enough within the company to represent its "directing mind and will".

1.8 Concern has been expressed that the identification principle does not adequately deal with misconduct carried out by and on behalf of companies, and does not strike an appropriate balance. In particular, some have suggested that it has proved disproportionately difficult to prosecute large companies such as banks for economic crimes committed in their names, by relatively senior managers, for the company's benefit. Commentators and policymakers have also noted that it can be much easier in practice to hold a small company to account for wrongdoing than a large business where responsibility for decision-making is more diffuse. Yet it is precisely these larger corporations whose actions will often have the most serious social and economic consequences.

1.9 In recent years, there have been some specific offences created by Parliament which seek to avoid the problems associated with the identification principle by criminalising "failure to prevent" other offences, such as bribery or tax evasion. The offence of corporate manslaughter was introduced in 2007 to expand the attribution of criminal responsibility to a company for deaths resulting from negligence. Parliament has also widened the scope of criminal liability of individual managers and directors through the introduction of bespoke offences in fields such as money laundering and financial misconduct, and by introducing individual liability to directors where corporate wrongdoing is attributable to their consent, connivance or (sometimes) neglect.

1.10 Explaining the decision to create an offence of failure to prevent facilitation of tax evasion in 2017, the Government said:

> The common law method of criminal attribution may have acted as an incentive for the most senior members of an organisation to turn a blind eye to the criminal acts of its representatives in order to shield the relevant body from criminal liability. The common law may also have acted as a disincentive to internal reporting of suspected illegal tax activity to the most senior members... Bodies that refrained from implementing good corporate governance and strong reporting procedures were harder to prosecute, and in some cases lacked a strong incentive to invest in preventative procedures. It was those bodies that preserved their ignorance of criminality within their organisation that the earlier criminal law could most advantage.[2]

1.11 There are competing concerns, however, that alternative models for assessing the criminal liability of corporations may place a disproportionate and costly compliance burden on law-abiding businesses. The introduction of the offences of failure to prevent bribery and failure to prevent facilitation of tax evasion were both accompanied by requirements on government to provide guidance on steps

[2] HMRC, "Tackling tax evasion: Government guidance for the corporate offences of failure to prevent the criminal facilitation of tax evasion", 2017.

companies should take to prevent their employees and agents from committing bribery or facilitating tax evasion. While this guidance is not binding on companies, failure to follow it may make it harder for a company to show that it had adequate procedures in place in the event of a prosecution. This in turn has led to companies adopting extensive compliance regimes with a view to being able to avail themselves of the defence.

1.12 A further reform has been the introduction of deferred prosecution agreements ("DPAs"), which we discuss in chapter 4. These are an agreement between a corporation and a prosecutor, overseen by the court, which enable a corporation to avoid prosecution provided it agrees to conditions such as co-operating with a criminal investigation, paying a financial penalty, and taking steps to ensure future compliance. However, while companies may take into account commercial realities when deciding whether to negotiate a DPA, DPAs ultimately rely on the underlying law of corporate criminal liability, and the limitations of corporate liability may make it harder to negotiate or enforce DPAs.

1.13 In 2017 the Ministry of Justice published a Call for Evidence on Corporate Liability for Economic Crime.[3] The evidence submitted in response to the Call for Evidence was considered inconclusive by Government.[4] There was no clear consensus from respondents on what corporate liability offences should be created if the identification doctrine were replaced. Some questioned whether there was a need for further criminal sanctions in the already heavily regulated financial services sector.

1.14 In November 2020, therefore, the Government asked the Law Commission to examine the issue and publish a paper providing an assessment of different options for reform. This discussion paper is part of that review. In the paper we outline the basis of criminal liability applying to corporations, discuss the criticisms which are made of the current law, examine some overseas analogues and proposals for reform, and finally ask a series of questions as to whether, and how, the law should be reformed.

1.15 As already noted, any change to the existing basis of liability, whether through reform of the identification principle or the introduction of specific 'failure to prevent' offences, has to strike an appropriate balance between society's interest in preventing and punishing misconduct, and providing an environment which supports businesses that provide jobs and livelihoods for millions of people and generate tax revenues that fund public services. These should not be seen as mutually exclusive – a system which cannot adequately deter and punish corporate wrongdoing unfairly disadvantages those companies which operate responsibly and creates an environment where wrongdoing that is harmful to society and the economy can thrive.

1.16 We recognise that different stakeholders will have a range of views and interests. We are publishing this discussion paper with a call for evidence rather than consulting on

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[3] Ministry of Justice, "Corporate Liability for Economic Crime – Call for Evidence", 2017, Cm 9370. The Government uses the term 'economic crime' to refer to a 'broad category of activity involving money, finance or assets, the purpose of which is to unlawfully obtain a profit or advantage for the perpetrator or cause loss to others'. This definition is broader than terms such as 'financial crime' or 'white-collar crime' and includes fraud, terrorist financing, sanctions contravention, market abuse, corruption and bribery, and money laundering (HM Treasury and Home Office, "Economic Crime Action Plan, 2019-22). However, implicit in this definition is the exclusion of smaller-scale acquisitive crime such as shoplifting or domestic burglary.

[4] Ministry of Justice, "Corporate Liability for Economic Crime – Call for Evidence: Government Response", 2020.

provisional proposals at this stage precisely because information on the likely impact of any reforms can only be assessed by taking evidence from firms, prosecutors and others.

1.17 In chapter 10, therefore, we ask a series of questions on the merits and impact of potential changes to the law on criminal liability either through reform of the general principle or the introduction of 'failure to prevent' offences that hold corporations liable for the misconduct of their employees and agents. We look forward to receiving a range of views and evidence to support our development of options for reform.

Chapter 2: General law on criminal liability of corporations

CRIMINAL LIABILITY OF CORPORATIONS GENERALLY

2.1 Corporations[1] (here "corporation" will be used to denote any non-natural legal person[2]) may be guilty of criminal offences just as individuals can.

2.2 Most of the gravest criminal offences include a "fault" element, also known as the "mental element" or "*mens rea"*. Examples of mental elements include intention, recklessness, knowledge or belief (or the lack of it).[3]

2.3 It might be said that fault or "culpability" is at the heart of the most well-known criminal offences. For instance, a person commits fraud by false representation if they:

(1) dishonestly make a false representation; and

(2) intend, by making that representation, to make a gain for themselves or another, or to cause loss to another, or to expose another to the risk of loss.

The "conduct" element is the making of a false representation. The fault elements are (i) that the false representation is made dishonestly and (ii) that the person making it intends thereby to make a gain or cause a loss.[4]

2.4 It is often the "fault" element that separates a criminal offence from a civil wrong such as breach of contract. The courts assume that "unless Parliament has indicated otherwise, the appropriate mental element is an unexpressed ingredient of every offence".[5]

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1 Corporations include not only companies, but Limited Liability Partnerships, and some bodies such as local authorities. A corporation does not include a Corporation Sole or an unincorporated association.

2 Under the Interpretation Act 1978, "person", in any legislation after 1889, is taken to include bodies corporate and unincorporated, unless a contrary intention appears; therefore, most statutory offences are in principle capable of extending to corporate bodies. They may also extend to non-incorporated associations like partnerships, clubs and societies, even though these are not legal persons; *W Stevenson & Sons (a Partnership)* [2008] EWCA Crim 273, [2008] 2 WLUK 618; *Bick* [2008] EWCA Crim 273, [2008] 2 Cr App R 14, L(R) and *F(J)* [2008] EWCA Crim 1970, [2009] 1 Cr App R 16.

3 Reform of Offences Against the Person (2015) Law Com No 361, para 2.3(2).

4 One reason why it may be preferable to refer to a "fault" element rather than "mental element" is that sometimes the fault describes the conduct rather than the defendant's mental state. In *Ivey* (2017) and subsequently in *Booth* (2020), the courts held that dishonesty is an objective test – whether the according to the standards of reasonable and honesty people what was done was dishonest (*Ivey v Genting Casinos (UK) Ltd* [2017] UKSC 67, [2017] 3 WLR 1212*; Booth & Anor v R* [2020] EWCA Crim 575, [2020] 3 WLR 1333). They overturned a former test – the so-called *Ghosh* test – which required a second stage where the court must also consider whether the defendant must have realised that what they were doing was dishonest by those standards.

5 *B v DPP* [2000] 2 AC 428, [2000] 2 WLR 452 at 460. The principle reflects the judgment of the Court of Appeal in *Sweet v Parsley* [1970] AC 132, [1969] 2 WLR 470.

2.5 The problem with the criminal liability of corporations is that corporations don't have minds, at least not in the same way as natural persons. A corporation cannot intend to do something, or be dishonest, at least not in the same way as natural persons.

2.6 Over the years the courts have sought to deal with the problem of attributing a fault element to a corporation by the introduction and refinement of the "identification principle". This means identifying the corporation with certain individuals associated with it. If that individual has the necessary mental state for a criminal offence, then the corporation is taken to have the requisite fault element for that criminal offence.

2.7 This is distinct from notions of vicarious liability, where one person or organisation is held responsible for the acts of another. The identification principle seeks to identify people whose conduct – and in particular whose mental states – *are taken to be* those of the company.

2.8 The question of which individuals may be identified with the corporation for these purposes has been a vexed one. Recently, the High Court has reasserted a test set out by the House of Lords, that such individuals would normally include the board of directors of a company, the managing director and perhaps other superior officers of the company who carry out functions of management and speak and act as the company. It would also include individuals to whom the board of directors has delegated some part of their functions of management, giving the delegate full discretion to act independently of instructions from the board of directors.[6] This rule, encompassing only individuals with the power to act upon their own discretion, and independently of any higher authority within the company is sometimes referred to as encompassing individuals who are identified as the "directing mind and will" (hereafter the "DMW") of the company for the relevant purposes.

2.9 The High Court made a qualification that the key to any question of attribution was ultimately always to be found in considerations of context and purpose. The question was: "whose act, knowledge or state of mind is for the purpose of the relevant rule to count as the act, knowledge and state of mind of the company."[7]

2.10 Before going on to consider the identification principle in more detail, we will distinguish from it two more restricted doctrines which have a more limited role in the criminal law: vicarious liability and the law of delegation.

Vicarious Liability

2.11 Vicarious liability arises when person A is held liable for the conduct of a separate person, B, without any consideration of whether A has satisfied the fault element. In England and Wales, it applies in civil law, but is generally not applicable in criminal law. Thus, for instance, if a pedestrian is seriously injured as a result of an employee driving dangerously in a company van, criminal liability will not generally attach to the company, but the company may be vicariously liable to the victim in tort.

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6 *SFO v Barclays* [2018] EWHC 3055, [2020] 1 Cr App R 28, approving *Tesco Supermarkets v Nattrass* [1972] AC 153 [1971] 2 WLR 1166, "with some qualification".

7 *SFO v Barclays* [2018] EWHC 3055, [2020] 1 Cr App R 28 quoting *Bilta UK Ltd (in liquidation) v Nazir* (No.2) [2015] UKSC 23, [2016] AC 1.

2.12 Where it does apply, however, it is not because one party is a corporate body. It is based on an employer-employee relationship, and may equally arise where the employer is a sole trader. Very often, though, the employer will be a corporate body.

2.13 As discussed in chapter 5 below, the rationale for vicarious liability in civil law is primarily one of public policy. Lord Phillips, in *Catholic Child Welfare Services* gave five reasons for the imposition of vicarious liability:

> (i) the employer is more likely to have the means to compensate the victim than the employee and can be expected to have insured against that liability;
>
> (ii) the tort will have been committed as a result of activity being taken by the employee on behalf of the employer;
>
> (iii) the employee's activity is likely to be part of the business activity of the employer;
>
> (iv) the employer, by employing the employee to carry on the activity will have created the risk of the tort committed by the employee; and
>
> (v) the employee will, to a greater or lesser degree, have been under the control of the employer.[8]

2.14 While considerations (ii)-(v) may well apply to criminal liability, and although criminal courts do have a power to award compensation to a victim,[9] the first consideration is much more applicable to civil than criminal law.

2.15 In general, there is no doctrine of vicarious criminal liability.[10] Vicarious liability, however, has been accepted in relation to criminal offences of strict liability, where no particular mental state is required. Where the offence is of strict liability, that is, it does not include a mental element, a corporation's lack of a mind is not an obstacle to prosecution, and "once it is decided that this is one of those cases where the principal may be held liable for the act of his servant, there is no difficulty in holding that a corporation may be the principal."[11]

2.16 Whether an offence is one of strict liability is frequently more a product of judicial interpretation than explicit legislative intent. As noted, the courts will tend to assume that an offence requires *mens rea* unless strict liability is necessarily *implied*. Sometimes, where a statute creates offences with explicit mental elements, the court may infer that an offence without one is intended to be strict liability; but it need not.[12] The courts have been generally happy to infer strict liability in relation to environmental pollution and food, product and workplace safety. They have also

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8 *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56 [35], [2013] 2 AC 1, [35].

9 Powers of Criminal Courts Act 1973, s 35.

10 *R v Huggins and Barnes* [1730] 94 ER 708; *R (Michael Craik, Chief Constable of Northumbria Police) v Newcastle Upon Tyne Magistrates' Court* [2010] EWHC 935 (Admin), [2010] 4 WLUK 590.

11 *Griffiths v Studebaker* [1924] 1 KB 102.

12 *Sweet v Parsley* [1970] AC 132, [1969] 2 WLR 470.

sometimes been willing to infer strict liability on the basis that the behaviour in question is not "truly criminal".[13]

2.17 Under vicarious liability, it is only the *conduct* of the person actually responsible which is being attributed to the company, not any mental element. Moreover, in many cases – such as the sale[14] or possession of goods – there is both a legal act and a physical act and both are capable of amounting to the conduct or *actus reus*. For instance, where goods are sold, while the employee may physically transact the purchase, only the owner – the company – can be have said to have "sold" the goods in the sense of parting with ownership.[15] In other cases – such as where a vehicle is used in the course of a business – the employer and the employee can be said to be simultaneously "using" the vehicle.[16]

2.18 At common law, vicarious liability was available in respect of criminal libel[17] until that offence's abolition in 2010,[18] and contempt of court.[19] One remaining exception where true vicarious liability remains for an offence requiring *mens rea* is the common law offence of public nuisance.[20] The fault element for the primary offender is that the defendant knew or ought to have known that nuisance would be caused.[21] The Police, Crime, Sentencing and Courts Bill currently before Parliament, among other measures, would abolish the common law offence of nuisance and replace it with a

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13 *London Borough of Harrow v Shah and Shah* [2000] Crim LR 692, [1999] 3 All ER 302. In Gammon (Hong Kong) Ltd. and Others v Attorney-General of Hong Kong (1985) 80 Cr. App. R. 194, the Judicial Committee of the Privy Council held that the presumption that an offence requires *mens rea* is particularly strong where the offence is "truly criminal" in character. "Truly criminal" was distinguished from "quasi-criminal" in *Sweet v Parsley* [1970] AC 132: "truly criminal" offences typically carry moral stigma, and are of general application to the conduct of ordinary citizens in the course of their everyday life, contrasted with "regulation of a particular activity involving particular danger to public health, safety or morals in which citizens have a choice as to whether they participate".

14 *Coppen v Moore (No. 2)* (1898) 2 QB 306.

15 *Smith and Hogan, Criminal Law* (10th ed 2002), p. 199. Smith and Hogan note that in *Coppen v Moore*, the defendant was held to be the seller "although not the actual salesman" because the mislabelled ham belonged to him. However, in *Harrow London Borough Council v Shah and Shah* [2000] Crim LR 692, [1999] 3 All ER 302, where the Shahs "sold" a lottery ticket to a child under 16, the Shahs were clearly not the seller – they had never owned the lottery ticket – but nor were either the natural person who had carried out the transaction. The court held that the offence was not "truly criminal" (and it may be that for the purpose of the relevant regulation "sell" had to be given a purposive interpretation).

16 *James & Son v Smee* [1955] 1 QB 78, [1954] 3 WLR 631, cf offences in Road Traffic Act 1988, ss 1-5A, involving "driving" a motor vehicle.

17 *Smith and Hogan, Criminal Law* (10th ed 2002) p 738.

18 However, under the Libel Act 1843, vicarious liability was qualified where the defendant could prove that the publication was made without his authority.

19 Vicarious liability remains in place for some forms of contempt. However, in relation to the publication of material tending to interfere with the course of justice (where strict liability applies), section 3 of the Contempt of Court Act 1981 provides a defence of innocent publication or distribution where a publisher does not know and has no reason to suspect that proceedings are active, or where a distributor does not know that it contains such matter, and has no reason to suspect that it is likely to. This means that one party to the publication may have a defence even though another party to the publication did not, so liability in these circumstances is not wholly vicarious.

20 *R v Stephens* [1866] LR 1 QB 702.

21 *R v Shorrock* [1994] QB 279; [1993] 3 WLR 698.

statutory offence (this specific measure follows our recommendation in 2015).[22] The *mens rea* requirement in the proposed new offence means that the identification principle would apply and in order to convict an organisation of the new offence it would be necessary to prove that a person constituting the organisation's directing mind and will had the necessary *mens rea*.

Delegation

2.19 The doctrine of delegation applies to a small subset of legislation where the law imposes a duty on a particular person and breach of that duty is a criminal offence, but the offence requires some *mens rea*. It does not rely on the employer-employee relationship. It is not a form of vicarious responsibility (the duty is personal to the delegator and the individual employee cannot themselves commit the offence), but the doctrine allows the *mens rea* of the delegate to be imputed to the delegator. It can be thought of as the reverse of vicarious liability: the conduct does not need to be attributed to the company (the duty lies with the company itself so failure to fulfil it is the company's conduct) but the relevant mental state of the delegate is imputed.

2.20 Delegation thus only arises in cases where the particular offence requires proof of *mens rea*. The doctrine has been invoked in relation to those who have a duty to regulate premises – for instance, offences of knowingly permitting prostitutes to meet in a place where refreshments are sold or consumed,[23] or knowingly permitting disorderly conduct.[24]

2.21 This doctrine has developed because otherwise liability would be avoided altogether if the person covered by the duty were to delegate management of, for instance, the premises, and the delegate then allowed whatever was not permitted, with the necessary *mens rea*. The delegate would not be subject to the legal duty, so would not commit an offence; but the person liable would not have the necessary *mens rea* to be convicted.

2.22 If this would defeat the aim of the statute, the courts may infer that Parliament intended the doctrine to apply, and convict the person under the legal duty, on this basis that his or her delegate had the necessary mental fault.

The identification doctrine and the "directing mind and will"

2.23 Aside from these two exceptions, the main principle of corporate criminal liability is the "identification doctrine", encapsulated in the 1971 ruling of the House of Lords in *Tesco v Nattrass*.[25] The case drew on the notion of a company having a "directing mind and will", "the very ego and centre of the personality of the corporation" from the civil case of *Lennard's Carrying Company*.[26]

2.24 The identification doctrine is not a form of vicarious liability. The question it seeks to answer is not "for whose acts should the company be responsible?" but "whose acts *are* those of the company?"

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[22] Simplification of Criminal Law: Public Nuisance and Outraging Public Decency (2015) Law Com No 358.

[23] Metropolitan Police Act 1839, s 44; *Allen v Whitehead* [1930] 1 KB 211.

[24] Metropolitan Police Act 1839, s 44; *Linnett v Metropolitan Police Commissioner* [1946] KB 290.

[25] *Tesco v Nattrass* [1972] AC 153, [1971] 2 WLR 1166, [1971] 2 All ER 127.

[26] *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705.

Tesco v Nattrass

2.25 Tesco was prosecuted for of an offence under section 11(2) of the Trade Descriptions Act 1968, having advertised in store the sale of Radiant washing powder at a reduced price of 2s 11d, when only packs at the normal price of 3s 11d were available.

2.26 The stock had been put out by an assistant who, finding there were no more reduced-price packs, put out packs marked with the normal price. The store manager was supposed to check that the correct packs were on sale, but did not.

2.27 That Act allowed a defence where the defendant could prove that commission of the offence was due to "the act of default of another person, an accident or some other cause beyond his control" and "he took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence by himself or any person under his control".

2.28 The magistrates held that while Tesco *had* exercised due diligence, the store manager was not "another person" within the meaning of the Act.

2.29 Tesco appealed to the Divisional Court, which held that the magistrates were wrong in holding that the manager was not "another person", but upheld the conviction on the basis that the "reasonable precautions" provision referred to Tesco and all its servants who were acting in a managerial or supervisory capacity.

2.30 Tesco then appealed to the House of Lords. The Lords ruled that Tesco had not committed the offence because neither the actions of the assistant nor the store manager could be attributed to the company. The offence was not one of strict liability – due to the defence clause – so Tesco was only liable if someone who represented the company's "directing mind and will" was responsible for the conduct.

2.31 While the Lords agreed broadly in principle that there was a need to identify a class of people who represented the company's directing mind and will, their precise definitions of who would be identified as embodying the directing mind and will, and what test should be applied in less clear cases, differed slightly.

2.32 For Lord Reid,[27]

> Normally, the board of directors, the managing director and perhaps other superior officers of a company carry out the functions of management and speak and act as the company. Their subordinates do not. They carry out orders from above and it can make no difference that they are given some measure of discretion. But the board of directors may delegate some part of their functions of management giving their delegate full discretion to act independently of instructions from them. I see no difficulty in holding that they have thereby put such a delegate in their place so that within the scope of the delegation he can act as the company.

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27 *Tesco v Nattrass* [1972] AC 153, 171.

So, for Lord Reid the DMW could be the directors collectively (whether severally is not clear), the managing director, or a senior manager to whom the Board had given full discretion to act independently of instructions from them.[28]

2.33 Lord Morris of Borth-y-Gest agreed that the DMW might be the board or might be a managing director. He drew on a comment from Viscount Haldane in *Lennard's Carrying Company v Asiatic Petroleum*[29] that the DMW,

> …may be under the direction of the shareholders in general meeting; that person may be the board of directors itself, or it may be, and in some companies it is so, that that person has an authority co-ordinate with the board of directors given to him under the articles of association, and is appointed by the general meeting of the company, and can only be removed by the general meeting of the company.[30]

2.34 Lord Morris also pointed to a boilerplate "consent, connivance or neglect" provision which had been included in section 20 of the Act.[31] As discussed in Chapter 5 below, a "consent or connivance" or "consent, connivance or neglect" provision allows individual officers of a company to be held personally criminally liable where a company is convicted of an offence, even if the officer would not ordinarily have had the required degree of involvement to be convicted as the main offender or an accessory.

2.35 Lord Morris concluded that "Within the scheme of the Act…an indication is given (which need not necessarily be an all-embracing indication) of those who may personify the 'directing mind and will'."[32] Section 20 of the Act referred to "any director, manager, secretary or other similar officer of the body corporate".[33] In the Divisional Court, "manager" had been interpreted as meaning "someone managing the affairs of the company rather than someone in the position of the manager of a store as in the present case" a definition from which Lord Morris did not demur, and which appears to extend beyond the Board members (in contrast, "secretary" seems to refer only to the Company Secretary).

2.36 As discussed in paragraphs 8.6-8.9. below, it is clear that manager in these provisions is not restricted to a director but extends to decision-makers outside the board who have both the power and responsibility to decide corporate policy and strategy – and would almost certainly include the Chief Executive.

2.37 For Viscount Dilhorne, meanwhile,[34]

> …one has in relation to a company to determine who is or who are, for it may be more than one, in *actual control* [emphasis added] of the operations of the company,

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[28] Delegation as used by Lord Reid is not in the same sense as the delegation principle, which applies only where there is a legal duty on a class of person but failure to comply requires a particular mental state.

[29] *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705.

[30] *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153, 180 citing *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705, 713.

[31] *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153, 178.

[32] *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153, 180.

[33] *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153, 178.

[34] *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153, 187.

> and the answer to be given to that question may vary from company to company depending on its organisation. In my view, a person who is in actual control of the operations of a company or of part of them and who is not responsible to another person in the company for the manner in which he discharges his duties in the sense of being under his orders, cannot be regarded as "another person"...

He also suggested that the consent, connivance and neglect provision "may have attempted to identify those who normally constitute the directing mind and will".[35]

2.38 Lord Diplock took a much more formalistic approach, holding that,[36]

> …the question: what natural persons are to be treated in law as being the company for the purpose of acts done in the course of its business, including the taking of precautions and the exercise or due diligence to avoid the commission of a criminal offence, is to be found by identifying those natural persons who by the memorandum and articles of association or as a result of action taken by the directors, or by the company in general meeting pursuant to the articles, are entrusted with the exercise of the powers of the company.

