Law Commission
Reforming the law

Corporate Criminal Liability:

an options paper

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Glossary

Actus: The 'physical' element of an offence, contrasted with the 'fault' or 'mental element'. Although this will often refer to an act, states of being, circumstances and consequences are also part of the actus of an offence.

Articles of association: The written rules about running a company agreed by its shareholders or guarantors, directors, and (where there is one) company secretary. Most companies use the "model articles of association" prescribed under the Companies Act 2006 or previous legislation.

Attempt: A person is guilty of attempting to commit an offence if, with intent to commit the offence, they do an act which is more than merely preparatory to the commission of it.[1]

Company: A legal entity formed by a group of persons usually to engage in business. Most companies in England and Wales are formed under the Companies Act 2006 or earlier Companies Acts. Some companies are created through specific legislation or (historically) by royal charter.

Conspiracy: An agreement between two or more persons to carry out or bring about commission of a criminal offence. It is not necessary for the conspirators to do anything to put the conspiracy into effect. While a corporation can, through a natural person representing its "directing mind and will", conspire with others, a conspiracy cannot exist between that natural person and the corporation alone.

Corporation: A legal entity distinct from the natural persons comprising it. Corporations include companies, local authorities, and universities. A corporation sole is an office held by an individual which has a distinct legal personality from the current occupant.

Deferred prosecution agreement ("DPA"): An agreement reached between a prosecutor and a corporate defendant allowing a prosecution to be suspended for an indefinite period provided that the organisation meets certain specified conditions.[2] They are subject to the supervision of a judge, who must be satisfied that the DPA is in the public interest and that the terms are fair, reasonable and proportionate.

Directing mind and will: A natural person representing the "directing mind and will of [a] corporation, the very ego and centre of the personality of the corporation."[3] In *Tesco v Nattrass*,[4] the House of Lords ruled that for a corporation to be criminally liable on the basis of the identification doctrine, it is necessary to identify one or more natural persons representing the "directing mind and will" of the corporation with the required fault element.

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1 Criminal Attempts Act 1981, s 1.

2 Crime and Courts Act 2013, sch 17.

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

4 *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153.

Director: Directors are the persons legally responsible for running the company. A private company must have at least one director, and at least one director must be a natural person.

Fault element: Also known as the mental element or mens rea – the state of mind necessary for a defendant to be guilty of an offence, such as intention, recklessness, knowledge or belief (or the lack of it). In some cases, fault is not about the state of mind of the defendant as the standard is one of negligence. The term "mens rea" (Latin for "guilty mind") is sometimes used as a synonym for the fault element of an offence. However, "mens rea" is also used to refer only to intention and recklessness alone.

Identification doctrine: The legal doctrine that for offences requiring proof of fault, a corporation may only be convicted where a natural person representing the corporation's "directing mind and will" possessed the necessary mental element.

Inchoate offence: Offences such as conspiracies, attempts and incitement, which may be committed notwithstanding that the substantive offence to which they relate is not, or may be, committed.

Legal person: An entity, other than a natural person, that is recognised as having the same capacity in law as a natural person. In England and Wales, legal persons include corporations, local authorities, limited liability partnerships,[5] co-operatives,[6] universities, building societies,[7] and incorporated friendly societies.[8] Trade unions have 'quasi-corporate' status:[9] although not technically corporate bodies, they may make contracts, sue and be sued, and be prosecuted for offences in their own name.

Mens rea: See fault element.

Money laundering: This normally refers to the processing of criminal property in order to describe its illegal origins. Under the Proceeds of Crime Act 2002 a person commits an offence of money laundering if he or she:

(1) conceals; disguises; converts; transfers; or removes criminal property from England and Wales, Scotland or Northern Ireland; or

(2) enters into or becomes concerned in an arrangement which he or she knows or suspects facilitates (by whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person;

(3) acquires criminal property; uses criminal property; or has possession of criminal property.

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5 Limited Liability Partnerships Act 2000.

6 Co-operative and Community Benefit Societies and Credit Unions Act 2010.

7 Building Societies Act 1986.

8 Friendly Societies Act 1992.

9 Trade Unions and Labour Relations (Consolidation) Act 1992.

Natural person: A living human being, as opposed to a "legal person". Where legislation refers to an "individual", this means that it only applies to natural persons.

Negligence: In criminal law, offences of negligence are offences characterised by a failure to observe some required standard when undertaking otherwise lawful conduct. There is no required mental element, and no requirement that the conduct results in harm.

In civil law, the tort of negligence occurs where a person (i) is under a duty of care to another person, (ii) breaches that duty, (iii) the breach causes harm.

Person: The Interpretation Act 1978 provides that in interpreting a statute from after 1889, unless the contrary intention appears, "person" is to be construed as "includ[ing] a body of persons corporate or incorporate".

Public interest entity: This term refers to certain large companies which are subject to additional audit and corporate disclosure requirements. In the UK, public interest entities are currently defined under the Statutory Audit Directive, as entities whose transferrable securities are tradable on a regulated market; credit institutions; or insurance undertakings.

***Respondeat superior*:** Latin for "let the master answer", this is the legal doctrine that holds a person (the 'principal') liable for the acts of their agent or employee, performed within the scope of their agency or employment. The doctrine is applied in civil law, and will often involve vicarious liability, since the principal may be held liable without being at fault. In many United States jurisdictions, respondeat superior is used to attribute criminal conduct to corporate bodies (but not to natural persons).

Reverse burden: A 'reverse burden' exists where the burden of proof is on a defendant to show or prove some matter in criminal proceedings (usually giving rise to a defence). Where the burden is a legal (or persuasive) burden, this normally requires the defendant to satisfy the court on the balance of probabilities. Where the burden is an evidential burden, it is enough for the defendant to adduce sufficient evidence to make it an issue, and then the burden is on the prosecution to disprove it to the criminal standard. When interpreting legislation, a requirement that the defendant "prove" some matter will normally mean that the burden is legal, whereas a requirement that the defendant "show" some matter will often be interpreted as imposing only an evidential burden.

Strict liability: An offence of which the defendant may be guilty despite not intending or being aware of one or more of the facts or results specified in the external elements of that offence.

Unincorporated association: An organisation set up through the agreement of a group of natural persons, with no separate legal personality. The Interpretation Act 1978 provides that, unless the contrary intention appears, in legislation since 1889 "person" includes a body of persons, corporate or unincorporate. Therefore, criminal liability can attach to an unincorporated association.

Vicarious liability: When one party is legally liable for the actions of another, despite not being personally at fault. Vicarious liability is not normally found in criminal law.

Chapter 1: Introduction

1.1 A corporation[1] has "a distinct legal entity from its owners, officers or members – a separate legal person."[2] As such, corporations can be subject to criminal and civil liability. In the year to September 2020, with caution for inaccuracies in the data, there were over 5,000 convictions of non-natural persons, representing around 0.6% of all convictions.[3] Many of these are for strict or absolute liability offences, such as breaches of environmental or trading regulations, which are often created with corporations in mind. But companies can commit offences with fault elements, which typically have been created with natural persons in mind.

1.2 The general rule of criminal liability applied to corporations is the "identification doctrine".[4] This provides that a company will generally only be liable for the conduct of a person who had the status and authority to constitute the company's "directing mind and will". There are exceptions to the application of this doctrine – for instance, in the case of offences of strict liability, the courts are generally content invoke vicarious liability and to hold companies liable for the conduct of their employees and agents. The identification doctrine may be displaced by express words in a statute or by necessary implication.

THE LAW COMMISSION'S REVIEW

1.3 In November 2020, we were asked by the Government to review the law on corporate criminal liability. In our terms of reference, we were asked to consider "the challenges faced by the criminal justice system under the current law relating to corporate criminal liability". Our exploration of options for reform was agreed to avoid "disproportionate burdens upon business." The remit of our substantive review included consideration of the suitability of the identification doctrine, the relationship

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1 Our terms of reference require us to "review the law relating to non-natural persons, including companies and limited liability partnerships". We concentrate in this paper on corporate bodies – that is, organisations with legal personality such as companies (including charitable companies) and limited liability partnerships (LLPs). The Interpretation Act 1978, s 5 and schedule 1, provides that unless the contrary intention appears, references in legislation to a "person" includes a body of person corporate or unincorporate. Accordingly, statutory criminal offences can apply to unincorporated associations, including (non-LLP) partnerships. The liability of unincorporated bodies is not in the remit of this report, but some of the discussion applies *mutatis mutandis* to unincorporated bodies.

2 A Pinto and M Evans, *Corporate criminal liability* (4th ed 2020) p 1.

3 Ministry of Justice, Criminal Justice system statistics quarterly, September 2020, Table Q5.1. The need for cautioned arises because, according to the Ministry of Justice (see footnote 2 in Table 5.1), ambiguity in the status of small business owners can lead to individual defendants being recorded as corporations, and, by implication, vice versa (for instance, some corporations were recorded as having received sentences only available to natural persons, such as community or custodial sentences. Figures up to September 2020, as opposed to more recent figures, have been used because of the disruption caused to prosecutions due to COVID-19.

4 This is alternatively referred to as the "identification principle". In this options paper, we use the term "identification doctrine" to refer to the current prevailing mode of attribution in the criminal law of England and Wales, and the term "identification principle" to refer more generally to a mode of attribution based on identifying or more natural persons with the requisite fault. However, we have also retained the term "identification principle" in direct quotations where it is used to refer to the identification doctrine.

between criminal and civil law on corporate liability, and other ways the criminal law can be used in relation to corporations.

1.4 We published our discussion paper considering the present law in these areas and possible approaches for reform in June 2021.[5] In the discussion paper, we set out the law relating to several areas of corporate criminal liability, including the identification doctrine. This is the current model for attributing the acts of individuals to a corporation under the law of England and Wales. It deems that the actions and mental states of the individuals who constitute the "directing mind and will" of a company can be attributed to the company. This means those individuals who are senior enough to be deemed to direct the company's mind and will can bind the company with their actions.

1.5 We explored several options for reform of the identification doctrine, including:

(1) The doctrine of "*respondeat superior*".[6] This attributes the criminal acts of any employee to the company, where they were committed in the course of employment and with an intention to benefit the company.

(2) The possibility under Australian Commonwealth law of attributing some fault elements – such as intent – to companies by way of their policies and procedures, on the basis that they are indicative of the culture of the corporation. A corporation can therefore be criminally liable for acts which were permitted or encouraged by its culture.

(3) Canadian legislation allowing the acts and mental states of "senior managers" to be attributed to a company. Alongside this, we also considered the Australian model of attributing the acts of "high managerial agents" to the company for which those individuals work.

1.6 Separately, we assessed the existing "failure to prevent" offences, for bribery[7] and the facilitation of tax evasion[8], and the possibilities for expanding this regime. These offences ascribe criminal liability to companies where they have failed to prevent employees or associates committing either bribery or the facilitation of tax evasion.

1.7 We also considered the liability of directors as individuals connected to corporate wrongdoing. This involved an assessment of the current formulation of "consent or connivance", or "consent, connivance and neglect" provisions which can be found in a variety of statutes and which attribute liability to directors for their part in a company's wrongdoing.

1.8 We asked questions about each of these options, the full list of which can be found in chapter 10 of the discussion paper. We received 45 responses to the consultation. We

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5 Corporate Criminal Liability: A discussion paper (2021) Law Commission.

6 Latin for "let the master answer". This principle, derived from English civil law, is used as the basis of corporate criminal liability in most US jurisdictions.

7 Bribery Act 2010, s 7.

8 Criminal Finances Act 2017, s 45.

also had engagement from a number of additional stakeholders during the consultation period.

1.9 This options paper will assess the responses we received to each of these questions, as well as additional options which have come to our attention during consultation. We will assess a number of options for reform to each of the key areas we addressed in the discussion paper.

THE MEANING OF "ECONOMIC CRIME"

1.10 Though this review is concerned with criminal liability generally, there is a particular focus on "economic crimes", with fraud as a paradigm of this, because these are offences that are particularly likely to be committed in a corporate context. Chapters 2 to 7 and chapters 9 and 10 are concerned with offences generally. Chapter 8, on failure to prevent offences, looks at a particular group of offences for which failure to prevent offences have been proposed, including economic crime as a category and fraud as a particular offence type. Chapters 11 to 13, which consider civil approaches, concentrate on economic crimes, with fraud as the core case.

1.11 There is no universal definition for "economic crimes". Not all acquisitive crime is "economic crime" – for instance, we would not ordinarily use the term to denote street robbery or shoplifting.

1.12 In their Economic Crime Action Plan 2021, the Government said:

> Economic crime refers 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 poses a threat to the UK's economy and its institutions and causes serious harm to society and individuals. It includes criminal activity which:
>
> (a) allows criminals to benefit from the proceeds of their crimes or fund further criminality
>
> (b) damages our financial system and harms the interests of legitimate business
>
> (c) undermines the integrity of the UK's position as an international financial centre
>
> (d) poses a risk to the UK's prosperity, national security and reputation
>
> This definition is broader than terms such as 'financial crime' or 'white-collar crime' to provide a holistic response to the following types of criminality:
>
> (a) fraud against the individual, private sector and public sector
>
> (b) terrorist financing
>
> (c) sanctions contravention
>
> (d) market abuse

(e) corruption and bribery

(f) the laundering of proceeds of all crimes[9]

1.13 Another source is the definition of "financial crime" in the Financial Services and Markets Act 2000, which includes any offence involving:

(1) fraud or dishonesty

(2) misconduct in, or misuse of information relating to, a financial market

(3) handling the proceeds of crime, or

(4) the financing of terrorism.[10]

1.14 This definition works for the purposes of this legislation, because the definition only goes to the duty of the Financial Conduct Authority (FCA) to minimise the extent to which businesses and the financial system can be used for purposes connected to financial crime. However, we consider that as a general definition of financial crime, this is too broad. In particular, "dishonesty" captures a range of behaviour which need not be "financial"; it also captures any offences dependent on theft – including offences such as burglary and robbery. On the face of it, this definition includes any offence of which dishonesty is a component, such as using a "black box" decoder to access satellite television unlawfully.[11]

1.15 We consider that, for the purposes of this project, economic crime is best considered as a broad category of activity, especially that concerned with the carrying on of business. It includes criminal offences relating to markets and the functioning of the financial system. It also covers a range of economic or unlawful business activity related to crime, including money laundering and fraud.

1.16 It would not cover all acquisitive crime, nor would it cover all criminal offences committed in a business context – even where this is done for financial benefit. For instance, a licensee who sells alcohol unwittingly to a seventeen-year-old commits a criminal offence, in the course of business, for profit; but we do not consider this, in itself, to amount to an economic crime.

EVENTS SINCE THE PUBLICATION OF OUR DISCUSSION PAPER

1.17 Since the publication of our discussion paper, there have been a number of developments in this area. These include:

(1) The Economic Crime (Transparency and Enforcement) Act 2022, which was introduced in Parliament in March 2022 and passed within two weeks.

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9 HM Government and UK Finance, Economic Crime Plan, 2019-2022, p 10.

10 Financial Services and Markets Act 2002, s 1H.

11 Communications Act 2003, s 125.

(2) The publication, in February 2022, of a report on economic crime by the House of Commons Treasury Select Committee.[12]

(3) High profile judgments in cases involving the prosecution of legal persons, including *FCA v NatWest, Environment Agency v Southern Water, and Care Quality Commission v Dudley NHS Trust.*

(4) Deferred prosecution agreements ("DPAs") agreed with *Amec Foster Wheeler Energy Limited* and *AB Ltd and CD Ltd*.

(5) The consultation by the Department for Business, Energy and Industrial Strategy ("BEIS") on proposed reforms to Companies House and the regulation of auditors.

The Economic Crime (Transparency and Enforcement) Act 2022

1.18 The Economic Crime (Transparency and Enforcement) Act 2022 deals with three main issues: the registration of overseas entities with interests in UK land and their beneficial owners, changes to the unexplained wealth order regime and sanctions.

1.19 The register of overseas entities is intended to be a publicly available register which identifies the beneficial owners of overseas entities which hold property in the UK. A different version of this already exists in the register of persons with significant control, which requires companies to provide information to Companies House about their ultimate owners and controllers. This only applies to entities registered in this country, however, so there is a gap in which companies registered overseas can benefit from opacity as to their beneficial owners.

1.20 The Act also amends the rules on civil penalties for breach of UK Government financial sanctions. At present, the Policing and Crime Act 2017 provides a power for the Treasury to impose monetary penalties for breach of sanctions.[13] The Economic Crime Act amends section 146 of the 2017 Act to remove the requirement for a person to have "known, suspected or believed any matter". This effectively introduces strict liability for such breaches of financial sanctions. It should be noted that these are civil powers, which means that the applicable standard of proof is the balance of probabilities and that they do not require, or lead to, a criminal conviction.

1.21 The Act also reforms legislation relating to unexplained wealth orders to create a new category of persons – "responsible officers" – who may be required to give information about interests held by non-natural persons. It also extends the time limits for which an interim freezing order has effect and enables the court to limit costs which may be recovered from an enforcement authority.

COVID-19 related fraud

1.22 The extraordinary circumstances of the COVID-19 pandemic and the unprecedented economic interventions introduced by Government to deal with the economic and social disruption it entailed created new avenues for fraud. In particular, in April 2020,

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12 Economic Crime, Report of the House of Commons Treasury Committee (2021-22) HC 145.

13 Policing and Crime Act 2017, s 146.

the Government implemented a scheme designed to support businesses. Through this scheme, 1.5 million individual loans were granted, worth £47 billion, after receiving applications from approximately a quarter of UK businesses.[14] According to the National Audit Office, over 90% of these, worth £39.7 billion, were given to micro-businesses with a turnover below £632,000.[15] The scheme operated such that banks and building societies loaned the money, with repayments backed by the Government if the businesses defaulted. However, it became evident that a portion of the loans had been claimed fraudulently. It is estimated that £4.9 billion was claimed fraudulently – this is 11% of the total £47 billion which was distributed.[16]

Treasury Select Committee report on Economic Crime

1.23 In the Treasury Select Committee's report, published 26 January 2022, the committee states its position that the identification doctrine is a problem. The committee make clear their support for expansive reform of this doctrine. The key reason they cite for supporting reform is the practical difficulties of successful prosecutions caused by the "directing mind and will test".[17] They also rely on the previous committee's report in 2019, which detailed evidence that committee received on the inadequacies of the identification doctrine.[18] They adopt the evidence of the SFO, primarily, which argues that the identification doctrine is unsatisfactory because of the "uncertainty" as to who is a directing mind and will. They cite large company structures of delegated responsibility and diffuse knowledge as further impediments.[19]

Recent notable cases

FCA v NatWest

1.24 On 6 October 2021, National Westminster Bank Plc ("NatWest") pleaded guilty to three offences contrary to the Money Laundering Regulations 2007 ("MLRs"). On 13 December 2021, it was sentenced in Southwark Crown Court to financial penalties. It was noted in the sentencing remarks that this was the first conviction of a bank under these regulations.[20]

1.25 The offences to which NatWest pleaded guilty were: between 2012 – 2016, failing to conduct ongoing monitoring of a business relationship, failing to determine the extent of ongoing monitoring on a risk-sensitive basis, and failing to apply enhanced ongoing

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14 National Audit Office, "The Bounce Back Loan Scheme: an update", 2 December 2021, available at: https://www.nao.org.uk/press-release/the-bounce-back-loan-scheme-an-update/.

15 National Audit Office, "The Bounce Back Loan Scheme: an update", 2 December 2021, available at: https://www.nao.org.uk/press-release/the-bounce-back-loan-scheme-an-update/.

16 BBC News, "Conservative minister resigns in anger over Covid fraud", 24 January 2022, available at: https://www.bbc.co.uk/news/uk-politics-60117513.

17 House of Commons Treasury Committee, Economic Crime, Eleventh Report of Session 2021-22, p 58.

18 House of Commons Treasury Committee, Economic Crime – Anti-money laundering supervision and sanctions implementation, Twenty-Seventh Report of Session 2017-19, p 54-59.

19 Above, p 54.

20 *R (The Financial Conduct Authority) v National Westminster Bank Plc* [2021], [3].

monitoring of a business relationship which presented a higher risk of money laundering and terrorist financing.[21]

1.26 These offences relate to NatWest's dealings with Fowler Oldfield, a jewellery business based in Bradford. Fowler Oldfield was a small company which bought gold for cash obtained from the foreign exchange company Travelex. The company started banking with NatWest on the basis that the business was high-risk, and that the bank would not handle its cash. However, over the course of a four year period of offending, Fowler Oldfield's risk was downgraded on NatWest's system, which was not subject to sufficient ongoing monitoring, and NatWest handled significant sums of the cash which Fowler Oldfield was generating. Over five years, Fowler Oldfield deposited over £365 million, of which £264 million was in cash. The bank admitted carrying out insufficient due diligence on this. The total fine to which NatWest was subject to, as a result of these failings, was £264,772,619.95.

1.27 This case is notable for the change it marks in the action taken by the FCA, which usually results in administrative penalties but in the case of NatWest, resulted in a conviction and fine. It could be a restatement of the weight of a criminal conviction, against a backdrop of serious and sustained failures to protect against money laundering. The criminal convictions of the company, and the sizeable fine it has to pay, are clearly intended to have a deterrent effect, as well as recognising wrongdoing.

Environment Agency v Southern Water Services Limited

1.28 On 9 July 2021, Southern Water was sentenced after pleading guilty to 51 counts of discharging untreated sewage into controlled coastal waters.[22] The offences were committed between 2010 and 2015, and concerned 6,971 discharges of untreated sewage into controlled waters.[23] The sentencing remarks detail the variety of visible and hazardous effects these discharges had on the environments and local communities.[24] The remarks note that one of the aggravating factors to this serious offending is Southern Water's 168 previous convictions and cautions.[25] It was therefore thought that the size of the fine for the latest offences needed to "bring home to the management of this and other companies the need to comply with laws that are designed to protect the environment." To do this, though Johnson J accepted the shareholders were not directly responsible for the offending, he imposed a fine which may have harmed their investments.[26] The fine imposed was £90 million.[27]

Care Quality Commission v Dudley NHS Trust

1.29 On 19 November 2021, Dudley Group NHS Foundation Trust was fined after pleading guilty to a prosecution brought by the Care Quality Commission ("CQC"), and was

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21 *R (The Financial Conduct Authority) v National Westminster Bank Plc* [2021], [2].

22 *R* (*Environment Agency) v Southern Water Services Limited* [2021].

23 Above, at [1].

24 Above, at [4]-[7].

25 Above, at [9].

26 Above, at [12].

27 Above, at [66].

sentenced by the magistrates' court. The Trust plead guilty to the offence of failing to provide safe care and treatment to two patients, causing them avoidable harm, contrary to regulations 12 and 22 Health and Social Care Act 2008 (Regulated Activities) Regulations 2014. The two patients both died as a result of the avoidable harm caused by the failing. The Trust was fined over £2.5 million for the two offences.[28]

Recent DPAs

1.30 Deferred prosecution agreements ("DPAs") are agreements reached between prosecutors (the SFO or the CPS) and an organisation which could be prosecuted for one or more of a number of offences.[29] The agreement is supervised and approved by a judge. The agreement suspends the prosecution of the organisation for a defined period, on the condition that the organisation meets certain requirements. The organisation must, for example, cooperate fully with the investigation into their wrongdoing, and usually agrees to reparative measures. The organisation may also be required to pay fines, compensation and disgorge profits made from the offending.[30]

SFO v Amec Foster Wheeler Energy

1.31 *SFO v Amec Foster Wheeler Energy Limited*[31] is a DPA regarding the alleged commission of offences of conspiracy to corrupt and failure to prevent bribery committed by Amec Foster Wheeler Energy Limited ("AFWEL"). The offences are alleged to have taken place between 1996 and 2014, during which time the former company Foster Wheeler Energy Limited ("FWEL") operated as a subsidiary of the global engineering company, The Foster Wheeler Group. FWEL was a contractor engaged in engineering oil and gas processing facilities, oil refinery, and chemical and petrochemical facilities. The offences relate to activities carried out to further this business. It is alleged that the company's employees and directors conspired with agents to make corrupt payments to public officials in connection with contracts the company obtained. It is also alleged that, in the period after the coming into force of the Bribery Act 2010, the company failed to prevent associated persons from committing bribery in Brazil, and did not have adequate procedures in place to prevent such activity.[32]

1.32 The deferred prosecution agreement included payment of a financial penalty of over £46 million and $4 million, disgorgement of profits of over £47 million and $3 million, and further remediation of internal compliance and ethics programmes.

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28 Sentencing remarks of District Judge Wilkinson in *R v Dudley NHS Trust,* 18-19 November 2021, https://www.judiciary.uk/wp-content/uploads/2021/11/R-v-Dudley-NHS-Trust-sentencing-remarks-191121.pdf.

29 For the full list of offences for which a DPA can be agreed, see sch 17, Crime and Courts Act 2013. The list includes bribery, fraud, false accounting and offences relating to money laundering.

30 See Sch 17(5) Crime and Courts Act 2013 for the content of a DPA.

31 *SFO v Amec Foster Wheeler Energy Limited* [2021].

32 *SFO v Amec Foster Wheeler Energy Limited* Statement of Facts.

SFO v AB and CD

1.33 *SFO v AB Ltd and CD Ltd* concerns two DPAs the SFO agreed with two companies on 19 July 2021. The SFO have not identified the companies for legal reasons and as such there is limited information. The agreement, statement of facts and judgment will only be published when reporting restrictions are lifted. At present, the SFO have said the agreements concern offences contrary to section 7 Bribery Act 2010, failure to prevent bribery.[33] The companies are UK-based, and the criminal conduct involved bribes paid to secure multi-million pound UK contracts.

1.34 These two DPAs required a total of over £2.5 million to be paid in fines and disgorgement of profits. The agreements also contain an undertaking by a parent company to support a "comprehensive compliance programme and obligations to report to the SFO on compliance at regular intervals during the two-year term of the DPAs."[34] The companies are both said to have fully cooperated with the investigation, and will continue to co-operate in related proceedings.

BEIS consultation on proposed reforms to Companies House and the regulation of auditors

1.35 BEIS published a consultation paper in March 2021 on audit and corporate governance. One of the provisional proposals in it was the introduction of mandatory reporting of anti-fraud measures for listed companies, banking and insurance companies with over 500 employees. This duty would be placed on directors to ensure the reporting requirement is complied with, designed to reinforce company directors' existing general responsibility for fraud prevention and detection.[35] This is discussed further in chapter 13.

THE OPTIONS PAPER

1.36 In this Options Paper, we are not making recommendations, but detailing options for reform – and ruling some out. In chapters 1-7 we consider the identification doctrine and possible options for reform. In chapter 8 we consider possible "failure to prevent" offences. In chapter 9, we consider directors' individual liability under "consent or connivance" provisions. In chapter 10 we consider the options available when sentencing corporations.

1.37 In chapters 11-14 we consider various options for civil law measures to address criminal offending carried out on behalf of corporations. These options focus on administrative monetary penalty regimes, civil actions and disclosure and reporting regimes.

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33 Serious Fraud Office, Press Release "SFO secures two DPAs with companies for Bribery Act offences", 20 July 2021, available at: https://www.sfo.gov.uk/2021/07/20/sfo-secures-two-dpas-with-companies-for-bribery-act-offences/.

34 Serious Fraud Office, Press Release "SFO secures two DPAs with companies for Bribery Act offences", 20 July 2021, available at: https://www.sfo.gov.uk/2021/07/20/sfo-secures-two-dpas-with-companies-for-bribery-act-offences/.

35 Department for Business, Energy and Industrial Strategy, "Restoring trust in audit and corporate governance", 8 March 2021, p 103.

1.38 While some of these options are clearly presented as alternatives, the case for adopting any particular reform needs to be considered in the context of which, if any, other reforms are taken forward.

The identification doctrine

1.39 On the principle of attribution of liability to corporations, we provide three options relating to offences with a fault element other than negligence. Option 1 is the retention of the existing identification doctrine. There are then two options where conduct could be attributed to the corporation if it had been performed by, or with the consent or connivance of, a "senior manager". Option 2A would use the definition of senior manager in the Corporate Manslaughter and Corporate Homicide Act 2007. Option 2B would use this definition, with the addition of a provision (drawn from the Canadian approach) that senior management includes the chief executive officer and chief financial officer of the organisation.

1.40 We also suggest that for offences of negligence, it should be possible to attribute negligence to a corporation, even if there is no individual who is personally negligent.

1.41 We reject as a general rule of attribution:

(1) adopting the principle of "*respondeat superior*", under which a company could be liable for any criminal conduct by an employee or agent acting within the scope of their employment with intent to benefit the corporation; and

(2) models of attribution based on "corporate culture" or similar.

"Failure to prevent" offences

1.42 We suggest as an option an offence of "failure to prevent fraud", limited to a small number of core fraud offences.

1.43 We also lay out some principles for future "failure to prevent offences" including:

(1) The base offence should have been committed with an intention to confer a business advantage on the organisation, or a benefit on a person to whom the associated person was providing services on behalf of the organisation.

(2) Organisations should have a defence of having put in place such prevention procedures as it was reasonable to expect.

(3) Organisations should have a defence that it was reasonable not to have any prevention procedures in place.

(4) The burden of proving that reasonable prevention procedures were in place, or it was reasonable not to have any prevention procedures in place, should lie with the defence.

(5) "Failure to prevent" offences should not apply to attempts, conspiracies, etc.

(6) "Failure to prevent" offences should not generally operate extra-territorially by default. A "failure to prevent" offence should only extend to conduct overseas where there is a demonstrable need for extraterritoriality.

1.44 We also detail and assess three other options for "failure to prevent" offences:

(1) Human rights breaches;

(2) Neglect and ill-treatment of vulnerable persons; and

(3) Computer Misuse Act 1990 offences.

1.45 Contrary to our general positions we think that if these offences were introduced:

(1) The possible offence related to human rights abuses should apply to extraterritorial conduct; and

(2) The possible offence relating to neglect and ill-treatment should not require proof of an intent to benefit the organisation.

1.46 We also consider that any "failure to prevent computer misuse" offence should be considered as part of the Home Office's ongoing review of the Computer Misuse Act 1990.

Directors' liability

1.47 We conclude that as a principle, directors should not be fixed with criminal liability on the basis that the organisation's commission of a criminal offence was attributable to their "neglect" unless that offence is one which can be committed by an individual defendant on the basis of negligence or strict liability.

1.48 We consider that in relation to existing offences where a "consent, connivance or neglect" provision is in a statute creating offences which require proof of fault greater than negligence, provision should be made to ensure that a director can only be prosecuted for an offence requiring that fault, if they consented to or connived in its commission. This could be done by a general legislative measure or by CPS guidance.

Sentencing of non-natural persons

1.49 We endorse the principles in the current sentencing guidelines relating to the imposition of financial penalties on corporate defendants.

1.50 We suggest an option of making publicity orders available in all cases where a non-natural person is convicted of an offence.

Civil penalties

1.51 In chapter 11 we consider three options for the imposition of administrative penalties upon corporations. We consider the operation of the FCA's regulation of the financial services sector, and regimes including those concerning market abuse and breach of financial sanctions. We consider that an option for reform is the introduction of a regime of administratively imposed monetary penalties. This could operate where a fraud is perpetrated by an associated person to a corporation, which was intended to benefit the corporation. In such cases the corporation would be liable to pay a monetary penalty unless it can show it took reasonable precautions to prevent the wrongdoing.