2.39 Lord Pearson, finally, broadly agreed with Lord Morris that the consent, connivance or neglect provision "affords a useful indication of the grades of officers who may for some purposes be identifiable with the company"[37] and that the word "manager" "refers to someone in the position of managing the affairs of the company, and would not extend to include a person in the position of [the store manager]".[38]

2.40 Although not entirely consistent, all the Lords' speeches make clear that those who can represent the directing mind and will are limited. The DMW clearly includes the board of directors collectively. Some thought that it would normally include the Managing Director. It may also include a senior manager to whom responsibility has been delegated, although whether that must be a strict delegation pursuant to formal board action or a *de facto* delegation is not certain. Some appeared to suggest that a reference to "director, manager or secretary" in a consent or connivance provision would make a senior manager a DMW.

2.41 It is not clear to what extent individual board members will be taken to constitute a directing mind and will – and subsequent case law established that there is no general principle that the knowledge and approval of one director is necessarily to be regarded as that of the board, and therefore the company.[39]

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35 *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153, 188.

36 *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153, 199 to 200.

37 *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153, 190 to 191.

38 *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153, 191.

39 *Ross River Ltd v Cambridge City Football Club Ltd* [2007] EWHC 2115 (Ch), [2008] 1 All ER 1004. It should be noted, however, that this civil case relied on *Meridian* (see following), and previous authorities had held that the knowledge of each director was to be treated as the knowledge of all (*Mohammad Jafari-Fini v Skillglass Ltd & others* [2007] EWCA Civ 261) except where that director or those directors are parties to an offence of which company as a whole is to be the victim (*Belmont Finance v Williams Furniture* [1978] 3 WLR 712, [1979] Ch 250).

2.42 In *R v Andrews Wetherfoil Ltd,*[40] the conviction of a company for bribery was overturned on the basis that the jury had not been properly directed on the level of seniority required to constitute a DMW. The prosecution had alleged that one of three people had the required seniority to fix the company with liability for the corrupt payment: the managing director, a "technical" director, and the manager of a housing division. The trial judge had indicated that if any of them had engaged in the conduct the company was responsible. On it being pointed out that the last of them was not a director, the trial judge had held "there is no magic in being a director. If you are the manager of the housing division or in any high executive position in such a way … the company can be liable".[41]

2.43 On appeal, the Court of Appeal held that "it is not every "responsible agent" or "high executive" or manager of the housing department" or "agent acting on behalf of a company" who can by his actions make the company criminally responsible. It is necessary to establish whether the natural person or persons in question have the status and authority which in law makes their acts in the matter under consideration the acts of the company".

2.44 The Court of Appeal found that the position of the manager of the housing division was "not at all clear" and that "to a lesser extent, this is true of [the technical director]". There was no suggestion, however, that the managing director might not have the status or authority to fix the company with liability.

Developments since *Tesco v Nattrass*

2.45 *Meridian*[42] was a New Zealand case heard by the Privy Council under its then jurisdiction as the final court of appeal for New Zealand. *Meridian* concerned the failure of two employees to disclose that the company had become a substantial security holder in another company, because they wanted to hide the transaction from their superiors.

2.46 Lord Hoffmann, giving the leading judgment, proposed that the rule of attribution for an offence should be found through normal rules of interpretation applied specifically to the offence in question, meaning that the corporation would be identified with different people for different offences, depending on the purpose of the offence:

> One possibility is that the court may come to the conclusion that the rule was not intended to apply to companies at all; for example, a law which created an offence for which the only penalty was community service. Another possibility is that the court might interpret the law as meaning that it could apply to a company only on the basis of its primary rules of attribution, ie if the act giving rise to liability was specifically authorised by a resolution of the board or a unanimous agreement of the shareholders. But there will be many cases in which neither of these solutions is satisfactory; in which the court considers that the law was intended to apply to companies and that, although it excludes ordinary vicarious liability, insistence on the primary rules of attribution would in practice defeat that intention. In such a case, the court must fashion a special rule of attribution for the particular substantive rule. This is always a matter of interpretation: given that it was intended to apply to a

40 [1972] 1 WLR 118.

41 *R v Andrews Wetherfoil Ltd* [1972] 1 WLR 118.

42 *Meridian Global Funds Management Asia v Securities Commission* [1995] 2 AC 500, [1995] 3 All ER 918.

company, how was it intended to apply? Whose act (or knowledge, or state of mind) was for this purpose intended to count as the act etc. of the company? One finds the answer to this question by applying the usual canons of interpretation, taking into account the language of the rule (if it is a statute) and its content and policy.

2.47 This development of the law was one we welcomed. In our 2010 consultation paper on Criminal Liability in Regulatory Contexts, we said: "It is clear from the decisions in *Pioneer Concrete*[43] and in *Meridian* that the courts now have the latitude to interpret statutes imposing corporate criminal liability as imposing it on different bases, depending on what will best fulfil the statutory purpose in question".[44] Consequently we concluded,

> There is no pressing need for statutory reform or replacement of the identification doctrine. That doctrine should only be applied as the basis for judging corporate conduct in the criminal law if the aims of the statute in question will be best fulfilled by applying it… We encourage the courts not to presume that the identification doctrine applies when interpreting the scope of statutory criminal offences applicable to companies.[45]

2.48 However, that ambition has not been realised. In fact, the courts have strongly reaffirmed the identification doctrine as the primary rule of attribution. In *Serious Fraud Office v Barclays*,[46] Lord Justice Davis (a Lord Justice of Appeal, although sitting as a Judge of the High Court) held that the "special rule" of attribution only comes into play when insistence on the primary rule would defeat Parliament's intention. In this case, where the alleged offence was one of fraud, there was nothing in the policy or scheme of the Fraud Act 2006 to justify a special rule of attribution in the circumstances of the case.

2.49 That is to say, rather than "not presuming" that the identification principles applies (as we had proposed), and only applying it if this would *best fulfil* the aims of the statute, *Barclays* holds that it is presumed that the identification doctrine does apply, and can only be displaced it applying it would *defeat* the aims of the statute.

2.50 While restating *Tesco v Nattrass*, *Barclays* arguably resolves some of the uncertainty stemming from the speeches in that case by limiting liability further than was envisaged by many interpretations of the identification doctrine.

2.51 In *Barclays*, the conduct which the Serious Fraud Office ("SFO") sought to attribute to the company included that of the Group Chief Executive (who was subsequently acquitted along with three other managers when tried individually) and its Group Finance Director (who was not charged due to ill-health) – both members of the Barclays Board. The SFO charged Barclays Plc and four individuals with offences of fraud by false representation and Barclays Plc, Barclays Bank Plc and two individuals

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43 In *Director-General of Fair Trading v Pioneer Concrete (UK) Ltd* [1995] 1 A.C. 456, the House of Lords held that a company was liable for a breach by its employees of an undertaking the company given had given to the Restrictive Practices Court, even though the breach was contrary to the company's instructions. The case was one of contempt, not criminal liability.

44 Criminal Liability in Regulatory Contexts (2010) Law Commission Consultation Paper No 195, para 5.103.

45 Criminal Liability in Regulatory Contexts (2010) Law Commission Consultation Paper No 195, para. 5.110.

46 [2018] EWHC 3055 (QB), [2020] 1 Cr App R 28.

with offences under the Companies Act 1985 when negotiating an investment deal with the state of Qatar.

2.52 Lord Justice Davis held that "there is no way … that JV, CL and RJ[47] were its 'directing mind and will' for all purposes … the principal question, put shortly, becomes whether they (or any of them) were the directing mind and will of Barclays for the purpose of performing the particular function in question".[48]

2.53 *Barclays* was perhaps unusual in that, in relation to the Qatar negotiations, the autonomy of the Chief Executive had been explicitly circumscribed by the Board. Lord Justice Davis held that the three defendants had only been authorised to negotiate, but the authority to finalise the agreement remained with either the whole board or a subcommittee in which the Executive Directors (JV and CL) were a minority. As the delegation had not involved "full discretion" to act independently and the three individuals remained "responsible to another person… for the manner in which they discharged their duties" they did not represent Barclays' DMW.

2.54 He held that there was nothing about the broad offence under section 2 of the Fraud Act 2006 which required a special rule of attribution to be fashioned. Applying Lord Reid's test (and also citing Lord Pearson in support) of whether the individual had "full discretion to act independently", he held that none of the defendants constituted Barclays' DMW for the transaction.

2.55 The judgment did not address the question of whether any of the individuals – not least the Chief Executive – might constitute the company's ego (or mind) without having to address whether they had been made its alter ego through an act of delegation. As noted above, Lord Pearson and Lord Morris, and possibly also Lord Reid, envisaged that a senior manager such as a Chief Executive could be regarded as a DMW without having to analyse the degree of delegation.[49] Varley, in particular, as Chief Executive and a Director, was the Managing Director (in function if not title) – which even Lord Reid had held was normally someone who would carry out the function of management and speak and act *as the company*.

2.56 The decision in Barclays effectively amounts to a restating of the position under *Tesco v Nattrass* (and on one of the more restrictive speeches). It suggests that any extension of liability under *Meridian* will be limited to cases where the objective of the statute clearly suggests some alternative basis of liability to the identification principle is required. This is the reverse of the position we anticipated in our 2010 report.[50] Our position then might be summarised as 'a purposive approach where possible; the identification doctrine only when necessarily implied'. The law following *Barclays* might

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47 John Varley, Group Chief Executive of Barclays; Christopher Lucas, Group Finance Director; and Roger Jenkins, Barclays Capital Executive Chairman of Investment Management in the Middle East and North Africa.

48 *SFO v Barclays* [2018] EWHC 3055 (QB), [2020] 1 Cr App R 28.

49 Lord Pearson only used delegation as the test for identifying an *alter* ego where the person purported to be a directing mind and will was not the company's "ego". He identified the company's ego with "any director, manager, secretary or other similar officer of the body corporate". On this basis, the Chief Executive would surely have satisfied Lord Pearson's formulation of the identification principle without having to look at the degree of delegation.

50 Robin Lööf, "Corporate agency and white collar crime – an experience-led case for causation-based corporate liability for criminal harms" [2020] *Criminal Law Review* 275.

be summarised as ‘the identification doctrine unless a special rule of attribution is necessarily implied’.

2.57 For one commentator,

> Lord Justice Davis’ judgment effectively removes companies with widely devolved management and functioning boards and sub committees from the reach of criminal prosecutors. *Tesco v Nattrass* has typically been interpreted as limiting the directing mind and will of a company to the board of directors, the managing director and, in certain circumstances, other superior officers. However, while acknowledging the practical necessity of such devolution and delegation within a business, Lord Justice Davis’ judgment confirms that the directing mind and will of the company cannot be attached to individuals operating at this level unless they have been delegated full responsibility and autonomy for that function and they do not report, nor are responsible, to anyone else. In practical terms, this means that unless such authority has been put into writing and is plainly being followed and acted upon, **it is highly unlikely that de facto authority to make decisions alone will ever be enough to make that individual the directing mind and will of the company**, and therefore highly unlikely that companies can be held liable for their actions.[51]

2.58 There are certainly cases where a de facto delegation has been enough to render another person the DMW. For instance, in *El Ajou v Dollar Land Holdings*,[52] it was held that the knowledge of the non-executive Chairman that the source of an investment was fraudulent was to be treated as that of the company. This was because he had de facto management of the transactions in question while the other directors had no involvement in the transactions at all (unlike *Barclays,* where the directors made clear that they would need to sign off on any deal).

2.59 Nonetheless, arguably *Barclays* makes the law more restrictive than under *Tesco v Nattrass*. The judges in *Tesco* appeared to accept that a Managing Director was likely to constitute a DMW as the company’s ego without needing to look whether the extent of delegation made them its alter ego. *Barclays* suggests that it is not enough to identify one or more directors with the requisite intent. Rather, it is also necessary to show that the board collectively possessed the necessary *mens rea* or that those identified directors had sufficient *de jure* authority to engage in the conduct on the behalf of the board of directors.

2.60 *SFO v Barclays* therefore can be seen as signalling the reversal of a period in which the courts had adopted a much more flexible approach to attribution of criminal liability. Not only has it reasserted the principle of *Tesco v Nattrass* but arguably makes the law harder to apply to a large corporation than *Tesco* envisaged. It is understandable that the Lords in *Tesco v Nattrass* may have felt that a store manager did not have the status or authority to make the company criminally liable; but most envisaged that a managing director normally would.

2.61 **Our conclusion in 2010 that there was no pressing need for reform of the identification doctrine was based on the trajectory of legal development**

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51 Patrick Rappo and Lizzy Bullock, “Barclays SFO trial: Is corporate criminal liability dead?”, *Thomson Reuters Regulatory Intelligence* (12 March 2020) (emphasis added).

52 *El Ajou v Dollar Land Holdings* [1994] 2 All ER 685, [1994] BCC 143.

following *Meridian*. In the light of *Barclays,* the assumptions on which that conclusion was based no longer hold true.

CRITICISMS OF THE CURRENT LAW

2.62 First, it is suggested that the law makes it difficult, in practice, to prosecute companies. For Pinto and Evans,

> The problem with the decision in *Tesco* is that the case has been understood as providing a practically exhaustive list of those whose acts or state of mind can be attributed to any corporation… A corporation that allows a degree of (but not full) autonomy to a subordinate employee (such as a store manager) will not, on *Tesco* principles, be liable.[53]

2.63 The identification doctrine also poses significant evidential difficulties. Sir David Green QC, former Director of the Serious Fraud Office, has observed that "the e-mail trail has a strange habit of drying up at middle management level".[54]

2.64 But even those who reject the cynicism of this suggestion may acknowledge that the law is deficient. Dr Robin Lööf has said,

> Such cynicism is misplaced. For perfectly sensible organisational reasons the Board and senior management are as a rule not in possession of the granular information required in order to participate in, let alone acquire *mens rea* with respect to, individual, allegedly criminal transactions …
>
> Be that as it may, what is beyond doubt is that English law makes it difficult to convict companies for serious economic and financial crime even when plainly committed on their behalf or for their benefit.[55]

2.65 Not only is this unfair to small businesses, but it is also arguably counterproductive in two ways. For one, as Gobert puts it:

> One of the prime ironies of *Nattrass* is that it propounds a theory of corporate liability which works best in cases where it is needed least and works least in cases where it is needed most. The directors and managers of small companies who are most likely to satisfy the *Nattrass* test are also likely to be directly involved in carrying out of the company's affairs and thus criminally liable in their own right; vicarious and corporate liability are largely superfluous for deterrent purposes. In large companies, on the other hand, there is far less likelihood of personal involvement by senior management in day-to-day activities. As a result, the possibility of personal criminal liability is not much of a deterrent while the *Nattrass* test frustrates efforts to impose corporate liability.[56]

2.66 Second, larger corporations will often be a in position to cause greater or more widespread harms. Corporate manslaughter law was reformed precisely because the

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53 A Pinto and M Evans, *Corporate Criminal Liability* (2nd ed 2008) p 55

54 "SFO to consider extending company liability beyond bribery", Compliance Week, 24 September 2013.

55 Robin Lööf, "Corporate agency and white collar crime – an experience-led case for causation-based corporate liability for criminal harms" [2020] *Criminal Law Review* 275.

56 James Gobert, "Corporate Criminal Liability: four models of fault" (1994) 14 *Legal Studies* 393.

identification doctrine proved ineffective in tackling the worst tragedies. It was, for instance, possible to prosecute the company responsible for the death of four children in a canoeing tragedy;[57] but not the one responsible for the death of 193 people on board the *Herald of Free Enterprise*.

2.67 The second problem is that the identification principle does not always bring clarity and certainty. While it is clear that those who can constitute a directing mind and will are limited, it is still not always clear who will do so. As suggested earlier, the finding in *Barclays* that the Chief Executive was not a DMW is arguably contrary to the assumption of most of the Law Lords in *Tesco v Nattrass*.

2.68 This uncertainty also extends to partnerships. Blackstone's Criminal Practice notes that,

> Problems concerning the seniority of those identified with [limited liability partnerships] (similar to those arising in relation to corporations) are likely to arise. It is, for example, presently unresolved whether an equity partner would be of sufficient seniority in a large LLP to be identified with it or whether only managing partners actually running the business will suffice.[58]

2.69 The third criticism is that the identification principle does not reflect real distribution of decision-making and corporate knowledge and sacrifices too much in applying an anthropomorphic analogy. For Mays, "quite simply the identification theory ignores the reality of modern corporate decision-making which is often the product of corporate policies and procedures rather than individual decisions."[59] Gobert argues that,

> Corporate policy is often different from the sum of the inputs of those who helped to formulate the policy, and typically is the product of either synthesis of views or a compromise among competing positions. Policy may also reflect the company's corporate ethos. This ethos, which is often unwritten, may have been forged by founders of the company who are no longer actively involved in its day-to-day affairs. When company policy or corporate ethos leads to the commission of a crime, the company should be liable in its own right and not derivatively.[60]

2.70 Fourth, the identification principle can also paradoxically make it harder to temper the unfair application of strict liability, because any attempt to temper it is likely to result in a requirement for full *mens rea* when applied to a corporation. For instance, in *Tesco v Nattrass*, the availability of a defence was held to introduce a *mens rea* requirement. But an alternative explanation was that Parliament had intended to create a strict liability offence for misleading advertisements made in the course of business, but

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[57] In 1994, OLL Limited was convicted of manslaughter of four children in a canoeing accident in Lyme Bay, Dorset, along with its Managing Director. The indictment alleged that both owed a duty of care to those who took part in the outdoor leisure activities operated by OLL to take reasonable care for their safety; and had breached that duty, by: (i) failing to devise, institute, enforce and maintain a safe system for the execution of an outdoor leisure activity, namely canoeing, by students attending the St Alban's Centre, Lyme Regis; […] (iv) failing to heed, either adequately or at all, the content of an undated letter sent to OLL […] and (v) failing to supervise the Manager of the Centre so as to ensure that canoeing was being safely taught at the Centre. *R v Kite* [1996] 2 Cr App R(S) 295.

[58] D Ormerod and D Perry, *Blackstone's Criminal Practice 2020* (2019) p 130

[59] Richard Mays, "Towards Corporate Fault as the Basis of Criminal Liability for Corporations" (1998) *Mountbatten Journal of Legal Studies* 31.

[60] James Gobert, "Corporate Criminality: New Crimes For The Times" [1994] *Criminal Law Review* 722.

tempered it with the ability to avoid prosecution where the conduct was clearly attributable to another person for whom the company clearly had no responsibility.[61]

2.71 Instead, *Tesco v Nattrass* leaves legislators with a stark choice – create an offence which cannot be enforced in the case of large companies or create an offence of strict liability and accept that corporations may be convicted despite blame lying with people over whom they have limited control.

2.72 In view of these criticisms in Chapter 10, question 2, we ask whether the identification principle provide a satisfactory basis for attributing criminal responsibility to non-natural persons and, if not, if there is merit in providing a broader basis for corporate criminal liability?

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61 Lord Diplock thought that, "To treat the duty of an employer to exercise due diligence as unperformed unless due diligence was also exercised by all his servants to whom he had reasonably given all proper instructions and upon whom he could reasonably rely to carry them out, would be to render the defence of due diligence nugatory". Lord Morris thought that to find the store manager not to be "another person" would render the defence "illusory". Both claims are open to question: there are clearly circumstances other than employee error where blame for a misleading indication might lie with someone who was truly "another person" and in which it would be unjust to hold the company responsible, such as where a customer had swapped price labels or where a misleading statement was printed on packaging as a result of manufacturer error. It is submitted that these are the types of cases that the defence was intended to cover.

Chapter 3: Specific legislation on criminal liability

SPECIAL LEGISLATIVE RULES OF CORPORATE CRIMINAL LIABILITY

3.1 Alongside the common law rule for attributing the fault element of criminal offences to a corporation, a number of statutory provisions have been enacted which concern, directly or less directly, the question of corporate criminal liability. Some of these, such as the offences of corporate manslaughter and failure to prevent bribery and facilitation of tax evasion are bespoke offences created for corporations. Others are offences of general application which make special provision for dealing with liability of corporations. We discuss these below as examples of alternative modes of corporate criminal liability.

Corporate Manslaughter and Corporate Homicide Act 2007

3.2 The offence of corporate manslaughter, something we had proposed in 1996,[1] was introduced following a series of collapses of high profile prosecutions of companies for gross negligence manslaughter, including the collapse of the prosecution of Great Western Trains in relation to the Southall train crash,[2] that of the operators of the Herald of Free Enterprise,[3] and the prosecution of Railtrack and Balfour Beatty over the Hatfield rail crash.[4] In *Attorney General's Reference (No. 2 of 1999)*,[5] relating to the Southall crash, the Court of Appeal ruled that a corporate defendant could not be convicted in the absence of evidence establishing the guilt of an identified natural person.

3.3 The statutory offence of corporate manslaughter replaces the offence of gross negligence manslaughter insofar as it applies to corporations and certain other bodies (including certain government departments). The elements of the offence are:

(1) the way in which an organisation's activities are managed or organised;

(2) causes a person's death;

(3) amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased; and

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1 Legislating the Criminal Code: Involuntary Manslaughter (1996) Law Com No 237.

2 In 1997, seven people were killed and 139 injured when a passenger train collided with a freight train in Southall. The passenger train, whose auditory automatic warning system had been switched off due to a fault, had passed several warning signals, which the driver had not seen as he was packing his bag, and was unable to stop in time to avoid the collision. The driver was charged with manslaughter but the case was dropped on health grounds.

3 In 1987, the ferry Herald of Free Enterprise capsized outside the port of Zeebrugge, resulting in 193 deaths. The ship sank after it set sail with its bow doors still open. The company and seven individuals were charged with manslaughter, but the jury were directed to acquit the company and the five most senior individuals.

4 In 2000, a passenger train came off the rails outside Hatfield, killing four people and injuring over seventy. The cause was a rail cracking as the train passed over. Two companies and five managers were charged with manslaughter, but the jury were directed to acquit all of them.

5 *Attorney General's Reference (No. 2 of 1999)* [2000] EWCA Crim 91, [2000] QB 796.

(4) the way in which the organisation's activities were managed or organised by its senior management was a substantial element in the breach of duty.[6]

3.4 "Senior Management" is defined as the persons who play significant roles in:

(1) the making of decisions about how the whole or a substantial part of the organisation's activities are to be managed or organised; or

(2) the actual managing or organising of the whole or a substantial part of those activities.[7]

3.5 The sentence is an unlimited fine, but the Act gives the court additional powers to make orders requiring the organisation to remedy the relevant breach or any deficiency in its policies, systems or practices,[8] and to require the organisation to publicise details of its conviction.[9]

3.6 The second and third components of the offence broadly replicate what is required for an individual to be convicted of gross negligence manslaughter – a breach of duty which causes a person's death and which amounts to gross negligence. What is novel is the replacement of the identification principle with a rule which looks at the way in which the organisation's activities are managed by senior management.

3.7 One advantage of this test over the identification principle is that it is arguably closer to the test applying to individuals than the identification principle. For an individual, it is possible to commit manslaughter by failing to notice what would have been immediately obvious to anyone competent; what matters is the standard of care, not the state of mind.[10] And accordingly, under the common law, it was possible for a company to commit manslaughter if an individual who was a DMW was grossly negligent. However, if the company as a whole failed to notice what a competent company would have recognised – perhaps because the way it was structured or managed its affairs meant that it was nobody's business to do so – then the company would not be guilty.

3.8 In *Attorney General's Reference (No. 2 of 1999)*, applying the identification principle to manslaughter created a somewhat anomalous situation. Although an individual's conduct might be sufficiently below the standard of care expected to sustain a finding that they were grossly negligent without considering their mental state at all, it was not enough to convict a company to show that *its* conduct was sufficiently below that standard. Rather, it was also necessary to point to the conduct of an individual director. That is, the offence did not require a state of mind in the case of an individual, yet it was necessary to identify a directing mind for the corporation.

3.9 Although the Corporate Manslaughter and Corporate Homicide Act 2007 addressed this issue in relation to gross negligence manslaughter, the same considerations may apply to some other offences, which include a fault element of negligence or similar. For instance, some offences have as the fault element that the person "knew or ought

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6 Corporate Manslaughter and Corporate Homicide Act 2007, ss 1(1) and 1(3).

7 Corporate Manslaughter and Corporate Homicide Act 2007, s 1(4)(c).

8 Corporate Manslaughter and Corporate Homicide Act 2007, s 9.

9 Corporate Manslaughter and Corporate Homicide Act 2007, s 10.

10 *R v Adomako* [1995] 1 AC 171, [1994] 3 WLR 288.

to have known".[11] There may well be cases where although it cannot be said of any particular individual director that they knew the relevant matter, or even that they personally ought to have known it, yet the company as a whole ought to have known, because it ought to have had procedures in place that would ensure it had the requisite knowledge.

"Failure to prevent" offences: The Bribery Act 2010 and the Financial Crime Act 2017

3.10 Recent years have seen the introduction of specific "failure to prevent" offences into the law of England and Wales,[12] in relation to the "base offences" of bribery[13] and facilitation of tax evasion.[14]

3.11 A corporation, like an individual, may be guilty of the offences of bribing another or accepting a bribe. Bribery consists of offering, promising or giving a financial or other advantage to another person either *intending* it as an inducement or reward for the improper performance of a relevant function or activity, or *knowing* that the acceptance of it would itself constitute the improper performance.[15] These offences all require "intent". Therefore, a corporation will only be guilty of such offences if a person who is the directing mind and will of the corporation has the necessary intent.

3.12 However, a corporation (or, to be precise, "relevant commercial organisation") may be guilty of the separate offence of failure to prevent bribery if:

(1) a person associated with it bribes[16] another person;

(2) intending to obtain or retain business or an advantage for the corporation.

3.13 The offence is intended to have a wide territorial reach, as part of the aim of the legislation was to prevent bribery being undertaken on behalf of UK companies in parts of the world where bribery is common and rarely prosecuted. The definition of "relevant commercial organisation" includes bodies incorporated, and partnerships formed, under the law of any part of the UK, which carry out business anywhere in the world, and any other corporate bodies and partnerships which carry out business in the UK.

3.14 The underlying bribery offence can be committed wholly or in part in the UK, or overseas by any person with a close connection to the UK (an individual holding a form of British nationality or ordinarily resident in the UK, or a body incorporated under the law of any part of the UK, or a Scottish partnership). A company can be convicted for failure to prevent bribery overseas even if the person who offered the bribe cannot

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[11] For instance, the Pensions Schemes Act 2021, s 107 creates a new criminal offence of "conduct risking accrued scheme benefits", punishable by up to seven years' imprisonment, where a person engages in conduct which detrimentally affects the likelihood of a defined benefit pension scheme being able to meet liabilities already accrued. It is a condition that the person "knew or ought to have known" that the act or course of conduct would have that effect.

[12] Bribery Act 2010, s 7; Criminal Finances Act 2017, ss 45 and 46.

[13] Bribery Act 2010, ss 1 and 6.

[14] This is not a specific offence, but a phrase used in the Criminal Finances Act 2017 to refer to a category of offences of aiding, abetting, counselling or procuring, or being involved in, tax evasion.

[15] There is an additional offence of bribery of a foreign public official under Bribery Act 2010, s 6.

[16] For the purposes of the person, a person bribes another if they are guilty of an offence under Bribery Act 2010, s 1 or s 6, or would be guilty (if prosecuted), or would be guilty if the territorial restrictions on the offence did not apply.

be prosecuted because they do not have a close connection to the UK and all elements of the offence took place overseas.

3.15 It is a defence to the failure to prevent offence for the company to show that it had adequate procedures designed to prevent associated people from undertaking the conduct in question. There is also a requirement for the Secretary of State[17] to publish guidance on the procedures that organisations can put in place to prevent bribery.[18]

3.16 The failure to prevent offence under section 7 of the Bribery Act 2010 has been mirrored in sections 45 and 46 of the Criminal Finances Act 2017 which create offences of failure to prevent the facilitation of tax evasion. A corporation (or, to be precise "relevant body"[19]) may be guilty of an offence if:

(1) a person associated[20] with the corporation,

(2) commits one of the offences described as a "UK tax evasion facilitation offence", or a "foreign tax evasion offence" when acting in the capacity of a person associated with the corporation.

3.17 It is a defence for the corporation to prove that it had in place such prevention procedures as was reasonable in all the circumstances to expect the company to have in place, or it was not reasonable in all the circumstances to expect the corporation to have any prevention measures in place.

3.18 There is a duty on the Chancellor of the Exchequer to publish guidance about the procedures that corporations can put in place to prevent associated persons from committing a tax evasion offence.

3.19 In the bribery offence, the bribe must be intended to obtain or retain business or a business advantage for the organisation. In the tax evasion offence, the person must be "acting in the capacity" of an employee, agent or representative.

3.20 There are, however, some differences between the two offences.

(1) There is a different relationship to the underlying offence. In bribery, it is failure to prevent the bribery offence itself; in tax evasion, it is failure to prevent the facilitation of tax evasion. That is, the bribery offence contemplates that the employee etc will be the briber; the tax evasion offence contemplates that a third party will be evading tax and the employee will be an accessory.

(2) The Bribery Act 2010 provides a defence of having "adequate" procedures in place. For the offence of failure to prevent facilitation of tax evasion, the test is "reasonable" prevention procedures in place, and explicitly contemplates that it may be reasonable not to have had prevention procedures in place at all.

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17 It is common for legislation conferring a power or duty on Ministers to refer simply to "the Secretary of State". The Interpretation Act 1978, sch 1, provides that this is to be read as "one of Her Majesty's Principal Secretaries of State". In practice, the duty will lie with or the power will be exercised by the government department with responsibility for the area.

18 Bribery Act 2010, s 9.

19 A "relevant body" is a body corporate or partnership under UK law, or a similar entity formed under the law of a foreign country.

20 A person is "associated" with the body if they are an employee, agent or a person who performs services for it, provided they are acting in that capacity (Criminal Finances Act 2017, s 44(4)-(5)).

(3) Whereas the section 7 Bribery Act offence is limited to failure to prevent commission of one of the core bribery offences in that Act, tax evasion offences are broadly defined.

3.21 The Government has issued statutory guidance in relation to both the bribery and facilitation of tax evasion offences. Both guidance documents identify six core principles guiding the procedures that should be put in place to prevent commission of the offence: proportionate procedures; top-level commitment; risk-assessment; due diligence; communication (including training); and monitoring and review.[21]

3.22 The "failure to prevent" model has been suggested by some commentators as a model for prosecuting economic crime given the difficulties that the identification doctrine creates.[22] It may also be that "failure to prevent" more accurately represents the culpability of companies where employees offend but the company does not encourage their offending (we made a similar argument in relation to the liability of directors in 2010).[23]

3.23 Equally, a criticism of "failure to prevent" offences as an alternative to prosecuting the substantive offence is that these offences do not carry the same culpability (although the company might in appropriate cases be convicted of the substantive offence). As Dsouza puts it,

> Bespoke corporate offences that are used to sidestep questions of attribution also carry bespoke labels… At least part of why we want to hold corporations *criminally* responsible relates to a conviction's morally loaded content… Shifting the locus of culpability away from the objectionable conduct weakens the basis for the public and morally loaded condemnation that is the currency of a conviction.[24]

3.24 In any potential extension of the "failure to prevent" model it would be necessary to consider:

(1) which base offences should be covered (for instance, if the aim is to cover "economic crime", the list of offences for which a Deferred Prosecution Agreement is available[25] might be a template);

(2) whether there should be a defence of having "adequate" or "reasonable" prevention procedures in place, and how this should work (for instance, should the burden of proof lie with the company or the prosecution);

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21 Ministry of Justice, *The Bribery Act 2010: Guidance about the procedures which relevant commercial organisations can put in place to prevent persons associated with them from bribing* (2011); HMRC, *Tackling tax evasion: Government guidance for the corporate offences of failure to prevent the criminal facilitation of tax evasion* (2017).

22 See for instance Michael Goodwin, Michelle Sloane and Aimee Riese, "Failing to prevent economic crime" (2019) *Law Gazette,* https://www.lawgazette.co.uk/practice-points/failing-to-prevent-economic-crime/5069921.article (last accessed, 8 June 2021); Polly Sprenger, "Failing to prevent economic crime: a new corporate offence" (2014) 25 PLC Magazine 8

23 Criminal Liability in Regulatory Contexts, (2010) Law Commission Consultation Paper No 195, paras 7.46 to 7.49. See para. 8.17 below.

24 Mark Dsouza, "The Corporate Agent in Criminal Law – An argument for comprehensive identification", (2020) 79 *Cambridge Law Journal* 1: 91-119.

25 See paragraphs 4.6-4.14 below.

(3) whether the offence should be limited – as with the existing bribery and tax evasion offences – to the conduct of associated persons or whether it might be appropriate to expect some institutions to prevent crime being committed using their services (for instance where third parties use platforms or financial service providers to carry out fraud); and

(4) the role of government guidance in relation to such procedures, especially if the principle were extended to a class of crime – such as economic crime – which covers a wide range of behaviours.

3.25 Alternatively, the Serious Fraud Office has proposed that the failure to prevent offences could provide a model for a new principle for the attribution of corporate liability to replace the identification doctrine.[26] Under this model, where a substantive offence was committed by an associated person, to obtain or retain business or a business advantage for a company or otherwise to benefit the company financially, the conduct would be attributed to the company and the company would be guilty of the substantive offence.

Specialist Printing Equipment and Materials (Offences) Act 2015

3.26 This somewhat niche legislation is mentioned as it explicitly incorporates a bespoke rule of attribution for corporate liability.

3.27 The Act criminalises the supply of specialist printing equipment where the supplier knows it will be or is intended to be used for criminal conduct. Specialist printing equipment means equipment for making documents such as identity documents, driving licences, travel tickets, proof of age, currency, or bank cards.

3.28 The legislation includes a specific provision under which a body is treated as having the requisite knowledge if “a person responsible within the body for the supply knows of the fact”.[27]

3.29 The Government’s original intention had been to create an offence including reckless supply, with a defence where the supplier had exercised due diligence and reported any concerns to the police. However, the government restricted the scope of the offence after consultation showed “a sufficient level of concern that requiring [suppliers] to be able to show they had carried out certain checks in order to avoid prosecution could lead to over-compliance and could therefore cause a burden for some businesses”.[28]

CRIMINAL LAW AND REGULATION

3.30 In some areas of activity, the criminal law interacts with regulatory regimes affecting one of more sectors. This enables actions to be taken against individuals for breaches of criminal law, with specialist regulation dealing with corporate failures to control the activities of individuals or to maintain sufficiently high standards to deal with the risks that their activities create.

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[26] Lisa Osofsky (Director, Serious Fraud Office), evidence to House of Lords Bribery Act 2010 Committee, 13 November 2018, Q 158.

[27] Specialist Printing Equipment and Materials (Offences) Act 2015, s 3(1).

[28] Home Office, *Public Consultation on Specialist Printing Equipment and Materials: Government Response* (2013).

3.31 Certain of these regimes, in particular those relating to economic crime, are summarised below. These regimes may be relevant for our purposes because: they bear on the question of the extent to which there is an enforcement gap, that is, to what extent malfeasance by corporations is not currently subject to effective enforcement. Secondly, they may provide examples of how non-criminal enforcement is used against individuals or corporations instead of, or to complement, criminal penalties. In particular, regulatory breaches will normally be subject to the lower civil standard of proof, the balance of probabilities.

3.32 Note, however, that there is often an overlap of jurisdiction: a company may still be able to be convicted of the substantive offence (subject to rules on corporate criminal liability) and individuals may themselves be regulated persons (particularly at higher levels of seniority). If individuals and companies are effectively subject to two regimes trying to control the same risks and activities, it is important that the regimes operate together in a way which does not impose unreasonable regulatory burdens.

Health and Safety at Work Act 1974 ("HSWA")

3.33 The HSWA does not make special provision for corporations. However, it creates criminal offences that may be committed by persons, including employers, occupiers of premises and manufacturers who fail to comply with duties imposed upon them under the Act or regulations passed under it. Some of those duties are duties to ensure, so far as is reasonably practical, that a certain harm, such as injury, does not come about. There is no fault element to these offences. If a person fails to comply with their duty, then they are guilty of an offence. Therefore, there is no bar to prosecution of corporations for these offences.

3.34 Section 15 of the HSWA also permits the Ministers to make regulations. Examples of regulations passed under the power of the HSWA include the Construction (Design and Management) Regulations 2015, which replaced earlier similar regulations, and which impose duties on clients, designers and contractors involved in a building, civil engineering or engineering construction work. Breach of the requirements under these regulations is a criminal offence under section 33 of the HSWA.

3.35 There is no fault element to most offences under the Health and Safety at Work Act, in particular, failing to observe one the general duties owed under the Act is a strict liability offence, as is breach of regulations made under the Act (unless the regulations themselves provide otherwise)

3.36 Being offences of strict liability, it also follows that a company will generally be vicariously liable for any offence under the Act committed by an employee in the course of their employment.

Provision of financial services

3.37 The Financial Services and Markets Act 2000 ("FSMA 2000") prohibits the provision, or purported provision, of financial services or financial promotion by those who are not "authorised persons" operating in accordance with the permission granted to them. Contraventions of these prohibitions are criminal offences. There are no fault elements. However, it is a defence to prove that the defendant took all reasonable

precautions and exercised all due diligence to avoid committing these offences.[29] Such "authorised persons" are often corporations.

3.38 Regulators (the FCA and Prudential Regulatory Authority ("PRA")), have extensive powers over "authorised persons". They may issue rules and guidance,[30] and publicly censure, issue financial penalties, suspend or remove authorisation from those in breach of their rules. There are rights of appeal to the Upper Tribunal.[31] In 2019, the FCA issued over £392 million in financial penalties to 21 individuals or corporations.[32]

3.39 Furthermore, the FCA and PRA have extensive powers of approval over the appointment of, and over the conduct of, those who are working within "authorised persons" who are undertaking "controlled functions" and "senior management functions". The FCA and PRA also have powers of approval over the certification of employees of authorised persons carrying out "specified functions". In relation to banks there are further powers concerning the appointment of directors and senior executives.[33]

Insider dealing

3.40 An individual only is guilty of an offence if they participate in insider dealing. There are certain defences.[34]

3.41 An individual or a corporation may be ordered to pay an administrative financial penalty by the Financial Conduct Authority ("FCA") if they have committed insider dealing or market abuse.[35] There is a right of appeal to the Upper Tribunal (Tax and Chancery Chamber).

Price-fixing ("cartels")

3.42 There is a twin regime addressing price-fixing and other cartels. The Enterprise Act 2002 creates an offence where an individual makes an agreement with one or more other persons to fix prices, limit supply or production, or engage in bid-rigging. Only an individual can be guilty of this offence.[36]

3.43 The Competition Act 1998 creates a quasi-criminal civil regime covering corporations. A corporation ("undertaking") is prohibited from entering into a price-fixing agreement or from abusing a dominant market position. Any breach by a corporation of such prohibitions may be enforced by the Competition and Markets Authority ("CMA")[37] who

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29 Financial Services and Markets Act 2000, ss 23(3) and 24(2).

30 See for example, The FCA Handbook, https://www.handbook.fca.org.uk/ (last visited: 26 May 2021).

31 Tribunals, Courts and Enforcement Act 2007.

32 FCA, "2019 fines" (20 January 2020), https://www.fca.org.uk/news/news-stories/2019-fines (last visited: 26 May 2021).

33 Financial Services and Markets Act 2000, Part V.

34 Criminal Justice Act 1993, ss 52 to 64.

35 Financial Services and Markets Act 2000, Part VIII, Market Abuse Regulation of the European Parliament and Council 596/2014.

36 Enterprise Act 2002, s 188.

37 Competition Act 1998, Enterprise and Regulatory Reform Act 2013. See eg Director of Fair Trading v Pioneer Concrete UK Ltd [1995] 1 AC 456 (under the predecessor legislation) and see para 2.43 above. The

may issue a direction requiring the parties to terminate or modify the agreement or conduct and, in the absence of compliance, the CMA may seek an order from the court requiring them so to do. The CMA may also impose a financial penalty of up to ten per cent of the undertaking's global turnover, which may be recovered as a civil debt. There is a right of appeal to the Competition Appeal Tribunal.[38] The CMA may apply to disqualify the director of a company which has infringed the Competition Act.[39] The CMA operates in accordance with published guidance (originally by the Office of Fair Trading) on applications for leniency by individuals and companies that report evidence of price-fixing activity to them.[40]

3.44 The regime under the Competition Act 1998 is one of strict liability and there is no defence of 'due diligence' or 'adequate procedures'.

Breach of sanctions imposed by the UK Government

3.45 HM Treasury has the power to make a freezing order, preventing persons from making funds available to the subject of the order where it is believed that they have taken action, or are likely to take action, detrimental to the UK's economy, or constitute a threat to life or property. A freezing order may include provisions making the breach of it a criminal offence. The criminal offences set out contain fault elements and there are the usual provisions regarding the criminal liability of corporate directors.[41]

3.46 Furthermore, HM Treasury has a power to impose a financial penalty against an individual or corporation that it is satisfied on the balance of probabilities has deliberately or recklessly breached an obligation under any financial sanctions legislation, which includes such freezing orders. The permitted maximum penalty is £1 million.[42] The penalty may be recovered as a civil debt. There is a right to seek a review of such a penalty by a Minister and a right of appeal against the Minister to the Upper Tribunal.[43]

3.47 Furthermore, the Sanctions and Anti-Money Laundering Act 2018 provides a power to make sanctions regulations for the purposes of compliance with international obligations or a number of other purposes. Such sanctions may be enforced as "financial sanctions legislation" above, or may contain their own provisions for enforcement, including civil means or the creation of criminal offences.

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jurisdiction of the CMA has been described as 'quasi-criminal' because it can lead to very large fines, see CMA v Flynn Pharma Ltd [2020] EWCA Civ 339, [2020] Bus LR 803

38 Competition Act 1998, ss 46 to 49E, s 59

39 Company Directors Disqualification Act 1986, ss 9A to 9E.

40 Leniency and no-action applications in cartel cases: OFT1495 - GOV.UK (www.gov.uk) (last visited April 2021), Applications for leniency and no-action in cartel cases (publishing.service.gov.uk), Quick Guide to Cartels and Leniency for Businesses (publishing.service.gov.uk).

41 Anti-terrorism, Crime and Security Act 2001, s 4, Sch 3.

42 Where the sanction breach relates to specific funds or economic resources, the maximum penalty is £1m or 50% of the funds/resources concerned, whichever is greater (Policing and Crime Act 2017, s 146(3)).

43 Policing and Crime Act 2017, ss 143, 146 and 147.

3.48 The sanctions regime is the responsibility of the Foreign, Commonwealth and Development Office and the Office for Financial Sanctions Implementation, ("OFSI"), which is part of HM Treasury.

3.49 There is a further power under the 2018 Act to make regulations concerning money laundering or terrorist financing and provision for those to be supervised by the FCA or Her Majesty's Revenue and Customs ("HMRC"), for them to impose civil penalties, or for further criminal offences to be created. Such criminal offences are required to contain a mental element, or include a defence grounded in lack of knowledge or belief or the taking of all reasonable steps etc.[44]

Money laundering

Proceeds of Crime Act 2002

3.50 In general, persons who engage in money laundering with the requisite degree of knowledge or suspicion are guilty of offences unless they have made an "authorised disclosure" and have received the appropriate consent from the authorities for their actions, or have a reasonable excuse for not making such an authorised disclosure.[45]

3.51 Persons engaged in "the regulated sector" (typically the financial services industry) are guilty of offences if they have reasonable grounds to suspect another person is engaged in money laundering and they do not report their suspicions to their employer's nominated money laundering reporting officer ("MLRO") or the National Crime Agency.[46] A MLRO commits an offence if they do not pass on, where appropriate, reports they receive of suspected money laundering.[47] Tipping-off a suspected money-launderer of a money-laundering investigation is an offence.[48] Persons outside the regulated sector may report suspected money laundering by others, and do not breach any professional rules of confidentiality they may be subject to if they do.[49]

Money Laundering Regulations 2017

3.52 The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 ("MLR 2017") make further provisions in relation to "relevant persons": including financial services institutions, independent legal professionals, estate agents, and casinos.[50] They must carry out risk assessments and have policies to manage effectively any risks they identify of money laundering and terrorist

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44 Sanctions and Anti-Money Laundering Act 2018, s 49, sch 2.

45 Proceeds of Crime Act 2002, ss 327 to 329, s 338, s 340. There is also a defence if the person intended to make a disclosure but had a reasonable excuse for not doing so.

46 Proceeds of Crime Act 2002, s 330.

47 Proceeds of Crime Act 2002, s 331.

48 Proceeds of Crime Act 2002, s 333, s 333A.

49 Proceeds of Crime Act 2002, s 337.

50 Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, r 8; these regulations replace earlier regulations such as the Money Laundering Regulations 2007/2157. The earlier MLR are still relevant for cases concerning pre-2017 activity eg *FCA v NatWest* (2021) which concerns rules 45, 8 and 14 of the MLR 2007: https://www.fca.org.uk/news/press-releases/fca-starts-criminal-proceedings-against-natwest-plc (last visited: 26 May 2021).

financing.[51] They must appoint a money laundering reporting officer, and where appropriate, they must appoint a member of the board of directors with anti-money laundering responsibility.[52] Beneficial owners, officers or managers of such institutions require approval from the supervisory authorities.[53] Such relevant persons have certain obligations, including to confirm the true identity of their customers, to keep certain records and to permit access to their records to law enforcement agencies.[54]

3.53 There are a number of supervisory authorities[55] who have certain duties under the MLR 2017.[56] The two most important ones are the FCA and HMRC.

3.54 A person is guilty of a criminal offence if they contravene certain duties[57] under the MLR 2017. There is no fault element. However, it is a defence to have taken all reasonable steps and exercised all due diligence to avoid committing the offence. As an alternative to criminal proceedings, the FCA or HMRC may impose an administrative penalty, including a financial penalty which is enforceable as a debt.[58] There is a right of appeal against such an imposition.[59]

Modern slavery and human trafficking

3.55 The Modern Slavery Act 2015 creates a number of criminal offences concerning slavery, or human trafficking (arranging or facilitating the travel of another person for the purposes of exploitation). These offences may be committed by individuals or corporations. They include fault elements.[60]

3.56 The Act also imposes an obligation on "commercial organisations", to prepare annual slavery and human trafficking statements. A commercial organisation is one which

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51 Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, rr 18 to 20, 24 and 25.

52 Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, r 21.

53 Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, r 26.

54 Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, rr 27 to 45H.

55 Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, r 7, sch1.

56 Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, r 46 to 52B.

57 Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, r 75, r 86, sch 6.

58 Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, r 101.

59 The right of the appeal is to the First-tier Tribunal or, in some circumstances, the Upper Tribunal: Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, rr 93 to 100; Value Added Tax Act 1994, s 82.

60 Modern Slavery Act 2015, s1 – 4.

supplies goods or services and which has a total turnover of a prescribed amount (currently £36 million per year).[61]

3.57 A slavery and trafficking statement must include details of the steps the organisation has taken to ensure that slavery and human trafficking is not taking place in any of its supply chains or any part of its business, or a statement that the organisation has taken no such steps. The statement may include details of the organisation's policies and due diligence processes, their effectiveness and its training concerning slavery and human trafficking. The statement must be approved by the board of directors (or equivalent) and must be signed by a director (or equivalent). It must be published on the organisation's website or provided by the organisation on request.[62] The Government has published statutory guidance on the duties imposed on commercial organisations in this regard.[63]

3.58 The duties on commercial organisations under these provisions are enforceable by the Secretary of State by seeking an injunction in the High Court.[64]

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61 Modern Slavery Act 2015, s54, Modern Slavery Act 2015 (Transparency in Supply Chains) Regulations 2015 SI 2015 No 1833.

62 Modern Slavery Act 2015, s54.

63 Modern Slavery Act 2015, s54(9), Home Office, "Transparency in Supply Chains etc. A practical Guide" (2015, last updated 20 April 2020).

64 Modern Slavery Act 2015, s54(11).

Chapter 4: Procedural rules for corporate prosecutions

CRIMINAL PROCEDURAL RULES PARTICULAR TO CORPORATIONS

4.1 There are a number of procedural provisions of the criminal law that relate specifically to corporations.

4.2 Proceedings, including criminal proceedings, may not be commenced against a company in administration, or against which a winding-up order has been made, without the leave of the court dealing with the insolvency proceedings. There is provision for an application to stay other proceedings where a winding-up petition has been presented against a company.[1]

4.3 A corporation may be served with criminal proceedings and other documents in connection with criminal proceedings in a number of ways, including: handing them to a person holding a senior position in the corporation; handing them to the corporation's legal representative where they are legally represented; or addressing them to the appropriate person to be served and leaving them at, or posting them to, the corporation's principal place of business, or, if that cannot be readily identified, any place where it carries on its activities or business.[2]

4.4 Generally, a representative of a corporation may act for it in criminal court proceedings, and the presence of a representative is equivalent to the presence of the corporation. A representative may enter a plea in a magistrates' court on behalf of a corporation, and may do so in writing on arraignment in the Crown Court.[3]

4.5 However, the most important procedural provisions of the criminal law that are specific to corporations are the provisions relating to deferred prosecution agreements.