Civil actions

1.52 In chapter 12 we consider the possibility of giving enforcement bodies the power to take action in the High Court against corporations. We also examine the case for reform of the costs regime to ensure that concern of costs does not deter enforcement action against corporate bodies.

Disclosure obligations

1.53 In chapter 13 we consider three possible models of placing obligations on larger corporations to disclose the measures they have put in place to prevent offending. We examine the requirement on certain large companies to report on steps taken to prevent modern slavery, and the Companies Act 2006 requirements to publish non-financial and sustainability information statements. We also consider recent EU draft legislation concerning policy creation for human rights and environmental impacts.

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1.54 We held several roundtables and meetings with individuals and organisations while we have been preparing this paper, and we are extremely grateful to them for giving us their time and expertise.

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1.56 The following members of the Law Commission criminal law team have contributed to this options paper at various stages: David Connolly (team manager), Robert Kaye (team lawyer), David Allan (team lawyer), Olivia English (research assistant).

Chapter 2: Attribution of criminal liability to corporations

INTRODUCTION

2.1 The first half of this paper – this chapter and chapters 3 to 7 following – discusses how to attribute criminal liability to corporations. In these chapters we will consider models of attribution: in other words, approaches which seek to identify whose acts and – more importantly – whose mental states or fault should be considered those of the corporation. In this chapter we discuss the general issue of attributing conduct to corporations, and also consider how far it would be possible to formulate in legislation distinct rules of attribution for particular provisions of criminal law. In chapters 3 to 6, we consider the existing identification doctrine, possible modifications of that approach, and the doctrine of corporate criminal liability used in the US, known as "*respondeat superior*", under which conduct of any employee can be attributed to the company, provided the conduct was within the scope of their employment, and intended, if only in part, to benefit the organisation. We also consider non-anthropomorphic approaches which look for corporate analogues to the fault elements designed for natural persons (in particular, how intent is to be attributed to corporations) rather than seek to identify natural persons with the required fault.

2.2 In later chapters, we will consider a variety of alternative ways of dealing with offences committed in the context of corporate – mainly commercial – activity, and in particular with "economic offences". This includes "failure to prevent" offences along the lines of those introduced in recent years in relation to bribery and the facilitation of tax evasion.

2.3 These questions are interrelated, but they are not alternatives. While there is corporate liability, there will always be the question of which conduct is to be attributed to the corporation and which is to be considered solely that of the employee or agent. "Failure to prevent" offences are a way of addressing conduct which cannot be *directly* attributed to the corporation, but there will remain situations in which it is right to recognise certain conduct as being conduct by the corporation itself. "Failure to prevent" – which suggests negligence rather than direct culpability – will not always best reflect the nature of the offending.

2.4 Likewise, even if the basis of attribution for offences in general is extended, there may still be a case for "failure to prevent" offences where it is deemed desirable to impose a positive duty on a company to take steps actively to prevent the commission of offences by its employees and agents. It is only under the broadest basis of identification – *respondeat superior* – that there would be little role for failure to prevent offences because the company would already be fixed with liability for the unlawful conduct by the employee.

CORPORATE CRIMINAL LIABILITY IN PRINCIPLE

2.5 It is not, or has not been, universally agreed that criminal liability for corporations is appropriate. In 1973 the Law Commission considered some of the objections to corporate criminal liability for "serious" offences, the main being

> that, as a matter of principle, where such an offence has been committed only he who committed it should be liable, not only because punishment of such offenders provides the best deterrent to others similarly placed but also because conviction of the company results only in loss to its shareholders (or in some instances to its creditors) who may be innocent.[36]

2.6 A counter-argument to the innocent shareholder point was put forward by C. R. N. Winn when noting that the shareholders are not personally punished: they do not go to prison unless they have aided or abetted the wrongdoing, and they do not pay the fines themselves.[37] Of course, there can be consequences to the value of the investment they made in the company, but the point can be made that shareholders share in the profits of an enterprise, and though their personal liability is limited, the value of their investment is also contingent on the company's performance. Shareholders are liable to suffer where a company is poorly managed – that is the risk they choose to take – and it is unclear why mismanagement that is not just poor but criminal should be any different.

2.7 In the 1973 Working Paper, we also considered arguments in favour of corporate criminal liability, which included:

(1) The deterrent effect of the publicity a company attracts on criminal conviction;

(2) The fine imposed on a company provides a means of depriving it of unjust enrichment.

(3) Where many individuals within a company are known to be involved in a particular offence, prosecution of the company may be more convenient.[38]

2.8 As Amanda Pinto and Martin Evans note,[39] in 1846 Lord Denman said:

> There can be no effectual means for deterring from an oppressive exercise of power for the purpose of gain, except the remedy by an individual against those who truly commit it, that is the corporation acting by its majority, and there is no principle which places them beyond the reach of the law for such proceedings.[40]

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36 Law Commission (1972) Working Paper no 44, p 29.

37 C.R.N. Winn, "The Criminal Responsibility of Corporations" (1929) 3 C.L.J. 398, 412.

38 Above, p 30.

39 A Pinto and M Evans, Corporate Criminal Liability (2nd ed 2008) p 4.

40 *R. v Great Northern Railway Co* (1846) 9 Q.B. 315.

2.9 This frames the actions of a corporation as the actions of a collective of individuals acting in concert, to then assert that such organisation should not evade the same liability individuals would face for the same conduct.

2.10 Since, there have been developments in the law such that corporate criminal liability is a well-established feature of corporate liability and of criminal law of England and Wales. The question is largely how corporate criminal liability should operate and in particular, given that a company can generally only act through human agents, in what circumstances should the conduct of a company's directors, managers, employees and agents be attributed to the company.

The issue

2.11 The basic issue that models of attribution seek to address is how to apply core requirements of a criminal offence to a corporate defendant, especially where these elements are framed with natural persons in mind. One way of doing this is to look for natural persons whose conduct and mental states can be attributed to the company.

2.12 It is common to divide the components of a criminal offence into two:

(1) The "actus" or physical,[41] or "external",[42] elements of an offence.

(2) The "fault" element[43] – sometimes referred to as "mens rea".[44]

2.13 Criminal offences are typically created with natural persons principally in mind. The "fault" element of an offence will usually be a mental state. However, corporate bodies do not have mental states.

2.14 A common fault element is intent. A person will normally be taken to have intended something (such as the consequences of some act) if they acted to bring that result

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41 While in many common crimes, the actus will be a physical *act* – for instance, taking a vehicle or making a statement, it can also include passive physical elements such as possession, or states of being (such as being drunk in charge of a motor vehicle). An act can, in some circumstances, include a failure to do something that a person is under a legal duty to do.

42 The "actus" can also include circumstances and consequences relating to the core act. For instance, certain conduct may only amount to a criminal offence when it takes place in public. Offences such as manslaughter or causing death by dangerous driving are only complete once a particular consequence ensues. Corporate manslaughter is an example of an offence where the actual conduct (in that case, a gross breach of a duty owed to a person) only becomes criminal a particular consequence follows from it. In contrast, with health and safety offences, the breach of duty is itself a criminal offence, and can be prosecuted regardless of whether any harm results.

43 A particular offence will often involve more than one act element, and one or more distinct fault elements may be applied to each. For instance, the offence of fraud by false representation requires that a person dishonestly makes a false representation and intends thereby to make a gain for himself or cause a loss to another or to expose another to the risk of loss. A false statement must be "untrue or misleading" and "the person making it knows that it is or might be untrue or misleading". It follows therefore that the although there is a single actus of making a statement that is untrue or misleading, there are three fault elements relating to (i) knowledge that the statement is, or might be, untrue or misleading, (ii) intention and (iii) dishonesty.

44 As we discussed at paras. 2.20-2.22 below, negligence is usually considered a fault element, but it is questionable whether it can be described as 'mens rea', since it may reflect the absence of any mental consideration at all.

about. However, a person may also be taken to have intended something if that result was a virtually certain consequence of their actions.[45]

2.15 Where a statute is silent as to the relevant fault element, the courts will often infer that Parliament intended the offence to include an intent element (although will not necessarily infer that intent was intended to apply to all elements of the offence.)

2.16 "Purpose" is a more restricted form of fault than intent. It refers directly to what the defendant *wants* to happen.

2.17 "Recklessness" also involves a mental element – being aware of a risk associated with some conduct but unreasonably going ahead with it nonetheless.[46]

2.18 Many offences contain a requirement that the act is done "knowingly" or where a person "believes" or "suspects" something. Knowledge will generally include "wilful blindness" – where a person *believes* something to be the case but deliberately avoids finding out to avoid having that confirmed;[47] where a person *suspects* something to be the case but deliberately avoids finding out, this may allow the court to *infer* that they had "blind-eye knowledge".[48]

2.19 Knowledge may also be a component of other fault elements, such as dishonesty. The recent judgments in *Ivey v Genting*[49] and *R v Barton and Booth*[50] have established that the test for dishonesty – which is a core component of many offences including fraud – is objective ("dishonest by the standards of ordinary people").[51] However, this test must be applied in the context of the facts as the defendant believed them to be.[52]

2.20 Negligence is another type of fault element. However, it is not truly a state of mind, and for a natural person it will often reflect the absence of a (careful) state of mind. We discuss this issue further at paragraphs 7.9 to 7.31. There are few offences where negligence is the required fault element.[53] One such offence was gross negligence manslaughter, but in the application of such offending to corporations, this has now been replaced by the statutory offence of corporate manslaughter. Smith, Hogan and

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45 *R v Woollin* [1999] 1 AC 82. However, the court need not infer that a person intended an outcome, even though it was a virtual certainty. A classic example would be where a doctor administers a drug to alleviate pain, knowing that it will hasten the patient's death.

46 *R v G and another* [2003] UKHL 50.

47 *R v Thomas* (1976) 63 Cr App R 65.

48 *R v Ismail* (1977) Crim LR 557.

49 *Ivey v Genting Casinos (UK) Ltd* [2017] UKSC 67, [2018] AC 391 at [74].

50 *Ivey* was a civil case, but in *R v Barton and Booth* [2020] EWCA Crim 575, [2021] QB 685 at [93-105], the Court of Appeal confirmed that *Ivey* was the applicable test for dishonesty in criminal law.

51 Prior to *Ivey*, the test for dishonesty required that the conduct must be dishonest according to the ordinary standards of reasonable and honest people *and* that the defendant must realise it was dishonest according to those standards.

52 In *Barton and Booth*, at [107], the Court of Appeal said "the test of dishonesty formulated in *Ivey* remains a test of the defendant's state of mind – his or her knowledge or belief – to which the standards of ordinary decent people are applied".

53 Smith, Hogan and Ormerod, *Criminal Law* (16th ed 2021) p 141.

Ormerod note that one of the few offences which involve negligence is causing or allowing a child or vulnerable adult to die or suffer serious injury by an unlawful act.[54]

2.21 Negligence in this context should be distinguished from the concept of negligence in tort law. In tort law, negligence requires a duty owed to another person, a breach of that duty, and harm resulting from that breach. However, in criminal offences of negligence, there is no requirement for harm to result, and failure to comply with the required standard of conduct replaces breach of a duty to another.

2.22 Even if negligence is not recognised as requiring any particular mental state, negligence *may* in certain circumstances have to take account of what a person knew or believed. While a negligent failure to consider a fact, or negligence leading someone to have an incorrect belief would not amount to a defence – it is possible to envisage circumstances in which a person would not be negligent because they reasonably, but wrongly, believed something which rendered their conduct reasonable.

2.23 Not all offences include a fault element. In offences of strict liability and absolute liability, what the person knew, believed or intended, is generally irrelevant. However, some offences are framed as being of strict liability, but allow a defence if the defendant can prove that they had, or lacked, a particular mental state; for instance, if they can show that they did not know and had no reason to believe that particular circumstances existed. Thus, the fact that an offence is one of strict liability does not necessarily mean that questions of mental state – and how these should be attributed to non-natural persons – will not arise.

Attribution of elements of a criminal offence to a non-natural person

2.24 Although in discussing corporate criminal liability it is common to talk of whose "acts" are to be attributed to the corporation, it is both acts and fault elements which need to be attributed to the corporate body. It is more often the attribution of the fault element which causes challenges in holding a corporate body liable for the conduct of their employees.

Attribution of "acts"

2.25 It is sometimes suggested that a company does not "act" directly, and that a corporate body can only "act" through agents.[55] This may be overstating matters. There are some circumstances in which *only* the company could be said to be doing the relevant act. For instance, if a company owns property, in circumstances in which ownership – rather than buying or acquiring – is unlawful, it does not make sense to say that the company is acting through a natural person. Although it might be said that the

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[54] Domestic Violence, Crime and Victims Act 2004, s 5. It is hard to imagine circumstances in which this offence could be attributed to a corporation.

[55] Lord Cranworth in *Aberdeen Railway Co v Blaikie Brothers* (1854). This is a House of Lords case, but strictly speaking relates to Scots law.

company had *acquired* the property only through the acts of another, it is the company itself which *owns* the property, and no one else.[56]

2.26 Likewise, if the unlawful "act" is a failure to fulfil a duty, and that legal duty is imposed on the company alone, it does not make sense to say that it is someone else who is failing to perform the duty; it is the company which is failing to do it. In England and Wales, many of the earliest cases imposing criminal liability on corporate bodies concerned failures to perform duties imposed directly on the companies as railway operators.

2.27 In *Attorney General's Reference (No 2 of 1999)*,[57] the Court of Appeal held that the "identification doctrine", which is the principal way of attributing criminal conduct to a corporate body in England and Wales, is as relevant to the conduct element of an offence as to the fault element. However, in practice the courts have found little difficulty in attributing the conduct element of an offence to a company in situations in which the offence does not contain a fault requirement.

2.28 There are frequently circumstances in which an act can be conceptualised in different ways so that both the corporation and a natural person may be said to be "doing" the act. For instance, under the Road Traffic Act 1988 it is an offence to "use" a motor vehicle on a road when the condition of the motor vehicle is such that the use of the motor vehicle or trailer involves a danger of injury to any person. Where the vehicle is being driven by an employee in the course of their employer's business, both the employee and the employer are – in distinct ways – "using" the vehicle. Likewise, where a person buys an item in a shop both the salesperson who transacts the purchase, and the shop from which title is transferred, can usually be said to be "selling" the item.

2.29 Where the offence cannot be conceptualised in this way, the courts may be willing to read into a statute a presumption that vicarious liability (that is, holding an employer liable for the conduct of an employee) was intended to apply. This is especially the case for offences of strict or absolute liability, or those which are "quasi-criminal" or "not truly criminal".[58]

2.30 However, this is not restricted to absolute or strict liability offences. In *Mousell Bros.*,[59] the court held that for an offence in section 99 of the Railway Clauses Consolidation Act 1845 of failing to give an account of the number or quantity of goods carried, which required proof of intent to evade payment of any tolls payable, an employer would be liable for the acts of its servants:

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56 Although it did not concern a criminal offence, the statute which was at issue in the key case of *Meridian Global Funds Management v Securities Commission* [1995] UKPC 5 (which we discuss further at paragraph 2.34 and following) was concerned with ownership of shares. There would seem to be little question that the proscribed conduct could only be performed by the corporate body; the question was whose knowledge was to be attributed to the company (the provision required notice to be "given as soon as the person knows, or ought to know, that the person is a substantial security holder").

57 [2000] 2 Cr App R 207.

58 *Mousell Bros. v London and North-Western Railway* [1915] 2 KB 836, *Sweet v Parsley* [1970] AC 132.

59 *Mousell Bros. v London and North-Western Railway* [1915] 2 KB 836.

> the Legislature must be taken to have known that the forbidden acts were of a kind which, even in the year 1845, would in most cases be done by servants… I think, looking at the language and the purpose of this Act, that the Legislature intended to fix responsibility for this quasi-criminal act upon the principal if the forbidden acts were done by his servant within the scope of his employment.

2.31 A more recent example is *Harrow London Borough Council v Shah*,[60] in which the owners of a newsagent were convicted of the offence of selling a lottery ticket to a person under 16, even though the sale had been transacted by an assistant in their absence and (unlike most cases where goods belonging to a trader are sold) the Shahs never "owned" the lottery ticket. The High Court held that the offence was one of strict liability and that the Shahs were a "party to the contravention" because, applying *Mousell Bros.,* this was an offence to which vicarious liability applied.

Attribution of fault elements

2.32 While it may make sense to talk of corporate bodies owning or possessing something, or publishing or broadcasting material, or causing something to happen, or failing to do something, it is less natural to talk about companies as holders of mental states. We might talk about a company intending to mount a takeover bid, or knowing its customers, but this use of personification is a convenient shorthand or means of expression rather than an assertion that the company has the relevant mental state of a natural person generally envisaged when offences are created by the criminal law.

2.33 In the law of England and Wales, when a particular fault element is required as part of an offence, in order to apply the offence to a corporate body, the courts will generally look for one or more natural persons with the relevant fault, a process we refer to as "attribution".

2.34 In *Meridian v Securities Commission*,[61] a New Zealand civil case considered by the Judicial Committee of the Privy Council,[62] Lord Hoffmann distinguished between "primary", "general" and "special" rules of attribution:

> The company's primary rules of attribution will generally be found in its constitution, typically the articles of association… There are also primary rules of attribution which are not expressly stated in the articles but implied by company law…
>
> These primary rules of attribution are obviously not enough to enable a company to go out into the world and do business.... The company therefore builds upon the primary rules of attribution by using general rules of attribution which are equally available to natural persons, namely, the principles of agency. It will appoint servants and agents whose acts, by a combination of the general principles of

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60 [2000] 1 WLR 83.

61 [1995] UKPC 5, at [8]-[10]. In this case, the statute which was at issue was concerned with ownership of shares. The chief investment officer purchased shares with the company's authority but not the directors' knowledge. There was a requirement to give notice of the purchase, of which the company was found to be in breach. The question was whether the actions of the chief investment officer were attributable to the company, and how the rules of attribution applied.

62 Until the end of 2003, the Judicial Committee of the Privy Council continued to act as the final appellate court for New Zealand.

> agency and the company's primary rules of attribution, count as the acts of the company…
>
> Any statement about what a company has or has not done, or can or cannot do, is necessarily a reference to the rules of attribution (primary and general) as they apply to that company…

2.35 Lord Hoffman asked how – when a rule of law excludes attribution on the basis of agency or vicarious responsibility (which is generally true of statutes creating criminal offences) – was such a rule to be applied to a company:

> There will be many cases where … 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 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.[63]

2.36 Although Lord Hoffmann suggested that a special rule of attribution would always be a matter of interpretation, there are a few cases in which a statute creating the offence details whose mental state is to be applied to a corporation.[64] In some cases, a special rule of attribution may apply to a category of offences.[65]

2.37 In the absence of a special rule of attribution for the particular provision, the courts will look for one or more natural persons of sufficient seniority, who represent the "directing mind and will" of the body, with the required mental state.[66] We discuss later how this doctrine, known as the "identification doctrine" has developed, and the detailed way in which it is now understood in law.

2.38 We note here that when Lord Hoffmann referred to situations where reliance on the "primary rules of attribution" would defeat the purpose of a rule, he was referring narrowly to the company's constitution, articles of association and some specific provisions of companies law. The identification doctrine would be, in Hoffmann's

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63 [1995] UKPC 5, at [12].

64 An example would be that found in the Specialist Printing Equipment and Materials (Offences) Act 2015, s 3(1), whereby a body is treated as knowing a fact about a supply of equipment if a person who has responsibility for the supply knows of the fact.

65 An example of a special rule applying to a class of offences is the "delegation principle". This applies to a small number of statutory offences where a duty is placed on a particular class of people (generally licensees of licensed premises) and failure to comply is a criminal offence, but the offence includes a mental element. *Allen v Whitehead* [1930] 1 KB 211 establishes that where a law places a duty on a person, and breach of that duty is a criminal offence requiring fault, where the person delegates supervision to a person, the acts and fault of the delegate can be attributed to the delegator.

66 Lord Hoffmann considered that the identification doctrine was itself a special rule of attribution. An alternative analysis is that the identification doctrine represents a general rule of attribution that the courts will apply by default where there is no special rule applying to the offence in question.

terms, a special rule of attribution. However, as discussed in footnote 66 below, some subsequent cases have taken "primary rules of attribution" as referring to the "identification doctrine" and therefore applied the test in *Meridian* differently.

2.39 Once a fault element can be attributed to someone who constitutes a "directing mind and will", it is generally unimportant whether they did the relevant act directly or caused another person to do it on behalf of the company. At this point, normal rules of agency will apply. For instance, if a director of a company decides to make a misleading statement in order to gain a financial benefit for the company, and directs a press officer to make the statement (the press officer not realising that it is false) the act of making the statement is attributed to the company, notwithstanding that the person who actually made it was not the company's directing mind and will (and would not personally be guilty because they lacked the necessary fault). It is not necessary to reframe the offence as the company having procured the making of a false statement through the innocent agent (the employee): the law treats the company – corporately – as having made the statement.

CONSULTATION QUESTION

2.40 With a view to determining the answer to the overall question in Part One – whose mental states should be considered those of the corporation – the first question we asked in the discussion paper was as follows:

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

2.41 The responses to this question can be categorised as follows:

(1) Principles governing the attribution of criminal liability to corporations: in other words, the question of what the identification doctrine should be.

(2) Principles guiding the question of whether criminal law is appropriate for corporations, and in which circumstances the civil law is more appropriate.

(3) General principles addressing the broad issue of corporate criminal liability.

2.42 The following analysis concentrates on responses which addressed (1).

Methods of attribution

2.43 A number of responses rejected the simple notion of attributing the mental state of one or more individuals to the corporation. Doctor Alison Cronin, of Bournemouth University, suggested that a corporation should be recognised as acting as an actor in itself. It should be defined by attributes including its culture, and not as an amalgam of individuals' actions. She said that principles of corporate criminal liability should "recognise corporate/non-natural agency and the capacity of such agents for wrongdoing." She noted that this is already done in the failure to prevent offences, but suggested such a model would be suitable for the attribution of liability:

> The attribution of corporate fault needs to be decoupled from the issue of individual criminality where circumstances deem it appropriate. This may be where it is impossible to identify the individuals responsible, for example when the corporation

> obscures internal accountability notwithstanding evident criminality, or, assuming it is possible to identify all the relevant individual participants in a group action, when it is important to hold the group … rather than those individuals, responsible. This could be in circumstances where the individual actors are ignorant of the harm they have brought about together, where the individual participation is relatively insignificant or where they may have been acting under such pressure, due to the norms, hierarchies and power imbalances operating in the particular corporate environment, that they cannot be held fully responsible for their contribution to the criminal outcome. Corporate criminality may also be evident, or manifest, where the individual actors are blameless.

2.44 Professor Elise Bant, of the University of Western Australia, suggested an alternative model, which we discuss further in chapter 6. She argued that the appropriate principles which should govern corporate criminal liability are those which facilitate examination of the systems (policies, procedures, processes) as a way of discerning an organisation's intentions. She likened this to, for example, individuals expressing their intention to travel somewhere by using a map.

2.45 The Fraud Lawyers Association supported collective knowledge as a principle of attribution, similarly to the submission of Alison Cronin. They recommended that:

> a company's criminality should not depend on attributing the entirety of criminal conduct to any particular individual but could be aggregated by reference to facts the company could reasonably be expected to know.

Tailored approaches for different offences

2.46 Some consultees recommended that the attribution of individual actions to a corporation should be tailored to the wrongdoing in question. The City of London Law Society, Corporate Crime Committee, suggested:

> In particular cases where the harms caused are likely to be especially severe and corporate criminal liability is considered the only practical way to address these, vicarious liability… may be justifiable…

2.47 Katherine Hardcastle, of 6KBW College Hill, also supported a tailored approach to criminal liability, saying:

> There are real advantages to Parliament legislating in respect of particular species of corporate criminal liability which can be tailored to the circumstances of the particular conduct or offence, and what society requires from the criminal law in that context. Put shortly, there is a real advantage to adopting tailor-made forms of liability in respect of particular offences like corporate homicide, or bribery, or printing false documents (as the case may be).

2.48 As an example of a particular context in which a specific formulation of the criminal law was recommended, Margaret Flynn, Aled Griffiths and Laura Pritchard-Jones[67] suggested that strict liability would be appropriate for health and welfare offences:

> We suggest that where the specified offence is silent as to the need or otherwise of proof of mens rea, that health and welfare statutes might be interpreted in a similar manner as environmental provisions and health and safety legislation, namely that they be regarded as strict offences. That is, the conduct is sufficient without the additional need to prove intention.

2.49 The Institute of Chartered Accountants in England and Wales ("ICAEW") suggested examples of principles which would help guide an attribution regime:

> For instance, if companies were liable for negligence in not knowing about the conduct, or for a culture tolerating the criminal activity concerned, this would be readily understood by the public and no doubt easier for authorities to prosecute. However, applying such an approach to crime generally (or a broad segment of crime, such as economic crime) could tilt the balance too far.
>
> If this route is pursued, we think that the corporate should only be criminally liable where the relevant individual (eg employee) intended to benefit the company. A defence should be available where reasonable procedures are in place and reasonable monitoring has been carried out to prevent the activity which in fact occurred. A corporate should only be held criminally liable for matters or individuals within its control.

CONCLUSION

2.50 Several commentators urged tailored solutions for particular offences – an approach along the lines of *Meridian*[68] – and accordingly we considered whether it would be possible to put *Meridian* on a statutory basis. (We had previously tried to encourage this approach by urging courts not to presume that the identification doctrine applies when interpreting the scope of criminal offences applicable to companies;[69] however, as we noted in our discussion paper, this ambition has not been realised.)[70]

2.51 However, we think that there will remain a need for a general rule of attribution for the purposes of criminal responsibility.

2.52 In this respect, it may be useful to draw a distinction between offences with a narrow purpose and more general offences.

2.53 In *R v Barclays*, which we discuss further in the next chapter, Jay J noted the submission of counsel that "the circumstances in which the courts have applied *Meridian* to the criminal law are few and far between, *and are confined to situations*

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67 Margaret Flynn was the first Chair of the National Independent Safeguarding Board in Wales, Aled Griffiths is the retired Deputy Head of Bangor Law School, Laura Pritchard-Jones is a lecturer at Keele University.

68 [1995] UKPC 5.

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

70 Corporate Criminal Liability: A discussion paper (2021), para. 2.48.

where the statutory purpose is readily definable, narrow and specific".[71] As an example of the former, consider the offence of selling a classified video recording in breach of classification under section 11 of the Video Recordings Act 1984. Where the allegation is that a video recording was supplied in breach of an age restriction, there is a defence available where the defendant can prove that "they neither knew nor had reasonable grounds to believe that the person concerned had not attained that age".

2.54 In *Tesco v Brent*,[72] the High Court held that for the purpose of that defence the knowledge of the defendant, in a case involving a corporate defendant "refers to the knowledge and information of the employee through whom the company effects a supply". That is, it identified a rule of attribution for that specific offence – the knowledge of the employee supplying the video recording is attributed to the company for the purposes of the offence.

2.55 We query whether it would be possible to infer particular rules of attribution for offences which are more broadly defined and targeted. While courts dealing with cases of sales of video recordings to underage children might be expected to come up with similar rules of attribution, courts dealing with the wide variety of circumstances in which an offence such as fraud might be committed in a corporate context might not do so. It could conceivably require a large number of appellate cases to bring legal certainty.

2.56 Second, a problem with the test suggested by Lord Hoffmann for seeking a special rule of attribution – that "the law was intended to apply to companies and that … insistence on the primary rules of attribution would in practice defeat that intention",[73] is that insistence on the primary rules *as Hoffmann used the phrase* in relation to criminal offences would frequently defeat the intention behind extending an offence to cover corporate bodies, since criminal conduct would rarely be formally authorised under the body's constitution and articles of association. Accordingly, it would be necessary to formulate a special rule for almost every criminal offence.

2.57 However, when the test is applied as being that insistence on the *identification doctrine* would defeat the purpose of the provision – as has been done by several courts attempting to give effect to *Meridian*[74] – the difficulty is that in very many cases, insistence on the identification doctrine does not defeat the intention to apply the rule to companies, since it is still possible to apply it to smaller companies, and it may

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71 *R v Barclays* [2018] 5 WLUK 736 at [176], emphasis added. Jay J felt that this submission was at "too high a level of abstraction". However he did conclude that he should not attempt to identify a special rule of attribution for the Fraud Act 2006 capable of applying to a range of circumstances; rather that he should "focus on the particular circumstances of this case and examine in that context whether an accurate identification of the statutory purpose leads to the implication of a special rule … consonant with the approach undertaken by Lord Hoffmann in Meridian". As we discuss in 3.33 below, we do not think this was, in fact, a correct interpretation of the approach advocated by Lord Hoffmann in *Meridian*.

72 [1993] 1 WLR 1037 at [1044].

73 [1995] UKPC 5, at [507].

74 In subsequent cases, including *R v St Regis Paper Company* [2011] EWCA Crim 2527 and *R v Barclays* [2018] 5 WLUK 736, courts attempting to adopt a "*Meridian* approach" have framed the test as whether reliance on the *identification doctrine* would thwart the purpose of the provision.

continue to be possible to apply it to some acts of the board of larger companies. It just makes it harder to apply the rule to larger, complex corporations.

2.58 In this respect, it is worth noting that in *Tesco v Brent*,[75] the High Court approved a special rule of attribution for the offence of selling age-restricted video recordings, not because the identification doctrine would make the law wholly ineffective, but that it would be "wholly ineffective *in the case of a large company*" (emphasis added). Moreover, the court held that Parliament could not have "intended the large company to be acquitted but the single-handed shopkeeper convicted".

2.59 Again, in *Barclays*, Jay J rejected an argument that the purpose of the Fraud Act 2006 would be thwarted unless a special rule of attribution was applied:

> "Thwarted" does not mean "make the [prosecution's] task more difficult" or something along the lines of, "criminal liability ought to attach in these circumstances". It is, of course, much easier to hold that a statutory purpose has been thwarted if that purpose is narrow and specific. A significant part of the difficulty arises because the SFO is invoking *Meridian* where the statutory context is so broad and general.[76]

2.60 It should be added that in contrast to the video recordings offence – where, practically, the board of Tesco would never be in the position of selling a video recording directly to a teenager – there remain circumstances where a statement of the board of a bank might amount to a fraudulent false statement, and accordingly applying the identification doctrine would not make the offence *wholly* ineffective in the case of a large company.

2.61 Third, there are thousands of criminal offences on the statute book, and legal certainty would not be enhanced if courts were empowered to apply new bases of liability in respect of long-established offences.

2.62 Finally, while we would encourage those responsible for drafting legislation creating criminal offences to consider whether a particular rule of attribution is necessary, we consider that this will be easier where offences are narrowly defined and have a limited purpose.

2.63 In the discussion paper, we cited the example of the Specialist Printing Equipment and Materials (Offences) Act 2015, which created a new offence of "supplying specialist printing equipment[77] knowing it will be used for criminal purposes". We cited that as an example of an offence which has a special, statutory rule of attribution: section 3 of that Act provides that a body "is to be treated as knowing a fact about a supply of equipment if a person who has responsibility within the body for the supply knows of the fact". Again, the statutory purpose of that provision is definable, narrow

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75 [1993] 1 WLR 1037.