Deferred prosecution agreements

4.6 Corporations, but not individuals, may enter into deferred prosecution agreements ("DPAs") with prosecutors.[4] Pursuant to such an agreement, a prosecution will be initiated then immediately suspended in return for an undertaking by the defendant corporation to take steps such as pay a financial penalty and to take remedial action. If the agreed steps are taken, then at the expiry of the term of the deferred prosecution agreement, the prosecution will be discontinued. The DPA must be subject to preliminary, and then final, approval of the court.[5]

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[1] Insolvency Act 1986, s 8, s 126, s 130, sch B1 para 43(6); *Re Rhondda Waste Disposal Ltd* [2001] Ch 57, [2000] 3 WLR 1304.

[2] Criminal Procedures Rules 2020, r 4.

[3] Magistrates' Courts Act 1980, s 46, sch 3; Criminal Justice Act 1925, s 33; Criminal Procedure Rules, r 46.

[4] Crime and Courts Act 2013, s 45, sch 17 (commencement 24 February 2014 but conduct before this date may be subject to an agreement).

[5] Crime and Courts Act 2013, sch 17 paras 7 and 8. See also the online SFO Operational Handbook including the sections on "Deferred Prosecution Agreements" (https://www.sfo.gov.uk/publications/guidance-policy-

4.7 The DPA regime applies to the common law offences of conspiracy to defraud and cheating the public revenue, certain offences under 12 statutes, certain offences relating to international financial sanctions, or counter-terrorism, certain offences under the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, or certain regulations made pursuant to the Sanctions and Anti-Money Laundering Act 2018. The Secretary of State may by order amend the offences concerned, including by adding any further offence of "financial or economic crime".[6] The statutory offences include, for example: theft, false accounting, money-laundering, fraudulent trading, fraud, bribery and failure by a commercial organisation to prevent bribery.[7]

Schedule of deferred prosecution agreements entered into so far

4.8 Nine DPAs have been entered into so far. Their details are set out in the following table.

	Pros.	Def.	Principal offence	Financial imposition	Dates of preliminary and final hearings for approval by the court	Individuals convicted in UK?
1	SFO	Standard Bank aka ICBC Standard Bank (2015)	FTPB[8]	$US 29m*[9]	p/a[10] 04/11/15 f/a 30/11/15	Not charged
2	SFO	XYZ aka Sarclad (2016)	Conspiracy to corrupt,[11] FTPB[12]	£8.5m	1st p/a 20/04/16 2nd p/a 24/06/16 f/a 08/07/16	Three acquitted by a jury

and-protocols/guidance-for-corporates/deferred-prosecution-agreements/) and "Corporate Co-operation Guidance" (https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/sfo-operational-handbook/corporate-co-operation-guidance/); and the Joint Guidance on Corporate Prosecutions (pdf available at: https://www.sfo.gov.uk/download/guidance-corporate-prosecutions/) and Deferred Prosecution Agreements Code of Practice (pdf available at: https://www.sfo.gov.uk/download/deferred-prosecution-agreements-code-practice/) (last visited 26 May 2021). See also commentaries, eg Karl Laird, "Deferred Prosecution Agreements: The Latest Developments" [2021] *Criminal Law Review* 283.

6 Crime and Courts Act 2013, part 2 sch 17 and s 31.

7 Crime and Courts Act 2013, part 2 sch 17 and ss 15 to 28. The legislation does not define "financial or economic crime".

8 Failing to prevent bribery under the Bribery Act 2010, s 7 ("FTPB").

9 * Indicates that costs were also awarded,

10 Preliminary agreement hearing ("p/a"); final agreement hearing ("f/a").

11 Conspiracy under s 1 Criminal Law Act 1977 to commit the offence of corruption (a common law and statutory offence; see the Public Bodies Corrupt Practices Act 1889, Prevention of Corruption Acts 1906, 1916); abolished by Bribery Act 2010.

12 Where the principal count on the indictment was conspiracy to corrupt but there were secondary offences of failing to prevent bribery this is noted as the presence of the failing to prevent bribery charges may have been a factor in the corporation agreeing to enter into the DPA in relation to the other counts.

	Pros.	Def.	Principal offence	Financial imposition	Dates of preliminary and final hearings for approval by the court	Individuals convicted in UK?
3	SFO	Rolls Royce (2017)	Conspiracy to corrupt, FTPB	£497m*	p/a 16/01/17 f/a 17/01/17	Not charged
4	SFO	Tesco (2017)	False accounting [13]	£129m*	p/a 27/03/17 f/a 10/04/17	Three acquitted on the direction of the judge
5	SFO	Serco Geografix (2019)	Fraud	£19m[14]	p/a 03/07/19 f/a 04/07/19	Two acquitted due to disclosure issues
6	SFO	Guralp Systems (2019)	Conspiracy to corrupt, FTPB	£2m	p/a 10/10/19 f/a 22/10/19	Three acquitted by a jury
7	SFO	Airbus (2020)	FTPB	€991m*	p/a 22/01/20 f/a 31/01/20	Investigations ongoing.
8	SFO	G4S Care and Justice Services (UK) (2020)	Fraud	£38.5m[15]	p/a 10/07/20 f/a 17/07/20	Charged, ongoing.
9	SFO	Airline Services (2020)	FTPB	£2.9m*	p/a 21/10/20 f/a 30/10/20	Not charged

4.9 It should be noted that individuals may not have been charged for reasons other than lack of evidential sufficiency, eg they may now be dead or infirm.

4.10 In the following cases the resources of the company that entered into the DPA, and the corporate structures concerned, were such that it appeared that the financial impositions under the agreement may affect in practice a separate corporate entity:

(1) Standard Bank: until 2015 a wholly owned subsidiary of Standard Bank Group Ltd (listed on Johannesburg stock exchange). However, there was no express provision for penalties to be paid by parent company.

(2) Sarclad UK: From 2000 it was a wholly-owned subsidiary of Heico Companies LLC, a US registered corporation. The majority of the financial impositions would be paid with assistance of a long-term loan from Heico.

13 Theft Act 1968, s 17.

14 Plus costs and a £70m civil settlement with the Ministry of Justice in 2013.

15 Plus costs and a £121m civil settlement with the Ministry of Justice in 2014.

(3) Serco Geografix ("SGL"): SGL was a wholly owned subsidiary of Serco Limited, which in turned was owned by a holding company which was owned by Serco Group PLC. Serco Group provided an undertakings to meet the obligations of SGL under the DPA, and to take certain steps as well in terms of its own compliance regime and reporting to the SFO.

(4) Airline Services Ltd ("ASL") was owned by Airline Services Holdings Ltd, which was owned by Airline Services and Components Group Ltd. Before the DPA hearings, ASL sold its Interiors and Handling business divisions and ceased trading. The court was told that after the DPA had been terminated it would be wound-up.

Discussion of DPAs

4.11 During our initial discussions with stakeholders, concern was raised as to the fairness of the DPA regime. In particular, concern was raised as to whether the potential commercial and reputational consequences of a criminal conviction were such that corporations were too strongly incentivised to enter into DPAs, or to undertake to meet the financial commitments of DPAs entered into by a subsidiary, despite having a potentially meritorious defence. It should be noted however that the DPA Code of Practice requires prosecutors to be satisfied that an evidential test has been passed before entering into a DPA.[16]

4.12 An alternative concern put forward by stakeholders was that the restricted interpretation of the identification principle following the case of *R v Barclays* may mean that in the future corporations will be less likely to enter into DPAs for offences that depend on that principle, such as fraud. In this regard, stakeholders point to the high proportion of DPAs that concern offences such as failure to prevent bribery, that do not depend on the operation of the identification principle.

4.13 A third concern was raised concerning the degree of judicial oversight in practice in relation to DPAs.[17] The DPA regime requires preliminary and final approval to be obtained from the Crown Court. Our schedule sets out the details of the applications and granting of such approvals. It is worth noting that applications for preliminary approval are made in private and only published if final approval is ultimately given, which means there may be applications for preliminary approval which have not been made public because no final approval was ever granted.

4.14 Finally, concerns have been raised as to whether, if the public interest is consistent with an agreement not to prosecute a corporation, and therefore not to seek a criminal conviction (on certain conditions), to what extent did the public interest require the institution of criminal proceedings at all? This may be so in particular against a suspect corporation which is cooperating with the authorities and which may also be subject to non-criminal penalties.

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[16] DPA Code of Practice, para 1.2(i)(b): "There is at least a reasonable suspicion based upon some admissible evidence that P has committed the offence, and there are reasonable grounds for believing that a continued investigation would provide further admissible evidence within a reasonable period of time, so that all the evidence together would be capable of establishing a realistic prospect of conviction…".

[17] See also eg David Corker, "The Deferred Prosecution Agreement regime: aligning rhetoric and reality" (13 April 2021) CorkerBinning blog https://www.corkerbinning.com/deferred-prosecution-agreement/ (last visited 2 June 2021).

Chapter 5: Corporate liability under civil law

CORPORATE LIABILITY IN CIVIL LAW IN ENGLAND AND WALES

5.1 Under the civil law, corporations are often held to be liable for the wrongful actions of individuals who stand in a particular relationship to the corporation, and where the civil wrong committed was attributable in a certain manner to that relationship. As discussed above at 2.11, this is called "vicarious liability". This is most commonly encountered in relation to corporations where the corporation is the employer of the individual concerned and the civil wrong occurred in the course of the employment.[1] Recent case law however has indicated that vicarious liability may extend to relationships "akin to employment".[2] By contrast, there is no vicarious liability in civil law for the actions of independent contractors.[3]

5.2 Vicarious liability is a common feature of civil legal systems generally. The justifications for it are perhaps relevant to the issue of the justification for corporate criminal liability.

5.3 Winfield and Jolowicz on Tort say:[4]

> There is little doubt that the existence of vicarious liability serves to improve standards and reduce accidents but, as elsewhere in tort law, it is questionable whether deterrence is a justification for tort liability or merely a beneficial effect of its imposition…
>
> Losses caused by the torts of the enterprise's employees are borne in small and probably unnoticeable amounts by the body of its customers, and the injured person is compensated without the necessity of calling upon an individual to suffer the disastrous financial consequences that may follow liability in tort. But [it is not clear] why the employer, as opposed to some other entity with deep pockets (such as the state) should bear the burden of effecting distribution of the losses in question. At a more fundamental level it has also been said that neither the fact that the defendant has deep pockets nor the fact that the defendant has insurance is a principled justification for imposing vicarious liability…
>
> The absence of a convincing rationale for vicarious liability has undoubtedly contributed to the difficulties the courts have faced in trying to construct an analytical framework that provides certainty and consistency in this area of tort law.

5.4 Recent years have seen the courts expand the test for what constitutes conduct for which vicarious liability may apply. The common law has traditionally distinguished

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1 The ambit of "within the course of employment" has recently been apparently extended, in cases involving sexual abuse, or assaults by employees; eg *Lister v Hesley Hall* [2001] UKHL 22, [2002] 1 AC 215; *Mohamud v Wm Morrison Supermarkets Plc* [2016] UKSC 11, [2016] AC 677.

2 *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56, [2013] 2 AC 1; *Armes v Nottinghamshire County Council* [2017] UKSC 60, [2018] AC 355.

3 *Barclays Bank plc v Various Claimants* [2020] UKSC 13, [2020] AC 973.

4 *Winfield and Jolowicz on Tort* (20th ed 2020) 21-006.

between a “detour” by an employee, and a “frolic”. This distinction comes from the English case of *Joel v Morison*,[5] which concerned liability in tort of an employee for an accident in which his servant knocked over a man while driving the employer’s horse and cart. Lord Parke held that, “The master is only liable where the servant is acting in the course of his employment”, but that “if the servants, being on their master's business, took a detour to call upon a friend, the master will be responsible... If he was going out of his way, against his master's implied commands, when driving on his master's business, he will make his master liable”. However, “if he was going on a frolic of his own, without being at all on his master's business, the master will not be liable.”

5.5 This traditional model distinguished between an unauthorised act and an unauthorised mode of doing an authorised act. However, in the twenty-first century, the common law has instead adopted a test of “close connection” with the employee’s duties.

5.6 In *Lister v Hesley Hall*,[6] sexual abuse carried out against children by a warden was held to be “inextricably interwoven with the carrying out … of his duties” even though it could never be described as a “mode” of carrying out his duties to care for the children. In *Mahmoud v Wm Morrison Supermarkets*,[7] the Supreme Court held that the conduct of a petrol station attendant who had racially abused and assaulted a customer was closely connected with his duties: the course of conduct had started while he was acting within the field of activities assigned to him, albeit in a “foul-mouthed” and “inexcusable” way, and “what happened thereafter was an unbroken sequence of events” and “a seamless episode”.

5.7 However, where the same company’s internal auditor leaked personal information about almost a hundred thousand colleagues, the company was not liable. He “was not engaged in furthering his employer’s business… on the contrary, he was pursuing a personal vendetta [against the company]”.[8]

5.8 Comparing this civil law rule of vicarious liability, to the general rule of criminal liability - based on the identification principle and set out in Chapter 2 above - indicates that there is a substantial difference between the two: companies may be financially liable to victims for serious criminal conduct committed by their employees in circumstances where the company would have no criminal liability.

5 *Joel v Morison* [1834] EWHC KB J39, (1834) 172 ER 1338.

6 *Lister v Hesley Hall* [2001] UKHL 22, [2002] 1 AC 215.

7 *Mahmoud v Wm Morrison Supermarkets* [2016] UKSC 11, [2016] AC 677.

8 *Wm Morrison Supermarkets plc v Various Claimants* [2020] UKSC 12, [2016] AC 677.

Chapter 6: Alternative approaches

APPROACHES TO CORPORATE CRIMINAL LIABILITY ELSEWHERE

6.1 We have considered a number of examples of different approaches taken to corporate criminal liability in overseas jurisdictions, both other common law jurisdictions, and elsewhere.

Common law jurisdictions

USA

6.2 The 50 US states and the Federal level are distinct legal jurisdictions, but US states generally proceed on the basis of "*respondeat superior"* under which a corporation may be criminally liable for the activities of its employees and agents where the employee is working within the scope of their employment and the acts were, at least in part, motivated by an intent to benefit the corporation.[1]

6.3 The principle was largely derived from English tort law. In *New York Central & Hudson River Company v United States*, the US Supreme Court endorsed the proposition that "since a corporation acts by its officers and agents, their purposes, motives, and intent are just as much those of the corporation as are the things done."[2]

6.4 "The scope of employment", as in English tort law, is not limited to cases where the activity is strictly required as part of the employment. Applying *Joel v Morison* (see paragraph 5.4 above), American courts distinguish between situations where the employee is no longer acting within the scope of his employment (a "frolic"), and those where there is a minor or insignificant deviation from the ways those duties are authorised to be performed (a "detour"). Consequently, a company can be held liable for an offence committed by an employee even if the employee is acting contrary to explicit instructions.[3]

6.5 The company need not have actually gained from the activity, provided that the actions were favourable to the company's interests, even if the primary motivation was the personal gain of the employee.[4]

6.6 In this one respect US law may be more generous to companies than that of England and Wales since in English law, a company may be liable for the criminal actions of a directing mind and will even where the company is the victim of the conduct (although it has been said that the courts will be slow to attribute criminal liability to the company in these circumstances).[5] (Nonetheless, in *United States v Sun-Diamond Growers of California* the conviction of an agricultural co-operative was upheld, even though the court found that Sun-Diamond "look[s] more like a victim than a perpetrator", on the

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[1] John Gallo, "The Corporate criminal defendant's illusory right to trial" (2014) 28 *Notre Dame Journal of Law, Ethics and Public Policy* 525, 528.

[2] *New York Central R Co v United States* (1909) 212 US 481, 492.

[3] *The President Coolidge (Dollar Steamship Co. v. United States)*, 101 F.2d 638 (9th Cir. 1939).

[4] *Standard Oil Co. of Texas v. United State*s, 307 F.2d 120 (5th Cir. 1962).

[5] SFO v Barclays [2018] EWHC 3055, [2020] 1 Cr App R 28 at [86(2)]

basis that the jury could have concluded that the responsible officer was acting out of a misguided intent to benefit the company.)[6]

6.7 The Dictionary Act,[7] which defines the use of terms for Federal legislation, provides that references to "a person" and "whoever" include not only corporations, but partnerships, associations, and joint-stock companies.

6.8 In relation to knowledge, some cases have suggested that the cumulation of knowledge of disparate employees may be imputed to the corporation through the "collective knowledge" doctrine.[8] In practice, this means the corporation may have the necessary knowledge even though no individual has the necessary knowledge to constitute *mens rea* and may in practice impose a proactive requirement upon companies to have information-sharing procedures in place. In *Bank of New England*, for instance, the offence consisted of failing to comply with a requirement to file reports on transactions over $10,000. The individual tellers were unaware of the requirement, while those officers who were aware of the requirement were unaware of the transactions, so no individual had the necessary mental element. But by imputing their knowledge to the company, the company had the requisite degree of knowledge to be guilty.[9]

6.9 However, while legal liability is in theory potentially very broad, this has given rise to criticisms of unfairness.[10] Sentencing guidelines and prosecutorial processes have been used to temper its application.[11] The potency of *respondeat superior* may also be one reason for the widespread use of DPAs and Non-Prosecution Agreements in the United States: "The corporation, in contrast to the government, may not survive an indictment, let alone a conviction" and this "calls into question whether the choice to enter into deferral is really a choice at all".[12]

6.10 Concern about overbroad liability also led the American Law Institute to propose a different test in its Model Penal Code. Companies would only be vicariously liable if "a legislative purpose to impose liability on corporations plainly appears" or the "offense consists of an omission to discharge a specific duty of affirmative performance imposed on corporations".[13] There would also be a defence of due diligence for offences in the former category. Otherwise, a corporation would only be liable for

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6 *United States v Sun-Diamond Growers of California*, 138 F.3d 961 (DC 1988). The allegation was that Sun-Diamond's vice president for corporate affairs had made illegal campaign contributions with a view to winning political favour, claiming the money back from Sun-Diamond under the false pretext that it was for tickets to a dinner. Although this constituted a fraud on the company, it was one being undertaken to cultivate a political relationship, which was part of his job.

7 1 US Code, §1.

8 *United States v. Bank of New England*, 821 F.2d 844 (1st Cir. 1987).

9 Anthony Ragozino, "Replacing the Collective Knowledge Doctrine with a Better Theory for Establishing Corporate Mens Rea: The Duty Stratification Approach" (1995) 24 *Southwestern University Law Review* 423.

10 See for example, Andrew Weissmann, "A New Approach to Corporate Criminal Liability" (2008) 44 *American Criminal Law Review* 1319.

11 Prof Sara Sun Beale, "The Development and Evolution of the US Law of Corporate Criminal Liability" (2016) 46 *Stetson Law Review* 41.

12 John Gallo, "The Corporate criminal defendant's illusory right to trial" (2014) 28 *Notre Dame Journal of Law, Ethics and Public Policy* 525, 539.

13 American Legal Institute, Model Penal Code, §. 2.07 (1).

conduct that was "authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting on behalf of the corporation within the scope of his office or employment". A high managerial agent would be someone "having duties of such responsibility that his conduct may fairly be assumed to represent the policy of the corporation".[14]

6.11 This limitation of corporate liability has not been adopted at the Federal level, but has been adopted by several states.[15]

6.12 *Respondeat superior* is not without its critics. Robert Luskin, for example, argues that risk-shifting arguments applicable in tort law do not apply to the criminal law so "the only appropriate justification for criminal *respondeat superior* liability is to ensure that corporations exercise an appreciable level of 'due care' in monitoring their employees". That being so "then, a fortiori, corporations that can demonstrate having taken such preventative measures should not be held vicariously liable".[16]

6.13 Richard L Cassin argues that "innocent shareholders pay the fines, and innocent employees, creditors, customers, and communities sometimes feel the pinch too. The embarrassment of corporate criminal liability is that it punishes the innocent along with the guilty".[17]

6.14 Albert Alschuler has likened it to "deodand" (the punishment of an animal or inanimate object that has killed someone) or "frankpledge" (the Anglo-Saxon practice of holding groups of households jointly liable for the conduct of one of their number if he evaded justice), complaining that "a single errant employee can cause the downfall of a multi-national corporation and the loss of thousands of jobs".[18]

6.15 Pamela Busy complains that,

> Because the *respondeat superior* standard focuses solely on an individual corporate agent's intent and automatically imputes that intent to the corporation, a corporation's efforts to prevent such conduct are irrelevant. Under this approach all corporations, honest or dishonest, good or bad, are convicted if the government can prove that even one maverick employee committed criminal conduct.[19]

6.16 Recognising the limitations of the identification principle (as endorsed in the Model Penal Code) she argues the law should instead focus on the extent to which a corporate's culture – or "corporate ethos" – encouraged criminal conduct. This is an approach which has already been adopted into the criminal code of Australian federal criminal law.

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14 American Legal Institute, Model Penal Code, §. 2.07 (4)(c).

15 Allens Arthur Robinson, '*Corporate Culture' as the basis for the criminal liability of corporations* (2008), p 29.

16 Robert Luskin, "Caring about corporate 'due care'. Why *respondeat superior* liability outreaches its jurisdiction" (2020) 57 *American Criminal Law Review* 302.

17 Richard L Cassin, "The Embarrassment of Corporate Criminal Liability" *The FCPA Blog* (27 December 2009) at https://fcpablog.com/2009/12/27/the-embarrassment-of-corporate-criminal-liability/ (last visited 25 May 2021).

18 Albert Alschuler, "Two Ways to Think about the Punishment of Corporations" (2009) *46 American Criminal Law Review* 1359, 1364.

19 Pamela H Bucy, "Corporate Ethos: a standard for imposing corporate criminal liability" (1991) *Minnesota Law Review* 1095.

The Financial Institutions Reform, Recovery and Enforcement Act (1989)

6.17 Of relevance to issues of corporate criminal liability in the USA, the Financial Institutions Reform, Recovery and Enforcement Act (1989)[20] permits the Department of Justice ("DOJ") to institute *civil* proceedings against a person, including a corporation, for certain *criminal* offences. The offences concerned are either those involving banks or other financial institutions, or more general offences, including mail fraud and wire fraud, where they "affect a federally insured financial institution". The civil burden of proof applies. This has been used many times for corporate economic crime offences, leading to some very large civil settlements.[21]

Australia

6.18 In Australia, liability for certain criminal offences under Commonwealth (that is, federal) law is governed by the Criminal Code, which is a schedule to the Criminal Code Act 1995 (Cth). Part 2.5 of the Code governs the liability of bodies corporate for offences. Prior to the Criminal Code, Commonwealth offences were generally dealt with applying principles of criminal responsibility of the state of the court hearing the matter.

6.19 However, although it was hoped that the states would also adopt the principles of the Commonwealth Criminal Code to govern their own criminal law, this did not occur. Consequently, the mode of corporate criminal liability in the Commonwealth Criminal Code is only generally applicable to certain Commonwealth offences.

6.20 Moreover, the anticipated replacement of statute-specific Commonwealth provisions with the Part 2.5 did not occur. In particular, the provisions of Part 2.5 were excluded from applying to either Chapter 7 of the Corporations Act 2001[22] – the primary legislation governing financial services industry – and sections of the Competition and Consumer Act 2010.[23]

6.21 Consequently, while Part 2.5 is the default attribution of liability to non-natural persons, it is not as widely used as anticipated and therefore there has been less judicial consideration of it than might have been the case.

6.22 Part 2.5, section 12.1 of the Code provides that the "physical element" of the offence (that is, conduct, a result of conduct, or a circumstance in which the conduct or a result of the conduct occurs) is attributed to the body corporate if the physical element is committed by an employee, agent or officer of the body corporate acting within the actual or apparent scope of his or her employment or authority.

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[20] Pub.L.101-73, s951, and see eg Jones Day, "FIRREA Civil Money Penalties: The Government's Newfound Weapon Against Financial Fraud" (May 2013) https://www.jonesday.com/en/insights/2013/05/firrea-civil-money-penalties-the-governments-newfound-weapon-against-financial-fraud (last visited 3 June 2021).

[21] For example, a $16.65bn settlement with Bank of America (2014) (https://www.justice.gov/opa/pr/bank-america-pay-1665-billion-historic-justice-department-settlement-financial-fraud-leading), $25bn settlement with Bank of America, JP Morgan Chase, Wells Fargo, Citigroup and Ally Financial (2012) (https://www.justice.gov/opa/pr/25-billion-mortgage-servicing-agreement-filed-federal-court), a $1.375bn settlement with Standard and Poor's Financial Services LLC (2015) (https://www.justice.gov/opa/pr/justice-department-and-state-partners-secure-1375-billion-settlement-sp-defrauding-investors) (last visited 26 May 2021).

[22] Corporations Act 2001 (Cth) s 769A

[23] Competition and Consumer Act 2010 (Cth) s 6AA: Part 2.5 of the Criminal Code from does not apply to an offence against Part IIIA or XIC, Division 7 of Part XIB, or section 44ZZRF or 44ZZRG.

6.23 In relation to any "fault element" (that is, intention, knowledge, recklessness or negligence, or any other specific fault element provided for in the offence), the Code draws a distinction between negligence and other fault elements.

Fault elements other than negligence

6.24 For fault elements other than negligence, the fault element of the offence must be attributed to the body corporate if the body corporate expressly, tacitly or impliedly authorised or permitted the commission of the offence. The Code goes on to state that the means of establishing authorisation or permission include the following.

(1) Proving that the board of directors intentionally, knowingly or recklessly carried out the conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the conduct.

(2) Proving that a high managerial agent of the body corporate (that is, an employee, agent or officer with duties of such responsibility that his or her conduct may fairly be assumed to represent corporate policy)[24] intentionally, knowingly or recklessly engaged in the relevant conduct or expressly, tacitly or impliedly authorised or permitted the commission of the conduct. However, it is a defence for the body corporate to prove that it exercised due diligence to prevent the conduct, authorisation or permission. (Recklessness on the part of the board or a high managerial agent will not suffice if the offence itself requires a fault element higher than recklessness.)

(3) Proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision.

(4) Proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant permission.

6.25 Relevant considerations in respect of corporate culture include: whether authority to commit an offence of the same or a similar character had been given by a high managerial agent of the body corporate; or whether the employee, agent or officer of the body corporate who committed the offence believed on reasonable grounds, or entertained a reasonable expectation, that a high managerial agent of the body corporate would have authorised or permitted the commission of the offence. So, for instance, even if a company's management does not permit (even tacitly) the commission of a particular offence, if there is tacit permission to other employees to commit a similar type of offence, this may be enough to demonstrate a corporate culture of non-compliance.

6.26 A difficulty here is that although the subheading of section 12.3 refers to "fault elements other than negligence", section 12.3 only deals with the attribution of intention, knowledge and recklessness. Section 5.1 of the Code, however, acknowledges that a law that creates a particular offence may specify other fault elements. Part 2.5 does not say how, or even if, other fault elements can be attributed to corporate bodies.

6.27 The Australian Law Reform Commission has noted that it can create uncertainty when an offence includes a fault element that does not fit within this structure. In particular,

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[24] It will be seen that the definition of a high managerial agent in Australian law is that recommended by the US Model Penal Code.

in at least one case a company had been acquitted on the basis that the prosecution could not attribute "dishonesty" to the company under section 12.3.[25]

Negligence

6.28 For negligence offences, the Code provides that a person – including a body corporate – is negligent if the conduct involves such a great falling short of the standard of care that a reasonable person would exercise, and such a high risk that the physical element exists or will exist, that the conduct merits criminal punishment.[26]

6.29 Crucially, even if no individual is negligent, the corporate body's conduct may still be negligent when viewed as a whole, by aggregating the conduct of any number of its employees, agents and officers. Negligence may be evidenced by the fact that the conduct was attributable to inadequate corporate management, control or supervision of its employees, agents or officers, or failure to provide adequate systems for conveying relevant information to those within the body corporate.[27]

6.30 In relation to strict liability offences (that is, where mistake of fact may provide a defence, unlike absolute liability offences) the company may have a defence if the body corporate shows it exercised due diligence to prevent the conduct. Here, failure to exercise due diligence may be evidenced by the fact that the conduct was attributable to inadequate corporate management, control or supervision of its employees, agents or officers, or failure to provide adequate systems for conveying relevant information to those within the body corporate. Again therefore, the company may be convicted even if no individual employee is found guilty: the individual employee may have a defence based on a reasonable but mistaken belief, but the corporation may guilty on the basis that the employee's mistake was attributable to inadequate corporate management or information systems.[28]

6.31 The following features are also observed in the Australian criminal code.

(1) Fault can also be attributed to the company on the basis of "corporate culture". This may be a positive culture of non-compliance or a failure to maintain a culture of compliance.

(2) The fault of a senior manager ("high managerial agent") can be attributed to the company even in circumstances where there has not been a delegation of sufficient authority for the manager to constitute a directing mind and will ("full discretion to act independently of instructions from [the board]"). Arguably this would capture a case such as *Barclays* where, although the board had not delegated the relevant decision making to the Chief Executive, it seems likely that being Chief Executive of a major international bank would constitute a "duty of such responsibility that his conduct may fairly be assumed to represent corporate policy".

(3) It is possible to attribute negligence to the corporation collectively, even though the conduct of individual employees may not itself be negligent. It is not clear

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[25] Australian Law Reform Commission, *Corporate Criminal Responsibility* (2020), para. 6.62. See also Shirley Quo, "Corporate Culture and corporate criminal responsibility in Australia" (2016) 37 *Company Lawyer* 392.

[26] Criminal Code Act (Cth) (1995), s 12.4.

[27] Criminal Code Act (Cth) (1995), s 12.4(2)-(3).

[28] Criminal Code Act (Cth) (1995), s 12.5.

whether this is permissible under the law of England and Wales. (In Attorney General's Reference No. 2 of 1999, the Court of Appeal held that "unless an identified individual's conduct, characterisable as gross criminal negligence, can be attributed to the company"[29] the company could not be guilty of the old common law offence of gross negligence manslaughter, Smith and Hogan suggested in their seventh edition that "a series of minor failures by officers of the company may add up to a gross breach by the company of its duty of care" and argued in their tenth edition that while,

> It is not possible artificially to create a *mens rea* in this way … arguably there is a place for it in offences of negligence… There is authority for such a doctrine in the law of tort and the concept of negligence is the same in the criminal law, the difference being one of degree – criminal negligence must be "gross"…[30]

6.32 Although Commonwealth law provides a wider basis of attribution that in the jurisdictions of the UK, New Zealand and Canada (see below), it has not been immune to criticism that it is too hard to convict corporate defendants. In 2020, the Australian Law Reform Commission ("ALRC") published a report on Corporate Criminal Responsibility which proposed a number of reforms which, on balance, would make it easier to attribute criminal liability to corporate bodies.[31]

6.33 The ALRC report made the following findings.

(1) Most statutes creating criminal offences contain their own fault tests which the default rules under the Criminal Code do not displace. These are generally based on the Trade Practices Act 1974 (Cth) and operate in conjunction with the common law principles of attribution.

(2) The existing attribution methods do not reflect notions of organisational blameworthiness or culpability in a consistent manner. These methods do not necessarily reflect the ways in which corporations are structured in practice, and can therefore operate in a discriminatory manner depending on the size and complexity of the particular corporation.

6.34 The ALRC made the following recommendations.

(1) Part 2.5 should be the default method of attribution and, if in very particular circumstances a unique method of attribution is required, there should be a clear rationale for departing from Part 2.5.

(2) The language of the provisions should be amended from "must be attributed" to "is taken to be committed by the body corporate" to make clear that this is not a form of vicarious liability but "the imposition of direct liability on the corporation".

(3) Attribution in respect of the physical element should be extended to cover any person acting at the direction, or with the agreement of consent (express or implied), of an officer, employee, or agent of the body corporate, acting within actual or apparent authority.

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29 [2000] EWCA Crim 91, [2000] 3 All ER 182

30 JC Smith, *Smith and Hogan: Criminal Law* (10th ed 2002) 206-7.

31 Australian Law Reform Commission, *Corporate Criminal Responsibility* (2020).

(4) The reference to “due diligence” should instead be to “reasonable precautions” – principally because “due diligence” has a specific meaning in relation to commercial transactions and use of the term risked confusion.

6.35 They proposed two options for reform of the fault element in corporate criminal liability.

(1) Option 1 would extend those whose fault was to be attributed to the company from “high managerial agent” to “officer, employee, or agent of the body corporate, acting within actual or apparent authority”.

(2) Option 2 would provide for attribution where one or more officers, employees or agents of the body corporate, acting within actual or apparent authority engaged in the relevant conduct and had the relevant state of mind; or one or more officers, employees or agents of the body corporate, acting within actual or apparent authority, directed, agreed to, or consented to the relevant conduct, and had the relevant state of mind. This option would provide a defence where the body corporate took reasonable precautions to prevent the commission of the offence.

6.36 Both options therefore countenanced a move away from high managerial agents and corporate conduct to something closer to *respondeat superior*. Citing Dr Ivory and Anna John, the ALRC argued that the meaning of the phrase “high managerial agent” could vary “both in accordance with the particular offence provisions and the ‘real’ distribution of powers in a company – or within a corporate group”.[32]

6.37 Although the corporate culture limb was little-used, respondents to the ALRC’s consultation overwhelmingly supported its retention, noting scenarios in which attribution by reference to corporate culture would greatly assist in prosecutions.

Canada

6.38 In Canada, criminal law is a federal responsibility (whereas in the USA and Australia criminal law jurisdiction lies primarily with the states and the federal criminal law power is ancillary to other enumerated federal responsibilities).

6.39 Traditionally, the identification doctrine applied in Canada.[33] However, an amendment to the Criminal Code of Canada in 2003 (An Act to amend the Criminal Code (criminal liability of organizations) SC 2003, c 21) provided an extension to the common law directing mind to "senior officers".

6.40 The Code now provides that, for offences requiring fault other negligence:

> an organization is a party to an offence if, with the intent at least in part to benefit the organization, one of its senior officers
>
> (a) acting within the scope of their authority, is a party to the offence; [or]
>
> (b) having the mental state required to be a party to the offence and acting within the scope of their authority, directs the work of other

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32 Australian Law Reform Commission, *Corporate Criminal Responsibility* (2020); Radha Ivory and Anna John, “Holding Companies Responsible? The Criminal Liability of Australian Corporations for Extraterritorial Human Rights Violations” (2017) 40(3) *University of New South Wales Law Journal* 1175, 1192.

33 *Canadian Dredge & Dock Co. v. The Queen* [1985] 1 SCR 662.

representatives of the organization so that they do the act or omission specified in the offence; or

(c) knowing that a representative of the organization is or is about to be a party to the offence, does not take all reasonable measures to stop them from being a party to the offence.[34]

6.41 In the case of offences requiring proof of negligence:

an organization is a party to the offence if

(a) acting within the scope of their authority

(i) one of its representatives is a party to the offence, or

(ii) two or more of its representatives engage in the conduct, whether by act or omission, such that, if it had been the conduct of only one representative, that representative would have been party to the offence;

and

(b) the senior officer who is responsible for the aspect of the organization's activities that is relevant to the offence departs – or the senior officers collectively depart – markedly from the standard of care that, in the circumstances, could reasonably be expected to prevent a representative of the organization from being a party to the offence.[35]

6.42 Senior officer is defined as "a representative who plays an important role in the establishment of an organization's policies or is responsible for managing an important aspect of the organization's activities and, in the case of body corporate, includes a director, its chief executive and its chief financial officer".[36]

6.43 Organization includes a public body, body corporate, society, company, firm, partnership, trade union or municipality; or an association of persons that is created for a common purpose, has an operational structure and holds itself out to the public as an association of persons.

6.44 The Canadian *test* for fault elements other than negligence is therefore not markedly broader than the common law test, requiring at the very least connivance, but its *scope*, encompassing not just directors but also senior officers, even in the absence of a wholesale delegation of authority, is broader.

Conclusion regarding common law jurisdictions

6.45 It can be seen therefore that among common law jurisdictions there is something of a continuum. England and Wales has the most restrictive basis for attribution – for companies with a board of directors, only faults attributable to the board (not necessarily individual board members) and, in limited circumstances, senior managers – give rise to corporate liability. Next, Canada, where faults of the board and senior management can be attributed. The basis for liability in Australia is wider still – the

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[34] Criminal Code, s 22.2

[35] Criminal Code, s 22.1

[36] Criminal Code, s 2

board, senior management (subject to a due diligence defence) and a wider corporate culture. And in the United States, the corporation is potentially liable on the basis of any employee possessing the necessary fault.

6.46 In Chapter 10, we ask whether principles drawn from these jurisdictions might provide an alternative basis for corporate criminal liability by way of replacement or modification of the identification principle, and what the consequences, especially for business, would be.

Other jurisdictions

6.47 Three other national jurisdictions, with large economies, sophisticated legal systems and which are geographically close to the UK, are Germany, Italy and France:

Germany

6.48 Traditionally, there has been no "formal" corporate criminal liability in Germany. However, since 1987, corporations and other legal persons may be made subject to regulatory penalties, including fines, where criminal or regulatory offences are committed in certain circumstances.[37] A regulatory offence is a breach of statutory duty where the statute provides for the imposition of a regulatory fine as a result. The circumstances where a corporation may be liable to pay a regulatory penalty are:

(1) A criminal, or regulatory offence is committed, as a result of which duties incumbent on the corporation are broken, or where the corporation has been thereby enriched, or was intended thereby to be enriched; and,

(2) the offence was committed by an individual occupying a certain position in relation to the corporation, including being a senior manager, specifically: "a person responsible on behalf of the management of the operation forming part of a legal person, or someone who supervises the conduct of business or other exercise of controlling powers in a managerial position."[38]

6.49 Furthermore, where:

(1) a breach of a duty imposed upon an operation or undertaking constitutes a criminal offence, or where it may be punished by a regulatory fine; and,

(2) the owner of the operation or undertaking intentionally or negligently omits to take the supervisory measures required to prevent the contravention of the duty; and,

(3) the required supervisory measures would have been prevented the offence or made its commission much more difficult;

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[37] Administrative Offences Act ("Gesetz über Ordnungswidrigkeiten" – "OwiG"), see further Dirk Seiler, Nathalie Isabelle Thorhauer, "Corporate Criminal Liability and Internal Investigations – Expected Legislative Changes in Germany", (2019) Herbert Smith Freehills LLP Seventh Annual Corporate Crime and Investigations Conference 2020 (https://www.mondaq.com/germany/corporate-crime/848502/corporate-criminal-liability-and-internal-investigations-expected-legislative-changes-in-germany, last visited 26 May 2021); Act on Regulatory Offences, https://www.gesetze-im-internet.de/englisch_owig/ (last visited 28 May 2021).

[38] OwiG, s30.

then the owner is deemed to have committed a regulatory offence. The required supervisory measures are deemed to comprise the appointment, careful selection and monitoring of supervisory personnel.[39]

6.50 Regulatory penalties on individuals or corporations under the Act may be imposed by an administrative authority, with a right of appeal to an administrative court. However, if there are associated criminal proceedings then the public prosecutor's office also has jurisdiction to bring proceedings for the regulatory offence. If the public prosecutor has conduct of such proceedings then the court which has jurisdiction over the connected criminal case may also impose the regulatory penalty.[40]

6.51 In general, the rules of criminal procedure applies to proceedings for regulatory penalties.[41]

6.52 There are recent proposed reforms to this regulatory penalty regime. The government has introduced proposed legislation, the Corporate Sanctions Act, also known as "Verbandssanktionengesetz" or "VerSanG".[42]

6.53 This draft legislation, as it stands, would introduce the following changes:

(1) A new category of "company crimes" would be created. The circumstances in which a company crime might be committed would be similar to the circumstances under the present law where a company may receive a regulatory penalty, see above. However, the operation of such company crimes would be closer to the way in which crimes committed by individuals are dealt with currently in Germany.

(2) The operation of such "company crimes" would be restricted to legal-entities with a commercial purpose.

(3) The new law would remove the prosecutors' discretion as to whether or not to prosecute alleged offences. This change was proposed owing to a belief that the discretion was being exercised inconsistently under the present law.

(4) For larger corporations, the proposed legislation would increase the maximum level of financial penalty which might be imposed.

(5) The territorial ambit of the law would be increased to include criminal offences committed abroad by companies based in Germany.

Italy

6.54 Traditionally under Italian law, corporations could not be guilty of criminal offences. Article 27 of the Italian Constitution provides that "criminal responsibility is individual".

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39 OwiG, s 130.

40 OwiG, ss 35 – 45.

41 Owig, s 46.

42 Gesetz zur Sanktionierung von verbandsbezogenen Straftaten, (Verbandssanktionengesetz – "VerSanG").

6.55 However, in 2001, Italy passed Decree 231 of 8 June to provide for a generic model of corporate "quasi-criminal" liability.[43] This law was in part intended to align Italian law with certain international provisions.[44] Although the liability is labelled as being "administrative", the statute provides that it will be determined by the criminal courts.[45]

6.56 Decree 231 includes the following provisions.

(1) Article 3 provides that it only extends to commercial organisations (as opposed to public-sector corporate bodies).

(2) Article 5 provides that a corporation may be administratively liable for a criminal offence, committed in its interest or to its advantage, in two scenarios. The elements of administrative liability in each of the two scenarios are slightly different. These two scenarios are:

(a) Under article 5(1)(a): where an offence is committed by a financially and functionally independent representative or senior executive within the corporation, or within an organisational unit of it, or someone exercising *de facto* management and control.

(b) Under article 5(1)(b), where the offence is committed by someone subordinate to a person within article 5(1)(a).

In each scenario, the corporation will not be liable of the person concerned committed the offence solely in their own interest, or in the interests of a third-party.

(3) In each scenario, articles 6 and 7 provide that a corporation may avoid liability if it has an Organisational, Management and Control "OMC" model. However, the provisions regarding the circumstances in which such a model may lead to a corporation avoiding liability are different, depending on whether the offence was committed by a manager with full authority within article 5(1)(a), or a subordinate within 5(1)(b), above.

(4) Where the offence was committed by a manager with full authority, the burden of proof is on the corporation to prove that:

(a) Prior to the offence, the senior executive organ of the corporation had adopted and efficiently enacted an OMC model.

(b) The OMC model was superintended by a sufficiently independent and competent division of the corporation.

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[43] James Gobert and Emilia Mugnai, "Coping with corporate criminality – some lessons from Italy" [2002] *Criminal Law Review* 619; Di Marilisa De Nigris, Andrea Strippoli Lanternini, Antonio Arrotina, "The Legislative Decree 231/01 the test of the international law" (2016) *Il diritto penale della globalizzazione* (https://www.dirittopenaleglobalizzazione.it/the-legislative-decree-no-23101-the-test-of-the-international-law/, last visited 26 May 2021).

[44] The Brussels Convention on the protection of European Communities' financial interests 1995; the Convention on the fight against corruption involving officials of the European Communities or officials of the Member States of the European Union 1997; the OECD Convention on Combating Bribery of Foreign Public Officials 1997.

[45] Decree 231 of 2001, article 36.

(c) The offence was committed by fraudulently circumventing the OMC model.

(d) There was no failure by the OMC model superintending division within the company.

Also, having an OMC model will only absolve a corporation from liability for a criminal offence committed by a manager with full authority under article 5(1)(a), if the OMC model meets a number or requirements. These are that it must:

(a) identify the activities in connection with which it is most likely crimes will be committed;

(b) include special protocols intended to ensure decisions are made and enforced by the company to prevent crime;

(c) identify the safest way to manage financial resources in order to prevent crimes being committed;

(d) make it compulsory for all officers and employees to supply the supervisory division concerned with the necessary information to ensure their compliance; and

(e) introduce disciplinary measures to sanction non-compliance with the model.

There are provisions for trade associations to draw up example models and to submit them to the government for comment.

(5) Where the offence was committed by a subordinate, the company may also avoid liability if it has an OMC model, however, in this scenario, the requirements of an OMC model required to avoid liability are less onerous and the burden of proof is not on the corporation. The only specified requirements of an OMC model in these circumstances are that, in a way commensurate with the size of the corporation, it includes a risk assessment; furthermore that it is implemented in a way which includes verification, and amendment should the company's business change, and; a disciplinary system to punish non-compliance with the measures set out in the model.

(6) Article 8 provides that the corporation may be liable even if no human perpetrator has been identified or convicted, or if a perpetrator could not legally be convicted (for instance, because of a statute of limitations). In practice however, it is very rare for administrative action to be taken against a company unless an individual wrongdoer or wrongdoers have been identified.

(7) Articles 24 and 25 limit the application of the statute to certain crimes. Originally, these were limited to offences involving corruption, and fraud against the state or the EU. They now include tax offences, insider trading, money laundering, manslaughter and offences resulting in bodily injury. However, the statute still does not apply, for example, to fraud except for frauds against public bodies. Where the offence concerned is one of manslaughter or an offence involving bodily injury, then the prosecution must prove, not that the offence was committed partly for the benefit of the company, but that it was the result of a failure to take precautions, that failure being for the benefit of the company.

6.57 In practice, the Italian legal system expects companies to identify which of the included offences they have a significant risk of exposure to, and to adopt suitable measures to minimise the risk of such offences being committed at least in part for their benefit. Many companies, including smaller companies operating in industries without particular risks of financial or bodily harm, do not have organisational, management and control models. The law is broadly popular although there is some concern as regards the extent of the burden placed upon companies who wish to minimise their risks of liability by instituting such an organisational, management and control model.[46]

France

6.58 Article 121-1 of the French Criminal Code provides that: "No one is criminally liable except for his own conduct."

6.59 However, article 121-2 provides:

> Legal persons, with the exception of the State, are criminally liable for offences committed on their account by their organs or representatives…

6.60 Since 2004, this provision has applied to any criminal offence.[47] There are further rules regarding the culpability of secondary parties (which might include corporations), which are similar to the rules on secondary liability for criminal offences in England and Wales. There are further restrictions on the criminal culpability of local authorities and their associations.

6.61 As set out in article 121-2 therefore, the key questions when considering corporate criminal liability under French law are:

(1) Was the offence committed on a corporation's account?

(2) Was the offence committed by the organ or representative of a corporation?

6.62 Neither of these terms are defined further in the Criminal Code. Practitioners suggest that the relevant organs or representatives of a corporation may include the board of directors or a supervisory board, directors, managers, general managers and others who are vested with the power to administer, manage and control the corporation, whether officially under the corporation's procedures, or on a de facto basis.[48]

6.63 As regards whether an offence was committed "on the account" of a corporation, practitioners say this includes all acts that are taken in the interests of the corporation as well as potentially acts committed in the course of the corporation's activity or

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46 With thanks to Enrico Mancuso, Pedersoli Studio Legale, Milan

47 Law No 2004-204 of 9 March 2004.

48 Eric Lasry (Baker McKenzie France), "Corporate Liability in France" Global Compliance News https://www.globalcompliancenews.com/white-collar-crime/corporate-liability-in-france/ (last visited 4 June 2021).

where the person concerned could be said not be acting in their own personal interest.[49]

6.64 In 2017, France introduced new anti-corruption legislation, known as the “Sapin II Law”.[50] It provided for:

(1) The establishment of a new anti-corruption agency, the Agence Française Anti-corruption (“AFA”), which supersedes the earlier agency, the Service Central de la Prévention de la Corruption.

(2) Compulsory implementation of ani-corruption compliance polices by French companies over a certain size. There are special rules for subsidiaries but generally these obligations apply to companies with:

(a) at least 500 employees, and

(b) annual revenue of at least 100 million euros.

(3) There are penalties for failure to comply with the obligations regarding having an anti-corruption programme. These include a power by the AFA to impose a fine administratively, with a right of appeal to an administrative court.

(4) A new procedure for settlement of criminal matters without admission of guilt, the “Judicial Convention in the Public Interest”. This operates mainly in the context of allegations of offences of corruption, money-laundering and tax fraud.

Conclusion regarding non-common law jurisdictions

6.65 The German and Italian legal systems share the characteristic that that the liability of corporations from criminal wrongs is “quasi-administrative”.

6.66 In both the German and Italian systems, there are provisions for corporate responsibility based directly on the criminal actions of senior personnel, or on failures by senior personnel to prevent criminal actions by more junior personnel.