76 *R v Barclays* [2018] 5 WLUK 736 at [193].

77 That is, equipment which is designed or adapted for the making of identity documents, travel or entry documents, currency notes or protected coins, documents used for verifying a person's age or national insurance number, debit or credit cards, or any instrument to which s 5 of the Forgery and Counterfeiting Act 1981 applies (including money orders, stamps, share certificates and copies of birth, marriage and death certificates).

and specific. While we would encourage drafters of legislation to consider whether a rule of attribution could be included within the statute, we recognise that this may not always be possible.

Principle 1.

2.64 We conclude that there is a need for one or more general rules of attribution to cover offences generally.

2.65 Once this is accepted, the question is whether the current rule – the identification doctrine – should be retained, or amended. Accordingly, in the next three chapters we examine the current identification doctrine and three possible models of reform.

Chapter 3: The identification doctrine

INTRODUCTION

3.1 Unless a special rule of attribution applies, the main way that the criminal law of England and Wales attributes liability to corporations for offences requiring proof of fault is the "identification doctrine", under which a corporate body will usually only be liable for criminal conduct by one or more natural persons representing its "directing mind and will".

3.2 The definitive statement of the identification doctrine is found in the judgments of the House of Lords in *Tesco v Nattrass.*[78] However, as discussed in our discussion paper, the five speeches of the judges – while agreeing that the conduct of the Tesco's employee in that case was not to be attributed to the company – and while broadly agreeing on the need to identify a "directing mind and will", gave different accounts of who should be considered to be capable of fixing the company with liability.

TESCO V NATTRASS

3.3 *Tesco v Nattrass* concerned liability of the supermarket chain for an offence under section 11(2) of the Trade Descriptions Act 1968 – by advertising a special offer on washing powder when only full-price packs were available. It had been the responsibility of the store manager to check the store's display and either remove the misleading display or reduce the price of the full-price stock. Section 23 of the Act provided that the accused had a defence if "the conduct was due to the act or default of another person" and the accused "took all reasonable precautions and due diligence to avoid commission of the offence".

3.4 Tesco claimed that they were not liable under section 11(2) because the misleading statement was due to the act or default of "another person" (their store manager). The magistrates' court at first instance rejected this, holding that that while Tesco had exercised due diligence, the store manager was not "another person" within the meaning of the Act. Tesco appealed to the Divisional Court, which held that the manager *was* "another person", but upheld the conviction on the basis that Tesco had not "taken all due diligence and exercised reasonable precautions", since they had delegated that task to the manager, who had failed to perform it.

3.5 Tesco then appealed to the House of Lords. The Lords ruled that Tesco had not committed the offence because the actions of the store manager in making the misleading statement in the first place could not be attributed to the company. The offence was not one of strict liability – due to the "due diligence" defence clause – so Tesco was only liable if someone who represented the company's "directing mind and will" was responsible for the conduct (here the false statement).

3.6 As we noted in the discussion paper, while the Law Lords agreed broadly in principle that there was a need to identify a class of people who represented the company's

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78 *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153.

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.

3.7 For Lord Reid,

> 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.[79]

3.8 Lord Morris of Borth-y-Gest agreed that the directing mind and will might be the board or might be a managing director. He also pointed to a boilerplate "consent, connivance or neglect" provision in section 20 of the Act (we discuss such provisions further in chapter 9). He suggested that the reference in that provision to a "director, manager or secretary" gave an indication of those who may "personify the 'directing mind and will'" (manager here 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".[80]

3.9 Lord Pearson broadly agreed with Lord Morris, while Lord Diplock took a more formal approach, suggesting that

> 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 … 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.[81]

3.10 Finally Viscount Dilhorne, while accepting that the "consent and connivance" clause pointed to the class of people who would normally constitute the directing mind and will, also stressed the need "to determine who is or who are, for it may be more than one, in actual control of the operations of the company", later referring to "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*"[82] (emphasis added).

3.11 Although not entirely consistent, all the Lords' speeches make clear that the class of those who can represent the directing mind and will is limited. The class clearly includes the board of directors collectively. Some thought that it would normally

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79 *Tesco v Nattrass* [1972] AC 153 at [171].

80 *Tesco v Nattrass* [1972] AC 153 at [178].

81 *Tesco v Nattrass* [1972] AC 153 at [199]-[200].

82 *Tesco v Nattrass* [1972] AC 153 at [187].

include the managing director.[83] It might 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 directing mind and will.[84]

The identification doctrine in practice

3.12 While the judgments in *Tesco v Nattrass* may have sought to clarify the law, they left a number of uncertainties. In practice, prosecuting authorities generally sought to identify someone with the status – that is, generally, a director – who had the necessary fault. Once such a person was identified, it was not thought necessary to identify whether they actually had the authority to engage in the criminal conduct in question.

3.13 It should be recognised that the judgment clearly meant that some people would not have the status and authority to fix the corporate body with criminal liability. *Tesco v Nattrass* was followed months later by *R v Andrews Wetherfoil*,[85] in which the conviction of a company for corruption was quashed. In that case, the three people alleged to have been involved were the managing director, a "technical" director, and the manager of a housing division. Although the alleged inducement – an offer of employment – had been formally signed by the managing director, the judge's direction to the jury had implied that the dishonest intention of any one of them could be enough to fix the company with criminal liability.

3.14 The Court of Appeal, quashing the verdict, 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 so that the natural person is to be treated as the company itself.

3.15 By implying that the jury might convict the company on the basis of the housing manager's conduct alone, the judge had fallen into error.

3.16 For prosecutors, therefore, it became necessary to find someone with the necessary culpability. Pinto and Evans suggest that *Tesco v Nattrass* was "understood as providing a practically exhaustive list of those whose acts or state of mind can be attributed to any corporation".[86] Although the judgments in *Tesco v Nattrass* allowed for the acts and state of mind of a person outside this class to be attributed, the

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83 Lord Reid at [171], Viscount Dilhorne at [188], and Lord Pearson at [191]. Lord Diplock at [199] also suggested a Managing Director would be covered, but his comment may only refer to one who had been appointed pursuant to a provision in the company's articles of association.

84 Lord Morris of Borth-y-Gest at [177] and Lord Pearson at [190]. Lord Diplock at [201] also referred to this clause, but again interpreted it as a reference to those who exercise the powers of the company under the articles of association.

85 *R v Andrews Weatherfoil* [1972] 1 WLR 118.

86 A Pinto and M Evans, *Corporate Criminal Liability* (4th ed 2020) p 55.

requirement for "full delegation" meant that this would rarely be effective. It was generally thought that if a director had the necessary fault, that would be sufficient to bind the company; the question was less clear with other managers, and would be fact-specific.

3.17 Thus in 2018, the SFO suggested that

> there remains uncertainty as to who represents the directing mind and will of a company. *It has generally been accepted that directors and senior officers of the company are likely to be capable of being directing minds in most cases*. However, in large, multi-national companies, the day to day management of the business will typically be delegated to managers or subsidiary companies and there is currently a lack of clarity as to what level, and under what circumstances, the directing mind and will of the company can be fixed (emphasis added).[87]

3.18 Rose LJ in *El Ajou* (a civil case, but concerning an allegation of fraud, and whether the non-executive director's knowledge was to be attributed to the company) considered *Tesco v Nattrass* to establish that

> The directors of a company are *prima facie* likely to be regarded as its 'directing mind and will' whereas particular circumstances may confer that status on non-directors.[88]

3.19 It seems clear in context – in distinguishing between directors and non-directors, not between the board and particular individuals, whether directors or not – that when Rose LJ says that the directors of a company are prima facie likely to be regarded as its directing mind and will, he was referring to them individually as well as collectively.

3.20 If *Tesco v Nattrass* were intended to suggest some elision between the notion of the directing mind and will and the scope of the "consent and connivance" clause, however, the way in which the two operated diverged. As we discuss in chapter 9, for consent or connivance, it was sufficient that the person fell within the relevant class (while interpreting "manager" in such clauses in the way that it was interpreted in *Tesco v Nattrass*). However, in relation to the identification doctrine, the person engaging in the conduct had to have the status *and* authority. That is – at least for managers outside the Board – it was not enough that they were concerned with the general management of the business as a whole, there had to have been a delegation sufficient to make them the directing mind and will, and this had been framed in terms of "full discretion"[89] or "not [being] responsible to another person in the company".[90] Still, it was generally assumed that in the case of a director (except possibly for situations in which they were actively seeking to act contrary to the interests of the company) the person would have the necessary status and authority.

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87 Serious Fraud Office, *Letter to Treasury Select Committee*, 16 July 2018, https://www.parliament.uk/globalassets/documents/commons-committees/treasury/Written_Evidence/sfo-corporate-liability-160718.pdf.

88 *El Ajou v Dollar Land Holdings* [1993] EWCA Civ 4.

89 Lord Reid at [171] and Lord Pearson at [192-193].

90 *Tesco v Nattrass* [1972] AC 153 at [187].

3.21 The decision of the High Court in *R v Barclays*,[91] therefore, while applying *Tesco v Nattrass*, and – as discussed in the following section – congruent with it, conflicted with the way that the case had come to be applied in practice. *Barclays* established that it is not even every director whose offending will fix the company with criminal liability. It is not even enough that the alleged criminality was said to be that of a director serving as chief executive.[92] *Barclays* suggests that in order for the conduct of one or more particular directors to be attributed to the company, they must have the requisite status *and* the authority in relation to the particular conduct. A director may have the required status, but if they did not have the authority to bind the company in relation to the conduct in issue, the company will not be criminally liable.

3.22 As one commentary on the case put it,

> *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... [*Barclays*] 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.[93]

Barclays

3.23 The allegation against Barclays (Barclays PLC and its subsidiary Barclays Bank PLC) was, in short, that the company, through its Chief Executive and Chief Finance Officer (both directors) and three others, had conspired to commit fraud by false representation during two capital raising exercises in the early stages of the financial crisis of 2008. In 2018, the charges against Barclays were dismissed by the Crown Court, in which a High Court judge sat in the Crown Court. The SFO then sought a voluntary bill of indictment to reinstate the charges. The High Court rejected this application (in which a Court of Appeal judge sat in the High Court). Proceedings against four individuals followed (the case against the fifth was not pursued on public interest grounds due to ill-health). All four were subsequently acquitted.

3.24 While recognising that the case against Barclays therefore rested upon allegations of criminality by individuals that were subsequently rejected, it is also important to recognise that in considering the two cases against Barclays, both the Crown Court and High Court had to proceed on the basis that the prosecution's case was true. The High Court also had to proceed on the basis of the facts as found in the Crown Court.[94]

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

92 In *Barclays*, one of those allegedly involved in the criminal conduct was the Chief Executive. He was, however, a member of the Board of both Barclays firms, and *de facto* Managing Director.

93 Patrick Rappo and Lizzy Bullock, "Barclays SFO trial: Is corporate criminal liability dead?", Thomson Reuters Regulatory Intelligence (12 March 2020).

94 When exercising its power under s 2(2)(b) of the Administration of Justice (Miscellaneous Provisions) Act 1933 to issue a voluntary bill of indictment, the High Court is bound by the factual findings of the Crown Court Judge, unless it can be shown that they were wholly unreasonable.

3.25 Both courts rejected the prosecution's submission that section 2 of the Fraud Act 2006 provided for a special rule of attribution.

3.26 Barclays conceded that the criminal state of mind of individual directors could be attributed to the bank *if* there had been an implicit delegation of the powers of the decision-making body of the bank to them. However, Barclays argued that:

> This witness evidence confirms that genuine authority was never delegated to any of the individuals asserted by the SFO to have represented the directing mind and will of Barclays, and that neither the Board nor the [Board Finance Committee] constituted a rubber-stamp for their decisions.[95]

3.27 The prosecution's approach was similar to that of the defence, but somewhat vaguer. It did not focus on evidence of delegation as such, but more on the status of the relevant individual. The trial judge summarised it, saying:

> … [leading counsel for the SFO's] analysis was that the true identification principle, as he put it, requires only that the company is identified with any individual with sufficient "status and authority", or "authority to deal", and that depends on a fact-sensitive examination "of what actually and practically occurred within the company".

3.28 It was the defence analysis – that the identification doctrine in these circumstances required some kind of delegation of genuine authority, and that in the circumstances, the actions of the board of directors (or the relevant committee of the board, the Board Finance Committee or "BFC") were not confined to "rubber-stamping" – that was accepted by Jay J, the trial judge. His decision was ultimately supported in the High Court.

3.29 A key difference between the parties in *Barclays,* and perhaps the issue upon which the case ultimately turned, was the necessary ambit of any delegated authority, in order to attribute to the bank the criminal state of mind of the relevant individuals concerning the fraud.

3.30 The three transactions at the heart of the case were two agreements to raise approximately £10bn in capital for the bank by creating and selling new shares and other financial instruments to certain buyers for that sum, (thereby reducing the rights of the existing shareholders accordingly) and a third transaction whereby the bank lent approximately $3bn to the Qatari Ministry of Finance in the knowledge, it was alleged, that the Qatar Investment Authority to purchase £1.17bn worth of the new shares being issued. The prosecution submitted that the authority granted to certain executives to conduct negotiations with key investors concerning the terms of the proposed capital raisings was sufficient to attribute their states of mind to the company. The defence submitted that in order to attribute the individuals' state of mind to the bank, it would be necessary to show delegated authority to make decisions in relation to the transactions at the heart of the case as a whole. On that basis, the defence said that the evidence could not possibly establish that the necessary authority had been delegated to the individual defendants. This was the key to the dismissal application in the Crown Court.

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95 *R v Barclays* [2018] 5 WLUK 736 at [59].

3.31 The trial judge, Jay J, accepted the defence's characterisation of the identification doctrine as being concerned with the question of implied delegation of power by the decision-makers, as opposed to it being a question generally of identifying someone with a sufficient degree of "status". Jay J cited Lord Sumption's interpretation of *Lennard's case*[96] in *Jetivia v Bilta*. Lord Sumption said:

> The directing organ of the company may expressly or implicitly have delegated the entire conduct of its business to the relevant agent, who is actually although not constitutionally its "directing mind and will" for all purposes. This was the situation in the case where the expression "directing mind and will" was first coined, *Lennard's Carrying Co v Asiatic Petroleum Co*. Such a person in practice stands in the same position as the board. The special insight of Lord Hoffmann, echoing the language of Lord Reid in *Tesco Supermarkets v Nattrass*, was to perceive that the attribution of the state of mind of an agent to a corporate principal may also be appropriate where the agent is the directing mind and will of the company for the purpose of performing *the particular function in question*, without necessarily being its directing mind and will for other purposes.[97]

3.32 Jay J ultimately found against the prosecution in *R v Barclays* because, when considering "the particular function in question", to use the words of Lord Sumption JSC, that function was the raising of capital and associated loans.[98]

3.33 (We consider that the way in which Lord Sumption, in *Jetivia v Bilta*, quoted Lord Hoffmann, from *Meridian*, risks being taken as suggesting that the process of formulating a rule of attribution is to ask who should be considered the directing mind and will in relation to the particular function, *in the particular circumstances* before the court. However, the full quote from Lord Hoffmann makes clear that he considered that "the particular function in question" refers to the particular provision:

> 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 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. The fact that *the rule of attribution is a matter of interpretation or construction of the relevant substantive rule* is shown by the contrast between two decisions of the House of Lords, Tesco Supermarkets Ltd. v. Nattrass and In re Supply of Ready Mixed Concrete.)[99]

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

97 *Jetivia v Bilta* [2015] UKSC 23; [2016] AC 1 at [67] (emphasis added). Strictly speaking, this was *obiter* as it was common ground that the two directors of Bilta constituted the entire board and its directing mind for all purposes – see Lord Sumption at [69] – and no question of delegation either to a particular agent or for a particular purpose arose.

98 *R v Barclays* [2018] 5 WLUK 736 at [171] and see generally [166] – [173].

99 *Meridian Global Funds Management Asia Ltd. v Securities Commission* [1995] 2 AC 500, at [507], emphasis added.

3.34 Giving the judgment of the High Court, Davis LJ's summary of the factual findings of the Crown Court Judge included the finding that (the relevant committees with explicit delegated power by the Board of Directors) "*were not mere rubber stamps or ciphers*".[100]

3.35 Having bound itself by the factual findings of the Crown Court judge, the High Court expressed itself as finding for the defence for the same reasons as the defence were successful in the Crown Court.

3.36 Later on, Davis LJ upheld the trial judge's decision that the relevant executives were not the directing mind and will of the company: employees who are the directing mind and will would not need to deceive the company. He said:

> Overall, [Jay J's] assessment was that [the relevant executives] "were deceiving the decision-makers [the other members of the board] in relation to the transaction in point and before the relevant decision was taken."[101]

3.37 Davis LJ noted that the SFO's case, by this stage, was that the relevant directors were the directing mind and will of Barclays for the entire capital raising processes. He said that this however confirmed the correctness of the reasoning of the Crown Court Judge. The directors concerned did not have authority to conclude the agreements for further shares to be issued and to issue the associated prospectuses. The relevant directors did not have "full discretion" and were responsible to another person for the manner in which they discharged their duties. It followed, Davis LJ said, that the relevant directors could not be regarded as the directing mind and will of Barclays for these purposes.

3.38 Another phrase that was used by Davis LJ in connection with the test to establish who was the directing mind and will of Barclays was, whether the relevant individuals had "entire autonomy". Davis LJ said during the course of his judgment:

> That the individuals had some degree of autonomy is not enough. It had to be shown, if criminal culpability was capable of being attributed to Barclays, that they had entire autonomy to do the deal in question; and that is not the case here.[102]

3.39 The language of "entire autonomy" is similar to the language of "full discretion" which was used by the members of the House of Lords in *Tesco v Nattrass*.[103] However, it should be noted that where this phrase was used[104] in *Tesco v Nattrass* it was in reference purely to situations in which a person who would not ordinarily be considered to represent a directing mind and will, might – on account of the degree of delegation – become one. In *Barclays*, by contrast, it was applied to take out of scope two directors – the Chief Executive and Chief Financial Officer – who ordinarily would have been taken to represent the directing mind and will of the company. That is,

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100 *Serious Fraud Office v Barclays* [2018] EWHC 3055 (QB), [2020] 1 Cr App R 28 at [90], quoting *R v Barclays* [2018] 5 WLUK 736 at [189].

101 Above at [91].

102 Above at [122].

103 [1972] AC 153.

104 That is, by Lord Reid at [171] and Lord Pearson at [192].

while the "full discretion" test was taken from *Tesco v Nattrass*, it was here being applied in different circumstances and to the opposite effect, and is why *Barclays* was taken to represent a narrowing of the law from how it was previous understood.

RELATIONSHIP TO CIVIL LAW

3.40 One factor which must be considered, and might be cited in support of retaining the identification doctrine in its current form is that the doctrine is also used in civil law – albeit that most of the civil case law concerns the question of attribution to the company of conduct which was criminal.

3.41 A significant proportion of the leading authorities which we have considered during our project, are civil cases. As noted by Lord Sumption JSC in his discussion of the origin of the identification doctrine, it was a doctrine of civil law before being recognised by the criminal law.[105] The case regarded as the "locus classicus" of the doctrine, *Lennard's Carrying Company v Asiatic Petroleum Company* was a civil case, involving whether the owners of an unseaworthy ship could avail themselves of an exclusion of their liability to the cargo owners.

3.42 *Meridian Global Funds Management Asia v Securities Commission*, another leading case on the subject, is also a civil case, concerning as it did whether the New Zealand Securities Commission was right to issue a claim in the New Zealand High Court for breach of the Securities Amendment Act 1988.

3.43 Relevant civil law cases involving the identification doctrine (which were all referred to by Jay J in *R v Barclays*) include:

(1) Whether a director's knowledge that funds derived from a breach of duty could be attributed to a company so as to enable those funds to be traced in equity.[106]

(2) Whether the liquidator of company is barred under the doctrine of illegality from recovering company assets from delinquent directors, on the ground that the delinquency of the directors can be attributed to the company; *Jetivia v Bilita.*[107]

(3) Whether a court judgment in favour of a company should be set aside on the ground that it was procured by fraud.[108]

(4) Whether the liquidators of a bank (BCCI) could recover funds from another bank on the grounds that it had been knowingly a party to the carrying on of the business of the former with intent to defraud its creditors.[109]

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105 *Jetivia SA v Bilta* [2015] UKSC 23; [2016] AC 1 at [65], referring to *Citizens' Life Assurance Co Ltd v Brown* [1904] AC 423 at [426].

106 *El Ajou v Dollar Land Holdings* [1993] EWCA Civ 4.

107 *Jetivia v Bilta* [2015] UKSC 23 [2016] AC 1.

108 *Odyssey Re v OIC Run-Off* [2000] 3 WLUK 342.

109 *Morris v Bank of India* [2005] EWCA Civ 693.

(5) Whether fraudulent misstatements in a company's share purchase agreement on account of the fraud of an individual could be attributed to the company for the purposes of the tort of deceit; *MAN Nutzfahzeuge AG v Freightliner*.[110]

3.44 In *Jetivia v Bilita*, Lord Sumption JSC referred to another example of where the operation of the identification doctrine is important in civil law: in connection with the public policy preclusion of recovery under an insurance policy in respect of a criminal liability where the insured's liability is personal or direct, but not where such liability is vicarious (for example, where an offence has been committed by an employee in the course of their employment but not in circumstances where they were the directing mind and will of the corporation).[111] Lord Sumption JSC said:

> …the concept of a "directing mind and will" remains valuable. It describes a person who can be identified with the company either generally or for the relevant purpose, as distinct from one for whose acts the company is merely vicariously liable.[112]

3.45 That said, Lord Toulson warned that

> While there is a role in our law for the concept of the directing mind and will of a company, it is important to analyse that role and in particular to avoid the dangers of ascribing human attributes to a non-natural person such as a company… finding that a person is for a specific purpose the "directing mind and will" of a company, when it is not merely descriptive, is the product of a process of attribution in which the court seeks to identify the purpose of the statutory or common law rule or contractual provision which might require such attribution in order to give effect to that purpose.[113]

3.46 In *El Ajou*, Nourse LJ considered there to be no divergence of approach between the criminal and civil jurisdictions.[114]

3.47 In the Crown Court in *R v Barclays*, Jay J referred to two cases which he suggested indicated otherwise. However, both these cases, on his analysis, concerned situations where the courts found that a special rule of attribution applied based on the rules of construction of the statutes in question.[115]

3.48 On the other hand, Davis LJ referred on a number of occasions to certain authorities being less persuasive because they were civil cases.[116] Davis LJ at one point, when considering the civil case of *Re Odyssey*, said:

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110 [2005] EWHC 2347 (Comm).

111 At p 29, referring to *Lancashire County Council v Municipal Mutual Insurance Ltd* [1997] QB 897 at [907].

112 *Jetivia SA v Bilta* [2015] UKSC 23, [2016] AC 1 at [70].

113 *Jetivia v Bilta* [2015] UKSC 23, [2016] AC 1 at [202].

114 *El Ajou v Dollar Land Holdings* [1994] BCC at p 150G.

115 *R v Barclays* [2018] 5 WLUK 736 at [153] – [165].

116 Eg above at [71], [80].

whatever the more expansive approach to corporate attribution the civil courts may (possibly) be prepared to embark upon in a given case, such an approach has, in the aftermath of *Meridian*, been eschewed by the criminal courts.[117]

3.49 Nevertheless, towards the conclusion of his summary of the authorities in the High Court, Davis LJ referred to the words of Sir Brian Leveson P in *R v A Ltd*, as providing an accurate summary of the legal position in the context of a criminal case:

> "Save in those cases where consideration of the legislation creating the offences in question leads to a different and perhaps broader approach … the test for the determining those individuals whose actions and state of mind are to be attributed to a corporate body remains that established in *Tesco Supermarkets Ltd v Nattrass*").[118]

3.50 This, Davis LJ noted, was consistent with the reasoning of the Supreme Court in the civil case of *Jetivia v Bilta*.[119]

3.51 Overall, therefore, the recent authorities – including the judgments in the Crown Court and High Court in *R v Barclays* – suggest that as things stand there is a significant degree of consistency in the application of the identification doctrine in the criminal law and civil law.

3.52 However, it should also be recognised that the identification doctrine has a very different role in civil law to criminal law. In particular, because civil law, unlike criminal law, allows for vicarious liability, it is rarely necessary to invoke the identification doctrine in order to *fix* a company with liability.

3.53 Rather, the issue has involved attempts to invoke the identification doctrine in order to fix a company with illegality, and thereby deny it a cause of action. There have been several cases where a culpable director has tried to invoke the identification doctrine to prevent a company (generally being under new management, or where a receiver is representing the company in the interests of its creditors) from taking action against that director, on the basis that the company should have the culpable conduct attributed to it, and therefore be prevented under the doctrine of illegality from taking action. Here the courts have invoked the "fraud exception" (although it is not limited to fraud) to hold that the illegality defence does not bar a claim by the company against a dishonest director in the same way that it would a claim against a third party.

3.54 Since allowing the culpable director to invoke the illegality defence against the company on the basis of their own misconduct would effectively result in the culpable director retaining the benefits of their own misconduct, and depriving innocent shareholders and/or third party creditors of compensation by the culpable party, there are obvious public policy reasons not to allow the identification doctrine to be used in this way.

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117 Above at [81].

118 *R v A Ltd.* [2017] 1 Cr App R 1 [27].

119 *Serious Fraud Office v Barclays* [2018] EWHC 3055 (QB); [2020] 1 Cr App R 28 at [83] – [84].

3.55 Indeed, in *Jetivia*, Lord Sumption noted

> Rules of attribution are derived from the law of agency, whereas the fraud exception, like the illegality defence which it qualifies, is a rule of public policy.[120]

DISCUSSION – PROBLEMS WITH THE CURRENT IDENTIFICATION DOCTRINE

3.56 Even before *Barclays*, the identification doctrine had often been criticised by commentators. Pinto and Evans, writing in 2008, said that

> The merit of the doctrine of identification is that it provides a mechanism where criminal acts may be attributed to a corporation; the drawback is the apparently narrow class of officers of the company whose acts in law are attributable to their employer. This principle of criminal law does nothing to encourage those officers who might be identified with it to involve themselves in the general management of the company… The division of a corporation into "brain" and "hands" is in appropriate in the common situation where the company is diffuse… *Tesco* is a somewhat simplistic tool with which to analyse decision-making in a large modern corporation let alone of a multi-national enterprise… The effect of *Tesco v Nattrass*, at first glance, has been to limit criminal liability for practical purposes to the very bottom of the corporate scale.[121]

3.57 More recently, Dsouza argued that

> the doctrine of identification offers little legal certainty, lacks principled foundations, and is based on questionable doctrinal logic.[122]

3.58 The main criticisms of the identification doctrine are

(1) It is too narrow.

(2) It does not reflect the reality of decision-making in complex organisations.

(3) It makes it too difficult to convict companies for offences committed for their benefit.

(4) It is unfair between small and large companies.

(5) It does not always bring certainty.

(6) It does not incentivise good corporate governance and may disincentivise it.

3.59 The interpretation placed upon the identification doctrine in *R v Barclays* was felt, by many stakeholders, to have reduced the number of cases where the state of mind of individuals may be attributed to a corporation.

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120 *Jetivia v Bilta* [2015] UKSC 23; [2016] AC 1 at [86].

121 A Pinto and M Evans, *Corporate Criminal Liability*, 2008, p 55.

122 Mark Dsouza, "The Corporate Agent in Criminal Law" (2020) 79 Cambridge Law Journal 91.

3.60 For example, Linklaters LLP said:

> There are at least two different approaches to attribution for companies and, even within the identification doctrine, there is too much scope for different interpretations of who constitutes the "directing mind and will" in the particular circumstances (see *R v Barclays* for instance, where a narrow approach was taken).

3.61 The CPS said that the decision in *R v Barclays* "has confirmed a narrow application of the identification doctrine."

3.62 Certain stakeholders felt that the decision in the case did not represent a change in the law. For example, the Three Raymond Buildings Financial Crime Practice Group said that the case did not alter the identification doctrine to make it more restrictive and that the restatement of the law in that case was supported by attractive reasoning.

The narrowness of the doctrine

3.63 Even before *Barclays*, the identification doctrine was criticised as unduly narrow on the basis that it had been treated as limiting the class of people who could constitute a directing mind and will.

3.64 In our view, the identification doctrine should not necessarily be seen as limited to the Board of Directors and the Chief Executive. In certain situations, a person outside this class can be seen as representing the company's directing mind and will if there has been a suitable delegation of corporate authority to deal with the matter in question.

3.65 In *Tesco v Nattrass*, the notion of "total delegation" was invoked only in relation to the situation where a person who would not ordinarily be considered as someone representing the "directing mind and will" might nonetheless be considered one in the particular circumstances – it was raised so as to allow the possibility of the identification doctrine extending beyond the normal class of those who would represent the "directing mind and will" (but presupposed that such a class existed). *Andrews Weatherfoil*, meanwhile, reasserted that delegation alone was not sufficient – it was necessary to have the "status and authority" to bind the company; it limited the extent to which delegation might make someone a "directing mind and will", but it again seemed to be premised on the existence of a class who would ordinarily have the requisite status and authority.

3.66 However, *Barclays* seems to suggest "status" and "authority" are now autonomous qualities and a person must have both in order to fix the company with liability. Commenting on the reference to "status and authority" in *Andrews Weatherfoil*, Davis LJ said:

> It is not enough simply to ask what the particular individual's "status" within a company is (although that "status" is undoubtedly very relevant). The focus also has to be on the particular authority bestowed by the company.[123]

3.67 Moreover, while it may be that senior managers whose work involves management of the whole affairs of the company could have the "status" required, it is unlikely that

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123 *SFO v Barclays* [2018] EWHC 3055 (QB), [2018] 11 WLUK 873 at [68].

they have the authority in the absence of "total delegation". In practice, however, it would be rare that a person outside that limited class of directors, the chief executive and a small number of senior managers would be given that authority with the complete autonomy suggested. Even where a single director has special responsibility for an area, it is likely that the board will retain both formal responsibility and the single director will ultimately be capable of being overruled by the board.

3.68 Whether this is "too narrow" is not a question which can be empirically assessed. For some people, the view that it is the Board which represents the "real company" will be persuasive; for others it will not.

Unfairness

3.69 There is little doubt that the identification doctrine operates differently in relation to small companies than it does in relation to larger companies. We consider that a rule which impacts disproportionately on smaller companies but fails to deal satisfactorily with similar conduct in larger firms is likely to be seen as unfair and could diminish confidence in the criminal law.[124]

3.70 Equally, we note that in *Tesco v Brent* a key reason for applying a special rule of attribution was that it could hardly be expected that Parliament "intended the large company to be acquitted but the single-handed shopkeeper convicted".[125]

3.71 This, however, is the consequence of leaving a large number of offences to be dealt with under the identification doctrine. While the identification doctrine remains in place, and remains the default mode of attribution, the law will continue to enable large companies to be acquitted for conduct which would see small businesses convicted.