6.67 The German system of corporate “administrative” liability applies to all criminal offences. The Italian system only applies to some. Perhaps significantly, the Italian system does not include offences of fraud committed against private persons or corporations.

6.68 The French system provides for corporate criminal liability on the basis of something akin to the identification principle. There is a recently introduced requirement for larger corporations to introduce anti-corruption polices, but this is limited to corruption only, and is enforced by administrative sanctions as opposed to criminal penalties.

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[49] Eric Lasry (Baker McKenzie France), “Corporate Liability in France” Global Compliance News https://www.globalcompliancenews.com/white-collar-crime/corporate-liability-in-france/ (last visited 4 June 2021).

[50] Law no 2016-1691 “Loi Sapin II pour la transparence de la vie économique”. See for example, Dentons, “Sapin II Law: The new French legal framework for the fight against corruption” (February 2017), Eversheds Sutherland LLP, “The new anti-corruption law SAPIN II: what is the impact for companies operating in France?” (March 2017).

Chapter 7: Sentencing of corporations

7.1 Not only were most criminal offences crafted with natural persons in mind, so too is the body of sentencing law. The only explicit provision for corporate offenders within the Sentencing Code[1] is section 14, providing for the committal of corporate offenders to Crown Court following summary conviction for an either way offence where the magistrates court considers its sentencing powers to be inadequate.

7.2 Section 57 of the Sentencing Code contains the statutory purposes of sentencing for adults. These are the punishment of offenders; the reduction of crime (including its reduction by deterrence); the reform and rehabilitation of offenders; the protection of the public; and the making of reparation by offenders to persons affected by their offences. The equivalent purposes for youth justice are in the Crime and Disorder Act 1998, under which "the principal aim of the youth justice system [is] to prevent offending by children and young persons".[2]

7.3 There is currently no such provision relating to the sentencing of corporations. Although the principles in section 57 might be broadly applicable, there may be additional considerations which it would be helpful to include in a bespoke provision. This may include the need to consider the impact on the economic viability of the organisation and the continued employment of its employees, and the potential impact on the local economy (although not necessarily on the company's shareholders) when sentencing corporate bodies.

Sanctions available when sentencing corporations

7.4 In practice, except for corporate manslaughter and offences under the Health and Safety at Work Act 1974, the only penalties that can be imposed on a corporation under criminal law are financial – fines, compensation orders and the statutory surcharges that apply. These are usually much more limited than the discretionary powers available to regulators where the organisation operates in a regulated sector.[3]

7.5 The lack of suitable punishments is sometimes given as one reason why a corporation could not be prosecuted for certain offences. However, in our view, this only now applies to the offence of murder.

7.6 It is also sometimes claimed that a corporation cannot be convicted of treason or piracy.[4] However, we do not consider this accurately reflects the current law. This claim was likely correct when *some* forms of treason and piracy carried the mandatory death penalty,[5] but the Crime and Disorder Act 1998, section 36, which removed the last vestiges of the death penalty from the law of England and Wales, makes a person

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1 Sentencing Act 2020, parts 2 to 13.

2 Crime and Disorder Act 1998, s 37(1).

3 There are also powers to disqualify persons from acting as company directors, Company Directors Disqualification Act 1986, ss 1 and 2.

4 See for example, the CPS Guidance on Corporate Prosecutions, https://www.cps.gov.uk/legal-guidance/corporate-prosecutions (last visited 26 May 2021).

5 In fact, only piracy when murder is attempted and some offences of treason carried the mandatory death penalty.

convicted of these offences “liable to imprisonment for life”. Unlike the mandatory death sentence for the offences previously required, and the mandatory life sentence for murder, *liability* to life imprisonment does not prevent the imposition of a fine in addition to or instead of imprisonment.

7.7 The Sentencing Code, sections 119 and 120, provide that a fine may be imposed in respect of any offence, *even if the relevant legislation only allows imprisonment*, unless:

> the offence is one in relation to which a mandatory sentence requirement applies by virtue of any of the following provisions of section 399—
>
> paragraph (a) (life sentence for murder etc),
>
> paragraph (b) (other mandatory life sentences), or
>
> paragraph (c)(iv) (minimum sentence for third domestic burglary offence);
>
> another enactment requires the offender to be dealt with in a particular way;
>
> or the court is precluded from sentencing the offender by its exercise of some other power.

7.8 In practice, however, other than the mandatory life sentence for murder, the remaining provisions are all couched in terms that apply only to natural persons (they contain an age requirement), and therefore would not operate in the case of a corporate offender to remove the power to levy a fine.

7.9 It remains the case, however, that it is impossible for a corporation to be convicted of murder. Since the mandatory life sentence does not apply to encouraging or assisting murder,[6] conspiracy[7] to murder[8] or attempted murder,[9] these are acts for which, in principle, a corporation could be sentenced.

Fines

7.10 Fines levied on corporations are subject to the same statutory maxima as apply to natural persons. In 2015, magistrates’ courts fining powers were increased so that a fine of level 5 on the standard scale became an unlimited fine, and any statutory maximum of £5,000 or more also became unlimited. However, it remains the case that for offences with a maximum penalty of less than £5,000, and offences punishable with fines on levels 1 to 4 of the standard scale, lesser fixed maximum penalties apply.

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6 Serious Crime Act 2007, ss 44 to 46.

7 However, a conspiracy must involve at least two distinct parties; there cannot be a conspiracy between a company’s sole DMW and the company, in the absence of the involvement of another person (*R v McDonnell* [1966] 1 QB 233, [1965] 3 WLR 1138).

8 Criminal Law Act 1977, s 3(2).

9 Criminal Attempts Act 1981, s 4(1).

7.11 The Sentencing Council's guidelines envisage a multi-stage process when sentencing corporations.[10] First, the seriousness of the *offence* is established. Second, the court is required to establish the organisation's turnover (or equivalent) figure. The Council publishes tables showing the ordinary starting point and range for each category of seriousness and size of company. From the starting point, the court will normally set a fine within the range that reflects the aggravating and mitigating factors in the particular circumstances. Then the court must "step back" to establish whether the figure is proportionate to the company's means. The court must also consider any impact on the firm's ability to make restitution to victims, its ability to improve conditions in order to comply with the law, and the impact of the fine on employment of staff, service users, customers and the local economy (but not directors and shareholders). Finally, the court will consider other factors such as assistance to the prosecution and credit for a guilty plea.

7.12 The Overarching Sentencing Guideline states that,

> When sentencing organisations the fine must be sufficiently substantial to have a real economic impact which will bring home to both management and shareholders the need to comply with the law. The court should ensure that the effect of the fine (particularly if it will result in closure of the business) is proportionate to the gravity of the offence.[11]

However, individual sentencing guidelines for certain offences, including corporate manslaughter, conspiracy to defraud and conspiracy to cheat the public revenue, and pollution offences, go on to state, "Whether the fine will have the effect of putting the offender out of business will be relevant; **in some cases this may be an acceptable consequence**."[12]

Alternatives to financial penalties

7.13 In 2006, a review of administrative sanctions by Professor Richard Macrory for the Government[13] recommended a greater range of penalties for corporate breaches of regulatory rules and criminal conduct. Specifically, in relation to criminal courts, he recommended that three additional sentencing options should be available for corporate offenders:

(1) Profit Orders, which would reflect the financial benefit gained from non-compliance and would be separate from any fine. While the fine would reflect

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10 Sentencing Council Guideline on Corporate offenders: fraud, bribery and money laundering (2014), https://www.sentencingcouncil.org.uk/offences/magistrates-court/item/corporate-offenders-fraud-bribery-and-money-laundering/; Sentencing Council Guideline on Corporate manslaughter (2016), https://www.sentencingcouncil.org.uk/offences/crown-court/item/corporate-manslaughter/; Sentencing Council Guideline on Organisations: Breach of food safety and food hygiene regulations (2016), https://www.sentencingcouncil.org.uk/offences/crown-court/item/organisations-breach-of-food-safety-and-food-hygiene-regulations/ (last visited 26 May 2021).

11 Sentencing Council, General guideline: Overarching principles (2019), https://www.sentencingcouncil.org.uk/overarching-guides/crown-court/item/general-guideline-overarching-principles/ (last visited 26 May 2021).

12 Sentencing Council Guideline on Corporate manslaughter (2016), https://www.sentencingcouncil.org.uk/offences/crown-court/item/corporate-manslaughter/ (last visited 26 May 2021). /

13 Richard Macrory, *Regulatory Justice: Making Sanctions Effective* (2006).

the seriousness of the breach, a profit order would reflect solely the profits made: "Thus it would be perfectly possible for a court to impose a substantial Profit Order where the savings were large, but impose a small fine because it considered the business had acted carelessly rather than with intent."[14]

(2) Corporate Rehabilitation Order, which "aim[s] to rehabilitate the offender by ensuring tangible steps are taken that will address a company's poor practices and prevent future non-compliance".[15]

(3) Publicity Order, because "reputational sanctions can have more of an impact than even the largest financial penalties".[16]

7.14 One of the aims of the proposal was to address the concern that existing confiscation orders,

> can only be used to capture acquisitive benefits such as profits that result from an offence. This benefit does not currently include provision for costs avoided, deferred or saved, which is a substantial part of the financial benefit obtained as a result of regulatory non-compliance.[17]

7.15 In fact, more recent case law has confirmed that "benefit" in the Proceeds of Crime Act 2002 can include indirect pecuniary benefits, including non-payment of tax.[18]

7.16 Macrory envisaged that Corporate Rehabilitation Orders would permit the company to agree to a plan of action that would remedy the matter which caused the harm. This could include, for instance, a compliance audit or a community project. Failure to comply with the order would result in the company being brought back to court and resentenced.

7.17 Publicity Orders, meanwhile,

> Would enable a court, to order that a notice… be placed in an appropriate publication, such as a local or national newspaper, a trade publication or another appropriate media outlet such as radio or television, or in a company's annual report within a specified period. The notice would state the background to the offence, the steps taken by the offender to prevent repetition and any remedial or compensatory measures taken by the offender.[19]

7.18 It can be seen that the Corporate Rehabilitation Order and Publicity Order are very similar to the powers of courts to make a remedial order in respect of offences under the Health and Safety at Work Act 1974 and the power to make remedial and publicity orders under the Corporate Manslaughter and Corporate Homicide Act 2010.

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14 Richard Macrory, *Regulatory Justice: Making Sanctions Effective* (2006) p 74.

15 Richard Macrory, *Regulatory Justice: Making Sanctions Effective* (2006) p 79.

16 Richard Macrory, *Regulatory Justice: Making Sanctions Effective* (2006) p 83.

17 Richard Macrory, *Regulatory Justice: Making Sanctions Effective* (2006) p 75.

18 See, for example, *R v Powell* [2016] Crim 1043, [2017] Env LR 11; *R v Morgan* [2013] EWCA Crim 1307, [2014] 1 WLR 3450 (landfill tipping case); *R v Ryder* [2020] EWCA Crim 1110.

19 Richard Macrory, *Regulatory Justice: Making Sanctions Effective* (2006) p 84

Serious Crime Prevention Orders

The Crown Court

7.19 The Serious Crime Act 2007 introduced a new power of the Crown Court when sentencing an offender. In addition to dealing with them in any other way it make a Serious Crime Prevention Order "SCPO", if it has reasonable grounds to believe that the order would protect the public by preventing, restricting or disrupting involvement by the offender concerned in serious crime.

The High Court

7.20 The High Court also has a standalone power, on application by the CPS or the SFO, to make a SCPO against a person, including a corporation. The power arises if the person has been "involved" in serious crime.

Generally

7.21 A key point in this regard is that the definition of being "involved in serious crime", and therefore the ambit of the power of the Crown Court and High Court is quite wide: Being "Involved in serious crime" includes facilitating serious crime by another, or *conducting oneself in a way likely to facilitate serious crime by another (whether or not such an offence was committed)*.[20]

7.22 "Serious crime" include money laundering, false accounting, fraud, facilitating tax evasion and offences under the Bribery Act (not section 7), and can include any offence committed in circumstances the court considers to be sufficiently serious.[21]

7.23 SCPOs may be made against corporate bodies, partnerships and unincorporated associations. They may involve restrictions, prohibitions or financial requirements in relation to property held by the corporation, or on the provision of goods or services, or on the employment of staff by the corporation, or they may require the provision of information, in a form and manner directed, to a law enforcement officer. An SCPO against a corporation may make provision for "authorised monitors" to monitor the activities of the subject of the order, and for the subject of the order to pay the costs of such monitors.[22]

7.24 Thus, for example, an SCPO might potentially be sought from the High Court to impose conditions on a corporation, even one outside the financial sector, where it has conducted itself in a way found likely to facilitate the commission of fraud by its employees. Such conditions might include a prohibition from providing certain services for a period, and/or the provision of regular information to law enforcement and paying for monitors to ensure its compliance. However, we are not aware of these powers being frequently used against corporations, and it may be argued that seeking to prove that a company has conducted itself in a way likely to facilitate, say, fraud, is a much higher threshold than, say, seeking to prove that the company failed to take adequate measures to prevent fraud – were that to be on obligation which was placed on corporations.

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[20] Serious Crime Act 2007, s2(1).

[21] Serious Crime Act 2007, s2(2), Sch1.

[22] Serious Crime Act 2007, ss 5(4), 19, 39 and 40.

Dissolution

7.25 As already noted in paragraph 7.12, the Sentencing Council contemplates that a financial penalty which puts a company out of business may, in some circumstances, be an acceptable outcome.

7.26 Where a corporate body operates in a regulated sector, it may effectively be forced out of business if withdrawal of the necessary licence to operate would make it unlawful to carry on its business. Examples would include financial services,[23] legal services,[24] fleet management,[25] and the provision of medical or social care.[26]

7.27 In some jurisdictions courts are empowered to dissolve a company upon a criminal conviction – what is sometimes called a "corporate death penalty". The Australian Law Reform Commission has proposed that the Crimes Act 1914 should be amended so that in the most serious cases the court could make an order dissolving the corporation.[27] The condition would be that the corporation had been convicted of an offence on indictment and that dissolution represented the only appropriate sentencing option in all the circumstances.

7.28 In England and Wales, there is a general power exercisable by the High Court (and in the case of a company with share capital of less than £120,000, the County Court) to wind up a company if "the court is of the opinion that it is just and equitable that the company should be wound up".[28] The Secretary of State has the power to petition a court to wind up a company on this basis following a report from inspectors appointed under the Companies Act 1985 or the Financial Services and Markets Act 2000, or from an overseas regulator.[29]

7.29 The consequence of a judicial dissolution may be different to the imposition of a fine so large it puts the company out of business. In a dissolution the assets would normally be liquidated, creditors repaid, and any surplus distributed to shareholders. However, where a fine is imposed that puts the company out of business, the fine would also have to be discharged before any surplus (if it remained) was distributed to shareholders.

7.30 Dissolution of a company also has the effect of rendering all outstanding criminal proceedings against the company at an end. It is possible to have a company restored to the register of companies, and thereby revived, for instance to enable legal proceedings to be brought against it. There is a wide class of people permitted to petition the court to have a company restored, including the Secretary of State, any former director or member, any person having an interest in related land, any creditor or person with a potential legal claim.[30]

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[23] Financial Services and Markets Act 2000, s 19.

[24] Legal Services Act 2007, s 14.

[25] Public Passenger Vehicles Act 1981, s 12; Goods Vehicles (Licensing of Operators) Act 1995.

[26] Health and Social Care Act 2008, s 10.

[27] Australian Law Reform Commission, *Corporate Criminal Responsibility* (2020), para. 8.113.

[28] Insolvency Act 2002, s 122.

[29] Insolvency Act 2002, s 124A

[30] Companies Act 2006, ss 1029 to 1032.

Overseas jurisdictions

7.31 Australia's Commonwealth criminal code contains a provision allowing a corporation to be found guilty of any offence, including one punishable by imprisonment. The Crimes Act 1914 (Cth) enables a fine to be imposed for any offence punishable by imprisonment, and where an offence is committed by a corporation, the maximum fine is five times that applying to a natural person.

7.32 Canada's criminal code makes provision for a court sentencing an organisation, but this is limited to the principles to be applied when considering the sentence to be given. This requires the court to consider:

> (a) any advantage realized by the organization as a result of the offence;
>
> (b) the degree of planning involved in carrying out the offence and the duration and complexity of the offence;
>
> (c) whether the organization has attempted to conceal its assets, or convert them, in order to show that it is not able to pay a fine or make restitution;
>
> (d) the impact that the sentence would have on the economic viability of the organization and the continued employment of its employees;
>
> (e) the cost to public authorities of the investigation and prosecution of the offence;
>
> (f) any regulatory penalty imposed on the organization or one of its representatives in respect of the conduct that formed the basis of the offence;
>
> (g) whether the organization was — or any of its representatives who were involved in the commission of the offence were — convicted of a similar offence or sanctioned by a regulatory body for similar conduct;
>
> (h) any penalty imposed by the organization on a representative for their role in the commission of the offence;
>
> (i) any restitution that the organization is ordered to make or any amount that the organization has paid to a victim of the offence; and
>
> (j) any measures that the organization has taken to reduce the likelihood of it committing a subsequent offence.[31]

7.33 In the United States, the Criminal Code section 3571 provides for a range of standard fines for breaches of federal law where the statute setting for the offence does not specify an amount. The amounts payable by organisations are double those for individuals.[32]

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[31] Criminal Code (R.S.C., 1985, c. C-46), s 718-21.

[32] 18 USC s 3571(b).

Conclusion

7.34 Corporate offending remains relatively overlooked in sentencing legislation in England and Wales. The unavailability of penalties other than fines (other than for a small number of statutory offences) does not, in practice, limit what offences can be prosecuted. However, there may be value in amending the Sentencing Code to make explicit provision for sentencing of corporate offenders. This could, for instance:

(1) clarify that a fine could be imposed on a corporation for any offence, regardless of any statutory restriction;

(2) establish principles for the purposes of sentencing corporations and the principles that should inform sentencing decisions by making provisions similar to section 57 of the Sentencing Code and section 37 of the Crime and Disorder Act 1998 (children);

(3) make special provision for fines where the maximum penalty has been established with natural persons in mind, for instance by disapplying statutory maxima where an offence is committed by a body corporate, in order to ensure that financial penalties cannot be treated as a "cost of doing business".

Chapter 8: Criminal liability of directors and other individuals for corporate misconduct

8.1 Where a crime is committed by a corporation, the company's directors and other officers may also be individually criminally liable. The first way in which a director may be liable is if they were a principal offender (and here they are likely to be the directing mind and will whose conduct formed the basis of the company's liability). For instance, if A and B are directors of company C Ltd, and launder money through the company, A, B, and C Ltd can all be prosecuted for the offence of money laundering.

8.2 The second is where the director is liable as an accessory who aided, abetted, counselled or procured the offence.[1]

8.3 The director may also be liable for conspiracy to commit the offence. Conspiracy can be prosecuted even if the anticipated crime does not take place. For instance, if the money that A and B were intending to launder is intercepted by police before the laundering takes place, A, B and C Ltd can still be convicted of conspiracy to commit the offence.

8.4 Conspiracy requires an agreement between two or more people. It is not possible to charge a conspiracy between an individual director and the company on the basis that he or she was its directing mind and will, as there are not two distinct minds. But it would be possible to charge a conspiracy between two directors and the company; one director, the company and a third party; or even between one director and the company where another person who was its DMW was a party to the conspiracy.[2]

"Consent or connivance" provisions

8.5 Additionally, it is common for criminal offences created by statute to make provision for individual directors to be individually liable if an offence is committed by a company. An example is section 12 of the Fraud Act 2006 which provides:

> (1) Subsection (2) applies if an offence under this Act is committed by a body corporate.
>
> (2) If the offence is proved to have been committed with the consent or connivance of—
>
>> (a) a director, manager, secretary or other similar officer of the body corporate, or

[1] Accessories and Abettors Act 1861, s 8. In some cases, a person who procures the commission of an offence is convicted as the primary offender, such as where they use an "innocent agent" who lacks the necessary fault element.

[2] For instance, having agreed to launder money through their company, B dies before the laundering takes place. It would be possible to prosecute A and C alone for the conspiracy, on the basis that B – as C's directing mind and will – had conspired with A.

(b) a person who was purporting to act in any such capacity, he (as well as the body corporate) is guilty of the offence and liable to be proceeded against and punished accordingly.

(3) If the affairs of a body corporate are managed by its members, subsection (2) applies in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate.

8.6 There is some authority on the meaning of terms like "director or manager", "director, manager, secretary and other officer". In *Gibson v Barton* (1875),[3] Blackburn J said:

> When the section says "director" it is plain enough a director is a director, but the words are "and manager". We have to say who is to be considered a manager. A manager would be, in ordinary talk, a person who has the management of the whole affairs of the company…

8.7 In *Registrar of Restrictive Trading Agreements v WH Smith*,[4] Lord Denning, interpreting the phrase "director, manager, secretary or other officer of that body corporate" in section 15(3) of the Restrictive Trade Practices Act 1956, held that 'manager' had the same meaning here as in *Re B. Johnson*,[5]: "the word 'manager' means a person who is managing the affairs of the company as a whole."

8.8 In *R v Boal*,[6] the Court of Appeal quashed the conviction of the Assistant Manager of Foyle's bookshop for an offence under the Fire Precautions Act 1971, holding that the intended scope of the provision was "only those who are in a position of real authority, the decision-makers within the company who have both the power and responsibility to decide corporate policy and strategy."

8.9 These judgments were mainly about restricting the scope of the term to exclude less senior managers. However, in *Re A Company* (1988) Lord Denning said of the term "officer of the company" in the Companies Act,

> I would not restrict these words too closely... It seems to me that whenever anyone in a superior position in a company encourages, directs or acquiesces in defrauding creditors, customers, shareholders or the like, then there is an offence being committed by an officer of the company.[7]

8.10 "Consent or connivance" goes further than encouragement. While "consent" requires proof of both awareness and a positive action, connivance (from the Latin "to close the eyes") can include circumstances where the director is "well aware of what is going on but his agreement is tacit, not actively encouraging what happens but letting it

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[3] *Gibson v Barton* (1875) LR 10 QB 329.

[4] *Registrar of Restrictive Trading Agreements v W. H. Smith & Son Ltd.* and others [1969] 1 WLR 2460

[5] *Re B. Johnson & Co. (Builders) Ltd.* [1955] Ch. 634

[6] *R v Boal* [1992] QB 591, [1992] 2 WLR 890.

[7] *Re A Company* [1980] 2 WLR 241, [1980] Ch 138.

continue and saying nothing about it"[8] and "wilful blindness" (where the person has suspicion but deliberately avoids acquiring positive knowledge.)[9]

8.11 Blackstone's Criminal Practice suggests that liability under these provisions:

> Is potentially wider than that of an accessory since a positive act of aiding and abetting is not necessarily required.[10] A conscious failure to prevent or report a director committing an offence would seem to be enough even though there is not a sufficiently clear or immediate right of control over the fellow director to give rise to liability as an accessory.[11]

8.12 For some offences, the provision extends to liability on the basis of consent, connivance *or neglect*.[12] In most cases, the choice of whether to extend the individual liability of directors and similar officers to include neglect would appear to reflect the fault element of the underlying offence. Where the offence is one which the company may commit by negligence or on the basis of strict liability, it might not seem inappropriate that a director could be found individually liable on the basis that their neglect caused or contributed to the commission of the offence.

8.13 A difficulty arises when neglect is used as a basis for directors' liability for offences which require a higher degree of fault for individual or corporate liability under the legislation. For instance, Part 7 of the Financial Services Act 2012 creates offences relating to misleading statements, misleading impressions and misleading statements etc in relation to benchmarks. The test for this is a high one: for the offence under section 89 the defendant must know the statement to be false or misleading in a material respect; or be reckless as to whether it is; or must dishonestly conceal a material fact.

8.14 However, under section 400 of the Financial Services and Markets Act 2000, if an offence under Part 7 of the 2012 Act is committed with the consent or connivance of an officer of the body corporate, *or is attributable to any neglect of that officer*, then the officer as well as the body corporate is guilty of the offence and liable to be proceeded against and punished accordingly. This means that while the individual who makes the statement can only be convicted if he or she was dishonest or

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8 *Huckerby v Elliott* [1970] 1 All ER 189, p194.

9 Robin Charlow, "Wilful Ignorance and Criminal Culpability" (1992) 70 (6) *Texas Law Review* 1361, fn 6.

10 There are some circumstances where wilful omission might constitute a positive act of encouragement, and thereby make the superior liable as an accessory. In *R v Gaunt* [2003] EWCA Crim 3925, the Court of Appeal considered the case of a Managing Director who had pleaded guilty to a charge of racial harassment on the basis that he was (indirectly) aware of harassment by his employees and that "by reason of his inaction those responsible may have taken the inaction as encouragement of his conduct". The Court of Appeal reduced the sentence to reflect his lesser culpability than the main offenders, but did not interfere with his guilty plea. However, this was only capable of amounting to encouragement of the harassers because those staff knew that the Managing Director knew of their harassment and knew he was taking no action. Connivance could potentially cover a situation in which the MD wilfully refrained from taking no action but, because the staff were unaware of his knowledge, this did not amount to encouragement.

11 *Blackstone's Criminal Practice 2020*, A6.26.

12 In our report on Criminal Liability in Regulatory Contexts, we noted that this wider basis of liability could be found in offences created in legislation including s 18(1) of the Safeguarding Vulnerable Groups Act 2006; s 110 of the Agriculture Act 1970; s 9 of the Knives Act 1997; s 400(1) of the Financial Services and Markets Act 2000; and s 20 of the Gangmasters (Licensing) Act 2004. See Criminal Liability in Regulatory Contexts (2010) Law Commission Consultation Paper 195, paras. 7.35-7.52.

knowingly or intentionally misleading, an officer of the company who did not make the statement personally can be convicted of the same offence on the basis that he or she was negligent.

8.15 This can lead to problems where the offence is one which carries significant social stigma. For instance, we noted that if a company commits an offence under the Protection of Children Act 1978 of distributing indecent photographs or pseudo-photographs of a child, a director of the company could be convicted, jailed and put on the sex offenders' register for the substantive offence merely because the company's conduct was attributable to his or her neglect, even though he or she personally did no such thing and was wholly unaware that the company had.[13]

8.16 In our 2010 consultation paper[14] we expressed concern that when the individual liability of one person (such as a director) depends on the commission of an offence by another person (such as an employee) the individual liability of the first should not arise unless (at the very least) awareness or assent to wrongdoing engaged in by the other person is shown.

8.17 However, we noted that in some circumstances where the commission of an offence by a corporate body was attributable to the neglect of one or more directors, a "failure to prevent" offence targeted at the individual director or equivalent officer might be appropriate. This would more accurately reflect the nature of the director's culpability.

8.18 In Chapter 10, at question 12, we ask what principles should govern the individual criminal liability of directors for the actions of corporate bodies and whether statutory "consent or connivance" or "consent, connivance or neglect" provisions are necessary in view of the general law of accessory liability?

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13 Criminal Liability in Regulatory Contexts (2010) Law Commission Consultation Paper No 195, para 7.43.

14 Criminal Liability in Regulatory Contexts (2010) Law Commission Consultation Paper No 195, paras 7.46 to 7.49.

Chapter 9: Recent developments

9.1 There have been a number of recent reviews that have included considerations of corporate criminal liability to a greater or lesser extent.

Law Commission projects

Law Commission project on criminal liability in regulatory contexts (2010–15)

9.2 In 2010, the Law Commission published a consultation paper and overview document on criminal liability in regulatory contexts. It included a critical review of the identification doctrine.[1] Proposal 13 within the consultation paper was that future legislation should specifically indicate the basis on which a corporation might be guilty of any criminal offences that the legislation created. In the absence of such provisions the court should treat this as a matter for statutory construction and should not presume that the identification doctrine applied. The proposal received 13 responses, the nature of which were mixed.[2] No final report was published, in anticipation of a further dedicated project on corporate criminal liability.

9.3 Legislation creating criminal offences which post-dated this review, for example the offences relating to misleading statements contained in the Financial Services Act 2012, has only rarely included explicit provisions concerning the ambit of corporate criminal liability: eg the Specialist Printing Equipment and Materials (Offences) Act 2015 discussed above.

Law Commission anti-money laundering project (2018–2019)

9.4 In 2018, the Law Commission published a consultation paper on anti-money laundering and the suspicious activity reports regime.[3] Questions 37 and 38 of the paper asked whether new offences should be created, of which a commercial organisation might be guilty on the basis of vicarious liability if their employees or associates failed to report suspicions of money laundering or terrorist financing, or where the commercial organisation had failed to take reasonable measures to prevent failures to report such suspicions.

9.5 In 2019, we published our final report on this topic. We noted that consultees had been split approximately equally on the merits of the two proposals, and that at the time, the results of the Ministry of Justice's call for evidence on the subject of corporate criminal liability generally were awaited (see below). Therefore, we did not recommend any changes to the law governing corporate criminal liability for failures to report suspicions of money laundering at that time.[4]

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1 Criminal Liability in Regulatory Contexts (2010) Law Commission Consultation Paper No 195, chapter 5.

2 Law Commission, *Criminal Liability in Regulatory Contexts: Responses* (2011), https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/06/cp195_Criminal_Liability_responses.pdf (last visited 26 May 2021).

3 Anti-Money Laundering: the SARS regime (2018) Law Commission Consultation Paper No 236, https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2018/07/Anti-Money-Laundering-the-SARs-Regime-Consultation-paper.pdf (last visited 26 May 2021).

4 Anti-Money Laundering: the SARS regime (2018) Law Commission Consultation Paper No 236, para 11.42.

Ministry of Justice reviews

Ministry of Justice Call for Evidence (2017)

9.6 In January 2017, the Ministry of Justice (MOJ) published a "Call for Evidence" concerning proposals to reform corporate liability for economic crime.[5] It asked 16 questions focussing on whether the identification principle should be replaced with some form of a failure to prevent certain economic crimes offence for corporations. The government's response was published in 2020, see below.

Further evidence from prosecution agencies

9.7 Following the Call for Evidence, the government asked a number of prosecuting agencies to provide any further evidence they had of the challenges faced when using the identification doctrine to prosecute large corporations. The results of this were referred to in the MOJ's response to the Call for Evidence, see below, but otherwise do not appear to have been made public (although see now the examples we provide in Appendix 1).

Government response to MOJ call for evidence (2020)

9.8 In November 2020, the Ministry of Justice published its response to the two exercises referred to above.[6] It found that that the results were inconclusive, and decided to commission a review by the Law Commission, to include the developments since the Call for Evidence in 2017, namely: the Criminal Finances Act 2017, the expansion of the Senior Managers and Certification Regime provisions within Financial Services and Markets Act 2000, the operation of the MLR 2017 and the judgment of the High Court in *SFO v Barclays*.[7]

Economic Crime Plan 2019 – 2022

9.9 The Economic Crime Plan,[8] published in July 2019 by HM Treasury and the Home Office, sets out seven priority areas for addressing economic crime. The MOJ's 2017 Call for Evidence, and the proposals contained within it, were alluded to.[9] However, the plan did no more than indicate that the response to the Call for Evidence would be published shortly. Elsewhere, proposals include building a new Crown Court location in the City of London, referred to as the "economic crime court"; to review the regulatory anti-money laundering powers; and for UK Finance and other private-sector associations to strengthen corporations' resilience to economic crime.[10] The

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5 Ministry of Justice, *Corporate Liability for Economic Crime: Call for Evidence* (2017), https://consult.justice.gov.uk/digital-communications/corporate-liability-for-economic-crime/supporting_documents/corporateliabilityforeconomiccrimeconsultationdocument.pdf (last visited 28 May 2021).

6 Ministry of Justice, *Corporate Liability for Economic Crime: Call for Evidence: Government response* (2020), https://consult.justice.gov.uk/digital-communications/corporate-liability-for-economic-crime/results/corporate-liability-economic-crime-call-evidence-government-response.pdf (last visited 26 May 2021).

7 *Serious Fraud Office v Barclays PLC* [2018] EWHC 3055 (QB), [2020] 1 Cr App R 28.

8 HM Treasury and Home Office, *Economic Crime Plan, 2019 to 2022* (2019), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/816215/2019-22_Economic_Crime_Plan.pdf (last visited 26 May 2021).

9 HM Treasury and Home Office, *Economic Crime Plan, 2019 to 2022* (2019), para 4.4.

10 HM Treasury and Home Office, *Economic Crime Plan, 2019 to 2022* (2019), paras 5.23 to 5.24, 6.10 to 6.22 and 6.23 respectively.

Corporation of London approved plans for a new 'Justice Quarter', which would house the economic crime court, on 22 April 2021.[11]

Parliamentary Select Committees

House of Lords Select Committee on the Bribery Act 2010 (2019)

9.10 In March 2019, the House of Lords Select Committee on the Bribery Act 2010 published its report scrutinising the operation of the Act since its coming into force in 2011.[12] Overall, the assessment was very positive. The report included a section on the potential use of the failure to prevent offence in section 7 of the 2010 Act as a model for future legislation.[13] It referred to evidence from the SFO in favour of so extending the failure to prevent offence, and from the National Crime Agency expressing caution regarding what precautions a corporation would be expected to take to prevent economic crime more generally. The report referred to comments of ministers, broadly in favour of the introduction of such an offence. However, the committee did not express a view.[14]

House of Commons Treasury Select Committee inquiries into economic crime (2019)

9.11 On 8 March 2019, the Treasury Committee published its report "Economic Crime – Anti-money laundering supervision and sanctions implementation".[15] The report focussed on anti-money laundering, but contained a section regarding legislative reform more generally. It received evidence in this regard from witnesses including the SFO, and the then Solicitor General, Robert Buckland QC MP.[16]

9.12 The SFO suggested two options: a modified vicarious liability approach and an extended failure to prevent offence.

9.13 Robert Buckland QC MP said that it was his firm belief that corporates responded well to a robust environment. He suggested that the UK should look very carefully at the US model of vicarious liability. He said his personal view remained that there was a

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[11] City of London, 'City of London's new "justice quarter" gets the go-ahead', https://news.cityoflondon.gov.uk/city-of-londons-new-justice-quarter-gets-the-go-ahead/ (last accessed 28 May 2021)

[12] The Bribery Act 2010: post -legislative scrutiny, Report of the House of Lords Select Committee on the Bribery Act 2010 (2017-2019) HL 303, https://publications.parliament.uk/pa/ld201719/ldselect/ldbribact/303/303.pdf (last visited 27 May 2021).

[13] The Bribery Act 2010: post -legislative scrutiny, Report of the House of Lords Select Committee on the Bribery Act 2010 (2017-2019) HL 303, paras 227 to 232.

[14] Above, para 229.

[15] Economic Crime – Anti-money laundering supervision and sanctions implementation, Report of the House of Commons Treasury Committee (2017-2019) HC 2010, https://publications.parliament.uk/pa/cm201719/cmselect/cmtreasy/2010/2010.pdf (last visited 27 May 2021).

[16] See further eg the oral evidence of Mark Thompson, Interim Director SFO, given to the House of Commons Treasury Committee inquiry on Economic Crime (4 July 2018) HC 940, http://data.parliament.uk/WrittenEvidence/CommitteeEvidence.svc/EvidenceDocument/Treasury/Economic%20Crime/Oral/86570.html (last visited 27 May 2021).

strong case for a new corporate criminal offence of failing to prevent economic crime.[17]

9.14 The committee concluded that there was clear evidence that legislative reform was needed to strengthen the hand of law enforcement. It suggested that the Government should set out a timetable to bring forward legislation to improve the enforcement of corporate liability for economic crime. The committee said that the SFO's suggestions should be considered as part of that.

2020 to 2021

9.15 On 23 October 2020, the Treasury Select Committee opened another inquiry into economic crime. This inquiry is ongoing. The written evidence submitted included a paper from Professor Nicholas Ryder and Demelza Hall comparing the UK and US systems, and highlighting legislation in the USA which permits US prosecutors to take civil enforcement actions as well as criminal enforcement actions against corporate malefactors.[18] This is discussed in more detail in the section above on alternative approaches to corporate crime.

The Financial Services Act 2021 amendments to include a failure to prevent economic crime offence

9.16 The Financial Services Act 2021 received Royal Assent on 29 April 2021. It includes certain provisions concerning insider dealing and financial services offences. During the passage of the bill through Parliament, attempts were made to include a new corporate "failing to prevent" economic crime offence within it. In particular, in debate in the House of Commons on 13 January 2021, two amendments were proposed to create offences of failing to prevent economic crime.[19] These clauses, and their proposed effects were as follows.

(1) New clause 4: A "relevant body" (authorised or registered by the FCA) would commit an offence where it facilitates, or to fails to prevent fraud, false accounting or money-laundering. There would be a defence to show that the defendant had in place such prevention procedures as was reasonable in all the circumstances, or that it was not reasonable in the circumstances to expect it to have any prevention procedures in place.

(2) New clause 30: A financial services company would commit an offence where it facilitates or does not take all reasonable steps to prevent the commission of fraud, false accounting, money-laundering, tax evasion, insider dealing, or

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17 See the oral evidence of Robert Buckland QC MP, Solicitor-General, given to the House of Commons Treasury Committee inquiry on Economic Crime (30 October 2018) HC 940, http://data.parliament.uk/WrittenEvidence/CommitteeEvidence.svc/EvidenceDocument/Treasury/Economic%20Crime/Oral/92136.html (last visited 27 May 2021), question 456.

18 Written evidence submitted by Professor Nicholas Ryder and Demelza Hall, Global Crime, Justice and Security Research Group, Bristol Law School, University of the West of England, Bristol, https://committees.parliament.uk/writtenevidence/16989/html/ (last visited 27 May 2021).

19 *Hansard* (HL) 13 January 2021, vol 687, cols 346 and 354-5, https://hansard.parliament.uk/commons/2021-01-13/debates/742D7439-7DA3-4816-8005-3582F3863BBE/FinancialServicesBill (last visited 27 May 2021). During debate on 11 November 2020, Kevin Hollinrake MP spoke in favour of such a provision and during the committee proceedings Pat McFadden MP, Abena Oppong-Asare MP and Jeff Smith MP tabled an amendment similar to clause 4, which was withdrawn after debate.

offences of making misleading statements etc under the Financial Services Act 2012.

9.17 During the debate, and in response to these proposed clauses, the minister concerned referred to this Law Commission project, the output of which he said the government would examine. However, neither of these amendments were selected for a vote by the Speaker. The Government opposed the amendments on the basis that the issue was best dealt with, not through sector-specific legislation, but within a broader context, including this Law Commission review.[20]

Proposals in relation to Companies House and audit reforms by BEIS

9.18 In recent months, the Department for Business, Energy and Industrial Strategy ("BEIS") has published draft proposals or calls for evidence in a number of areas which concern corporate governance and malfeasance. These include the following.

(1) Government Response to the Corporate Transparency and Register Reform Consultation (September 2020): this sets out a broad package of reforms to Companies House including giving it a more effective role in tackling economic crime by improving the integrity of information available to it about companies and other business entities.[21]

(2) A further Corporate Transparency and Register Reform Consultation (December 2020), in three parts.

(a) Consultation on the powers of the registrar: contains proposals on a power of Companies House to query information provided to it, greater power of Companies House to remove or rectify information on it, and changes to the duties on companies to keep their own register of information.[22]

(b) Consultation on improving the quality and value of financial information on the companies' register: contains proposals to reform the means by which company information is submitted to Companies House, the nature of the information required and the extent to which it may be checked by Companies House.[23]

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[20] *Hansard* (HL) 3 May 2021, vol 810, col 416GC, https://hansard.parliament.uk/lords/2021-03-03/debates/F28BE3DA-9ECF-4A19-89F8-6C56E01C6D02/FinancialServicesBill (last visited 28 May 2021). Amendments 81 - 84 were tabled in the House of Lords aimed at creating a "failure to prevent" criminal offence. None were pressed to a vote. Speakers in favour included Lord Garnier and Baroness Bowles.

[21] Department for Business, Energy and Industrial Strategy, *Corporate Transparency and Register Reform: Government response to the consultation on options to enhance the role of Companies House and increase the transparency of UK corporate entities* (18 September 2020), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/925059/corporate-transparency-register-reform-government-response.pdf (last visited 27 May 2021).

[22] Department for Business, Energy and Industrial Strategy, *Corporate Transparency and Register Reform: Powers of the Registrar* (9 December 2020), https://www.gov.uk/government/consultations/corporate-transparency-and-register-reform-powers-of-the-registrar (last visited 27 May 2021).

[23] Department for Business, Energy and Industrial Strategy, *Corporate Transparency and Register Reform: improving the quality and value of financial information on the UK companies register* (9 December 2020), https://www.gov.uk/government/consultations/corporate-transparency-and-register-reform-improving-the-quality-and-value-of-financial-information-on-the-uk-companies-register (last visited 27 May 2021).

(c) Consultation on implementing the ban on corporate directors.[24] In the UK, only one of a company's directors need be a natural person, unlike, for example, Germany or the USA where all directors must be. The government is considering implementing the legislation passed in 2015 which would bring a similar ban into effect, with possible exceptions.[25]

(3) The white paper "Restoring trust in audit and corporate governance"[26] contains proposed reforms of auditing: to increase competition and the reduce the potential for conflicts of interest; to provide for more involvement of shareholders in the audit policy; and for the Financial Reporting Council to be replaced by the Audit, Reporting and Governance Authority.

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24 Department for Business, Energy and Industrial Strategy, *Corporate Transparency and Register Reform: implementing the ban on corporate directors* (9 December 2020), https://www.gov.uk/government/consultations/corporate-transparency-and-register-reform-implementing-the-ban-on-corporate-directors (last visited 27 May 2021).

25 Small Business, Enterprise and Employment Act 2015, s 87.

26 Department for Business, Energy and Industrial Strategy, *Restoring trust in audit and corporate governance: Consultation on the government's proposals* (March 2021) CP 382.

Chapter 10: Questions for discussion

(1) What principles should govern the attribution of criminal liability to non-natural persons?

(2) Does the identification principle provide a satisfactory basis for attributing criminal responsibility to non-natural persons? If not, is there merit in providing a broader basis for corporate criminal liability?

(3) In Canada and Australia, statute modifies the common law identification principle so that where an offence requires a particular fault element, the fault of a member of senior management can be attributed to the company. Is there merit in this approach?

(4) In Australia, Commonwealth statute modifies the common law identification principle so that where an offence requires a particular fault element, this can be attributed to the company where there is a corporate culture that directed, encouraged, tolerated or led to non-compliance with the relevant law. Is there merit in this approach?

(5) In the United States, through the principle of *respondeat superior*, companies can generally be held criminally liable for any criminal activities of an employee, representative or agent acting in the scope of their employment or agency. Is there merit in adopting such a principle in the criminal law of England and Wales? If so, in what circumstances would it be appropriate to hold a company responsible for its employee's conduct?

(6) If the basis of corporate criminal liability were extended to cover the actions of senior managers or other employees, should corporate bodies have a defence if they have shown due diligence or had measures in place to prevent unlawful behaviour?

(7) What would be the economic and other consequences for companies of extending the identification doctrine to cover the conduct along the lines discussed in questions (3) to (5)?

(8) Should there be "failure to prevent" offences akin to those covering bribery and facilitation of tax evasion in respect of fraud and other economic crimes? If so, which offences should be covered and what defences should be available to companies?

(9) What would be the economic and other consequences for companies of introducing new "failure to prevent" offences along the lines discussed in question (8)?

(10) In some contexts or jurisdictions, regulators have the power to impose civil penalties on corporations and prosecutors may have the power to impose administrative penalties as an alternative to commencing a criminal case against an organisation. Is there merit in extending the powers of authorities in England and Wales to impose civil penalties, and in what circumstances might this be appropriate?

(11) What principles should govern the sentencing of non-natural persons?

(12) What principles should govern the individual criminal liability of directors for the actions of corporate bodies? Are statutory "consent or connivance" or "consent, connivance or neglect" provisions necessary or is the general law of accessory liability sufficient to enable prosecutions to be brought against directors where they bear some responsibility for a corporate body's criminal conduct?

(13) Do respondents have any other suggestions for measures which might ensure the law deals adequately with offences committed in the context of corporate organisations?

Appendix 1: Examples of cases where a wider corporate criminal liability may have been significant

1.1 Prosecutors have provided us with the following examples of cases where they suggest that a wider basis of corporate criminal liability in English law might have permitted further lines of enquiry relating to a corporation. Where appropriate, the details have been anonymised, and in all cases the facts have been simplified and narrowed to focus on the issue in hand. The examples have been divided into those from outside the financial services sector, and those from inside it.

OUTSIDE THE FINANCIAL SERVICES SECTOR

1. Action 4 Employment, 2015

1.2 This case was investigated by Thames Valley Police and prosecuted by the CPS. Ten employees of the company Action 4 Employment ("A4E") pleaded guilty to, or were convicted of, offences relating to submitting false documents for the purposes of the Department for Work and Pensions' "Inspire to Aspire" employment and training scheme. The 167 false claims submitted led to a loss of £289,000 on a contract with the DWP worth £1.3 million.

1.3 The judge described the fraud as "systemic" and said it had operated over a considerable period of time. However, the company to return any sums through the criminal proceeding. The Chief Executive of the company said it had a zero-tolerance policy towards fraud and that money had been set aside to ensure the taxpayer lost nothing. He said that the offences "do not reflect the way this company operates or the values of our 2,100 staff, whose honesty and integrity are much valued."[1]

2. "Operation W"

1.4 A small or medium-sized company in the construction industry, and some of its employees, were investigated for offences relating to the provision of roadworks services to a local authority. There was evidence of an alleged fraud carried out by employees of the company (but the cases against the individuals were discontinued for unrelated reasons). It was alleged that the fraud resulted in road surfaces having a thinner than required top layer. As a result, the company saved significant expenditure.

1.5 Prosecutors say that it would not have been possible to prosecute the company for the alleged fraud under the identification principle because the suspects were not members of the board of directors.

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[1] BBC News, "A4e staff jailed for DWP back-to-work training fraud" (31 March 2015), https://www.bbc.co.uk/news/uk-england-32139244 (last visited 27 May 2021).

3. An agency providing interpreters to the Ministry of Justice

1.6 Company A was a large company which acted as an agency for the provision of freelance foreign language interpreters to the Ministry of Justice ("MOJ") and Her Majesty's Courts and Tribunals Service ("HMCTS").

1.7 Individual B successfully applied for registration as a freelance interpreter with A, by falsely claiming they possessed the necessary level of qualification. A checked B's application, but did not check the existence of a certificate that B claimed to have. A supplied B to act as interpreter in 88 court and tribunal cases over a period of four years. B also masqueraded as individual C, who was a qualified interpreter put forward by A. In this way, B acted as an interpreter in a further 52 cases.

1.8 In total, B claimed more than £65,000 in fees.

1.9 Company A reported the fraud when it came to light. B was convicted of fraud offences against A.

1.10 Prosecutors say that, while the MOJ and HMCTS might have recovered from A the fees wrongly paid to A and B as a result of B's actions, A's failure to adequately vet B's application for registration, or take effective steps to prevent B purporting to be another individual, might have been the proper subject of a corporate failing to prevent fraud offence, had one existed.

4. Frauds by centres for "Test of English for International Communication" qualifications

1.11 The Test of English for International Communication ("TOEIC") is an international standardised test of English language proficiency for non-native speakers.

1.12 Companies A, B and C were colleges accredited as TOEIC test centres. Individuals X, Y and Z were nominated to be Test Centre Administrators for A, B and C respectively. As such, the role of X, Y and Z was to ensure that the TOEIC test was conducted properly and in accordance with official guidance.

1.13 Instead, X, Y and Z engaged in the systematic criminal abuse of the TOEIC, in particular by arranging for proxy test takers to take the TOEIC on behalf of some paying foreign students. This enabled the students to falsely demonstrate a proficiency in the English language, and to secure Tier 4 visas to enter and/or remain in the UK.

1.14 Individuals X, Y and Z were convicted of fraud-related offences. However, prosecutors say that, in the circumstances, the identification principle could not provide the basis for a prosecution of the corporates A, B and C. The existence of a failure to prevent fraud offence might have led to the investigators to consider A, B and C as suspects.

5. SFO v Serco Geografix Limited

1.15 Serco Geografix Limited ("SGL") was a wholly owned subsidiary of Serco Limited ("SL"). SL is a wholly-owned subsidiary of Serco Group plc. The three also shared the same registered address and staff in common, for example, two directors of SGL were also senior employees of SL.

1.16 SL specialises in the delivery of services to government across five sectors: Defence, Justice and Immigration, Transport, Health and Citizen Services. It employs approximately 22,000 people. In 2004, the UK government entered into two contracts with SL for the provision of electronic monitoring ("EM") services. At the relevant time, SL was separated into divisions dedicated to servicing different contracts. SGL was responsible for providing the equipment used for serving the EM contract.