3.72 Even with a modest expansion of the identification principle this discrepancy would be likely to persist. If, for instance, the doctrine were expanded to allow identification on the basis of the culpability of a single senior manager, there will inevitably continue to be cases in which a small company would be convicted but not a large company, because it would be inherently more likely that in the small firm senior managers would be closer to the level at which misconduct took place and therefore more likely to have the knowledge needed to fix the company with liability.

Certainty

3.73 In his High Court judgment in *Barclays*, Davis LJ argued that *Tesco v Nattrass* had the virtue of bringing "a degree of certainty":

> It is said that it involves too narrow an approach and is capable of deflecting Parliament's intention in various statutory provisions, particularly regulatory offences. It is also said that such an approach would tend to render large companies with widely devolved management less exposed to criminal prosecution than small companies. I can see some force in those points. But as against that, the decision in

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124 In a similar vein, in our report on Misconduct in Public Office, we noted that it was a common criticism of that offence that it tended to be used primarily against junior officials rather than senior decision makers that members of the public might reasonably expect to be held criminally accountable. Misconduct in Public Office [2020] Law Com No 397, paras 3.37-3.39.

125 *Tesco Stores Ltd v Brent LBC* [1993] 1 WLR 1037 at [1043].

> *Tesco v Nattrass* (read with *Lennard's*) can be said to give rise to a degree of certainty in the required approach.[126]

3.74 The degree of certainty that the identification doctrine gives should not be overstated. Certainly, the idea that the identification doctrine did not fix a company with criminal responsibility even where the alleged offending was by two directors, those being the Chief Executive and Chief Financial Officer, and the alleged offending occurred in the context of financial negotiations, which those two were conducting, was considered by some to be surprising.[127]

3.75 Moreover, the requirement for there to have been a "total" delegation of authority for an individual to fulfil the identification doctrine, even where the individual has the necessary status, may make it harder to identify in advance of a trial whose actions are considered to be those of the company. In *Barclays* itself, the decision that the Chief Executive and Chief Financial Officer did not have the necessary authority was in part based on witness statements. It is therefore possible that the necessary clarity as to whether a person had the necessary "status" and "authority" for the purposes of the identification doctrine will not become clear until trial.

3.76 We also note that in *Barclays*, whether there had been the necessary delegation to the Chief Executive and Chief Financial Officer depended in part on whether delegation was conceived of in terms of the negotiations or the wider capital raising project as a whole. Moreover, *Barclays* was at least a case in which the constraints on the delegation to the individual directors could be clearly evidenced. In many cases, the degree to which a director enjoyed *de jure* or *de facto* discretion over an area will be very difficult to establish to the criminal standard. It could prove particularly problematic when establishing the degree of delegation is based not on documentary evidence but testimony from directors and managers themselves. Again, it is questionable how far this enhances legal certainty.

3.77 Nor have other models of attribution, for instance, capturing the activities of senior managers under consent or connivance provisions – given rise to any greater degree of uncertainty than the identification doctrine, and quite possibly less.

3.78 In short, even if the identification doctrine gives risk to a degree of certainty, we are not convinced that it gives any *greater* certainty than alternative models.

Incentives for good corporate governance

3.79 As Davis LJ said

> *Tesco v Nattrass* (which continues to be binding) has, as I have said, been criticised for having the consequence that larger companies may be more readily absolved from criminal responsibility whilst smaller companies may not. That may be so: but it does not necessarily represent the whole story. It is just because some companies

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126 *Serious Fraud Office v Barclays Plc and another* [2018] EWHC 3055 (QB); [2020] 1 Cr App R 28 at [67].

127 We note that in a briefing following's Barclays' success in the appeal Herbert Smith Freehills said

> "To many, it will come as a surprise that the court held that Barclays could not be held criminally culpable for the actions of its CEO and CFO in circumstances where the court had to take the SFO's case – which relied upon the guilt of such individuals – at its highest."

> are very large that it becomes a practical necessity to devolve and delegate various functions, operations and decision-making processes. A board of a large international corporation cannot possibly be expected to know, or concern itself with, all of that corporation's day-to-day transactions and operations. So devolution and delegation, as a matter of corporate governance, thus becomes a practical necessity in order to improve decision-making and the discharge of responsibilities. It therefore would be quite wrong to presume that such devolved structures are put in place as a device to avoid corporate responsibility, criminal or otherwise.[128]

3.80 In our discussion paper, we quoted Dr Robin Loöf on the suggestion that companies structure their activities so as to avoid incurring criminal liability under the identification doctrine:

> 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 …[129]

3.81 We accept that devolved structures are not necessarily put in place *in order* to avoid corporate responsibility, criminal or otherwise, but given that such devolved structures *are* put in place by large corporations, it is reasonable to ask how the decisions and conduct that flow from such decisions of the corporation should be treated by the criminal law.

3.82 In the discussion paper, we also noted the comment of James Gobert that the identification doctrine "works best in cases where it is needed least and works least in cases where it is needed most".[130] The directors and managers who are most likely to be caught by the identification doctrine are likely to be found criminally liable in their own right, and "vicarious and corporate liability are largely superfluous for deterrent purposes".

3.83 It is a legitimate criticism of the identification doctrine that far from creating incentives to ensure compliance, the doctrine rewards companies whose boards do not pay close attention.

3.84 This is not to say that companies are rewarded if they "turn a blind eye" to misconduct. This was categorically rejected in *Barclays*, and we accept that in general a company which *believes* that misconduct is taking place and *deliberately* seeks to avoid having that belief confirmed will be fixed with knowledge. The issue instead is that companies with poor oversight and compliance will not have the knowledge of misconduct at a sufficiently high level for the corporation to be fixed with it for the purpose of establishing intent, dishonesty, etc, whereas companies which do obtain such knowledge risk being criminally implicated.

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128 *Serious Fraud Office v Barclays Plc and another* [2018] EWHC 3055 (QB); [2020] 1 Cr App R 28 at [101].

129 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.

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

3.85 As currently constituted, a company whose directors – collectively – engaged in fraud would be criminally liable as a company. If the directors wholly abrogated their role to a Chief Executive who exercised total control of the company, and the CEO used the firm as a vehicle for fraud, the company would also be criminally liable. Yet if the board exercised some oversight and direction, albeit inadequate, the Chief Executive would no longer have the "status and authority" to fix the company with criminal liability, but nor would the board have sufficient knowledge and intent to do so either. This result is both arbitrary and conducive to poor corporate governance.

CONCLUSION

3.86 In the discussion paper we commented that in the wake of *Meridian*, it had been felt that the case demonstrated that courts had greater latitude to apply bespoke rules of attribution. *Barclays* does not directly contradict that – rather it established that the Fraud Act 2006 did not entail a special rule of attribution and therefore the general rule should apply. Nor does *Barclays* contradict earlier law, in particular *Tesco v Nattrass*. But it affirms what is on any analysis a narrow view of the identification doctrine, narrower than many observers believed the law to be pre-*Barclays*.

3.87 The consequence of this is that while some commentators – and ourselves[131] – anticipated that in the wake of *Meridian* courts would be more able to adopt provision-specific approaches to corporate criminal liability where this would make application of the law to companies more consistent and fairer, the reverse has actually happened:

(1) the identification doctrine remains the default rule of attribution

(2) the hurdle for adopting a purposive approach is that reliance on the identification principle would wholly defeat the purpose of the legislation (not just its application to large companies)[132] and

(3) the basis of liability under the identification doctrine is even more difficult for prosecutors to reach than was thought to be the case before, since it requires proof not only that a person in the requisite class had the requisite mental state, but also that they had *de facto* authority in relation to the conduct in question.

3.88 The key arguments in favour of the identification doctrine, espoused by some defenders of it, are ones of legal certainty – although this should not be overstated. There is also a normative argument that it reflects the acts and decisions which *should* be attributed to the company, a "metaphysical" argument about what constitutes the

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131 Criminal Liability in Regulatory Contexts (2010) Law Commission Consultation Paper 195. At para 5.103, we said

> "It is clear from the decisions in Pioneer Concrete 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. Consequently, 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."

132 *SFO v Barclays* [2018] EWHC 3055 (QB) at [69].

"real company". The latter is something which cannot be addressed empirically and upon which people will necessarily have differing opinions.

3.89

Option 1.

3.90 Retain the identification doctrine as interpreted by recent case law.

3.91 However, we are in no doubt that the identification doctrine is an obstacle to holding large companies criminally responsible for offences committed in their interests by their employees. In the absence of reform to the doctrine itself, the case for additional measures to tackle economic offences, such as "failure to prevent" offences, would be even more compelling.

3.92 Nonetheless, as we discuss in chapter 8 following, while maintaining the current identification doctrine may strengthen the case for new failure to prevent offences, they should not be regarded as something which would wholly address gaps in enforcement caused by the identification doctrine. Accordingly, in the following chapters we examine three possible alternative models of attribution.

Chapter 4: A statutory identification principle including senior managers

INTRODUCTION

4.1 As discussed in the previous chapter, a criticism of the identification doctrine is that it is, in practice, focused on a narrow group of people who can be said to represent the company's "directing mind and will" – namely the board of directors, and a person to whom there has been a total delegation of authority. The criticism is that this does not reflect the reality of corporate decision making in which a range of decisions affecting the organisation are taken by people who do not have such a senior level of office. In particular, senior managers who are not on the Board – with the possible exception of a Chief Executive sitting outside the Board – are likely not to be pursued as a directing mind and will, even though in practice they take important decisions of corporate policy and strategy.

4.2 In *Tesco v Nattrass*, several of the judgments drew an analogy between the "consent or connivance" provision in the legislation and the notion of the directing mind and will. That is, senior "managers" and "officers" of the company were contemplated as being in scope.

4.3 We discuss "consent or connivance" provisions in chapter 9. For the purposes of this chapter it is sufficient to recognise that in practice the courts have adopted differing approaches towards imputing corporate liability *from* the personal liability of a manager (using the identification doctrine) and fixing a manager with personal liability where a company has been found guilty of an offence (using a consent or connivance provision). For the former, only a person to whom there has been a complete delegation is likely to be considered a directing mind and will. However, for assessing whether an individual should be fixed with personal liability once the company has been found guilty, a broader understanding seems evident.

4.4 A further consequence of the prevalence of such provisions in criminal statutes is that case law interpreting them does, in practice, inform an understanding of the idea of a senior manager. As we discuss further in chapter 9, this has been restricted to those who manage "the affairs of the company as a whole" or "the company itself", or those with "real authority" who "decide corporate policy and strategy". In particular, it has been held not to extend to a branch manager or an assistant manager with no decision-making responsibilities.

4.5 This raises the issue of whether it would be useful to legislate so that decisions and actions of relevant senior managers are clearly capable of being attributed to the company for purposes of criminal liability. This would provide a broader basis of liability than the existing identification doctrine, while ensuring that only senior people with signification strategic or administrative responsibilities would be capable of fixing the corporation with criminal liability; it would not generally capture 'rogue employees' working at a relatively low level in an organisation.

4.6 This is something which been done by statute in Australia and Canada, where the federal criminal codes have principles for attributing responsibility to corporations which expressly include senior managers. In this chapter we examine two approaches: that currently used in Australian (Commonwealth) legislation; and that used in the Canadian Criminal Code. We also consider two definitions of senior management that exist in domestic legislation.

THE AUSTRALIAN APPROACH

4.7 In Australia, the Criminal Code provides that one circumstance in which a fault element may be attributed to the company[133] is by

> proving that a high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence

where a high managerial agent is

> an employee, agent or officer of the body corporate with duties of such responsibility that his or her conduct may fairly be assumed to represent the body corporate's policy.

4.8 The Australian Law Reform Commission has noted that

> This term ["high managerial agent"] is unique to the Criminal Code and is not drawn from the Corporations Act or general corporate law. As such, the interpretation of high managerial agent may be independent of pre-existing notions of seniority and responsibility in corporate law.

4.9 Where a company is prosecuted on the basis of culpability of a high managerial agent there is a due diligence defence "if the body corporate proves that it exercised due diligence to prevent the conduct, or the authorisation or permission".

4.10 There is limited evidence from which to determine the success of this model in Australia. The Australian Law Reform Commission reported that there were only ten prosecutions of corporations between 2009 and 2019 under the Criminal Code.[134]

4.11 The Australian Law Reform Commission has recommended reform of the corporate liability regime so that liability could be attributed on the basis of any officer, employee or agent acting within actual or apparent authority (i.e. *respondeat superior*). The two

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133 The others are (i) proving that the board of directors intentionally, recklessly or knowingly carried out or authorised or permitted the commission of the offence, (ii) proving that a corporate culture existed which encouraged, tolerated, encouraged or led to non-compliance with the relevant provision and (iii) proving that the body corporate failed to maintain a culture that required compliance with the relevant provision. We discuss (ii) and (iii) in Chapter 5.

134 Australian Law Reform Commission, *Corporate Criminal Responsibility* (2020), 1.20.

options for reform[135] they have suggested would both therefore see the notion of a "high managerial agent" removed from the Criminal Code.

THE CANADIAN APPROACH

4.12 Canadian law provides a helpful comparator because traditionally, the identification doctrine was applied in the criminal law. In 2003, the Criminal Code of Canada was amended to extend the common law concept of a directing mind to "senior officers". This development is therefore an example of a potential approach English law could take to reform of the identification doctrine.[136]

4.13 Corporate criminal liability in Canada is governed by the relevant sections of the Criminal Code as amended in 2003. Section 22 provides that

> In respect of an offence that requires the prosecution to prove fault – other than negligence – an organization is a party to the 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;
>
> (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 representatives of the organization so that they do the act or make the 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

where a senior officer is

> 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 a body corporate, includes a director, its chief executive officer and its chief financial officer.

4.14 The view of commentators was that the first part of the definition (setting policy) essentially codifies the common law position whereas the second part (managing activities) extends the scope of attribution to a lower level of managers.[137]

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135 The ALRC's "Option 1" would retain the current structure of the Criminal Code, s 12.3(2), but would replace the reference to a high managerial agent with 'officer, employee, or agent of the body corporate, acting within actual or apparent authority'. (It would also scrap the fourth mode of attribution, that of proving the absence of a culture of compliance.) Under its "Option 2" the conduct of any director, employee or agent could be attributed to the company where the conduct was undertaken on behalf of the corporation and within the scope of actual or apparent authority, subject to a defence of reasonable precautions.

136 See Law Commission, Corporate Criminal Liability: A discussion paper (2021), paras 6.38 to 6.44 for a discussion of Canadian law.

137 Darcy MacPherson, "Extending Corporate Criminal Liability?: Some Thoughts On Bill C-45" (2004) 30 Man. LJ 253 – 284.

4.15 Explaining the change to the law, the Justice Department stated that

> The definition therefore focuses on the function of the individual, rather than on any particular title… In addition, the new definition makes it clear that the directors, the chief executive officer and the chief financial officer of a corporation are, by virtue of the position they hold, automatically "senior officers". A corporation charged with an offence cannot argue that the individuals occupying these positions actually had no real role in setting policy or managing the organization and therefore were not senior officers.[138]

"SENIOR MANAGEMENT" IN DOMESTIC LEGISLATION

Corporate Manslaughter and Corporate Homicide Act 2007

4.16 There are also (at least) two examples in the UK of legislation identifying "senior managers" of a company: the Corporate Manslaughter and Corporate Homicide Act and section 59ZA of the Financial Services and Markets Act 2000. Although we did not ask a consultation question on the domestic examples, the approach of the corporate manslaughter offence was raised by some respondents so is considered below.

4.17 The offence of corporate manslaughter is committed where the way in which an organisation's activities are managed or organised causes a person's death, and amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased. The way in which its activities are managed or organised by its senior management must be a substantial element in the breach of duty. Senior management is defined as

> the persons who play significant roles in-
>
> the making of decisions about how the whole or a substantial part of its activities are to be managed or organised, or
>
> the actual managing or organising of the whole or a substantial part of those activities.[139]

4.18 The meaning of the term "significant" roles was referred to in the Explanatory Notes to the Act. The Notes said that the term refers to

> Those persons who play a significant role in the management of the whole or a substantial part of the organisation's activities. This covers both those in the direct chain of management as well as those in, for example, strategic or regulatory compliance roles.

4.19 It is important to recognise that the corporate manslaughter offence does not fix a company with responsibility on the basis of a senior manager's culpability. One of the aims of the legislation was to move away from an approach to manslaughter that

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138 Department of Justice, "A Plain Language Guide: Bill C-45 - Amendments to the Criminal Code Affecting the Criminal Liability of Organizations", at https://www.justice.gc.ca/eng/rp-pr/other-autre/c45/p02.html.

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

relied on individual culpability capable of being attributed to the company. Insofar as it provides a model for attribution on the basis of an aspect of "corporate culture" ("the way its affairs are managed or organised") we discuss this further in Chapter 5.

4.20 We cite it in this chapter, however, as an example of domestic legislation which recognises a distinction between management of a company (section 1(1)) and senior management (section 1(3)). Both sections 1(1) and 1(3) refer to "the way [the organisation's] activities are managed or organised" – that is, management as a function – but section 1(3) separately refers to "senior management", referring to a person or body of people.

4.21 We are not aware of any case law interpreting the phrase "senior management" in the 2007 Act, which may be understandable given the relatively low number of cases brought, and the fact that most have concerned small businesses.

4.22 The size and complexity of an organisation would be relevant to understanding whether a group of people constituted "senior" management. For instance, a store manager of a branch of a national supermarket chain (such as the store manager in *Tesco v Nattrass*) would not be a member of "senior management". However, the general manager of a bookshop with a single outlet (like the general manager of Foyle's in *R v Boal* – but not his assistant) might be.

Financial Services and Markets Act 2000, section 59ZA

4.23 The Senior Managers Regime for financial services is underpinned by the Financial Services and Markets Act 2000. Specifically, section 59ZA defines a "senior management function":

> A function is a "senior management function", in relation to the carrying on of a regulated activity by an authorised person, if-
>
> (a) the function will require the person performing it to be responsible for managing one or more aspects of the authorised person's affairs, so far as relating to the activity, and
>
> (b) those aspects involve, or might involve, a risk of serious consequences-
>
> (i) for the authorised person, or
>
> (ii) for business or other interests in the United Kingdom.
>
> … the reference to managing one or more aspects of an authorised person's affairs includes a reference to taking decisions, or participating in the taking of decisions, about how one or more aspects of those affairs should be carried on.

CONSULTATION QUESTION

4.24 The question asked in the discussion paper was:

> 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?

4.25 The majority of respondents thought there was no merit in the Canadian and Australian identification principles which attribute corporate criminal liability when a member of the senior management has the requisite fault. The main reasons for this were:

(1) The lack of clarity in the "senior manager" and "high managerial agent" without significant case law to define the category, and therefore the potential for the judiciary to interpret it more broadly than was perceived to be intended, as in Canada.

(2) Conversely, the fact that despite the wider definition, Canada and Australia have not had many successful prosecutions. The conclusion drawn from this was that there is no indication the prosecution rates would be significantly better here to justify the uncertainty of introducing a new definition.

(3) The threshold would still not capture common criminality by lower-ranking employees and agents, with one reason for this being that companies could still organise themselves to avoid liability for senior management.

4.26 A majority of respondents who expressed views on both sides of this question favoured the Canadian approach over the Australian approach. Two respondents (GC100 and Herbert Smith Freehills) said they did not think reform of the identification doctrine in this way was necessary, but said that if they did, there is merit in the Canadian approach (as opposed to the Australian formulation).

Views on the expansiveness of these options

4.27 Some suggested that expansion of the doctrine to senior managers would accurately reflect decision making in organisations. For example, Tony Lewis, of Fieldfisher, said:

> If an extension of the identification principle is enacted, we are of the view that the extension could be grounded in the decisions of senior management and / or the directing mind and will of the business. This is because senior management are more likely to be making key operational decisions which could attract criminal liability than the central board, or other persons representing the 'directing mind and will' of a particular business.

4.28 Doctor Lorenzo Pasculli, of Coventry University, suggested:

> It is fair to assume that the intentional, negligent, reckless or knowing conduct of the senior manager reflects corporate policy or decision-making. Similarly, the organisation should be criminally liable if the fulfilment of the relevant material element (*actus reus*) of an offence by an employee or an agent of the organisation was expressly or implicitly authorised or permitted by a senior manager. Here again the decision of the manager represents a policy or a decision of the company.

4.29 Others suggested this option had merit because it would address the perceived problem of unequal application of the doctrine to large and small companies. Jamas Hodivala QC, on behalf of the Fraud Lawyers Association, said:

> We agree that there is merit in statutory reform to widen the scope of the identification principle. Attributing fault to a corporate by attributing the fault element of a member of senior management will go some way, in our opinion, to closing the lacuna between the potential liability of large and small corporates.

4.30 However, some stakeholders thought there was not merit in a senior manager model. Alison Saunders DBE, of Linklaters, was unsupportive of this approach because it is too wide:

> If the law on corporate criminal liability is to be reformed, the better approach, which would more appropriately reflect the company's conduct in these circumstances, would be to introduce specific 'failure to prevent' offences (with appropriate safeguards … to prevent the prosecution of companies whose relevant systems and controls were fit for purpose). The identification principle would then be reserved for cases where, for instance, there was clear evidence that the relevant conduct had been authorised by the Board.

4.31 The GC100 also suggested this approach would be unsuitable, because the current identification doctrine correctly represents the reality of decision making in companies:

> The current law reflects the real distribution of decision-making and, probably more importantly, corporate knowledge in large, multinational corporations such as its members.

4.32 Other stakeholders rejected this formulation because it was not wide enough. Transparency International UK took this view, referring to the low prosecution rates in Canada and Australia of corporations. Similarly, Corporate Justice Coalition were wary of a senior manager model because corporations may change their structures to evade liability on a technical basis. This was a concern also raised by members of the 3 Raymond Buildings Financial Crime Group, who suggested that potentially obstructive labelling by companies would highlight the need for a fact-specific approach.

4.33 Both the CPS and the SFO expressed doubt about this model. The CPS was concerned it would not capture conduct committed by lower level employees, notwithstanding the complicity of senior management. The SFO said:

> The SFO cases in Appendix 1 to the Discussion Paper highlight the dangers of restricting this range of individuals to senior management. For example, in the LIBOR and EURIBOR investigations, many of the individuals involved – in practices condoned, encouraged or tolerated by their employers – were middle-ranking. It is also possible that, by setting a bar below which liability cannot be attributed to the company, a company could arrange its operations to distance individuals at or above that level. This again highlights the need for any reform of the identification principle to sit alongside a wider range of failure to prevent offences that encourage good corporate behaviour.

4.34 Our attention was drawn to potential problems taking terms from other jurisdictions. The City of London Law Society Criminal Law Committee noted that:

> When considering the use of the term "senior officers" and drawing on the experience of both Canada and Australia, please be aware that in those jurisdictions it is typically the case that the Chief Financial Officer is not a board position and, as such, the extension of the liability regime to "senior officers" is in part to address the fact that the directors are generally all non-executive directors other than the CEO. In the UK, the CFO will invariably be a director, often with other senior executives also as board members. The lack of clarity as to who might be within the scope of a definition of senior officer (or any other term) highlights the difficulty in developing an approach which can adequately address the myriad range of corporate and management structures that are adopted by companies of varying size, complexity and international reach and the difficulty for boards in adopting an approach to avoid the company committing an offence.

Comparison of the Canadian and Australian models

4.35 Broadly, the Canadian model was preferred by stakeholders. For example, both Herbert Smith Freehills and GC100 favoured the Canadian approach because they found "senior managers" to be a clearer and more familiar concept than "high managerial agent". In expressing their relative support for the Canadian approach, Herbert Smith Freehills suggested some difficulties with the Australian approach:

> The definition of "high managerial agent", is broad and ambiguous, being: "an employee, agent or officer of the body corporate with duties of such responsibility that his or her conduct may fairly be assumed to represent the body corporate's policy" (emphasis added). There has been no significant analysis of the term in any case to date. For a corporation's compliance officers to identify who might be "fairly assumed" to represent the body corporate's policy is fraught with uncertainty. This is compounded by the doctrine's potentially expansive operation, which substantially increases the risk exposure of large, sophisticated and segmented corporations that have hundreds or thousands of potential "high managerial agents". Who fits this definition is fact and circumstance specific. The inevitable consequence is the imposition of a significantly more rigorous compliance and monitoring burden, particularly in circumstances where this method of fault attribution has a due diligence defence attached to it. Although potentially attractive, in theory, to enforcement and prosecution agencies, this attribution method has rarely – in practice – been applied.

4.36 However, there was some support for the Australian model of "high managerial agent". The SFO noted a benefit of the Australian model:

> the Australian approach would also address the concerns arising from the *Barclays* judgment, in that it looks generally at whether the high managerial agent has "duties of such responsibility that his or her conduct may fairly be assumed to represent the body corporate's policy" as opposed to the specific authority delegated to the individual.

4.37 The Fraud Lawyers Association also voiced support for the Australian model:

> We consider that the definition of "High Managerial Agent" (Australia) is more appropriate than that of "Senior Officer" (Canada)… we note that there is little authoritative jurisprudence in Canada interpreting the term "senior officer" but that

which there is demonstrates that the Canadian model appears closer to a model of vicarious liability than the Australian definition… In contrast, we consider that the definition of "High Managerial Agent" attributes liability to the corporate from the conduct of individuals who have such responsibility as to identify them as representative of corporate policy.

We consider that an extension to include High Managerial Agents is consistent with the existing attribution model of corporate criminal liability in England and Wales but will widen the scope of potential liability. The definition will be instructive to corporates and is very likely to have a demonstrably beneficial impact on the corporate culture of compliance. It is relevant to the director community and easy to explain to Boards… We consider this proposed reform strikes the right balance.

ANALYSIS

4.38 While there was no consensus among respondents, analysis suggests that the Canadian approach was favoured over the Australian.

4.39 In considering the two approaches it is worth distinguishing between (i) the way that culpability is attributed and (ii) the definition of "senior management" (or similar) used in the legislation.

Mode of attribution

4.40 The Canadian approach is a narrow approach. The necessary fault element will only be attributed to the company if a senior officer

(a) acting within the scope of their authority, is a party to the offence;

(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 representatives of the organisation so that they do the act or make the omission specified in the offence; or

(c) knowing that a representative of the organisation 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.

4.41 The definition appears to enable a senior officer to make the company liable by directing an employee to do the act, even if the employee would not incur criminal liability themselves (provided the senior officer has the requisite intent). For instance, if a director tells a press officer to issue a statement, knowing that the statement is false, the director would have the requisite fault, even though the press officer might not have the requisite fault because they did not know that the statement was false.

4.42 However, where the director merely acquiesces under (c), the legislation appears to require that the employee would have the necessary fault element to be a party to the offence. Thus, for instance, if a director knew that a press officer was about to issue a statement which was false, the director's inaction would only fix the company with corporate liability *if* the press officer also knew that the statement was false (and therefore the director did not stop the employee becoming a party to the offence). If the press officer believed the statement to be true, the press officer would not become

a party to the offence and therefore the director's (deliberate) inaction would not fix the company with corporate liability.

4.43 The inclusion in the Canadian legislation of the qualification that the senior manager must be "acting within the scope of their authority" seems to suggest that the action must be within the field of the manager's work. This might be considered a reasonable suggestion. It is questionable, for instance, whether a company should be fixed with liability for an offence where the senior manager responsible for it was clearly acting outside their role. For instance, to adapt the example above, if the Head of Occupational Health and Safety instructs the press officer to issue a misleading financial statement, should the firm be held responsible?

4.44 Alternatively, if it is understood to mean that the manager must have had authority to engage in the (criminal) conduct in question, it is likely to lead to similar difficulties as already arise under the identification doctrine. Even if an activity is clearly within the ambit of the senior manager's role, it will rarely be the case that a manager is "authorised" to engage in criminal conduct.

4.45 The Australian model (concentrating solely on the second limb), is broader. Where a "high managerial agent" expressly, tacitly or impliedly authorised or permitted the commission of the offence, their fault is attributed to the corporate body.

4.46 "Commission of the offence" here appears to relate to commission of the offence *by the company*, not commission of the offence by an employee. Section 12.2 of the Code reads

> *If a physical element of an offence is committed by an employee*, agent or officer of a body corporate acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority, the physical element must also be attributed to the body corporate.

4.47 It does not say "*if a criminal offence is committed by an employee*, etc, the physical element of the offence must also be attributed to the company". It is sufficient that the employee commits the physical or conduct element; whether the employee had the necessary fault or *mens rea* would seem to be irrelevant.

4.48 To take the example of the press officer issuing a statement which they (wrongly) believe to be true, but which the director (tacitly) allows them to issue knowing it to be false, the "physical element" is the issuing of the statement. That act of the press officer would be attributed to the company. The fault element would be that the director knew the statement to be untrue, and could be attributed to the company on the basis that they tacitly permitted the commission of the physical element.

4.49 We consider that it is right that in such a case, where the director or manager connives in conduct which they know to be unlawful, even if the person carrying out the conduct lacks the necessary fault themselves, this should be sufficient for the company to be found to have the necessary culpability.

4.50 The Australian approach does not require that the high managerial agent was acting within the scope of their authority.

4.51 In *The Queen v Note Printing Australia and Another*,[140] two companies, one a wholly-owned subsidiary of Australia's central bank, and the other a joint venture part owned by the central bank, were sentenced for three offences of conspiracy to bribe a foreign public official. The prosecution case was that the all those involved were "high managerial agents" – some were directors – but that the respective boards of directors of the two companies were not involved in, and had no knowledge of, the conduct, and that the senior executives had misled the board and actively hid the conduct from the board.[141]

4.52 There is an evident contrast, therefore, between *Note Printing Australia* and *Barclays*, and it would appear that under the Australian legislation a company could be convicted on the basis of the conduct of senior managers in circumstances in which the identification doctrine of the law of England and Wales would probably not allow conviction.

4.53 However, and unlike the Canadian legislation, there is a defence available under the Australian Criminal Code where conduct is committed by or with the consent of a high managerial agent, but the company had exercised due diligence to prevent the conduct.

Definitions

4.54 As noted above, the notion of "high managerial agent" is not found elsewhere in Australian criminal law. The definition in the Criminal Code is somewhat subjective in that it refers to the person having "duties of such responsibility that his or her conduct *may fairly be assumed* to represent the body's corporate policy". In practice, this also involves a large degree of circularity – the person's conduct will be treated as the company's if their conduct can fairly be assumed to represent the company's policy.

4.55 The Canadian approach is more grounded in notions which are found elsewhere in the criminal (and civil) law (of both Canada and England and Wales) and therefore the jurisprudence is likely to be clearer. In contrast, as noted above, "high managerial agent" is a term unique to the legislation on Australian corporate criminal liability. The boundaries of who constitutes a high managerial agent are less clear.

4.56 Second, both the Canadian and Australian approaches ground liability in a person with a particular link to corporate policy. However, the Canadian definition explicitly extends this beyond "policy" to include "managing an important part of the organisation's activities". (In this approach, the Canadian model is like the domestic corporate manslaughter offence.) In this respect it is more apt clearly to include senior managers whose decisions cannot be characterised as involving corporate policy or strategy but who are nonetheless making important company-wide decisions (for instance, purely operational decisions such as resource allocation).

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140 [2012] VSC 302.

141 In the subsequent sentencing of two of the co-conspirators, the trial judge commented "When I sentenced NPA and Securency in 2012 for their parts in the conspiracies, it was done on the basis that the prosecution accepted that the respective boards of directors had no knowledge of the illegal conduct being carried out by the companies' "high managerial agents". From what I have learned since then, I have some reservations about the accuracy of that agreed fact. *CDPP v Curtis* [2017] VSC 613 and *CDPP v Boillott* [2018] VSC 739.

4.57 Given that the Australian Law Reform Commission has made recommendations that would remove "high managerial agent" from the country's legislation, and that many Australian criminal statutes disapply the assumptions about corporate liability in the criminal code, it is hard to justify using it as a model.

4.58 The main advantage of the Canadian approach is clarity, not least in that it explicitly includes any director as well as the chief executive and chief financial officer.

4.59 In relation to the Canadian model, some stakeholders noted the danger of companies structuring themselves so as to put certain positions outside the scope of liability.

4.60 A further danger with the Canadian approach may be that "senior" has been given a broad understanding so that it applies to what might be considered middle management. In the case of *R c Pétroles Globales*, the judge cited comments made by the Attorney General during the legislation's passage through Parliament, in which he had indicated that the Bill would extend the identification doctrine to "the guilty mind of a middle manager … for example, the manager of a sector of a business such as sales, security or marketing, and the manager of a unit or enterprise like a region, a store or a plant."[142]

4.61 It seems clear that *Barclays* would have been decided differently under both the Australian and Canadian models, since the actions of either chief executive or chief financial officer (let alone both acting together) are automatically taken to be capable of attribution to the company.

4.62 While the definition of management in the Corporate Manslaughter and Corporate Homicide Act 2007 is not necessarily any *clearer* than the current identification doctrine, it arguably has two advantages – (i) it more accurately reflects the breadth of decision-making in modern companies, and (ii) it is likely to encourage greater corporate oversight because it is harder for those who make decisions about the whole or a substantial part of the activities are managed to remain ignorant about misconduct than a Board who may be charged only with the general direction of the company.

4.63 It should be noted that both the Canadian and Australian criminal codes treat negligence differently from other corporate fault elements in that collective negligence on the part of the corporation (Australia) or its senior officers (Canada) can be attributed to the company even if no individual was sufficiently negligent to be personally culpable. Negligence is the absence of something – care – whereas other mental elements all require the presence of something (intent, awareness of risk, knowledge). We discuss how offences of negligence and strict liability should be treated in chapter 7.

4.64 We do not think that the definition of senior management in the Senior Managers Regime provides a useful basis for a wider model of corporate criminal liability. The reference to a "risk of serious consequences" might be important in the financial services context but it will not always be relevant to criminal culpability. It is possible to

[142] Canada, Parliament, House of Commons Debates, 37th Parl, 2nd Sess, No 119 (15 September 2003) 1345.

envisage satellite litigation as to whether the role of a senior manager was sufficiently related to a risk of serious consequences to make the company criminally liable.

4.65 Moreover, the legislation in section 59ZA was always intended to be interpreted and applied through a regulatory system, not primarily through criminal law, and therefore the Financial Conduct Authority would provide further guidance on how this was to be interpreted and applied – that is, who would constitute a senior manager. It is also directed to a specific class of institutions that can be expected to have some common characteristics, whereas if we were to legislate for corporate criminal liability we would be looking at the whole range of companies – and potentially other non-natural persons, such as charities and trade unions,[143] with very different structures and purposes.

CONCLUSION

4.66 There is a case for extending the basis of criminal liability (for offences requiring fault or *mens rea*) to cover situations where the conduct was done by, or at the behest of, a member of the senior management of a corporation. We conclude that "senior management" would need for these purposes to include someone who is involved in taking decisions relating to the corporate policy and strategy and management of (i) the affairs of the company as a whole or (ii) a substantial part of it. That would not require the senior manager to have responsibilities across the whole of a company's responsibilities: they would be a senior manager if their responsibilities involve taking decisions relating to corporate strategy and policy in a particular area – such as health and safety, or finance, or legal affairs.

4.67 It would not usually capture someone whose role was limited to management of a discrete unit – such as an individual store – which does not represent a substantial part of the company's affairs.

4.68 However, where that operation *did* represent a substantial part of the company's activities, it would be captured. To take one instance, if a media company's affairs consisted of the publication of two newspapers, each publication could be "a substantial part" of the affairs of the company, and accordingly each publication's senior management would be caught by the expanded definition.

4.69 We can see merit in the definitions of senior management in both the Canadian Criminal Code and the Corporate Manslaughter and Corporate Homicide Act 2007.

4.70 The main advantage of the Canadian approach is clarity, not least in that it explicitly includes any director and the chief executive and chief financial officer. However, we are conscious that in Canada the phrase "senior officer" has been interpreted by some in a way which could be seen as covering relatively junior managers.

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[143] In law, trade unions have a unique status, referred to as "quasi-corporate". They are not a body corporate, but are capable of making contracts, suing and being sued, and being prosecuted in their own name; see Trade Union and Labour Relations (Consolidation) Act 1992, s 10.

4.71 The main advantage of using the definition of senior management in the Corporate Manslaughter and Corporate Homicide Act is that this would provide consistency across two aspects of the criminal law of England and Wales.

4.72 Both these options include reference to policy and management so are apt to cover not only those who decide on broad strategy, but also those who take operational decisions covering the whole of the corporation or a substantial part of it. These options are also apt to exclude those managers who really only apply corporate policies (for instance, a store manager).

4.73 We do not consider there is a substantive difference between "the establishment of an organization's policies or … managing an important aspect of the organization's activities" and "the making of decisions about how the whole or a substantial part of its activities are to be managed or organised, or the actual managing or organising of the whole or a substantial part of those activities". On this basis, it would be preferable for any drafting to be as consistent so far as possible with the definition in the Corporate Manslaughter and Corporate Homicide Act 2007. However, the Canadian approach also expressly provides that in the case of a body corporate any director, the chief executive and chief financial officer are senior officers. There may be value in such clarity, provided that this is drafted as an inclusive list.

4.74 If this option is pursued, the basis of attribution should be along the lines of the Australian legislation. That is, it would be sufficient to show that the senior manager engaged in, authorised or permitted the conduct – it should not be necessary to show that they were "acting within the scope of their authority" in doing so. We do not suggest that there should be a "due diligence" defence along the lines of the Australian Criminal Code where the conduct has been done by or authorised by the senior manager. The point of such an extension would be to reflect the position that the conduct of senior managers constitutes in criminal law the conduct of the company. A requirement that the manager be acting in the scope of their authority or a defence of due diligence would be contrary to this principle.

Options

4.75 Accordingly, we recommend the following options for consideration:

Option 2A.

4.76 Allowing conduct and a fault element to be attributed to a corporation if a member of its senior management engaged in, consented to or connived in the offence. Under this model, a fault element could be attributed to an organisation if a member of the organisation's senior management engaged in, consented to, or connived in the offence.

4.77 A member of the organisation's senior management would be any person who plays a significant[144] role in the making of decisions about how the whole or a substantial part of the organisation's activities are to be managed or organised, or the actual managing or organising of the whole or a substantial part of those activities.

Option 2B.

4.78 As with Option 2A, with the addition that the organisation's chief executive officer and chief financial officer would always be considered to be members of its senior management.

4.79 Amending the identification principle for criminal law in line with either of these options would raise the question of whether the change should be mirrored in civil law.

Consequences of amending the identification principle for civil law

4.80 If a statutory attribution of corporate liability were to replace the identification doctrine, a question arises as to what this would mean for the identification doctrine in civil law.

4.81 As discussed in the previous chapter, the identification doctrine initially developed as a civil law rule: *Lennard's Carrying Co v Asiatic Petroleum*[145] was a civil case. Moreover, although *Lennard's* did not concern criminal conduct, many subsequent civil cases have dealt with the identification doctrine in relation to the attribution of conduct that was in fact criminal: *El Ajou v Dollar Land Holdings,*[146] and *Jetivia v Bilta*[147] both involved the question of whether fraud by one or more directors should be attributed to the corporation.

4.82 If criminal liability were to be extended to conduct engaged in or committed by senior managers (including directors), should such conduct also be attributed to the organisation for purposes of civil law?

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144 For the meaning of "significant" see paragraphs 4.17-4.18.

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

146 [1993] EWCA Civ 4.

147 [2015] UKSC 23.

4.83 This is something which has had to be considered in both Canada and Australia as a result of the expanded liability under each country's Criminal Code.

4.84 In Australia, in *ASIC v Managed Investments Ltd and Ors (No 9)*,[148] the definition in the Criminal Code was used to attribute to a corporate in civil law for a fraud carried out by their senior managers The Court (at 613) stated that "the terms of s 12.3(2)(b) in particular of the Criminal Code (Cth) reinforce my conclusion that their conduct and intentions should be attributed to [the company]".

4.85 Following the broadening of criminal liability under the Canadian Criminal Code, MacPherson suggested that there was now a question "whether the common law [of torts] should continue as it has with respect to the use of the identification doctrine in tort, or, alternatively, whether the common law should reflect the changes brought about in the statute.". He concluded

> In my view, the latter option is preferable. At least three reasons justify this result. The first is historical… Since, throughout the history of the doctrine, the civil and criminal sides have essentially been inextricably intertwined with one another, it would seem logical to me that the two should continue to operate together if possible…
>
> The second reason … is judicial economy. There can be little doubt that the criminal and civil sides of the law can be invoked under the same facts. By having both criminal and civil liability decided under the same test, the parties involved may avoid the need for two trials…
>
> The third rationale lies in the similarity of purpose between the two uses of the doctrine. The fact is that, whatever the circumstances of its application, the identification doctrine is designed to answer one question: when should an individual's mental state be considered to be that of the corporation? Given that the question to be answered is the same in both contexts – civil and criminal – should the methodology for answering that not also begin at the same point. A corporation is a legal person. We are in the process of assessing whether this legal person has given mental state. At least at the level of theory, it would seem logical that the same test be applied to answer that one question.[149]

4.86 In practice, we do not envisage that changing the basis of liability will have extensive consequences for the civil law.

4.87 First, in relation to civil disputes between the company and a third party, the company will often be liable, notwithstanding that the conduct cannot be attributed to the company under the identification doctrine. Where a senior manager carries out criminal conduct affecting a third party, even if the company is not liable on the basis of attribution of the director's conduct to the company, it will very often be vicariously liable for the conduct or liable in negligence for the harm caused to the third party's interest by its own failure to identify and prevent the conduct.

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148 [2016] QSC 109.

149 D MacPherson, "The Civil and Criminal Applications of the Identification Doctrine: Arguments for Harmonization" (2007) 45 Alberta Law Review 171, 193-196.

4.88 Second, many of those civil cases in which the identification doctrine is invoked involve situations in which liability is in question between the culpable director(s) and those *now* running the company, and concern attempts by the culpable director(s) to invoke the doctrine of illegality. However, public policy considerations (sometimes referred to as the "fraud exception") will usually prevent the identification doctrine being used in this way.

4.89 The terms of reference for this options paper require us to consider the relationship between the criminal and civil law, but we are not in a position to make recommendations in relation to the latter. Suffice it to say that if changes are made to the identification doctrine in relation to criminal liability, it will be necessary to consider whether these should be mirrored with respect to civil law, and if so whether this should be by statute or development of the common law.

Chapter 5: "*Respondeat superior*" liability

INTRODUCTION

5.1 The doctrine of *respondeat superior* is the primary model of corporate criminal liability in the federal courts and most state courts in the US.[150] It enables a company to be held criminally liable for the activities of its employees and agents, where they commit offences within the scope of their employment and their acts are, at least in part, motivated by an intent to benefit the corporation.[151] As we noted in the discussion paper, the company does not need to have gained from the activity to be liable, provided the actions were intended to be favourable to the company's interests, even if the primary motivation was the personal gain of the employee.[152] The doctrine can be applied to employees of any level, provided they were acting broadly within their role.

5.2 The doctrine of *respondeat superior* differs from the primary attribution mechanism in England and Wales – the identification doctrine – in that the conduct and mental state attributed can be that of any employee or agent, not just the "directing mind and will" or senior leadership of the company.

5.3 *Respondeat superior* is often described as a form of vicarious liability. It can be argued that *respondeat superior* is not a form of vicarious liability, but rather a mode of attribution, although the distinction comes close to collapse at this point.

5.4 Under vicarious liability, a person A is held legally liable for the conduct of another person B. In *Lister v Hesley Hall*, it was held that "[v]icarious liability is legal responsibility imposed on an employer, *although he is himself free from blame*".[153] So, for instance, in that case, the owners of a boarding annex of a school for children with emotional and behavioural difficulties were held legally liable to compensate victims of sexual abuse carried out by a warden there, on the basis that there was a "close connection" between the abuse and the warden's employment. There was no suggestion, however, that the sexual abuse carried out by the warden was in any sense carried out "by" the school.

5.5 Vicarious liability in civil law is not limited to corporations. A natural person may be vicariously liable for the acts of his or her employee or agent.

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150 Dr Alison Cronin's submission.

151 Corporate Criminal Liability: A discussion paper, 6.2.

152 Corporate Criminal Liability: A discussion paper, 6.5.

153 *Lister v Hesley Hall* [2001] UKHL 22 (emphasis added).

5.6 The main rationales for vicarious liability are considerations of public policy. In the *Christian Brothers* case,[154] Lord Phillips gave five public policy reasons for imposing vicarious liability on employers:

(1) 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;

(2) the tort will have been committed as a result of activity being taken by the employee on behalf of the employer;

(3) the employee's activity is likely to be part of the business activity of the employer;

(4) the employer, by employing the employee to carry on the activity will have created the risk of the tort committed by the employee;

(5) the employee will, to a greater or lesser degree, have been under the control of the employer.

5.7 In contrast, the need for a rule of attribution in criminal law, of which *respondeat superior* is one, arises because corporate bodies can generally only perform acts through natural persons, and therefore a rule of attribution is necessary to decide which acts are those "of" the company. When a company is convicted of a criminal offence under *respondeat superior*, it is not convicted on the basis that "another person" did the act in question but it is expedient to convict the company, but rather that that person's acts *were* those of the company.

5.8 Crucially, *respondeat superior* is not used in criminal law to attribute criminal liability to natural persons (which would be truly vicarious, as it is difficult to see how the acts of one natural person could simultaneously be the acts of another natural person).[155]

5.9 As we noted at the outset of this chapter, *respondeat superior* is the usual mode of attribution for corporate liability in United States jurisdictions. As with the development of corporate criminal liability in England and Wales, this development was driven by the implications of criminal legislation affecting railway companies. In *New York Central & Hudson River RR Co v United States*,[156] the US Supreme Court had to consider the constitutionality of the Elkins Act, which made it a misdemeanor for a rail carrier to offer preferential rates. The Act provided that:

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154 *Catholic Child Welfare Society and others v Various Claimants and the Institute of the Brothers of the Christian Schools and others* [2012] UKSC 56, at [35].

155 In "common enterprise" or "joint enterprise" cases, and in particular in those cases where two or more people join in committing a single crime, in circumstances where they are, in effect, all joint principals, each defendant will be liable for the acts of the others (*A, B, C and D v R* [2010] EWCA Crim 1622), and it is not necessary to establish who was responsible for the particular acts (*R v Swindall and Osborne* (1846) 175 ER 95).

156 (1909) 212 US 481.

> the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier acting within the scope of his employment shall in every case be also deemed to be the act, omission, or failure of [the] carrier.

5.10 Upholding the constitutionality of the Elkins Act, the Supreme Court held:

> We see no good reason why corporations may not be held responsible for and charged with the knowledge and purposes of their agents, acting within the authority conferred upon them. If it were not so, many offenses might go unpunished and acts be committed in violation of law where, as in the present case, the statute requires all persons, corporate or private, to refrain from certain practices, forbidden in the interest of public policy…
>
> We see no valid objection in law, and every reason in public policy, why the corporation, which profits by the transaction, and can only act through its agents and officers, shall be held punishable by fine because of the knowledge and intent of its agents to whom it has entrusted authority to act in the subject matter.

5.11 However, although the Supreme Court held that a statute imposing corporate liability *could* be constitutional, it did not compel *respondeat superior* where a statute was silent on the matter. Nonetheless,

> lower courts interpreted the decision as essentially mandating a strict *respondeat superior* rule in all corporate cases (civil or criminal), even absent statutory incorporation... Subsequent courts rendered *New York Central's* holding a general rule: an employee's actions and mental state may be attributed to the corporation despite being in violation of contrary corporate policy. They further expanded the doctrine by holding that employees need only act within the apparent scope of their authority to act on behalf of the corporation. And although an additional requirement that the employee must act, at least in part, for the purpose of benefitting the corporation seemingly limited the doctrine … the benefit requirement is satisfied even if the conduct causes substantial harm to the corporation, so long as a jury can infer some potential benefit.[157]

5.12 The doctrine thus makes it easier successfully to prosecute large companies than under the more restrictive identification doctrine. It enables companies to be held to account where they have benefitted, or were intended to benefit, from wrongful conduct committed by people operating at more junior levels in a company's hierarchy than other attribution models.

5.13 However, its breadth has also led to criticisms, including that the efforts of a company to discourage employees from committing criminal offences are effectively ignored.[158] The argument goes that if the corporation is held liable for the criminal conduct of the employee, regardless of any steps they have taken to prevent it, then they will not be incentivised to take preventative measures. A counterargument to this is that if the preventative measures are successful in preventing the employee from committing the

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157 Robert Luskin, "Caring About Corporate "Due Care": Why criminal *respondeat superior* liability overreaches its jurisdiction" [2020] 57 American Criminal Law Review 303.

158 Corporate Criminal Liability: A discussion paper, 6.15.

offence, they will prevent the company becoming liable – which provides an incentive to take preventative steps.

5.14 It is also worth noting that domestic competition law – that is, law relating to anti-competitive agreements[159] and abuse of a dominant position[160] – holds corporate bodies responsible where the conduct in question is that of an employee, and in some cases an agent, with no requirement that the person represent the company's directing mind and will.

5.15 Competition law is quasi-criminal: the regulator, the Competition and Markets Authority, has the ability to impose fines of up to ten per cent of worldwide revenue where the anti-competitive conduct has been committed intentionally or negligently by the undertaking.[161] Although these are administratively imposed, they are intended to be penal sanctions. Findings and penalties may be appealed to the Competition Appeals Tribunal.[162]

5.16 EU law also provides for sanctions for anti-competitive agreements and abuse of a dominant position, and jurisdiction to enforce this is shared between the European Commission and national competition authorities. Again, the regime is quasi-criminal[163] but the powers are extensive: the Commission can issue penalties of up to ten per cent of global turnover, and while the Commission's findings can be challenged, and penalties can be cancelled, reduced or increased by the Court of Justice of the European Union, this is in the nature of judicial review of an administrative sanction rather than a judicially imposed penalty. Parent companies can be held liable for anti-competitive activity by wholly (or nearly wholly) owned subsidiaries.[164]

CONSULTATION QUESTION

5.17 In light of this discussion, we asked consultees the following at Question 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?

5.18 Of the consultees who responded to this question, a slim majority opposed the option of adopting the *respondeat superior* model in England and Wales.

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159 Competition Act 1998, ss 2-11.

160 Competition Act 1998, ss. 18-19.

161 Competition Act 1998, s 36(3).

162 Competition Act 1998, Schedule 8 para 3.

163 Case T-541/08 *Sasol and others v Commission* EU:T:2014:628 [2014] 5 CMLR 16.

164 Case C-595/18 P *The Goldman Sachs Group v Commission* EU:C:2021:73.

Comparative safeguards

5.19 One of the main reasons consultees gave for opposing this option was that it could only be applied if it had the safeguards that accompany it in the US. There was an indication from consultees that *respondeat superior* created an over-wide basis for liability, with subsequent reliance on prosecutorial discretion. The US system affords flexibility through DPAs, non-prosecution agreements and discretion not to prosecute. There is, for example, guidance in the form of memos on Federal Prosecutions which requires prosecutors to consider factors before commencing prosecution, for example, the "collateral consequences" to employees, investors and the economy.[165]

5.20 By contrast, some consultees compared the CPS's Full Code test, which requires prosecutors to assess whether a prosecution is in the public interest. Notably, this does not include consideration of the collateral consequences of a prosecution. Similarly, the CPS and the SFO can enter into DPAs with companies, but not agreements not to prosecute organisations altogether.

5.21 For clarity, the Full Code test which prosecutors currently apply in England and Wales is met when prosecutors:

(1) Are satisfied that there is sufficient evidence to provide a realistic prospect of conviction against each suspect on each charge [such that a conviction is more likely than not]; at which point a prosecution will usually take place unless

(2) There are public interest factors tending against prosecution which outweigh those tending in favour.[166]

If *respondeat superior* were introduced in the law of England and Wales, the threshold test would likely permit a corporate prosecution where a junior employee acted contrary to company policy, even for an offence requiring a mental element.

5.22 This is compared to non-prosecution agreements used in the US. The Fraud Lawyers Association noted that:

> the successes in the US come with the protection of the established provision for Non-Prosecution Agreements ("NPAs") which, in the face of strict liability, allows the corporate to make representations to the US prosecuting authority not to prosecute.

5.23 At present, it would not be permissible for corporates to make representations to prosecutors, and there is no scope for prosecutors to consider them outside of the Code Test.

5.24 These differences and the consequences they would have if *respondeat superior* were introduced in English law were summarised by Jamas Hodivala QC, on behalf of the Fraud Lawyers Association:

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165 Nicholas Ryder, "Too scared to prosecute and too scared to jail? A critical and comparative analysis of enforcement of financial crime legislation against corporations in the USA and the UK", J. Crim. L. 2018, 82(3), 245-263, 252.

166 Crown Prosecution Service, *The Code for Crown Prosecutors,* October 2018.

In short, without wider statutory reforms and changes to the operating models and resourcing of English and Welsh prosecuting authorities, we consider that strict vicarious liability would be more punitive if adopted in our system than it is in the US and this would therefore have the effect of seriously discouraging large commercial enterprise in England and Wales.

5.25 These safeguards discussed by consultees have also been the subject of some of the criticism aimed at *respondeat superior* in the US. It has been said that it gives too much power to prosecutors; it has resulted in non-statutory approaches to determining whether and when to pursue the corporation; and there have been concerns that in practice it is disproportionately used to target smaller businesses.[167] This last criticism is also frequently aimed at the identification doctrine in England and Wales, suggesting that an expansion of the legal basis of corporate criminal liability will not necessarily lead to a broader range of companies being prosecuted and convicted.

5.26 The *respondeat superior* doctrine has received criticism that it is too wide, because it enables the actions of an employee at any level of seniority to bind the company. The criticism is that this is unfair in principle.

5.27 It has also been said that it is too narrow: in order to convict a company of a criminal offence, a prosecutor must prove that a single individual within the corporation had all the necessary knowledge to make out the offence. Some therefore argue that despite its perceived width, it still presents unforeseen barriers to successful prosecutions.[168] As such, *respondeat superior* would not necessarily be a silver bullet despite the fact that it provides a wider basis for attributing liability than English law.

The relationship between criminal and civil law

5.28 Under our terms of reference, we are required to consider the relationship between civil and criminal liability. As a model of liability, the US's *respondeat superior* is the nearest analogue to the liability corporations have in civil law in England and Wales. So, for example, under the rules of agency in the civil law of England and Wales, the actions of the employee can bind the employer to a contract when acting within their actual or apparent authority, and in tort law an employee can make their employer vicariously liable to third parties with whom they interact.[169]

5.29 That said, it should be recognised that in recent years, vicarious liability in the civil law of England and Wales has expanded further. In *Various Claimants v Catholic Welfare Society*,[170] Lord Phillips said, "vicarious liability is on the move". In *Lister v Hesley*

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167 Corporate Crime Reporter, "To strengthen corporate criminal law, get rid of the doctrine of respondeat superior", 26 July 2021, available at https://www.corporatecrimereporter.com/news/200/to-strengthen-corporate-criminal-law-get-rid-of-the-doctrine-of-respondeat-superior/. See also, Nicholas Ryder, "Too scared to prosecute and too scared to jail? A critical and comparative analysis of enforcement of financial crime legislation against corporations in the USA and the UK" (2018), 82 Journal of Criminal Law 245-263 for examples of prosecutions which caused corporations to fold.

168 M Diamantis, "Functional Corporate Knowledge", (2019) 61 William & Mary Law Review 319, 340.

169 M Dsouza, "The corporate agent in criminal law – an argument for comprehensive identification" (2020), 79 Cambridge Law Journal 91-119, 107.

170 [2012] UKSC 56, at [12].

Hall,[171] the House of Lords held that the appropriate test for vicarious liability was whether there was a sufficiently "close connection" with the employment that it would be fair and just to hold the employer responsible, rather than whether it was "within the scope of" the employment, or "a wrongful act authorised by the master or a wrongful and unauthorised mode of doing some act authorised by the master".[172]

5.30 Conversely, in the United States, vicarious liability in civil law and criminal liability under *respondeat superior* remain relatively closely aligned.

5.31 Practically, therefore, this divergence between English and US civil law means that even if *respondeat superior* along American lines were to be adopted for criminal liability in England and Wales, there would likely be different tests for establishing whether a corporation was responsible for misconduct by an employee depending on whether the issue was one of criminal liability or civil liability.

5.32 We do not think that criminal liability could be so broad as the test for vicarious liability under civil law. For instance, it would not be appropriate for a corporate body to be found guilty of sexual assaults in circumstances such as those which gave rise to civil liability in cases such as *Lister v Hesley Hall* or the *Christian Brothers* case.

5.33 There are different rationales for imposing civil and criminal liability on employers. In broad terms, civil liability aims to allocate risk between parties and to ensure that those who suffer loss as a result of a breach of duty are compensated insofar as is possible, by those who caused their loss. These principles do not align with criminal culpability, which reprimands the acts society has decided are the most wrongful and/or harmful. It has been said that

> Crime is crime because it consists in wrongdoing which directly and in serious degree threatens the security or well-being of society, and because it is not safe to leave it redressable only by compensation of the party injured.[173]

Using this excerpt to find a definition of a "crime", Smith and Hogan distinguish between civil and criminal wrongs:

> Crimes generally involve behaviour which has a particularly harmful effect on the public and goes beyond interfering with merely private rights.[174]

5.34 It is a criticism of *respondeat superior* that it does not sufficiently engage with criminal culpability. It makes no difference to liability under *respondeat superior* that the conduct was contrary to corporate policy or that the company had taken steps to prevent the conduct.

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171 [2002] 1 AC 215.

172 Salmond on Torts, (1st ed 1907), p 83 and Salmond and Heuston on Torts, (21st ed 1996), p 443 cited in *Lister v Hesley Hall* [2002] 1 AC 215, at [15].

173 CK Allen, "The Nature of a Crime" (1931, Vol. 13 No. 1), Journal of Comparative Legislation and International Law, 11.

174 Smith, Hogan and Ormerod, *Criminal Law* (16th ed 2021), p 3.

Other responses opposed to *respondeat superior*

5.35 A number of consultees expressed concern that that *respondeat superior* would make England and Wales a less attractive place to do business. This was a theme among respondents who were generally opposed to proposals for broader models of liability, of which *respondeat superior* is one. The argument is that the more restrictive and burdensome corporate criminal laws become in this jurisdiction, the less attractive it will be to businesses and individuals.

5.36 An objection which was often raised alongside this argument was the compliance burden any new or altered rules would place on companies. This concern has been recognised since the inception of the project and has remained a factor for consideration throughout consultation.[175] The concern was articulated in response to this question because it would constitute a radically different basis of liability, and therefore would entail compliance work for companies. For example, GC100 said

> The application of the *respondeat superior* principle in the US and the possibility that a very junior employee's behaviour can be attributed to the company creates a significant compliance burden to little benefit.

5.37 There was also opposition to this option on a principled basis. Alison Saunders DBE, responding for Linklaters, said

> If one accepts the principle that serious criminal offences should not operate on a strict liability basis, it seems manifestly unfair to hold companies criminally liable for substantive offences where employees – especially junior ones – have engaged in economic crimes contrary to company policies or controls.

Similarly, the City of London Law Society's Corporate Crime Committee said:

> vicarious liability, as a concept, sits uncomfortably with other, prior, principles of the criminal law, which include the importance of *mens rea* for the most serious offending.

5.38 An important concern raised by consultees was, as noted above at paragraph 5.13, the disincentive to maintain legal and regulatory compliance if the acts of any employee could be attributed to the company. The perception that this model would create a compliance disincentive has developed because the doctrine operates as long as the employee or agent acted unlawfully and with the intention to benefit the company, without a defence which considers compliance efforts. The CPS shared the concern that this would be counterproductive:

> Such a model would not draw a distinction between companies with comprehensive compliance programmes and those without, and therefore might not provide such a strong incentive to develop such programmes.

5.39 Baker McKenzie similarly said that any attribution model "must involve an assessment of the compliance measures in place to prevent commission of the relevant offence." There was acknowledgement within some responses that the current framework for

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[175] Corporate Criminal Liability Options Paper, Terms of Reference, para 1.3.

corporate criminal liability is beneficial because, at least in part, it incentivises better corporate compliance than would be achieved without the threat of a criminal conviction, or even a criminal prosecution.

5.40 The Transparency Task Force said, in answer to Question 8 about failure to prevent offences, that the "failure to prevent" regime "has proved effective for bribery and tax evasion in raising awareness and encouraging companies to put in place better compliance systems." It can be said that the offences themselves, for example the failure to prevent bribery offence, are powerful not for their conviction record but for the threat they present of possible conviction. This effect can only materialise, however, if the offence has a due diligence-style defence. It is thought that the principles of good corporate governance are drawn out by guidance provided with defences, which are enacted because of the possibility of defending oneself.

5.41 There was also a concern that lowering the threshold undermines the value of a criminal prosecution, which was voiced by Linklaters:

> If the threshold for corporate liability were lowered to that extent, there is a risk that corporate prosecution would be viewed by some as a cost of doing business rather than as an incentive to operate a robust compliance model.

ANALYSIS OF THE SUPPORT FOR THE OPTION

Making prosecutions easier

5.42 One of the main arguments given by those who thought there was merit in this option was the increased prosecutorial reach it would provide. The US rates of prosecution were cited as an example of the accountability which could be achieved if this model were used. Spotlight on Corruption were among those sharing this view, who said "there is little doubt that the United States' vicarious liability regime has allowed one of the strongest records on corporate prosecutions across the board globally." In particular, some consultees valued this model because it removes the senior management threshold requirement from the identification doctrine. This was seen as a way of overcoming the difficulty of applying the present doctrine to larger companies.

5.43 It is notable that some consultees who saw merit in the model also discussed the need for procedural safeguards and a defence, to ensure the wide basis does not result in unfairly high and frequent penalties for companies.

5.44 While the SFO did not support *respondeat superior* as their preferred option, they considered there was merit in adopting aspects of the doctrine in formulating a statutory rule of attribution. They proposed an option which would base corporate liability on the offending of "an officer, employee or agent, or person associated with it" where they intend "to obtain or retain business for the company; or to obtain or retain a business or financial advantage for the company."