1.17 This case ultimately resulted in a Deferred Prosecution Agreement ("DPA") between the SFO and SGL, with an undertaking from Serco Group plc in relation to various aspects of the agreement.[2]

1.18 In entering the DPA, SGL took responsibility for dishonestly misleading the MOJ as to the true extent of the profits being made on the EM contract. The statement of facts stated that senior individuals within SGL, and the SL division that oversaw the EM contract, provided the MOJ with documents containing false figures, intending that as a result the MOJ would not seek to exercise its contractual rights to reduce the amounts it paid for the services SL provided.[3]

1.19 SL was the beneficiary of the fraud (the senior individuals involved did not gain a direct financial advantage from the fraud). It was stated in the statement of facts that SL's senior management within the division concerned encouraged practices that significantly increased the risk of fraud, and that the actions of the senior individuals within SGL were intended to make a gain for both SL and SGL.[4]

1.20 Notwithstanding these factors, the identification principle precluded a DPA with, or prosecution of, SL. The individuals through which SGL accepted criminal liability, whilst relatively senior within the relevant division of SL, fell short of being the controlling minds of SL. A corporate resolution was only possible in this case due to the role played by SGL in the fraud and its position as a separate legal entity within the SL division that oversaw the EM contract.

1.21 Two individuals were prosecuted and acquitted at the direction of the trial judge.

WITHIN THE FINANCIAL SERVICES SECTOR

6. R v Bank of Scotland aka "Operation Hornet" (CPS, Thames Valley Police)[5]

1.22 Between 2002 and 2007, employees in the Impaired Assets Division, in the Reading regional headquarters of Bank of Scotland ("BOS"), committed a series of offences

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[2] Serious Fraud Office, "Deferred Prosecution Agreement - Serco Geografix Ltd & SFO", https://www.sfo.gov.uk/download/deferred-prosecution-agreement-serco-geografix-ltd-sfo/ (last visited 27 May 2021).

[3] *Serious Fraud Office v Serco Geografix Limited*, "Statement of facts prepared pursuant to paragraph 5(1) of schedule 17 f the Crime and Courts Act 2013" (20 June 2019), https://www.sfo.gov.uk/download/deferred-prosecution-agreement-serco-geografix-ltd-sfo/ (last visited 27 May 2021), paras 17 and 38.

[4] *Serious Fraud Office v Serco Geografix Limited*, "Statement of facts prepared pursuant to paragraph 5(1) of schedule 17 f the Crime and Courts Act 2013" (20 June 2019), paras 32 and 48.

[5] See eg BBC News, "HBOS: A highly unusual fraud case" (30 January 2017), https://www.bbc.co.uk/news/business-38796087 (last visited 28 May 2021); FT Adviser, "HBoS banker behind £245m fraud must repay £130k" (9 October 2018),

involving defrauding and extorting money from small businesses seeking loans from the bank.

1.23 In 2007, the bank identified certain suspicious conduct. Following an internal investigation, it notified the Financial Services Authority ("FSA") in 2009. In 2013, the FSA paused its investigation for a criminal investigation to take place. In 2017, six individuals, including the Director of the Impaired Asset Division and another BOS employee, were sentenced for their part in the offences.

1.24 In 2019, the Financial Conduct Authority ("FCA") (as the FSA had by then become) fined BOS £45.5 million for failing to promptly disclose its suspicions to them. According to the FCA statement, because commercial lending was subject to very limited regulation at the relevant times, the activities of the Impaired Asset Division did not constitute further breaches of the FCA regulations.[6]

1.25 There was no corporate prosecution. However, prosecutors have suggested that there was evidence of corporate failures on control issues affecting BOS's business in a number of areas, which a failure to prevent offence might have been able to address. It is suggested by prosecutors that:

(1) there was no process for defining risk appetite, beyond high-level industry sector limits, and these were not used effectively to constrain growth;

(2) staff were incentivised to focus on revenue rather than consideration of risk;

(3) there was a culture of optimism which affected the attitude towards assessing credit risk in the course of loan approval and resulted in a reluctance to refer stressed transactions to the High Risk team in BOS responsible for dealing with such transactions;

(4) risk management was regarded as a constraint on the business rather than integral to it; and

(5) a significant part of the portfolio had not been risk rated or ratings were out of date.

7. SFO v Barclays (capital raising)[7]

1.26 The SFO indicted Barclays Plc and four individuals with conspiracy to commit fraud by false representation contrary to section 1(1) of the Criminal Law Act 1977. The SFO

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https://www.ftadviser.com/mortgages/2018/10/09/hbos-banker-behind-245m-fraud-must-repay-130k/?page=1 (last visited 28 May 2021); This is Money, "Lloyds will reopen compensation claims over HBOS fraud after damning review found victims were not all treated equally after fraudsters plundered £1bn to fund sex parties, superyachts and lavish holidays" (10 December 2019), https://www.thisismoney.co.uk/money/markets/article-7777075/Former-judge-condemns-shortcomings-review-HBOS-Reading-branch-banking-fraud.html (last visited 28 May 2021).

6 FCA, "FCA fines Bank of Scotland for failing to report suspicions of fraud at HBOS Reading" (21 June 2019), https://www.fca.org.uk/news/press-releases/fca-fines-bank-scotland-failing-report-suspicions-fraud (last visited 27 May 2021).

7 *SFO v Barclays* [2018] EWHC 3055 (QB), [2020] 1 Cr App R 28; SFO, "Former Barclays executives acquitted of conspiracy to commit fraud" (28 February 2020), https://www.sfo.gov.uk/2020/02/28/former-barclays-executives-acquitted-of-conspiracy-to-commit-fraud/ (last visited 27 May 2021).

also indicted Barclays Plc, Barclays Bank Plc and two of those individuals, with providing unlawful financial assistance contrary to section 151 of the Companies Act 1985. The individual alleged conspirators included the Chief Executive and Finance Director.[8]

1.27 The charges related to Barclays' capital raising arrangements with Qatar Holding LLC and Challenger Universal Ltd, which took place in June and October 2008, and a US$3 billion loan made available to the State of Qatar acting through the Qatari Ministry of Economy and Finance in November 2008. The SFO alleged that Barclays and the individuals involved conspired to devise a mechanism to pay Qatar a higher rate of commission than other investors in the capital raising were receiving, while falsely declaring they were being paid the same, lower rate of commission, that other investors were paid. It was alleged that false representations were made within documents issued during those capital raisings, including various prospectuses and subscription agreements. The SFO alleged that senior executives at Barclays were aware that the US$2 billion loan by Barclays was to be used to participate in its own capital raising, contrary to the prohibition on this within section 151 of the 1985 Act.

1.28 The case against Barclays Plc and Barclays Bank Plc was dismissed by the Crown Court on the basis that the individuals mentioned above could not be said to be the directing mind and will of Barclays with respect to the capital raisings or the loan to Qatar because they did not have relevant authority to act on behalf of the bank in these regards. The judge held that relevant authority for those purposes rested with the board and certain board committees.[9]

1.29 The SFO applied to the High Court for permission to serve a draft indictment (voluntary bill) to reinstate proceedings, on the basis that the Crown Court had applied the identification principle too narrowly.[10] The High Court rejected the SFO's application, for essentially the same reasons as the Crown Court. The High Court also refused the SFO permission to appeal to the Supreme Court.

1.30 Prosecutors say that this case demonstrates the challenges of the identification principle. They say that, under the law as it stands, in order to decide whether the acts of an individual can be attributed to the company, the court has to focus on who has delegated authority under the company's constitution, other relevant procedures and in practice, in respect of the conduct in question. In large companies, with complex constitutions and procedures, the delineation of power and control is rarely clear and may rest with a range of individuals and committees.

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8 Serious Fraud Office, "Barclays PLC and Qatar Holding LLC", https://www.sfo.gov.uk/cases/barclays-qatar-holding/ (last visited 27 May 2021).

9 *R v Barclays Plc (Southwark CC)* [2018] 5 WLUK 736; *SFO v Barclays Plc* [2018] EWHC 3055, [2020] 1 Cr App R 28 at [88] – [93].

10 Under the Administration of Justice (Miscellaneous Provisions) Act 1933, s2(2)(b); Crim PR r10.3; Criminal PD 2015 Division II, para 10B. See *Serious Fraud Office v Barclays Plc* [2018] EWHC 3055 (QB), [2020] 1 Cr App R 28.

1.31 Of the four individuals charged, the Chief Executive was acquitted at trial on the direction of the judge and three other senior executives were acquitted by the jury.[11]

1.32 It has been suggested that the FCA will levy a financial penalty in the region of £50m on Barclays arising from the events surrounding the fundraising, but no final decision has been made.[12]

8. LIBOR and EURIBOR investigations

1.33 The SFO undertook a series of investigations into the manipulation of the London Interbank Offered Rate ("LIBOR") and the Euro Interbank Offered Rate ("EURIBOR"). LIBOR and EURIBOR are benchmark interest rates used as a reference for financial transactions and products. They are calculated using submissions from banks. Each bank's submission should reflect its assessment of the rates at which it can borrow unsecured funds from other banks. In 2017, it was estimated that LIBOR was used as a reference rate in financial contracts with a value of US$300 trillion.[13]

1.34 The SFO's investigations were primarily concerned with whether LIBOR and EURIBOR had been manipulated for the benefit of positions taken by derivatives traders within the banks concerned. This would have had the effect of increasing the profits of the banks.

1.35 The SFO pursued prosecutions against individuals but could not bring criminal proceedings against banks. The FSA or FCA fined a number of banks.[14] In contrast, the United States achieved criminal disposals in respect of the banks involved as well as regulatory action. For example, the banks paid large fines and admitted misconduct under various plea agreements and non-prosecution agreements with the Fraud Section of the Criminal Division of the US Department of Justice ("DOJ"). See further details below:

8(i). Barclays (US Dollar LIBOR)

1.36 The SFO charged six former employees of Barclays with conspiracy to defraud in connection with its investigation into manipulation of US Dollar LIBOR. It was alleged that traders and submitters had conspired to submit rates that were favourable to the

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11 Serious Fraud Office, "Barclays PLC and Qatar Holding LLC".

12 CityAM "Barclays fights £50m fine over Qatari capital" (16 September 2013) https://www.cityam.com/barclays-fights-50m-fine-over-qatari-capital/ (visited 31 May 2021).

13 *R v Pabon (Alex Julian)* [2018] EWCA Crim 420, [12].

14 As set out below, for misconduct relating to LIBOR and other benchmarks, the FSA fined Barclays Bank plc £59.5m, Deutsche Bank £227m and UBS AG £160m. The FSA or FCA also fined the Royal Bank of Scotland £87.5m, ICAP Europe Ltd £14m, Rabobank £105m, Martin Brokers £630,000 Lloyds Bank plc £50m, see eg FCA "Deutsche Bank fined £227 million by Financial Conduct Authority for LIBOR and EURIBOR failings and for misleading the regulator" (24 April 2015) https://www.fca.org.uk/news/press-releases/deutsche-bank-fined-%C2%A3227-million-financial-conduct-authority-libor-and-euribor (last visited 2 June 2021).

trading positions of the traders. Three of the individuals charged were found guilty at trial, one pleaded guilty and two were acquitted.[15]

1.37 At trial, one of the defendants contended that "the practice of asking the submitters to put in a rate which suited the traders was so widespread throughout the trading floor that senior management must have been aware of it or condoned it". As a result, he said, it "was reasonable to believe that this was acceptable practice and not thought to be improper". In support of this, he claimed that he had learnt this practice from his mentors, who were also manipulating the rate, and used email and telephone communications for these purposes despite knowing they were monitored for compliance purposes.[16]

1.38 Prosecutors say that it was not possible to prosecute Barclays due to the identification principle. The individuals involved were middle and senior-ranking but not at Board level. There was insufficient evidence against anyone senior enough to constitute a directing mind and will. A failure to prevent offence, or different rules of attribution, may have enabled Barclays to be prosecuted.

1.39 In the US, Barclays Bank Plc admitted misconduct, including manipulation of US Dollar LIBOR. It agreed to pay a penalty of US$160 million under a non-prosecution agreement with the Fraud Section of the Criminal Division of the DOJ. Barclays acknowledged that wrongful acts were carried out by employees within the scope of their employment and intended, at least in part, to benefit the bank. According to the statement of facts, Barclays employees provided LIBOR and EURIBOR submissions that, at various times, were false because they improperly took into account the trading positions of its derivative traders or reputational concerns about negative media attention relating to its LIBOR submissions.[17]

1.40 Barclays also settled related matters with the US Commodity Futures Trading Commission ("CFTC"), which imposed a US$200 million civil monetary penalty and required Barclays to implement detailed measures designed to ensure the integrity and reliability of its benchmark interest rate submissions.[18]

1.41 In 2012, the FSA (as it then was) in the UK fined Barclays £59.5 million for misconduct in relation to LIBOR and EURIBOR. Barclays cooperated fully and agreed to settle at

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15 Serious Fraud Office, "LIBOR US Dollar (Barclays)", https://www.sfo.gov.uk/cases/libor-barclays/ ; The Guardian, "Libor-rigging trial: ex-Barclays traders jailed for two to six years" (7 July 2016), https://www.theguardian.com/business/2016/jul/07/libor-rigging-trial-ex-barclays-traders-jailed-merchant-pabon-mathew-johnson (last visited 27 May 2021).

16 *R v Pabon (Alex Julian)* [2018] EWCA Crim 420, [2018] Crim LR 662, [20].

17 DOJ, "Barclays Bank PLC Admits Misconduct Related to Submissions for the London Interbank Offered Rate and the Euro Interbank Offered Rate and Agrees to Pay $160 Million Penalty" (27 June 2012) https://www.justice.gov/opa/pr/barclays-bank-plc-admits-misconduct-related-submissions-london-interbank-offered-rate-and (last visited 27 May 2021); see Statement of Facts agreed as part of the non-prosecution agreement between the Fraud Section of the Criminal Division of the Department of Justice and Barclays Bank PLC, para 50.

18 Commodity Futures Trading Commission, "CFTC Orders Barclays to pay $200 Million Penalty for Attempted Manipulation of and False Reporting concerning LIBOR and Euribor Benchmark Interest Rates" (27 June 2012), https://www.cftc.gov/PressRoom/PressReleases/6289-12 (last visited 27 May 2021).

an early stage. It qualified for a 30% discount under the FSA's settlement discount scheme.[19]

8(ii). Barclays and Deutsche Bank (EURIBOR)

1.42 In 2015, the SFO charged 11 former employees of Barclays and Deutsche Bank with conspiracy to defraud in connection with its investigation into manipulation of EURIBOR. Three of the individuals were found guilty at trial, one pleaded guilty and three were acquitted. The SFO subsequently closed its case in relation to the other four, following the refusal of extradition requests.[20]

1.43 The individuals involved were middle and senior ranking but not at board level. There was insufficient evidence against anyone senior enough to constitute a directing mind and will.

1.44 The SFO did not charge Barclays or Deutsche Bank. A failure to prevent offence or different rules of attribution may have enabled Barclays and Deutsche Bank to be prosecuted, presuming any jurisdictional or other requirements could be met.

1.45 In the US, the UK subsidiary of Deutsche Bank AG pleaded guilty to wire fraud for its role in manipulating a number of benchmark interest rates including EURIBOR and agreed to pay a fine of US$150 million under a plea agreement. Deutsche Bank AG entered into a deferred prosecution agreement with the Fraud Section of the Criminal Division and the Antitrust Division of the DOJ with respect to wire fraud and antitrust charges in connection with its role in manipulating US Dollar LIBOR and engaging in a price-fixing conspiracy to rig Yen LIBOR. Deutsche Bank AG acknowledged misconduct and agreed to pay a penalty of US$625 million. Both Deutsche Bank AG and its UK subsidiary acknowledged that wrongful acts by employees were within the scope of their employment and intended, at least in part, to benefit each company.[21]

1.46 This was in addition to approximately US$1.4 billion in regulatory penalties and disgorgement in the US – US$800 million as a result of action by the CFTC and US$600 million as a result of action by the New York Department of Financial Services.[22]

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19 Financial Conduct Authority, "Barclays fined £59.5 million for significant failings in relation to LIBOR and EURIBOR" (26 June 2012), https://www.fca.org.uk/news/press-releases/barclays-fined-%C2%A3595-million-significant-failings-relation-libor-and-euribor (last visited 27 May 2021).

20 Serious Fraud Office, "EURIBOR", https://www.sfo.gov.uk/cases/euribor/ (last visited 27 May 2021).

21 Department of Justice, "Deutsche Bank's London Subsidiary Agrees to Plead Guilty in Connection with Long-Running Manipulation of LIBOR" (23 April 2015), https://www.justice.gov/opa/pr/deutsche-banks-london-subsidiary-agrees-plead-guilty-connection-long-running-manipulation (last visited 27 May 2021); Statement of Facts between the Fraud Section of the Criminal Division and the Anti-Trust Division of the Department of Justice and DB Group Services (UK) Limited, para 68; Statement of Facts between the Fraud Section of the Criminal Division and the Anti-Trust Division of the Department of Justice and Deutsche Bank AG, para 113.

22 Commodity Futures Trading Commission, "Deutsche Bank to Pay $800 Million Penalty to Settle CFTC Charges of Manipulation, Attempted Manipulation, and False Reporting of LIBOR and Euribor" (23 April 2015), https://www.cftc.gov/PressRoom/PressReleases/7159-15; New York Department of Financial Services, "NYDFS Announces Deutsche Bank to pay $2.5 billion, terminate and ban individual employees, install independent monitor for interest rate manipulation" (23 April 2015), https://dfs.ny.gov/reports_and_publications/press_releases/pr1504231 (last visited 27 May 2021).

1.47 In the UK, the FCA found that at least 29 individuals, including managers, traders and submitters based in London, Frankfurt, Tokyo and New York, were involved in misconduct at Deutsche Bank concerning the manipulation of LIBOR and EURIBOR. The FCA also found that the misconduct went unchecked because of Deutsche Bank's inadequate systems and controls. The FCA fined Deutsche Bank AG £227 million, in part because it misled the FCA and failed to cooperate on certain issues during the investigation.[23]

1.48 As noted above, Barclays reached agreements with the US DOJ and CFTC and the UK FSA with respect to LIBOR and EURIBOR.

8(iii). Tom Hayes (Yen LIBOR: UBS and Citibank)

1.49 Another SFO case concerning LIBOR rigging involved the conviction, in 2015, of Tom Hayes for eight counts of conspiracy to defraud.[24]

1.50 Hayes was a derivatives trader working in Tokyo at UBS Securities Japan Limited ("UBS Japan") from 2006 to 2009, and Citigroup Global Markets Japan Inc ("Citigroup Japan") from 2009 to 2010. At no material time was he in a managerial role.

1.51 The SFO's case was that, between 2006 and 2010, he conspired with others to manipulate submissions in relation to Yen LIBOR in order to advance his trading interests and the profits of the banks for which he worked.[25]

1.52 During the trial, Mr Hayes said that his actions were not dishonest. He denied that he had sought to procure LIBOR submissions that were not genuine perceptions of a bank's borrowing rate. He said that what he did was common practice and that there were a range of potential LIBOR submissions which could be justified. He further contended that his actions were not only condoned but encouraged by his employers and that he was instructed to act in the way which he did. In his appeal against sentence, Mr Hayes' mitigation included the assertion that his "conduct was condoned, if not encouraged, by his immediate managers even if his own conduct took the extent of the manipulation of LIBOR to new levels". The Court of Appeal noted however that although Mr Hayes' had, before his trial, made wide admissions and indicated a willingness to assist the authorities in relation to his misconduct, his decision ultimately not to participate in that process, and to assert during the trial that his actions were honest, removed that mitigation.[26]

1.53 The SFO did not charge UBS or Citigroup in connection with the matter. A failure to prevent offence may have enabled the banks to be prosecuted, presuming any jurisdictional or other requirements could be met.

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[23] FCA "Deutsche Bank fined £227 million by Financial Conduct Authority for LIBOR and EURIBOR failings and for misleading the regulator" (24 April 2015) https://www.fca.org.uk/news/press-releases/deutsche-bank-fined-%C2%A3227-million-financial-conduct-authority-libor-and-euribor (last visited 2 June 2021).

[24] Serious Fraud Office, "LIBOR Yen (Hayes)", https://www.sfo.gov.uk/cases/libor-hayes/ (last visited 27 May 2021).

[25] *R v Hayes (Tom Alexander)* [2015] EWCA Crim 1944, [2].

[26] *R v Hayes (Tom Alexander)* [2015] EWCA Crim 1944, [8], [50] and [92].

1.54 In contrast, in the US, UBS Japan was charged with a felony relating to manipulation of LIBOR and agreed to pay a fine of US$100 million pursuant to a plea agreement with the Fraud Section of the Criminal Division of the DOJ. In addition, UBS AG (the parent company headquartered in Zurich) entered into a non-prosecution agreement with the Fraud Section of the DOJ in which it admitted misconduct and agreed to pay an additional US$400 million penalty.[27] Additionally, the US CFTC imposed a US$700 million civil monetary penalty on UBS and a US$175 million civil monetary penalty on Citibank,[28] and the Swiss Financial Market Supervisory Authority ordered UBS AG to disgorge CHF59 million in profits.[29]

1.55 In the UK, the FSA found that at least 45 individuals, including managers and senior managers, were involved in, or aware of the misconduct at UBS concerning the setting of LIBOR and EURIBOR. The routine and widespread manipulation of such submissions was not detected by UBS's compliance department or the group internal audit, which undertook five audits of the relevant business area during the relevant period. The misconduct occurred in various locations including Japan, Switzerland, the UK and the USA. The FSA / FCA imposed the following penalties:

(1) UBS AG was fined £160 million; and

(2) Arif Hussein, former Head of UBS's GBP Rates Desk, was prohibited from working in financial services.[30]

1.56 Mr Hayes's case is currently being examined by the Criminal Cases Review Commission ("CCRC"). In 2017, Mr Hayes was banned from performing any function in relation to any regulated activity in the financial services industry. This decision was appealed to the Upper Tribunal and proceedings there have been stayed pending the CCRC's examination of the case.[31]

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27 Department of Justice, "UBS Securities Japan Co. Ltd. to Plead Guilty to Felony Wire Fraud for Long-running Manipulation of LIBOR Benchmark Interest Rates" (19 December 2012), https://www.justice.gov/opa/pr/ubs-securities-japan-co-ltd-plead-guilty-felony-wire-fraud-long-running-manipulation-libor (last visited 27 May 2021).

28 Commodity Futures Trading Commission, "Deutsche Bank to Pay $800 Million Penalty to Settle CFTC Charges of Manipulation, Attempted Manipulation, and False Reporting of LIBOR and Euribor" (23 April 2015), https://www.cftc.gov/PressRoom/PressReleases/7159-15 ; Commodity Futures Trading Commission, "CFTC Orders Citibank, N.A. and Japanese Affiliates to Pay $175 Million Penalty for Attempted Manipulation of Yen LIBOR and Euroyen TIBOR, and False Reporting of Euroyen TIBOR and U.S. Dollar LIBOR" (25 May 2016), https://www.cftc.gov/PressRoom/PressReleases/7372-16 (last visited 27 May 2021).

29 Swiss Financial Market Supervisory Authority (FINMA), "LIBOR: FINMA concludes proceedings against UBS and orders disgorgement of profits" (19 December 2012), https://www.finma.ch/en/news/2012/12/mm-ubs-libor-20121219/ (last visited 27 May 2021).

30 Financial Services Authority, "UBS fined £160 million for significant failings in relation to LIBOR and EURIBOR" (19 December 2012), https://www.fca.org.uk/news/press-releases/ubs-fined-%C2%A3160-million-significant-failings-relation-libor-and-euribor; Financial Conduct Authority, "FCA publishes Decision Notice for former UBS Libor trader" (14 April 2016), https://www.fca.org.uk/news/press-releases/fca-publishes-decision-notice-former-ubs-libor-trader (last visited 27 May 2021).

31 Financial Conduct Authority, "FCA decides to ban Tom Hayes" (8 November 2017), https://www.fca.org.uk/news/press-releases/fca-decides-ban-tom-hayes; *Hayes (Tom) v The Financial Conduct Authority* [2017] UKUT 423 (TCC); BBC News, "They wanted to jail a banker - I was that banker" (22 February 2021), https://www.bbc.co.uk/news/business-56088419 (last visited 27 May 2021).