Circumstances in which *respondeat superior* would be appropriate

5.45 The second part of this question asked consultees to give circumstances in which it would be appropriate to hold a company responsible for its employee's conduct. Several organisations (Spotlight on Corruption, UK Anti-Corruption Coalition,

Transparency International UK, the APPG on Fair Business Banking and Transparency Task Force) thought the Netherlands model of vicarious liability was the most appropriate form through which to attribute liability. The Netherlands model is similar to that of the US, attributing liability based on factors including the following:

(1) the conduct constituting the offence is within the normal course of business of the corporate entity;

(2) the corporate entity benefitted from the offence;

(3) the offence was committed by an employee of or a person working on behalf of the corporate entity;

(4) the corporate entity could have prevented the conduct but failed to do so, and therefore is taken to have accepted it.[176]

This approach is favoured by the organisations who drew our attention to it because it is a similar model to the US. It is a wide, blanket model in which a corporation can in theory commit any crime under the above indicators of attribution. One difference between the Netherlands and the US is that the last factor is analogous to the failure to prevent model, indicating that it would allow for evidence of measures taken to prevent the criminal conduct.

5.46 Mia Campbell, writing for the Fraud Advisory Panel, said vicarious liability "should be limited to more serious offences, such as economic crimes, or those which result in significant harms to others or benefits to the company."

5.47 However, there is a principled objection to the argument that there should be a wider basis of liability for serious offending but not for less serious offending, which is that the punishment and stigma associated with a finding of a serious offence will generally be more serious than those for a minor offence, which is why the courts have generally held that only for less serious offences are strict or vicarious liability to be inferred. In practice, it would also be difficult to determine whether corporate offending was more or less inherently harmful in any given case, without engaging in the sentencing practice of examining the harm caused and the level of culpability.

5.48 Some consultees suggested that vicarious liability would be appropriate where the company has benefitted from the wrongdoing, which is a requirement of *respondeat superior.*[177] It is also similar to a feature of the Bribery Act failure to prevent offence, which requires that the bribe is to obtain or retain a business advantage for the company, or in the conduct of business. Failure to prevent offences and vicarious liability have been likened to each other and support for vicarious liability was expressed on the basis that it is similar to the familiar failure to prevent model. Though on one interpretation the approaches are similar – both constitute a direct attribution of liability – failure to prevent offences mean the company is liable only for its failure to prevent the underlying criminal conduct occurring. In other words, these offences do not directly attribute liability to the company for the positive act of committing the

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176 Clifford Chance, *Corporate Criminal Liability*, April 2016.

177 See para 5.7 on the distinction between *respondeat superior* and vicarious liability.

substantive or underlying offence, only for the failure to prevent an associated person from doing so. Conversely, the identification doctrine directly attributes liability for the positive act of committing the offence. *Respondeat superior* is an alternative to the identification doctrine, not an alternative to failure to prevent offences, and therefore it is not analogous to the type of liability for which it received some support.

CONCLUSION

5.49 The majority of consultation responses did not support this option, and this analysis has identified further problems with its potential implementation. However, a significant minority supported it.

5.50 One of the most common arguments in favour was that it will make corporate prosecutions easier to achieve. As has been discussed, however, we do not consider this a principled reason for which such a decision should be made: the question is whether a company *should* be criminally liable for the acts of its employees, and if so, in what circumstances.

5.51 We also recognise that *respondeat superior* has come under sustained criticism from academic commentators in the United States.

5.52 Adopting *respondeat superior* would represent a fundamental change in corporate criminal liability in England and Wales.

5.53 Other issues with this option – including the inappropriateness of the breadth of vicarious liability in civil law as a basis of culpability in criminal law, and practical concerns about prosecutorial safeguards – further support the majority's conclusion that this option is unsuitable. As such, there is insufficient evidence to support the proposition that a company should be liable for the criminal acts of any of its employees. For these reasons, we do not consider the adoption of *respondeat superior* to be a suitable alternative to the identification doctrine.

Chapter 6: "Corporate culture" and similar models of attribution

INTRODUCTION

6.1 The models of attribution we have discussed so far – the identification doctrine, a wider identification principle including senior management, and *respondeat superior* – all seek to identify one or more natural persons whose acts and mental states are attributed to the corporation.

6.2 However, other models of liability attribution have been proposed and in some cases enacted which look not to natural persons to stand for the corporate but instead seek to find analogies to fault elements developed with natural persons in mind that can be applied to complex organisations. For instance, instead of looking for a corporate "mind and will", the model will look for corporate culture, policy and practices; instead of looking for a natural person who authorised conduct, the model will seek to establish if those culture, policies or practises encouraged, permitted or licensed the conduct.

THE AUSTRALIAN MODEL

6.3 Since 1995, this approach has been incorporated into the federal Criminal Code of Australia. For offences with fault elements other than negligence – for example, intent – one way in which a corporation can be guilty of an offence if it expressly, tacitly or impliedly authorised or permitted the commission of the offence. To attribute the offence using the corporation's culture, it must be proved that

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

(2) the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.[178]

6.4 A "corporate culture" is defined in the federal Criminal Code as: "an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes place."[179] Some of these concepts are clearer than others – a policy and a rule can in many cases be understood through the documents they were disseminated in, whereas it may be difficult to evidence an attitude or practice.

6.5 Factors relevant to the application of corporate culture as a fault element include:

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178 Criminal Code Act (Cth) (1995), s 12.2(c) and (d).

179 Criminal Code Act (Cth) (1995), s 12.3(6).

(1) whether the authority to commit the same or a similar offence had been given by a high managerial agent of the corporate; and

(2) whether the employee, agent or officer who committed the offence reasonably believed, or had a reasonable expectation, that a high managerial agent would have authorised or permitted the commission of the offence.[180]

6.6 Even if company management does not permit the commission of an offence, there may still be a corporate culture of non-compliance if there is tacit permission for other employees to commit *similar* offences.[181]

6.7 There has been debate in Australia about the effectiveness of these provisions. The discussion paper details recent recommendations by the Australian Law Reform Commission ("ALRC") effectively to widen the corporate criminal liability provisions, by moving away from the concept that the corporate culture directed or encouraged conduct, to a format similar to *respondeat superior*. Among the reasons for this are the concept's lack of clarity, undefined boundaries, and high threshold in trying to capture a culture within a singular policy or practice. It was also notable that since the provisions relating to corporate culture have been in place in Australia (for over twenty years), the ALRC says they have only been considered in one case, in which the judge ordered the jury to acquit.[182] These concerns expressed by the country's own law reform body, and the lack of jurisprudence, were determining factors for many consultees when doubting the suitability of this option for English law.

6.8 A particular issue with the corporate culture approach is that the legislation specifically deals with the attribution of "intention, knowledge or recklessness" (and, elsewhere, negligence). Thus, other states of mind, and in particular dishonesty, are not attributable under the Criminal Code. In *R v Potter & Mures Fishing*,[183] a charge against a corporation for an offence requiring proof of dishonesty was dismissed after the judge held that dishonesty could not be attributed under the relevant section.

6.9 In March 2020, the Australian Law Reform Commission published a report on corporate criminal liability which recommended amendment of the corporate culture mode of attribution. It provided two possible options for reform of the corporate liability model. One would remove the corporate culture provisions altogether. Even under the other model, however, the second limb – that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision – would be removed. The Commission said

> There is a conceptual difficulty in having to prove, beyond reasonable doubt, the failure to create and maintain a theoretical culture which, had it existed, would have required compliance with the relevant provision.[184]

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180 Criminal Code Act (Cth) (1995), s 12.3.

181 See Corporate Criminal Liability: a discussion paper (2021) para 6.25.

182 Australian Law Reform Commission, *Corporate Criminal Responsibility* (2020), para 6.108.

183 Unreported. See Australian Law Reform Commission, *Corporate Criminal Responsibility* (2020), para 6.108.

184 Australian Law Reform Commission, *Corporate Criminal Responsibility* (2020), para. 6.106.

CONSULTATION QUESTION

6.10 The question we asked consultees in relation to this option was:

> 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?

Analysis of opposition to this approach

6.11 One of the commonly held views about this option was that it is theoretically attractive, because it could capture some misconduct which amounts to criminality which is so widespread within an institution that it seems reasonable to assess its culture. For instance, the evidence of phone hacking at tabloid newspapers appears to be a situation where a "corporate culture" model would and should capture the conduct.

6.12 In his 2012 inquiry into the culture, practices and ethics of the press, Leveson LJ found that

> Without attempting to draw any conclusions about how many journalists or executives were engaged in, or aware of, phone hacking, it does seem clear … that there was "a culture of illegal information access" deployed at [News Group Newspapers] in order to produce stories for publication. It is inconceivable that this was not symptomatic of a broader culture at the paper which regarded the imperative of getting information for stories as more important than respecting the rights of any individuals concerned or, indeed, compliance with the Editors' Code or the law.[185]

6.13 Equally, "corporate culture" seems to capture businesses operating by systematic mis-selling amounting to fraud (i.e. dishonest, false statements in order to make a gain): such a business could be seen as having a 'culture of non-compliance', and as having systems and procedures which encourage the practice.

6.14 However, this view often led consultees to the conclusion that in practice, this option is not viable. As such, a significant majority of responses to this question expressed the view that there was no merit in the option. The main reasons for this were: the lack of clarity in the definition of "corporate culture"; a concern that the concept is too nebulous; and the lack of prosecutions that have actually eventuated in Australia under this formulation. The lack of prosecutions has meant that there is little evidence of its successful use, which caused many consultees to doubt its efficacy. One such consultee was the SFO, who said:

> The Australian approach with respect to corporate culture has been "little-used" and has therefore yet to be fully tested. In contrast, nine of the twelve DPAs secured by the SFO include section 7 Bribery Act 2010 [failure to prevent] offences. Whilst in principle, there may be some merit in an approach that allows for liability to be attributed to a company in a wider range of circumstances, the SFO considers that

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[185] The Leveson Inquiry, "A report into the culture, practices and ethics of the press", The Right Honourable Lord Justice Leveson, November 2012, Vol 2, p 512.

the more appropriate and effective solution for the UK would be to focus upon a wider range of failure to prevent offences.

6.15 Notably, Spotlight on Corruption also expressed reservations about the concept because it has not been proven effective in Australia. They said:

> The notion of 'corporate culture' has been criticised, as the Australian Law Reform Commission's report itself notes, for being too ambiguous. It is possible that proving a culture exists may also impose an additional and almost impossible burden on prosecutors.

6.16 Many consultees were concerned about the practical difficulties this option presents. Linklaters provided an assessment of some of the issues they foresaw with implementing such an approach:

> Careful thought would need to be given to defining what corporate culture is, what it requires, and how it can be established. This would, in our view, require detailed statutory guidance. Without such guidance, it would be extremely difficult to measure and demonstrate corporate culture. Evidential difficulties may also arise when seeking to prove that a corporate culture "tolerated" or "led to" non-compliance. This may mean that, in practice, in order to rely on this method of attribution, a "bad culture" (and not merely a lack of adequate procedures) must be proven, which may be difficult.

These difficulties would be exacerbated by the fact that there is currently no similar provision in English law, and therefore no analogous definitions to work from with respect to concepts such as whether a corporate "tolerated" non-compliance.

6.17 GC100 shared these concerns, and elaborated that the undefined nature of the concept of "corporate culture" would cause problems:

> The impracticalities of the model are readily discernible: objectively proving, beyond a reasonable doubt, that a corporation had a defective corporate culture (that tacitly or explicitly tolerated, encouraged or facilitated criminal misconduct) is likely to be very challenging indeed. The test, as formulated in Part 2.5 of the Criminal Code, is intentionally broad and indefinite to enable it to capture a range of corporate misconduct, but suffers from nebulousness and a lack of clear proscriptions. Not only does this make the model almost unenforceable, but it renders programmes to ensure compliance difficult for corporations to formulate.

6.18 There was also concern that it would place a significant burden on prosecutors. Transparency Task Force referred to it as presenting an "additional hurdle" for them. In the Australian model, the burden of proof is on the prosecution. Professor Elise Bant said one of the problems with the concept is that it does not establish the "evidential strategies and proofs that are required to prove a corporate culture and the connection between that concept and the specific mental states required by the law." These in theory could be developed through case law but the limited prosecutions in Australia do not bolster this argument.

6.19 Professor Bant points out that this also requires prosecutors to be "model litigants" taking test litigation. She argues that it is inappropriate to rely on test litigation to

reveal the “evidential strategies and proofs” of the corporate culture model in practice. Moreover, in practice, test cases could feasibly take the form of long trials with corporate bodies calling multiple witnesses in order to build a picture of a positive compliance culture.

6.20 The lack of successful prosecutions, the recommendations to move away from the model detailed at 1.4, and the practical difficulties make it difficult to support this option. This is compounded by its unfamiliarity in English law.

Overlap with failure to prevent offences

6.21 Jamas Hodivala QC, on behalf of the Fraud Lawyers Association, expressed the view that in substance, there would be an overlap between this concept and the existing failure to prevent offences. The overlap would mean that “whilst “adequate procedures” may afford a defence to one specific offence, inadequate implementation of those procedures may expose a risk of liability for attribution by “corporate culture”.” He argued that this would cause confusion for those attempting to implement good corporate governance.

6.22 It has been said (by consultees and more widely) that the failure to prevent offences are powerful because they incentivise corporate compliance, and therefore instil a positive corporate culture. It might be said that this result is similar to the intended result of a model which attributes liability based on a company’s culture. If companies know that their procedures will be examined, the incentive to implement procedures which are compliant with the law is clear. The overlap between the two models can again be seen here. The case for corporate culture as an attribution method is weakened, however, because it would be more difficult to implement in English law than further failure to prevent offences.

6.23 As we noted in the previous chapter when comparing *respondeat superior* to failure to prevent, the consequences of the two options are different: one of the key differences in the outcomes is that under failure to prevent offences, the company is not convicted of the positive act of committing the crime. The failure to prevent mechanism recognises that the company did not commit the crime – an individual within it did – but that the company shares a degree of blameworthiness for not preventing the wrongdoing. This is a weaker form of liability in one sense. But the Australian corporate culture model shows us that more convictions of corporate bodies do not necessarily follow from an ‘easier’ (wider) model, due in part to definitional issues.

The regulatory arena

6.24 There was some support for this option in theory but in a regulatory, rather than a criminal, context. Nick Barnard, Corker Binning, voiced support for the practicality of examining the culture in a large company to help determine liability, but said

> This is a test that more appropriately sits in the regulatory arena, and I would suggest that the same results can be achieved by improving and promoting the outcomes of regulatory action, rather than broadening the scope of criminal liability to an extent not seen elsewhere in UK law.

Underpinning regulatory offences with a liability basis which examines the culture of a corporate body may enable action to be taken on a wider range of wrongdoing.

However, this option was mooted as an alternative to the way in which criminal liability is attributed to a company. The wrongdoing the identification doctrine is used to prosecute, or is hoped to be used to prosecute, such as fraud, remains a criminal offence. It is therefore a different exercise to taking regulatory action.

Analysis of support for the option

6.25 A minority of respondents thought that there was merit in this approach. The main reason for this appeared to be that it would strengthen the ability of prosecutors to target actions perpetrated by employees and agents who operate below the senior management level, and certainly below the directing mind and will level.

6.26 There was some support for the option on the basis that in principle, it is right to criminalise the actions of a corporate which can be traced to a permissive attitude.

6.27 The FCA also thought there was merit in the idea that "liability might arise from the existence of a certain corporate culture (or failure to prevent a certain corporate culture), as opposed to attribution simply being dependent on a particular individual or group."

6.28 The Financial Crime Compliance Research Group expressed support for this option because it provides flexibility. They said

> With regard to the financial crime committed within a corporate environment, the accusation levelled at prosecutors during the LIBOR cases was the pursuit of fairly junior employees, with not enough consideration of the broader environment which may have contributed to, or even encouraged such criminal behaviour.

6.29 This may be taken as a criticism of the lack of criminal prosecutions of the companies within which individual traders found to have manipulated the LIBOR rate worked. There were, however, significant financial penalties imposed on banks by the FCA: Barclays was fined £59.5 million[186] and UBS was fined £160 million.[187]

An alternative – the systems intentionality approach

6.30 As part of our consultation, we also had the opportunity to consider what has been described as a "systems intentionality" approach to corporate fault. As this, like the "corporate culture" approach, is concerned with drawing corporate analogies to personal fault elements rather than identifying natural persons with the requisite fault whose personal behaviour is attributed to the company, we consider such approaches here.

6.31 Elise Bant is a Professor of private law and commercial regulation at the University of Western Australia. She proposed an alternative to the identification doctrine which moves away from a grounding in the acts of individuals, towards an approach which

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186 Financial Conduct Authority, "Barclays fined £59.5 million for significant failings in relation to LIBOR and EURIBOR", 27 June 2012, available at: https://www.fca.org.uk/news/press-releases/barclays-fined-%C2%A3595-million-significant-failings-relation-libor-and-euribor.

187 Financial Conduct Authority, "UBS fined £160 million for significant failings in relation to LIBOR and EURIBOR", 19 December 2012, available at: https://www.fca.org.uk/news/press-releases/ubs-fined-%C2%A3160-million-significant-failings-relation-libor-and-euribor.

conceptualises the corporate's state of mind as its "systems, policies and practices".[188] Professor Bant summarises the systems intentionality approach as follows:

> Corporations adopt systems that enable them to make and implement decisions and respond purposefully to events… Corporations use systems that reveal their corporate purposes. The subordination or supplanting of human actors through adopted systems (including automated and algorithmic systems) does not destroy our capacity to understand the user's intention from the nature of the system that is adopted and applied. Further, we can infer some knowledge of the user from what is necessary for the system to function.

6.32 Although it is common to talk of requiring "proof" of intent, intention is not required to be proven independently of conduct. This may happen on occasion – for instance, where a suspect makes a confession in a police interview admitting what they were intending to do, or has told others in advance what they are planning. In many cases, however, the court is invited to *infer* intent from conduct. In England and Wales, the Criminal Justice Act 1967 provides that

> A court or jury, in determining whether a person has committed an offence, —
>
> (a) shall not be bound in law to infer that he intended or foresaw a result of his actions by reason only of its being a natural and probable consequence of those actions; but
>
> (b) shall decide whether he did intend or foresee that result by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances.

6.33 One such common inference is as follows: if a person does a particular action which is highly likely to lead to a particular outcome, a court is entitled to infer that they intended that outcome. To take an example, if a person throws a stone at a window hard enough to break it, this is not conclusive proof that they intended to break the window. They may have been aiming somewhere else, not intending to hit the window at all, or they may have intended not to break the window but just to make a loud enough noise to arouse someone inside. However – and especially absent any other explanation – the court can *infer* that they intended to break the window.

6.34 A systems intentionality approach applies a similar principle to the conduct of organisations. For instance, where an organisation is accused of making a misleading statement in marketing materials, the fact that the system adopted for the production of such materials was apt to include false claims (for instance, if material used figures known to be prone to error, and there was no check before publication) would be evidence from which a jury might infer that the company "intended" to mislead.

6.35 The systems intentionality approach has several attractive features. First, like a corporate culture approach, it recognises that in practice not only is decision making in corporations diffuse, but it is more than just the sum of individual decisions. Corporate policies and systems have an effect on decisions taken by natural persons within

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[188] For the approach explained in full, see Elise Bant, "Culpable Corporate Minds" (2021) 48 UWA Law Review 352-388.

those organisations. Second, it is possible to extend it to decisions and actions taken automatically where corporations have chosen to contract out decision making to automated processes.

6.36 Third, and significantly, Professor Bant's approach is grounded in the sort of inferences already made by criminal courts in relation to personal defendants.

6.37 The way in which corporate intent is inferred is by demonstrating that the system was apt to lead to the criminal conduct, not just that an individual had the necessary intent. Thus, unlike *respondeat superior*, it is an approach which is apt to exclude the actions of truly "rogue" employees, since unless misconduct by individuals is truly "systemic" it will not be possible to infer the necessary intent.

6.38 The systems intentionality approach was considered by the Victoria Royal Commission into the Casino Operator and Licence (the "Crown Commission") which considered findings of money laundering and links to organised crime by Melbourne's casino operator. The Commission implicitly approved of the systems approach, concluding that "systemic and sustained change is needed for a culpable corporation to reform its character, as revealed through its systems, policies and processes".[189]

6.39 Systems intentionality is an attractive idea in some ways. In particular, it is grounded in a principle that already exists in the criminal law of England and Wales, namely the inferring of intention from reasonably foreseeable consequences. However, there are some challenges in operationalising this as a general model of attribution.

6.40 First, when intentionality is inferred for natural persons, natural and probable consequences are used to *infer* what is in the person's mind. It is not a different *form* of intent from direct intent, but a way of inferring one from the other.

6.41 Corporate intent, however, would be something different. Under a systems intentionality approach, the court would not be invited to infer that one or more natural persons representing the company actually had the intent, but that regardless of whether any natural persons had the intent, the corporation, in some sense, did. Thus, although both the processes of inferring intentionality for natural persons and corporations would be similar in the sense that they would be inferring intention from manifested outcomes, what was being inferred would be very different things: the former would be an inference as to a state of mind, the latter would be an inference as to a corporate goal.

6.42 Second, we think that in order to be viable, a different model of corporate *knowledge* would also be required. It is noted above that under systems intentionality *some* knowledge can be imputed. As Professor Bant notes, designing and operating a system requires knowledge of the sort of inputs and key functions. However, we question whether operation of a system would demonstrate the specific knowledge required to prove most offences.

6.43 Knowledge is a fundamental part of most fault elements. For instance, if a natural person destroys property, wrongly believing it be their own (and no one else's), they are not guilty of criminal damage because they lack knowledge that the property

189 Royal Commission into the Casino Operator and Licence, Report, para. 101.

belongs to another. If a person makes a false statement, believing it to be true, they are not guilty of fraud, since they lack knowledge that the statement is, or might be, false.

6.44 It is possible to have aggregate models of corporate knowledge which reflect the fact that knowledge within an organisation might be dispersed. Consider a situation in which A – say a firm's head of customer relations – knows that a firm's debtor will default on a payment due to be made. B, the financial director, has no reason to know that the debtor will default, but does know that without the payment the company will no longer be a going concern. The debtor does indeed default, but D, the Chair, unaware of this, makes a statement that the company is a going concern.

6.45 It could be said that in aggregate the company "knows" that it is no longer a going concern. And, therefore, that it knowingly makes a false statement. One might go so far as to suggest that a system of dispersed knowledge which makes it likely that such misleading statements might be issued could be said be one "designed" to make misleading statements. However, it is questionable whether it makes sense to say that the company *intended* to make a statement that it *knew* to be false.[190]

6.46 Knowledge is also fundamental because for many offences, mere intent to do the act is not in question, what matters is the intent do so in certain circumstances, or with certain consequences, or with awareness of a risk of such consequences (offences of recklessness, for instance), and knowledge of those circumstances, consequences or risks is therefore of crucial importance.

An alternative – the organisational fault approach

6.47 Dr Lorenzo Pasculli, Coventry Law School, proposed an alternative to the identification doctrine based on "organisational fault". He suggested this would be a model for attribution of direct criminal responsibility to corporate bodies. Actions by one or more people associated with the organisation could be attributed to it if the actions were committed by an associated person (an employee, agent or someone performing services for the organisation, acting in that capacity) and one or more of the following factors are present:

(1) the relevant act was fulfilled by one or more senior managers with the requisite mental state;

(2) the relevant act was fulfilled with the express or implicit authorisation or permission of a senior manager;

(3) the relevant act was "caused, enabled, permitted or facilitated by inadequate management, control or supervision of the conduct" of the associated persons who fulfilled the criminal act;

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190 *Armstrong v Strain* [1952] 1 KB 232: the necessary knowledge for the tort of deceit could not be found by adding the innocent mind of a principal, who knew facts which showed what his agent said to be untrue but did not know what the agent was saying, to the innocent mind of the agent who did not know that what he was saying was untrue.

(4) the relevant act was caused, enabled, permitted or facilitated by the way the organisation's activities are managed and organised; or

(5) the relevant act was caused, enabled, permitted or facilitated by the organisation's culture.

6.48 Dr Pasculli groups these five criteria of attribution into three main categories – policy and decision making, organisation and management, and culture. He defines "culture" as "the values, attitudes, orientations, and behavioural conventions expressed by the policies, rules, courses of conduct, practices or any other characteristic" of an organisation.

6.49 The model he proposed included a defence, which would operate where an organisation could "prove that it had effectively implemented adequate organisational, management and control models to prevent criminal conduct of the same or similar kind of that committed by its agents." This would operate in a similar way to the defences to the current failure to prevent offences.

6.50 This approach shares similarities with "systems intentionality": in its efforts to identify the corporate's mental state, it moves away from anthropomorphic attribution, in favour of a model which is bespoke to the way corporate bodies operate. They also both allow for aggregated knowledge, which gets closer to capturing the way decisions are made in companies, without the practical problem of how to aggregate knowledge between individual people within a company.

CONCLUSION

6.51 The corporate culture form of attribution was not supported by a majority of consultees, which means the evidence base from consultation points away from this model as a viable option. As some stakeholders note, it would be difficult to recommend an overseas model where the jurisdiction's own law reform body has said the model is not fit for purpose and should be reformed. There is also the issue that the Australian legislation is limited to attributing intent and recklessness, and therefore has not been able to accommodate – for instance – dishonesty. Therefore, and for the reasons above, we do not consider it a suitable option for reform to the identification doctrine.

6.52 For similar reasons, we have therefore concluded that while the systems intentionality and organisational fault models are interesting and potentially promising, neither is a possible model for wholesale reform of corporate criminal liability across the law of England and Wales.

6.53 In our 2010 Consultation Paper on Criminal Liability in Regulatory Contexts, we provisionally proposed that legislation should include specific provisions in criminal offences to indicate the basis on which companies might be found liable.[191] One example of a statute adopting a systems approach is the model of liability in the Corporate Manslaughter and Corporate Homicide Act 2007 (although here the model is concerned with a fault analogous to gross negligence rather than intent). It looks at "the way [the organisation's] affairs are managed and organised". We also note that

[191] Criminal Liability in Regulatory Contexts (2010) Law Commission Consultation Paper No 195, para. 1.62.

this same basis has subsequently been used to attribute corporate liability for the offence of ill-treatment or wilful neglect in the Criminal Justice and Courts Act 2015, section 21.

6.54 Similarly, it might be possible to consider the use of systems intentionality or corporate fault as a basis of liability when developing or reforming specific offences in the future, where this was felt to be an appropriate basis of liability. The experience gained from doing so might provide a basis for assessing whether such approaches might be a viable legal model for wider application.

Chapter 7: Conclusions on attribution of criminal liability to corporations

7.1 If corporate bodies are to be subject to the criminal law, we consider that it is inevitable that some general or default rule of attribution is necessary, in order that fault elements in offences designed primarily with natural persons in mind can be applied to corporate bodies. This does not preclude special rules of attribution for particular offences or classes of offence, whether these are incorporated in the enacting legislation itself or inferred by the courts.

OFFENCES REQUIRING PROOF OF FAULT

7.2 We do not think that either *respondeat superior* or a "corporate culture" approach should be pursued. Both would represent very substantial changes to the basis of liability in this jurisdiction. We are not convinced that *respondeat superior* is an appropriate model for attributing criminal liability to corporations. It has been much criticised in the United States as being overly broad and as giving too much power and discretion to prosecutors.

7.3 Models grounded in concepts such as "corporate culture" which seek not to look for a natural person with the required fault element, but to use instead corporate analogues, are attractive in theory. However, they remain largely unproven in practice. In particular, we do not think we can recommend the Australian "corporate culture" method of attribution given that it has been rarely used in Australia, and Australia's own Law Reform Commission has recommended that it be either amended or repealed. It might be possible to consider the use of such models as a basis of liability when developing or reforming specific offences in the future, where this was felt to be an appropriate basis of liability. The experience gained from doing so might provide a foundation for assessing whether such approaches might be a viable legal model for wider application.

7.4 Accordingly, for offences requiring proof of fault elements including intent, recklessness, knowledge and dishonesty, we consider that the choice is between (i) retaining the current identification doctrine (Option 1), and (ii) modifying the identification doctrine to extend the model of attribution to include the actions of individual directors and senior managers (Options 2A and 2B). Option 2A would define senior managers as those who play significant roles in—

(1) the making of decisions about how the whole or a substantial part of its activities are to be managed or organised, or

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

7.5 Option 2B would expand this definition to provide that the chief executive and chief financial officer are always to be considered senior managers.

7.6 Options 2A and 2B would:

(1) in respect of directors, restore the law to the position as it was widely thought to operate before *Barclays*, under which the conduct of a single director would generally be sufficient to fix an organisation with criminal liability; and

(2) in respect of senior managers outside the board, extend the law by making clear that their conduct, individually, could fix the company with criminal liability without having to show that there had been a "total delegation" of authority by the board.

OFFENCES OF NEGLIGENCE

7.7 As discussed in chapter 2, while the identification doctrine is in theory as applicable to the conduct element of an offence as to the fault element, in practice, for offences in which proof of fault is not required, the courts have often interpreted the legislation in a way which allows the acts of employees to be attributed to the employer.

7.8 There is no simple rule that strict or absolute liability offences can be attributed to a company. However, many strict liability offences are, in practice, offences for which the courts have been prepared to apply vicarious liability or accept that the act of the individual employee is the act of the company.

7.9 The courts are generally unwilling to interpret an offence as not requiring fault in the absence of clear Parliamentary intent. The exceptions tend to be those offences that are "not truly criminal" or "regulatory" offences. This is also a category where the courts are more likely to infer that Parliamentary intended vicarious liability to apply.

7.10 While this means the problem of attribution does not generally arise for strict liability offences, there *is* an issue with respect to negligence. As we discussed earlier, it is questionable whether negligence is a state of mind at all:

> It is sometimes argued that the absence of foresight or knowledge is just as much a state of mind as its presence, but since negligence may be proved without establishing anything as to what was going on in D's mind, It seems more appropriate to restrict the term [mens rea] to intention and recklessness.[192]

7.11 There are few crimes for which negligence is an explicit component. The common law offence of public nuisance was an offence of negligence[193] (and was an offence for which the courts applied vicarious liability), but the Police, Crime, Sentencing and Courts Act 2022, section 78, implementing recommendations we made in 2015,[194] will, once commenced, replace the common law offence with a statutory offence of intentionally or recklessly causing public nuisance.

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192 Smith and Hogan, Criminal Law, 10th edition.

193 Simplification of Criminal Law: Public Nuisance and Outraging Public Decency (2015) Law Com 358, para 2.12.

194 Simplification of Criminal Law: Public Nuisance and Outraging Public Decency (2015) Law Com 358, para 2.12.

7.12 Manslaughter is an offence of (gross) negligence; however, specific provision for corporate manslaughter is now made under the Corporate Manslaughter and Corporate Homicide Act 2007.

7.13 However, in a series of earlier cases dealing with liability for gross negligence manslaughter, the courts held in general terms that in order to convict a company, it was necessary to identify an individual with the requisite fault. This may initially have been because until *Adomako* in 1994, gross negligence for the offence of manslaughter was equated with recklessness, and therefore was a *mens rea* offence.[195] However, even after *Adomako*, the courts held that for gross negligence manslaughter, proof of fault on the part of an individual constituting a firm's directing mind or will was necessary.[196]

7.14 We think that it is an error to conceive of negligence in this way. In *Armstrong v Strain*,[197] which concerned the degree of knowledge for the tort of deceit, Lord Devlin commented "you cannot add an innocent state of mind to an innocent state of mind and get as a result a dishonest state of mind". This is not true, however, of negligence, since negligence is not the presence of a particular state of mind but – if it relates to a state of mind at all – the absence of one. A company may be corporately negligent even though no individual was personally negligent, precisely because no one was responsible for taking the necessary care to avoid commission of the offence. There may also be situations in which the actions of individuals, although negligent, were not so bad as to be "grossly negligent", but where cumulatively, they amounted to gross negligence on the part of the organisation.

7.15 It is for this reason that both the Canadian and Australian Criminal Codes have made special provision for offences of negligence.

7.16 In Canada, section 22.1 of the Criminal Code provides that

> In respect of an offence that requires the prosecution to prove 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 conduct, whether by act or omission, such that, if it had been the conduct of only one

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195 For instance, *R v East Kent Coroner, ex parte Spooner* [1987] 3 BCC 636: "A company may be vicariously liable for the negligent acts and omissions of its servants and agents, but for a company to be criminally liable for manslaughter – on the assumption I am making that such a crime exists – requires that the mens rea and the actus reus of manslaughter should be established not against those who acted for or in the name of the company but against those who were to be identified as the embodiment of the company itself."

196 *R v Great Western Trains* [1999] 6 WLUK 468; *Attorney General's Reference (No 2 of 1999)* [2000] QB 796: "In our judgment, unless an identified individual's conduct, characterisable as gross criminal negligence, can be attributed to the company, the company is not, in the present state of the common law, liable for manslaughter".

197 [1952] 1 K.B. 232.

representative, that representative would have been a 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.

7.17 Sub-section 22.19(a)(ii) is intended to cater for a situation in which more than one employee undertakes conduct which on its own would not constitute the conduct element of offence. The Canadian government used the following example: if an employee turned off three separate safety systems, leaving a factory unprotected, they might be guilty of manslaughter. However, if three employees separately turned off one system each, believing that the other two systems would provide adequate protection, they would not. What 22.19(a)(ii) does is aggregate the acts of the separate employees in order to attribute them to the corporation:

> The fact that the individual employees might escape prosecution should not mean that their employer necessarily would not be prosecuted. After all, the organization, through its three employees, turned off the three systems.[198]

7.18 The Canadian legislation then provides two ways in which negligence can be attributed to the corporate body.

7.19 First, the negligence of a senior officer can be attributed to the corporation if they are "the senior officer who is responsible for that aspect of the organization's activities". So, for instance, in the factory example, if the senior officer responsible for factory safety had acted with due diligence, it would not be possible to convict on the basis that the finance director had not done so – because it was not the finance director's responsibility to do so.

7.20 Second, however, negligence can also be attributed to the corporation if the senior officers *collectively* depart from the standard of care – that covers the situation in which no one person was individually negligent but the company was still corporately negligent precisely because no one had the necessary responsibility. To use the example above, the company could be convicted if the senior officer in charge of factory safety was negligent, or if the company as a whole did not have in place a system of safety. The first limb, conversely, would prevent the company avoiding liability on the basis that they had been corporately responsible and any failing was on the part of the senior officer in charge of safety personally.

7.21 The Australian Criminal Code does not contain anything comparable to sub-section 22.19(a)(ii). The physical element of any offence must be carried out by an employee, agent, or officer of the corporation acting within the actual or apparent scope of his or her employment or authority.

7.22 A company is subject to the general test of negligence in section 5.5. Thus, a company is negligent if the company's conduct falls so far short of the standard of

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198 Department of Justice Canada, "Criminal Liability of Organizations: A Plain Language Guide to Bill C-45"

care that a reasonable person would expect in the circumstances, and generates such a high risk that the physical element exists or will exist that the conduct merits criminal punishment.

7.23 Section 12.4 of the Criminal Code then provides that

> (2) If:
>
> (a) negligence is a fault element in relation to a physical element of an offence; and
>
> (b) no individual employee, agent or officer of the body corporate has that fault element;
>
> that fault element may exist on the part of the body corporate if the body corporate's conduct is negligent when viewed as a whole (that is, by aggregating the conduct of any number of its employees, agents or officers).
>
> (3) Negligence may be evidenced by the fact that the prohibited conduct was substantially attributable to:
>
> (a) inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers; or
>
> (b) failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.

7.24 Thus, the Australian legislation does the same as 22(1)(b) of the Canadian Criminal Code – it allows negligence to be proved by a corporate failure, even where no individual can be shown to have been criminally negligent.

7.25 It is implicit in the Australian legislation that a company might also be found liable on the basis of an individual's personal culpability, but there is no explicit provision for this. Given that an individual's intention, knowledge or recklessness can be imputed to the company if they are a "high managerial agent" it would be odd if their negligence could not be. However, section 12.3 of the Criminal Code, which allows attribution to the company of fault elements of high managerial agents, only applies to intention, knowledge or recklessness, and section 12.2, which deals with negligence does not have a corresponding provision.

7.26 As we did not ask a specific question on the issue, we are not in a position to consider fully how the law should address this issue. Most respondents to our questions on the identification doctrine and its alternatives appeared to have offences requiring *mens rea* in mind.

7.27 We are, however, satisfied that even if the identification doctrine is retained (as at present under option 1, or extended under options 2A or 2B), it should not be necessary to demonstrate personal negligence on the part of a natural person in order for a corporation to be convicted of an offence of negligence.

7.28 In the case of a corporation, which obtains legal personality by virtue of incorporation, and thereby becomes liable to duties and responsibilities as well as legal rights, where

a breach of those duties amounts to criminal negligence it is appropriate that the corporation's negligence should be considered as a whole. Whether by legislation along the lines of that in Canada or Australia, or through statutory interpretation and development of the common law, we conclude that in principle corporations should be capable of committing offences of negligence on the basis of collective negligence, even where individual negligence cannot be demonstrated.

CONCLUSION

7.29 We think there is a need to retain a default rule of attribution for offences requiring proof of intent, reckless, knowledge or dishonesty. We do not think that either a corporate culture approach or *respondeat superior* would be an appropriate basis for the liability of corporations in the criminal law of England and Wales. We therefore propose options of retaining the identification doctrine as at present (option 1) or extending the identification principle to include the actions of senior managers (options 2A and 2B).

Principle 2.

7.30 For offences of negligence, we conclude that it should be possible to convict a corporation on the basis of collective negligence even if it is not possible to identify an individual whose conduct was personally negligent. A corporation might be collectively negligent, precisely because there was no individual with the necessary responsibility.

7.31 In Part Two we examine the case for 'failure to prevent' offences in respect of economic and other crimes. However, reform of the identification doctrine and failure to prevent offences are not alternatives (except that under *respondeat superior*, had we recommended it be considered, there would have been little purpose in failure to prevent offences), and whether the identification doctrine is or is not reformed, the case for failure to prevent offences needs to be considered separately. However, if the identification doctrine is retained as at present (Option 1) the case for additional provision will inevitably be more compelling than were it extended under Option 2A or Option 2B.

Chapter 8: Failure to Prevent Offences

8.1 Given the constraints that the identification doctrine places on the ability to hold corporations accountable for criminal activity carried out with a view to benefitting the organisation, many stakeholders argued for an extension of "failure to prevent" offences. This was particularly highlighted in relation to "economic crimes" such as fraud, but there were also several stakeholders who felt that failure to prevent offences could be of value in sanctioning and deterring other forms of conduct carried out to benefit corporate bodies, including human rights related offences.

INTRODUCTION

8.2 Recent years have seen the introduction of specific "failure to prevent" offences in relation to the "base offences" of bribery and facilitation of tax evasion.

8.3 These offences have some similarity with both the doctrine of *respondeat superior* and vicarious liability, as they provide that where an employee or agent, was acting (in some way) within the scope of their employment or agency or to benefit the organisation, the organisation itself is guilty of an offence, subject to a defence where the company had in place certain arrangements to prevent commission of the underlying offence.

8.4 Under the Bribery Act 2010, section 7, 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 another person;

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

8.5 The underlying bribery offences 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). However, a commercial organisation can be convicted for failure to prevent bribery overseas even if the person who offered the bribe *cannot* be guilty of an offence under UK law, for instance where all elements of the offence took place overseas and the individual does not have a close connection to the UK.

8.6 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[199] to publish guidance on the procedures that organisations can put in place to prevent bribery.

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[199] The legislation just refers to "the Secretary of State" but in practice it is the Secretary of State for Justice who has published the guidance.

8.7 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 ("CFA 2017") which create offences of failure to prevent the facilitation of tax evasion. A corporation (or, to be precise "relevant body") may be guilty of an offence if:

(1) a person associated with the corporation,

(2) commits one of the offences described as a "UK tax evasion facilitation offence", or a "foreign tax evasion offence" when

(3) acting in the capacity of a person associated with the corporation.

8.8 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 that "it was not reasonable in all the circumstances to expect the corporation to have any prevention measures in place".

8.9 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.

8.10 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.

(3) However, as discussed below, the meaning of adequate has generally been understood to mean "reasonable in all the circumstances". The fact that procedures did not, in fact, prevent the bribery taking place does not necessarily mean that they were not adequate.

(4) The provision in the CFA 2017 explicitly contemplates that it may be reasonable in some circumstances not to have had prevention procedures in place at all. There is no such provision in the Bribery Act 2010, and we think it is unlikely that a company could claim that it had "adequate" procedures if it had no procedures at all (notwithstanding the meaning of "adequate" noted in (3)).

(5) In the bribery offence, the bribe must be by a person "associated with" the organisation[200] and intended to obtain or retain business or a business

[200] A person is "associated with" the commercial organisation if they "provide services" for it. The associated person need not be an individual. The associated person may be an employee, agent or subsidiary (this aspect of the definition is not exhaustive). Where a person is an employee of a commercial organisation, it is presumed that they provide services on behalf of the organisation and are accordingly an associated person, unless the contrary is shown (Bribery Act 2010, s 8).

advantage for the organisation. In the tax evasion offence, the person must be "acting in the capacity" of an employee, agent or representative.

(6) Whereas the section 7 Bribery Act offence is limited to failure to prevent commission of one of two core bribery offences in that Act, tax evasion offences are broadly defined and encompass a range of domestic offences and their overseas analogues. They also include attempts; aiding, abetting, counselling and procuring; and encouragement.

(7) The offence in section 7 of the Bribery Act 2010 is indictable-only. The offences in sections 45 and 46 of the Criminal Finances Act 2017 may be tried in the magistrates' court.

(8) A prosecution under the Bribery Act 2010 requires the personal consent of the Director of Public Prosecutions or the Director of the Serious Fraud Office. This is replicated in respect of prosecutions under section 46 of the Criminal Finances Act 2017 (that is, in relation to foreign tax evasion). However, prosecutions under section 45 of the Criminal Finances Act 2017 (that is, for offences relating to domestic tax evasion) do not require such consent.

(9) Both statutes require the relevant Cabinet Minister to publish guidance on the procedures that relevant bodies can put in place to prevent the associated persons from committing the prohibited activities. The 2017 Act goes further in permitting the Chancellor to issue supplementary guidance, and to approve guidance prepared by another person.[201]

8.11 The Government has issued statutory guidance in relation to both the bribery and facilitation of tax evasion offences.[202] 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.

8.12 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. 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.

8.13 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 applying the identification doctrine).

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[201] For instance, the Chancellor has approved guidance prepared by UK Finance for the financial sector under this provision.

[202] Ministry of Justice, "Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing" (2011); HM Revenue and Customs, "Tackling tax evasion: Government guidance for the corporate offences of failure to prevent the criminal facilitation of tax evasion" (2017).

8.14 At this point, it is worth noting that "failure to prevent" may also characterise the way in which competition law imposes quasi-criminal liability (we discuss this earlier at 5.15).

8.15 In *Safeway Stores Ltd v Twigger*,[203] the Court of Appeal rejected the idea that this liability for breaches of competition law was strictly vicarious – that is, rather the conduct is a wrong by the employer, not merely holding a blameless employer responsible for a wrong by the employee.

8.16 In that case, Safeway, having been informed it would be fined by the Office of Fair Trading for anti-competitive conduct, sought to recover the penalties from those directors and employees responsible for the conduct in question. The court held that

> The claimants' liability is not a vicarious one. They are not liable for the illegal acts of their agents or employees because s. 36 of the Competition Act only imposes liability on an undertaking which is a party to an agreement which infringes the prohibition in Chapter I of the Act and that liability can only be imposed if the infringement has been committed intentionally or negligently by the undertaking. The liability to pay the penalty is thus a liability of the undertaking where it (the undertaking) has intentionally or negligently committed the infringement…
>
> No one is liable for the penalty imposed by the Competition Act except the relevant undertaking.[204] The liability is, therefore, personal to the undertaking. If there is a liability it cannot be imposed on any person other than the undertaking and the undertaking is personally liable for the infringement. If a penalty is imposed, it will only be because the undertaking itself has intentionally or negligently committed the infringement.

8.17 Thus, the company was precluded from pursuing the employees on the basis of the maxim "ex turpi causa non oritur actio" – that is, on the basis of its own wrongful conduct.[205] Safeway was personally in breach of the law and on that basis, public policy precluded it recovering the penalty from others.

CONSULTATION QUESTION

8.18 The first question we asked in the discussion paper in relation to failure to prevent was:

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203 [2010] EWCA Civ 1472, 2 All ER 841.

204 It is worth noting that there is a separate cartel offence in the Enterprise Act 2002, which covers individuals. Initially this required that the individual acted "dishonestly" in entering into an anti-competitive arrangement, meaning that the company might be quasi-criminally liable in circumstances where no individual was criminally liable. The requirement for dishonesty was removed in the Enterprise and Regulatory Reform Act 2013, s 47(2).

205 This rule, meaning "an action does not arise from a dishonourable cause" prevents a litigant from pursuing an action that arises from their own wrongdoing. An important exception to the principle (the "Hampshire Land exception") means the acts of an agent or employee are not attributed to the principal for the purposes of the maxim in cases between the principal and the agent or employee, where those acts are directed against the principal (but they will still be attributed in respect of proceedings involving third parties).

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?

8.19 The narrow majority of respondents thought there should not be further failure to prevent offences. The main reasons given for this were:

(1) A concern about overregulation, primarily using the example of money laundering.

(2) A concern about potential lack of specificity, giving the example of the category of “economic crimes” being widely drawn.

(3) A concern about an undue compliance burden on companies.

8.20 One of the consultees who made the point about the risk of overregulation was the FCA:

> There is the scope for overlap with regulatory matters and we foresee difficulty with extending this concept beyond the existing categories of bribery and tax evasion. As set out above, the MLRs [Money Laundering Regulations] in effect are already a failure to prevent regime with respect to money laundering.

8.21 The concern about the increased compliance burden on companies was raised by GC100:

> Large companies will already have well developed ethics policies and internal controls which are designed to prevent fraud (and other offending). Nonetheless, the introduction of a new offence will inevitably drive compliance activity re-assessing those controls, which we anticipate will add cost but little value.

8.22 This was shared by the City of London Lawyers Society, Corporate Crime Committee, which suggested that:

> A possible remedy to this issue [of compliance costs] might be to introduce a revenue-based or employee-based threshold at which a business could become in-scope of the offence. This could ease the administrative burden on investigators by minimising in-scope businesses to those that could materially impact confidence in the UK business sector and allow investigating authorities to pursue corporates that are able to provide satisfactory recourse.

8.23 The minority of respondents thought there should be further failure to prevent offences. The main reasons given for this were the benefits of enhancing the reach of prosecutors and the ability to broaden the regime to other offences (particularly those which are not included in the economic crime category). It is notable that the main prosecution agencies (the CPS and SFO) were in favour of expanding the regime. Some respondents did not express a preference either way, but just assessed the options. Therefore, these numbers do not reflect every response to this question.

8.24 As an example of the support for the option, the CPS said

> The CPS believe that an extension of the 'failure to prevent' model to fraud, false accounting and money laundering would be unlikely to require companies to do more than what they would already be expected to do under the current law (which relies on the identification doctrine) but it would enable prosecutors to hold them to account more effectively where they fail to do so. This would enhance public confidence in the criminal justice system.

8.25 Spotlight on Corruption and the All-Party Parliamentary Group on Fair Business Banking supported an expansion of failure to prevent offences on the basis that it would improve consistency:

> Given that bribery and tax evasion usually involve an element of money laundering and often fraud, it is inconsistent to have different models of corporate liability operating for different economic crimes. Fraud, false accounting and money laundering impose serious costs to society, just like bribery and tax evasion. The lack of consistency between the offences has been highlighted by prosecutors as hindering their work on economic crime.

8.26 A significant number of respondents refrained from expressing a firm view on whether more offences of this nature should be created or not, but rather set guidelines for the offences if they are implemented. Some, such as GC100, expressed disapproval of the creation of additional failure to prevent offences, but still set out the appropriate parameters as they saw them.

8.27 For example, many respondents, some of whom opposed expansion of the regime, suggested the introduction of a monetary or harm-based threshold for liability, only above which a failure to prevent offence is engaged. Similarly, respondents on both sides of the debate (including Simmons and Simmons and TheCityUK) made the point that there should be a requirement of intention to benefit the company, in keeping with the requirement in the bribery offence that the bribe must be to obtain or retain business, or a business advantage, for the commercial organisation. This is to protect the company from the perceived prevalence of "rogue traders", particularly in the context of fraud. Some said that fraud is most often committed against the company, rather than for its benefit, and therefore a failure to prevent offence is inappropriate. Linked to this, some suggested that the offence should only bite when committed by an "associated person", which should be carefully construed to ensure criminality only captures conduct which is within the usual course of the corporate's business.

8.28 Principally, there was recognition that this regime produces a different type of criminal sanction as compared to the identification doctrine. There was expression of the possibility that criminal sanctions will carry less weight if they are easier for prosecutors to secure. This argument was used by Transparency International UK, for example, to restate support for reform of the identification doctrine. Conversely, those who thought there was insufficient evidence to introduce new offences restated their view that the identification doctrine should not be reformed.

Offences which should be covered by any new offences

8.29 Multiple respondents suggested the starting point for offences to be covered should be those contained in Part 2 of Schedule 17 to the Crime and Courts Act 2013. This list includes offences of fraud, false accounting, theft and money laundering. This

would mirror the offences available for Deferred Prosecution Agreements. Among those who supported such an approach were the the SFO, the CPS, the Fraud Lawyers Association, and Transparency Task Force.

8.30 However, John Binns, BCL Solicitors, noted that it might be difficult for companies to assess their risk exposure to a broad range of failure to prevent offences, such as that in the Crime and Courts Act 2013.

8.31 Others, such as the British Venture Capital Association, suggested an offence-by-offence basis would be more suitable, to ensure there was a clear need for a particular failure to prevent offence.

8.32 Herbert Smith Freehills made this point, and further suggested that some failure to prevent offences would be duplicative with existing rules. They gave the example of a hypothetical failure to prevent money laundering offence:

> For the AML [Anti-Money Laundering] regulated sector (which extends beyond the financial sector), the regime would be entirely duplicative. We struggle to envisage any scenario in which a firm could fail to prevent money laundering (assuming an 'adequate procedures' defence exists and is not made out), and would not commit an offence under reg.86 of the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 ("MLR").

8.33 Contrastingly, Dr Alison Cronin suggested that money laundering is a serious offence to which the model could be applied, because "in principle there is no bar to the application of the failure to prevent model to any economic, or other, crime particularly where there are existing compliance requirements."

8.34 Dr Cronin also said that fraud would be a context in which the model could apply. She suggested that

> The addition of such an approach to corporate fraud is recommended and would result in a range of offences available to suit various circumstances. The Fraud Act 2006 would continue to deal with instances of individuals who perpetrate fraud in the corporate context but are nonetheless criminally liable as individuals… A statutory offence of corporate failure to prevent fraud would inculpate companies who had failed to put in place procedures adequate to prevent the commission of fraud by lower level officers, employees and associates.

8.35 By contrast, GC100 suggested that by comparison to the existing offences, fraud would be difficult to define:

> bribery is a very specific type of conduct which is comparatively easy to understand and where risk points can be readily identified (notably winning new business or interacting with public officials, especially in high risk jurisdictions) … It is much more difficult to see how a large company could sensibly address the risk that one of its (potentially) tens of thousands of employees might commit fraud.

8.36 Some respondents favoured extending "failure to prevent" beyond economic crimes. For example, Margaret Flynn, Aled Griffiths and Laura Pritchard-Jones called for the introduction of failure to prevent offences in the health and care sector.

8.37 Jenner & Block LLP suggested that other offending should be considered for failure to prevent offences:

> The government may also wish to give further thought to criminalising other forms of the most pernicious harms to society by corporates, including other abuses of human rights in companies' supply chains and wrongdoing relating to the environment and climate change. We of course appreciate these harms do not currently constitute criminal offences in England and Wales.

Similarly, Corporate Justice Coalition called in stronger terms for an ofence of failure to prevent human rights abuses.

Defences which should be available

8.38 A majority of stakeholders thought there should be a defence to any new failure to prevent offences. Further, a majority preferred the wording of "reasonable procedures", or "reasonable in all the circumstances". This is taken from the offence of failure to prevent the facilitation of tax evasion, and was preferred over the defence of "adequate procedures" in the offence of failure to prevent bribery. Among supporters of a reasonableness defence were the CPS and Alison Saunders DBE, Linklaters, the latter of whom said:

> We prefer the "reasonable prevention procedures" formulation in sections 45 and 46 of the Criminal Finances Act 2017 over the "adequate procedures" formulation in section 7 of the Bribery Act 2010, given that (i) adequacy is an inherently difficult threshold to meet in circumstances where procedures have (by definition) failed; and (ii) the Criminal Finances Act explicitly recognises that there may be circumstances in which it is reasonable not to have procedures.

Several stakeholders also highlighted the importance of guidance in helping companies to understand their obligations, and what might constitute reasonable procedures.

Extraterritoriality

8.39 Several commentators made comments, both in response to this question and elsewhere on the application of extraterritoriality to corporate liability. As extraterritoriality is a feature of the existing "failure to prevent" offences – and was a key reason for the argument for a "failure to prevent" offence in relation to human rights abuses, we consider these comments in this chapter.

8.40 Several organisations which favoured the use of "failure to prevent" offences enunciated extraterritoriality as a principle which should apply to corporate criminal liability in their answer to consultation question 1 on principles

8.41 Susan Hawley, Spotlight on Corruption recommended that the general principles applicable to corporate criminal liability should include "Extra-territoriality - to capture the global nature of much corporate activity and avoids a competitive disadvantage for UK-based companies". The APPG on Fair Business Banking also recommended - "extra-territoriality which captures the global nature of much corporate activity."

8.42 Corporate Justice Coalition said

A robust approach to extraterritoriality should ensure liability for cross-border corporate crimes (to include crimes encouraged or facilitated abroad by corporate decisions and/or choices made in the UK).

8.43 Conversely, in their response, GC100 urged us to consider carefully the jurisdictional scope of any new “failure to prevent” offence. They said

> Firstly, a broad "associated person" concept may raise concerns that the employee of a subsidiary in an overseas jurisdiction is an "associated person" of the UK parent company... Suppose, for example, there is a “failure to prevent fraud” offence. If an employee of an overseas subsidiary commits a fraud on a customer of the subsidiary in the relevant overseas jurisdiction, is that really a proper matter for the UK criminal law? … Why should the UK parent be considered responsible for the acts of employees of a different legal entity over which it has no formal control?
>
> Secondly, it remains unclear how the [Bribery Act 2010] test of "carrying on part of a business in the UK" should be interpreted. If this test is introduced in any new “failure to prevent” offence, and is read broadly, such that a non-UK company may come within the scope of the offence merely by virtue of having some activity or perhaps a subsidiary here, this could have an effect on investment in the UK.

8.44 Herbert Smith Freehills similarly advised caution, noting that

> The current offences under the [Bribery Act 2010] and [Criminal Finances Act 2017] have extremely broad extra-territorial effect. One aspect of this is the possibility that overseas subsidiaries, or their employees, may be considered to be the associated persons of a UK parent company... Another aspect is the 'carrying on part of a business in the UK' test for a "relevant commercial organisation". This can result in conduct which has no UK nexus falling technically within the scope of UK jurisdiction.

ANALYSIS

Whose actions and which of their actions should corporations be liable for?

8.45 As noted above, the basis of liability for the two existing failure to prevent offences differs. For the bribery offence, the associated person must be acting to benefit the commercial entity. For the facilitation of tax evasion offence, it is sufficient that they were “acting in [the] capacity” of an employee, agent or service provider to the body.

8.46 The distinction no doubt reflects the way in which it was envisaged that the offences would typically occur. The facilitation of tax evasion offence was primarily directed at companies such as accountants, banks and law firms which provide services to clients. As such, it seems likely that it was contemplated that the individual employee etc would actually be seeking to facilitate tax evasion by the client, who would be the principal beneficiary of the conduct.[206]

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[206] It would still be possible to prosecute a commercial organisation under section 7 of the Bribery Act 2010 for failing to prevent bribery by an employee or agent intended to benefit a client of the organisation, provided that it could be shown that the employee or agent intended thereby to confer a business advantage on the commercial organisation.

8.47 If there were a broader offence relating to failure to prevent economic crime, there are a much wider range of circumstances in which an employee or agent might commit the offence. They might be seeking to benefit the company directly. They might be seeking to benefit a client of the company directly, and the employer only indirectly, for instance by engaging in false accounting on behalf of a client.

8.48 At first sight, therefore, "acting in the capacity" of an associated person might appear to be a more appropriate basis of liability. However, it is possible that this might be too broad given the wide range of offences potentially covered, and might in practice extend to conduct conferring no benefit, direct or indirect, upon the company. Indeed, it might even extend to a person acting to harm the company: in *Moore v Bresler*,[207] false tax returns by a company secretary and branch manager were attributed to the company even though they were acting to conceal their own theft of company property.

8.49 For instance, consider the example of a person who commits a fraud against their employer by submitting false expenses claims. While they are clearly not acting on *behalf of* their employer, still less *in the interests of* their employer, it is hard to say that they are not "acting in the capacity" of an employee – after all, only an employee would be submitting expenses claims.[208]

8.50 When an employee engages in misconduct to benefit his or her employer, this will almost invariably involve an element of direct or indirect personal gain. For instance, an employee who is remunerated on a commission basis might engage in fraudulent mis-selling because they will earn a commission for orders brought in for the company. In other cases, the personal benefit may be less direct – for instance where an employee engages in fraudulent behaviour in order to keep a client happy and thereby retain the engagement for the company.

Requirement to benefit the company

8.51 A number of respondents were concerned that "failure to prevent" risked making companies liable where they themselves are the victim.

8.52 We agree that where an organisation is the intended victim of the offending, it should not be liable. There is no need to impose a positive duty on organisations to take steps to prevent offences being committed against them; they already have an interest in doing so, and if they choose not to, that is primarily an issue for the company and its shareholders.

8.53 Accordingly, we have concluded that the test in the offence of failure to prevent facilitation of tax evasion would be too broad. If extended to fraud, for instance, some employees acting to defraud a company could still be found, under *Moore v Bresler*, to have been acting in the capacity of an employee.

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207 [1944] 2 All ER 515.

208 In the civil case of *Wm Morrisons Supermarkets v Various Claimants* [2020] UKSC 12 it was held that Morrisons was not liable for a deliberate data breach which an employee had performed deliberately to harm the company. The conduct was "not so closely connected with acts he was authorised to do that … it can fairly and properly be regarded as done by him while acting in the ordinary course of employment".

8.54 We conclude, therefore, that any "failure to prevent" offences should include a requirement to benefit the company.

8.55 This, however, needs to be broadly understood. One possible explanation for the breadth of the test in the tax evasion offence is that drafters contemplated that the underlying facilitation would be undertaken to assist a *client* of the organisation. For instance, facilitation of tax evasion might be engaged in by a lawyer or accountant seeking to benefit their company's client. It would not be the ***employer's*** liability to tax which would be evaded.

8.56 Nonetheless, in such circumstances, the conduct might still be said to have been intended to benefit the organisation indirectly.

8.57 However, a simple requirement that the conduct be intended to benefit a *client* for whom the employer provides services on behalf of the company could capture cases where the employee and client conspired to commit an offence where the company was a victim.

8.58 We consider that the test in the Bribery Act 2010 might be too narrow. Under that test, it is necessary to show that the bribery was intended to obtain or retain business for the organisation, or to obtain or retain a business advantage for the organisation. While the second part of this test might be capable of capturing many instances where an employee engages in criminal conduct on behalf of their employer's client, conscious that it is part of their role to satisfy the client in a general sense, a requirement on the prosecution to prove separately that the employee intended thereby to benefit their employer indirectly could be challenging.

8.59 We also consider that it is important that the test should encompass situations in which, although it is not the person's primary purpose to benefit the company, that outcome is intrinsically related to their purpose. An obvious example would be where a person who is paid a commission on sales makes misleading, fraudulent claims in order to win sales and thereby obtain commission. Their *purpose* is not to benefit the company, but to benefit themselves. However, because of the way that their pay has been structured, they nonetheless *intend* to benefit the company. (Indeed, the point of practices such as commissions and bonuses is to align employees' personal interests with corporate goals. In such circumstances it is somewhat artificial to identify a single or dominant purpose.)

8.60 We consider therefore that if a "failure to prevent" offence is introduced to cover either economic crime[209] generally, or a relatively broad offence such as fraud, the test should be that an organisation (C) should be liable where the associated person (A) committing the base offence

(1) intended to confer a business advantage on C, or

[209] See para 1.10 for a discussion of the meaning of "economic crime".

(2) intended to confer a benefit[210] on a person to whom A provides services on behalf of C

but that C should not be liable under (2) where the conduct was intended to cause harm to C.

8.61 If such a provision were enacted, it would be necessary to consider whether C should have to *prove* that the conduct was intended to cause harm to C, or whether it should be sufficient for C to raise the issue, whereupon it would be for the prosecution to rebut it to the criminal standard.

8.62 We considered whether it should be sufficient to place a reverse burden on C to show or to prove that the conduct was *not intended to benefit* C (rather than to cause harm to C), but concluded that this was too broad. For instance, in the example where A helps C's client to evade tax, even where C can demonstrate that A was wholly unconcerned with whether C benefitted or not, it is the three-way relationship between C, the employee A, and the client which has facilitated the offending, and in the circumstances it is not unreasonable to expect C to have put procedures in place to prevent A from breaking the law.

Extraterritoriality

8.63 It is notable that the existing "failure to prevent" offences for bribery and facilitation of tax evasion both allow companies to be held liable for failure to prevent employees engaging in criminal conduct outside the UK. We noted at paragraphs 8.43 to 8.44 that we had been urged to consider the jurisdictional scope of new offences.

8.64 At present the main categories of offences with extraterritorial reach are

(1) Terrorism offences[211];

(2) Offences of serious violence[212]; and

(3) Sexual offences against children and those with a mental disorder impeding capacity to consent.[213]

8.65 Extraterritoriality in the law of England and Wales is unusual. UK Government policy is that criminal offending is best dealt with by the criminal justice system of the state

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210 The reason for referring to "benefit" rather than "business advantage" in the second scenario is that the company C need not make A's services available to the client in connection with the client's business. For instance, an accountancy firm may make A's services available in relation to the client's person tax arrangements.

211 Suppression of Terrorism Act 1978 (giving effect to the European Convention on Suppression of Terrorism); Terrorism Act 2000 ss 59 and 62-63; Terrorism Act 2006, s 17.

212 The Domestic Abuse Act 2021 extends extraterritoriality to murder, manslaughter, causing actual or grievous bodily harm, poisoning, child destruction, and coercive or controlling behaviour. This was in part intended to give effect to the Istanbul Convention (the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence). The Female Genital Mutilation Act 2003 also has extraterritorial effect.

213 Sexual Offences Act 2003, s 72 and sch 2.

where the offence occurred.[214] Extraterritoriality is usually provided for either when it is required pursuant to an international commitment[215] or there are compelling public policy reasons, such as an inability or unwillingness of overseas jurisdictions to deal with serious offending committed there.[216] With the exception of terrorism offences, extraterritorial application is usually limited to British citizens and residents.

8.66 We recognise that in general where employees of a UK-based company engage in criminal conduct overseas that will be firstly a matter for the law enforcement system in that jurisdiction. Moreover, that jurisdiction's legal system may enable the UK-based employer to be held liable for the criminal conduct of their employee under the model of criminal attribution or the jurisdiction's own rules of agency. In those circumstances, imposing extraterritorial liability on the UK company would be duplicative.

8.67 Accordingly, we have concluded that there should not be any default expectation that any future "failure to prevent" offences should have extraterritorial effect. A "failure to prevent" offence should only be extended to cover conduct overseas when there is a demonstrable need for extraterritoriality in relation to that offence specifically.

Defences – adequate or reasonable procedures

8.68 We noted in the discussion paper that the term "adequate" in relation to procedures capable of providing a defence to a charge under section 7 of the Bribery Act 2010 has had to be given a strained reading. It seems counterintuitive to say that procedures were "adequate" to prevent bribery when, necessarily, the bribery has actually taken place.[217]

8.69 The House of Lords Committee on the Bribery Act 2010, conducting post-legislative scrutiny of the Act, considered whether there was "a danger that "adequate" will be interpreted too strictly, so that a company which had in place procedures which were reasonable in all the circumstances but did not in fact prevent bribery taking place might be unable to avail itself of the defence".[218]

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214 Home Office, Extraterritorial Jurisdiction Factsheet (2022), https://www.gov.uk/government/publications/domestic-abuse-bill-2020-factsheets/extraterritorial-jurisdiction-factsheet.

215 For instance, the Council of Europe Istanbul Convention requires the UK to be able to prosecute certain offences, including physical and psychological violence, stalking, non-consensual sexual offences, forced marriage and female genital mutilation when committed outside the UK by a UK national or a person habitually resident in the UK. The Bribery Act 2010 was in part intended to give effect to a requirement in the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions to criminalise bribery of a foreign public official, including sanctions on legal persons. Annex 1 of the Convention provides that if (as under the identification doctrine) corporate liability is only triggered by the acts of persons with the highest managerial authority, this will be adequate where that liability includes failure to prevent a lower level person from bribing a foreign official.

216 An example here might be the extraterritorial effect given under s 72 and schedule 3 of the Sexual Offences Act 2003 to rape and certain sexual offences against children.

217 It is recognised that in contract law, "adequate" has a particular meaning and does not mean the same as "sufficient". Thus, something given in consideration may be "sufficient" to make the contract valid, notwithstanding that it is not "adequate". See, eg *Chappell v Nestle* [1960] AC 87.

218 The Bribery Act 2010: Post-legislative Scrutiny, Report of the House of Lords Bribery Act 2010 Committee (2017-19) HL 303, para 210.

8.70 It concluded that such an interpretation was very unlikely, and accordingly were minded not to recommend amendment of the wording.

8.71 Nonetheless, we conclude that if further "failure to prevent" offences are created the defence of procedures which were "reasonable in all the circumstances" is preferable to one of "adequate procedures". As the Lords' Select Committee concluded,

> On the assumption … that there is no intended or actual difference in meaning between "adequate" procedures and procedures which are "reasonable in all the circumstances", we believe the latter more clearly gives the intended meaning.

8.72 We also conclude that any future "failure to prevent" offences should include the defence in the Criminal Finances Act 2017, whereby a company has a defence if it can prove that it was reasonable in the circumstances not to have any prevention procedures. This is particularly the case if future failure to prevent offences are extended to cover a broader range of conduct. For instance, it might be perfectly reasonable for a business not to have any measures in place to tackle, say, money laundering if they operate in a sector with a negligible risk of such misconduct.

The burden of proof

8.73 We were urged by GC100 that the burden of proving that the firm did not have adequate procedures in place should lie with the prosecution. The organisation noted that "[a]lthough we recognise that reverse burdens do exist in English law, on the whole the concept of a reverse burden runs contrary to principles of justice and fairness."

8.74 Alison Saunders DBE also said, "The burden should be on the prosecution to prove all elements of the offence, including that a company did not have adequate/reasonable prevention procedures in place".

8.75 In *Sheldrake v DPP*,[219] the House of Lords considered the compatibility of reverse burdens of proof with the European Convention on Human Rights. Although the courts have not established definite criteria as to when a reverse burden will be justified, relevant criteria include

(1) Whether other matters have to be proved by the prosecution beyond reasonable doubt before liability can attach to the accused;[220]

(2) Whether the subject matter is peculiarly within the knowledge of the defendant;[221]

(3) The nature of the threat the measure is intended to combat;[222]

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219 [2004] UKHL 37.

220 *R v DPP ex parte Kebeline and Others* [2000] 2 AC 326.

221 *R v DPP ex parte Kebeline and Others* [2000] 2 AC 326; *R v Johnstone* [2003] 1 WLR 1736 50.

222 *R v DPP ex parte Kebeline and Others* [2000] 2 AC 326.

(4) Whether the offence is "truly criminal";[223]

(5) Whether the regime could operate sensibly if it depended on the prosecution to prove the relevant matter;[224]

(6) The severity of the sanction;[225]

(7) The consequences for the ability to prosecute the offence if the requirement were "read down" to be an evidential rather than a persuasive burden.[226]

8.76 Considering these, we think that a reverse persuasive burden in this case is justified. First, before any issue arises, the prosecution will be required to prove commission of the base offence to the criminal standard. Moreover, proving this will establish a *prima facie* case that the organisation's processes have failed to prevent commission of the base offence.

8.77 Second, the processes that the company has put in place to prevent commission of the base offence will be peculiarly within the knowledge of the organisation.

8.78 Third, conviction for a "failure to prevent" offence would amount to a finding of a lower degree of culpability than conviction for the substantive offence.

8.79 Fourth, because these are offences which can only be committed by organisations, they cannot result in a loss of liberty. The impact of a conviction would be financial or reputational. However, we acknowledge that for many of these offences the fine in question would be unlimited, and conviction could have serious consequences for the organisation, for instance in relation to eligibility to bid for contracts with overseas governments.

Conspiracies, attempts and aiding and abetting

8.80 A possible issue arises in relation to whether any failure to prevent offences should cover attempts, conspiracies, aiding, abetting etc. Arguably this extends the reach of corporate liability too far.

8.81 The offences covered by the offence of failure to prevent tax evasion include an offence under the law of any part of the United Kingdom consisting of—

(a) being knowingly concerned in, or in taking steps with a view to, the fraudulent evasion of a tax by another person,

(b) aiding, abetting, counselling or procuring the commission of a UK tax evasion offence, or

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223 *Sliney v London Borough of Havering* [2002] EWCA Crim 2558 [48.4]; *R v Lambert* [2001] UKHL 37, 154.

224 *Sliney v London Borough of Havering* [2002] EWCA Crim 2558 [48.3].

225 Above at [48.6].

226 Above at [48.7].

(c) being involved art and part in the commission of an offence consisting of being knowingly concerned in, or in taking steps with a view to, the fraudulent evasion of a tax.

However, conduct carried out that amounts to (a) is only covered if the other person actually commits an offence. This drafting is understandable, given that the core offence – the actual evasion of tax – is likely to have been committed by a third party (the taxpayer on whom the liability to tax actually fell) so the associated person will often have been acting as a secondary party to the offence.

8.82 On the face of it, liability for failure to prevent under the Bribery Act 2010 only arises if an associated person "bribes another person". This does not extend to conspiracies, etc. However, the definition of "bribe" – an offence under section 1 of the Bribery Act – does include the *offer* or *promise* of a bribe (so effectively encompasses attempts). This means that where an employee offers a bribe to a third party, intending thereby to benefit the organisation by whom they are employed or for which they provide services, the organisation is guilty of a failure to prevent offence regardless of whether the bribe is actually paid.

8.83 Some respondents suggested that the list of offences for which a deferred prosecution agreement is possible, found in the Crime and Courts Act 2013, Schedule 17, might serve as a possible list of offences to which a failure to prevent economic crime offence might apply. This includes not only substantive offences, but also (by section 29) extends this to offences of aiding, abetting, counselling or procuring, encouraging or assisting, or attempting or conspiring to commit one of the substantive offences.

8.84 We are concerned that if "failure to prevent" offences were extended to broader categories of crime, inclusion of attempts and conspiracies, etc, could lead to counterproductive and counterintuitive results. For instance, a company might put in place extensive financial controls to prevent the *commission* of fraud. However, it is limited in how far it can actually prevent employees *attempting* or *conspiring* to commit fraud. What companies might do is have policies and guidance in place to encourage ethical conduct and deter misconduct.

8.85 Although it did not concern a "failure to prevent" offence, the High Court considered a similar scenario in the *Barclays* judgment, noting that on the prosecution case, that the conduct of the Chief Executive and Chief Financial Officer was sufficient to fix *Barclays* with liability for the conspiracy offence, then even if the Board, having found out about the conspiracy, intervened to stop it, the company would have been liable for the antecedent conspiracy. Davis LJ concluded that "such a conclusion is not merely unattractive: it is surely extraordinary".[227]

8.86 Including ancillary offences, such as attempts and conspiracies, within scope of a "failure to prevent" offence, may mean that even if a company has a very strong set of procedures in place to prevent economic crime from happening, it could be held liable simply because an employee *tries* to commit it, or because two employees *agree* to commit it, even though the company's procedures would have stopped it.

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227 *SFO v Barclays* [2018] EWHC 3055 (QB) 125.

8.87 (It might be that in such cases a court would find that the organisation had a "reasonable procedures" defence. Strictly speaking, it would be hard to argue that the procedures were reasonable in all the circumstances to prevent commission of the *attempt* or the *conspiracy*, but it might be accepted that it was reasonable not to have any procedures in place merely to prevent attempts and conspiracies, because there were procedures to prevent the substantive offence being completed.)

8.88 We therefore conclude that any "failure to prevent" offences should generally not extend to ancillary offences such as attempts and conspiracies.

8.89 The situation is somewhat more complicated with aiding and abetting. Those who "aid, abet, counsel or procure" the commission of an offence are liable to punished as a principal offender under the Accessories and Abettors Act 1861.[228] This requires that the offence is actually committed or brought about. Under the Serious Crime Act 2007, sections 44 to 46, a person can also be convicted of encouraging or assisting an offence, whether or not the offence takes place.

8.90 We think that where the substantive offence is carried out, and an employee or agent of the company has assisted or encouraged the commission intending thereby to benefit the company, it is reasonable to hold the company responsible for its failure to prevent that activity. However, where the substantive offence does not occur, and the acts of assistance or encouragement have not actually resulted in commission of the substantive offence, they are more comparable to unsuccessful attempts and unrealised conspiracies. Accordingly, while we think there is a case for failure to prevent to extend to conduct where the employee could be convicted of one of the core fraud offences, as a consequence of the 1861 Act, we do not think it should extend to situations where the employee would only be liable for encouraging or assisting under the Serious Crime Act 2007.

[228] Accessories and Abettors Act 1861, s 8.

SUMMARY OF GENERAL PRINCIPLES ON "FAILURE TO PREVENT" OFFENCES

Principle 3.

8.91 "Failure to prevent" offences should reflect the following general principles.

(1) Organisations should generally only be liable for failure to prevent commission of an offence that was

(a) intended to confer a business advantage on the organisation, or

(b) intended to confer a benefit on a person to whom the associated person provides services on behalf of the organisation,

but the organisation should not be liable under the second of these where the conduct was intended to cause harm to the organisation.

(2) Organisations should have a defence available on the basis of "reasonable", rather than "adequate", procedures to prevent commission of the underlying offence(s).

(3) There should be provision along the lines of section 45(2)(b) of the Criminal Finances Act 2017 to the effect that it might be reasonable in the circumstances not to have any procedures at all.

(4) The burden of proving that the organisation had put in place reasonable prevention procedures, or that it was reasonable not to have any such procedures, should lay with the defence.

(5) There should be a duty on Government to publish guidance on the procedures that organisations can put in place to prevent commission of the underlying offence(s).

(6) There should be a power for Government to publish additional guidance on prevention procedures for particular sectors or issues.

(7) There should be a power for Government to approve guidance on prevention procedures published by third parties.

(8) Whether failure to prevent offences should extend to extra-territorial commission of the underlying offences should be considered on a case-by-case basis.

(9) Failure to prevent offences should only extend to substantive criminal offences, and not to inchoate offences such as attempts and conspiracies.

FAILURE TO PREVENT ECONOMIC CRIME

8.92 Several stakeholders suggested categories of crime other than economic crime which should be covered by "failure to prevent" offences, and some queried whether companies ought, in principle, to be capable of being held liable for any offending by associated persons that they were in a position to prevent by reasonable and proportionate actions.

8.93 It might be argued, however, that given that the primary purpose of most corporate bodies is to make economic profits, there is a particular risk of *economic* crimes[229] being committed on their behalf. Conversely, there will be categories of crime where it is highly unlikely (even if theoretically possible) that an offence would be committed in the interests of the corporation or its clients. Sexual offences is an obvious category,[230] as is violence against the person, although it is possible to think of sectors (for instance, the security industry) where the risk may be higher.[231]

8.94 There are other categories of offending which may be likely to be committed in a corporate context, but where the offences are created in such a way that there is no obstacle to the corporate body being prosecuted for the substantive offence, and therefore there is unlikely to be a need for "failure to prevent" offences. Environmental and health and safety offences are examples of offences which, whether because they are framed as strict liability offences or because they impose direct duties on employers and occupiers of premises, are capable of being enforced against corporations directly.

8.95 Accordingly, we conclude that there is a stronger case in principle for introducing failure to prevent offences in relation to economic crime than for most other areas of crime.

8.96 Subject to the point discussed above on the inappropriateness of including ancillary offences (aiding and abetting, attempts, conspiracy, etc), Part 2 of Schedule 17 of the

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229 See para 1.10 for a discussion of the meaning of "economic crimes".

230 However, it is certainly possible to consider situations in which a corporate body might commit a sexual offence for commercial reasons. For instance, under the voyeurism offence in the Sexual Offences Act 2003, s 67, it is an offence to operate equipment to enable another person to observe, for the purposes of obtaining sexual gratification, a third person doing a private act. It is entirely conceivable that the equipment could be operated by or on behalf of a corporate body. A corporation might also encourage or conspire with a natural person to commit a sexual offence. For instance, a company distributing extreme pornography for profit might procure commission of an offence under the Sexual Offences Act 2003, s 69 (intercourse with an animal).

231 There have certainly been civil cases where the use of personal violence has been found to have been sufficiently related to a person's employment to make the company liable. In *Mohamud v Morrisons* [2016] UKSC 11, Morrisons supermarket was held liable for an apparently racist attack on a customer by a member of staff at a petrol station. It was held that the attack was "in connection with the business" and so Morrisons was liable: "It was Mr Khan's job to attend to customers and to respond to their inquiries. His conduct in answering the claimant's request in a foul mouthed way and ordering him to leave was inexcusable but within the "field of activities" assigned to him. What happened thereafter was an unbroken sequence of events. … When Mr Khan followed the claimant back to his car and opened the front passenger door, he again told the claimant in threatening words that he was never to come back to the petrol station. This was not something personal between them; it was an order to keep away from his employer's premises, which he reinforced by violence". However, the Supreme Court held that the employee's *motivation* was not to benefit his employer's business.

Crime and Courts Act 2013, which lists offences for which a Deferred Prosecution Agreement may be concluded, has been suggested as a good starting point for a list of economic crimes suitable for failure to prevent offences. This list includes offences such as theft, false accounting, fraudulent evasion of duty and VAT, forgery, fraud, and bribery.

8.97 However, we conclude that this list would be too broad. First, it includes offences under the Bribery Act 2010 and the failure to prevent facilitation of tax evasion offences, which are already subject to their own bespoke regimes. In the case of the Bribery Act offences, the list in Part 2 Schedule 17 also includes the offence of *being* bribed.[232] It is difficult to conceive of circumstances in which a company should be held liable for one of their employees receiving a bribe, given that a bribe would generally require the employee to perform their duties "improperly" – which would suggest in breach of their duty to the employer.[233]

8.98 Second, the list includes a number of offences connected with money laundering (section 23 of the list includes five offences under the Proceeds of Crime Act 2002). There is already a penalty regime covering money laundering regulations, which includes both criminal offences and civil penalties. These regulations are risk-based, placing additional obligations on organisations operating in areas with a particular vulnerability to money laundering, such estate agents, casinos, and dealers in high value goods.

8.99 Extending "failure to prevent" offences to cover breaches of these would create additional positive duties on organisations which would overlap with the duties under the anti-money laundering regime. The Money Laundering Regulations already place extensive duties on particular organisations whose activities are at particular risk of being used for money laundering. A general offence which could be committed by failing to prevent an associated person from engaging in or facilitating money laundering would impose a positive duty on commercial organisations generally in a relatively untargeted way. If guidance were then provided effectively relaxing those obligations in respect of lower-risk sectors (on the basis that it was reasonable in those circumstances not to have prevention procedures in place) then the duties under the failure to prevent offence and the money laundering regime would be largely duplicative.

8.100 Third, the list includes several offences connected with financial services regulation. The Financial Conduct Authority and Prudential Regulation Authority already have extensive regulatory powers to enforce the regulatory regime for financial services, and we think it would be duplicative and potentially burdensome to impose separate duties under a "failure to prevent" offence.

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232 Bribery Act 2010, s 2.

233 Strictly speaking, a bribe may be paid to secure improper performance of a relevant function by any person, not just the recipient. Consider the following scenario: A is an architect, working for firm C Ltd, and in that capacity provides services to company D Ltd. A is married to B, a local authority planning officer. D Ltd pays a bribe to A, in order to obtain planning permission from B. In these circumstances, A's acceptance of the bribe is intended to benefit C Ltd's client, for whom A provides services in the capacity of an employee of C Ltd. However, we do not think it would be right in these circumstances to hold C liable for failing to prevent A's acceptance of the bribe.

8.101 We consider that any "failure to prevent" offence intended to combat economic crime would, at a minimum, have to include the offences of fraud by false representation,[234] obtaining services dishonestly,[235] the common law offence of cheating the public revenue, false accounting,[236] fraudulent trading,[237] dishonest representation for obtaining benefits,[238] and fraudulent evasion of excise duty.[239]

8.102 However, this, when taken even at its narrowest – an offence, effectively, of failing to prevent fraud – highlights a challenge with applying the "failure to prevent" approach to an offence which can be committed in a wide range of ways and circumstances. If it is accepted that it would be necessary to provide guidance as to the steps that an organisation might take to prevent employees and agents committing fraud against third parties, how might guidance be developed given the wide range of circumstances in which such conduct might take place?

8.103 We consider that given that breadth, *if* a failure to prevent economic crime offence were introduced it should be limited, at least initially, to the core fraud offences identified above. In accordance with the general principles we articulated above, we do not think the offence should extend to attempts or conspiracies to commit fraud.[240] Likewise, we do not think the offence should extend to the common law offence of conspiracy to defraud.[241]

8.104 We also consider that in addition to requiring government to issue general guidance as to the broad approaches organisations should consider to prevent fraud against third parties, there would be a need for government to issue specific guidance to cover areas giving rise to a particular risk of such conduct.

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234 Fraud Act 2006, s 2. The list under Part 2 Schedule 17 also includes the offences of fraud by failure to disclose information (Fraud Act 2006, s 3) and fraud by abuse of position (Fraud Act 2006, s 4).

235 Fraud Act 2006, s 11.

236 Theft Act 1968, s 17.

237 Companies Act 2006, s 993.

238 Social Security Administration Act 1992, s 111A.

239 Customs and Excise Management Act 1979, s 170.

240 It should be stressed that this would not require that the fraud proceeded to the point where the gain was actually made or the loss was caused. Fraud is complete once the false representation is made. So, for instance, if the fraud consisted of dishonestly making false claims in a prospectus, with a view to making financial gains for the company, once the prospectus was issued, the employee responsible would be guilty of fraud, and the company (subject to any defence) of failure to prevent fraud. It would not matter that no person had actually been induced to part with their money on the basis of the false representations.

241 We recognised that common law conspiracy to defraud is often used to prosecute actual, realised frauds, especially complicated frauds where the conduct is spread over several defendants, and worried that exempting it might leave a gap. However, we consider that where conspiracy to defraud is charged against the employees or agents, this would not prevent the company being convicted of failure to prevent fraud, provided that the conduct of one or more employees could alternatively have been prosecuted using one of the included fraud offences: as with the existing "failure to prevent" offences, it is not necessary that the associated person is *convicted* of the substantive offence.

Option 3.

8.105 An offence of failure to prevent fraud by an associated person. This would be committed where an associated person (who might be an employee or agent) commits an offence of fraud with intent to benefit the corporation, or to benefit another person to whom they provide services on behalf of the corporation.

8.106 The fraud offences would include fraud by false representation, obtaining services dishonestly, the common law offence of cheating the public revenue, false accounting, fraudulent trading, dishonest representation for obtaining benefits, and fraudulent evasion of excise duty.

8.107 This offence should be implemented in accordance with the principles set out at Principle 3.

FAILURE TO PREVENT – OTHER OFFENCES

8.108 As noted in the previous section, in their response to the discussion paper, HM Revenue and Customs queried why a failure to prevent offence should be limited to economic crime.

8.109 We consider that the case for an offence covering economic crimes is stronger than for crimes generally given that there is a particular risk of economic crimes being committed on behalf of organisations, or with a view to benefitting the organisation, than other categories of offence.

8.110 A principled argument for "failure to prevent" offences is that where an organisation stands to benefit from criminal conduct carried out by their employees or agents, it is reasonable to impose a positive duty on them to put in place procedures to prevent this. This case is even stronger where corporate practices – such as targets, bonuses and commissions – can create positive incentives for employees and agents to engage in the criminal conduct.

8.111 There may, nonetheless, be situations in which one might want to impose criminal liability on a corporation for failure to prevent commission of an offence where this is in no sense intended to benefit the organisation. The case for doing so may be stronger when commission of the base offence may be linked less directly to corporate financial considerations.

8.112 For instance, the Criminal Justice and Courts Act 2015 creates a "care provider" offence where an associated person commits an act of ill-treatment of neglect against a service user, and this is attributable to the negligence of the care provider.[242] Part of the rationale for such an offence is that while ill-treatment is unlikely to be intended to

[242] The test of corporate culpability, based on the offence of corporate manslaughter, is that the care provider's activities are managed in a way which amounts to a gross breach of a relevant duty owed to the victim.

benefit the care provider financially, financial decisions taken by the provider may make neglect and ill-treatment more likely.

8.113 Imposing a positive duty on a person (even a legal person) backed up with criminal standards for a negligent failure to fulfil that duty is a substantial step, and accordingly requires compelling justification.

8.114 A general "failure to prevent crime" offence would impose a large, generalised duty on organisations to identify risks of offending which could occur in an enormous variety of ways across the organisation, and to put in place procedures to prevent that offending from occurring. It could potentially place huge compliance burdens on companies. This would be the case even if limited to the prevention of offences intended to benefit the organisation.

8.115 We reject the option of having a generalised "failure to prevent" offence on this basis. As such, below we consider three categories of offence where we have been urged to consider a specific to "failure to prevent" offence: overseas human rights abuses, neglect and ill-treatment of vulnerable adults, and computer misuse.

Overseas human rights breaches

8.116 We received a submission from Corporate Justice Coalition ("CJC") and Traidcraft, endorsed by Labour Behind the Label and Amnesty International UK, supporting introduction of a "failure to prevent" offence covering human rights abuses.

8.117 Under this offence, closely modelled on the provisions of the Bribery Act 2010 and the Criminal Finances Act 2017, a relevant commercial organisation would be guilty of an offence if an associated person, with intent to obtain or retain business for the organisation, or to obtain or retain an advantage in the conduct of business for it, did an act anywhere in the world which (if committed in England and Wales) would amount to a specified offence. The specified offences are murder, rape, an offence under section 1 of the Modern Slavery Act 2015 (holding a person in slavery or servitude or requiring a person to perform forced or compulsory labour), kidnap, false imprisonment, corporate manslaughter, grievous bodily harm or wounding with intent), poisoning,[243] causing bodily injury through explosives,[244] use of explosives or corrosive substances with intent to cause grievous bodily harm,[245] and endangering life by damaging property.[246]

8.118 In arguing for this offence, Traidcraft and CJC say

> It is right, and there is ample precedent for the principle, that companies operating in the UK should take action here (i.e. at the highest decision making level) to prevent what is recognisable as criminal activity abroad (whether or not that conduct is classified as criminal in the foreign state)… There is currently a failure to hold to

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243 Offences Against the Person Act ss 23 or 24.

244 Offences Against the Person Act s 28.

245 Offences Against the Person Act s 29.

246 Criminal Damage Act 1971 s 1(2).

account criminally UK companies (and companies which operate in the UK and/or have UK listings) which are complicit in human rights abuses abroad…

8.119 Ultimately, whether to introduce such an offence is a question of policy. It is evident that, although the offence proposed by Traidcraft and CJC would be capable of capturing failure to prevent human rights abuses where the base offence took place in the UK, its main purpose is to capture conduct overseas. Therefore, in deciding whether to introduce such an offence a key issue would be whether there is a sufficiently pressing need for extraterritoriality; this cannot in practice be divorced from the challenges of holding to account in the overseas jurisdiction both the primary offenders (which may be corporations) and allegedly complicit UK firms.

8.120 However, a further issue to be considered – if it is accepted that this is the key reason – is whether it would be not preferable to make the core human rights abuses extraterritorial.

8.121 We do not consider that failure to prevent offences should be introduced simply because it is in practice difficult to prove substantive offences against companies which are alleged to be actually complicit in offending. That is, they should not be introduced simply because it is believed that domestic firms are actually involved in encouraging or directing the commission of criminal offences but there is insufficient evidence of this to prosecute them. They should only be introduced if there is a demonstrable need to impose a positive duty on the firm to put in place reasonable prevention procedures.

8.122 We have certain concerns about the offence as drafted by CJC. We have considerable doubt about the inclusion of corporate manslaughter. Unlike the other offences, which require either intent or recklessness or similar, the offence of corporate manslaughter is an offence of negligence. If the aim of including corporate manslaughter is so that a UK company can be prosecuted where its negligence (within the UK) had led to deaths overseas, then this might suggest that the offence of corporate manslaughter itself should have extraterritorial effect. (There would also not seem to be any logical reason for including corporate manslaughter but not gross negligence manslaughter when committed by an individual who might be an agent of the commercial body.)

8.123 We also have a concern about the provision in the draft offence dealing with encouraging or assisting crimes. In part, this reflects our concern, discussed at paragraphs 8.80-8.90 above, about extending liability to inchoate offences. However, a further issue is that under sections 45 and 46 of the Serious Crime Act 2007, on which this part of the draft appears to be based, an act capable of encouraging or assisting an offence will only itself be an offence if

(1) the person intended to assist or encourage its commission[247] or

[247] Serious Crime Act 2007, s 45.

(2) the person believed that the offence would be committed and that the act would encourage or assist its commission.[248]

8.124 These caveats are not in the draft legislation, however. As drafted, therefore, a company could be liable if an employee or agent or subsidiary overseas did an act capable of encouraging or assisting a third party to commit an act amounting to a human rights abuse, even if the employee, agent or subsidiary neither intended nor foresaw that the human rights abuse would occur.

8.125 We agree with the Corporate Justice Coalition that if there were to be such an offence there should be a defence of having reasonable prevention procedures in place, and a defence that it was reasonable not to expect the commercial organisation not to have such procedures in place. This would go some way to limiting the burden that the extraterritorial nature of the provision would otherwise place on corporations, since only those with overseas employees, agents, or subsidiaries would in practice need to put in place prevention procedures to prevent human rights abuses abroad (although others might need to ensure they had measures to prevent domestic human rights abuses). (The draft legislation only makes the corporate body liable for the conduct of those who provide services and, accordingly, it is unlikely to cover suppliers of goods.)

8.126 Finally, the model proposed by Traidcraft and the CJC provides, along the lines of the Bribery Act, that the failure to prevent offence should only apply to relevant *commercial* organisations. It might be considered whether such an offence should also apply to other organisations which operate internationally.

Option 4.

8.127 An offence of failure to prevent human rights abuses.

8.128 In deciding whether to take this option forward, a key issue for consideration would be whether the case for extraterritoriality had been made out.

Neglect and ill-treatment of vulnerable persons

8.129 We were urged to consider corporate criminal liability in respect of ill-treatment or neglect of vulnerable adults following a report by the Norfolk Safeguarding Adults Board (NSAB) into the deaths of three young adults with learning disabilities who had all been patients at Cawston Park Hospital.[249] The report was authored by Margaret Flynn, who had previously led the Serious Case Review into abuse at Winterbourne View Hospital.[250]

8.130 In a response to our consultation, Margaret Flynn, with Aled Griffiths and Laura Pritchard-Jones, argued that failure to prevent offences should be adopted in the

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248 Serious Crime Act 2007, s 46.

249 Norfolk Safeguarding Adults Board, "Safeguarding Adults Review: Joanna, Jon and Ben", September 2021.

250 This followed transmission of footage of patients with autism and learning disabilities being abused at Winterbourne View Hospital, South Gloucestershire, by the BBC's *Panorama* in May 2011.

health and social care sectors, but that these should not be "promoted as a replacement alternative to that of substantive offences". We also met with the NSAB to discuss their concerns.

8.131 There is already a "care provider" offence in section 21 of the Criminal Justice and Courts Act 2015. Under this provision, where an individual care worker ill-treats or wilfully neglects an individual in their care, the care provider may be liable.

8.132 The offence is not modelled as a "failure to prevent" offence, however. Instead, it is based on the offence of corporate manslaughter. The care provider is only liable if "the care provider's activities are managed or organised in a way which amounts to a gross breach of a relevant duty of care owed by the care provider to the individual who is ill-treated or neglected" and "in the absence of the breach, the ill-treatment or wilful neglect would not have occurred or would have been less likely to occur".

8.133 Thus, unlike a "failure to prevent" offence, where once the criminal conduct is proven the onus is on the organisation to show it had prevention procedures in place which were reasonable, under this provision, even once the ill-treatment or neglect is proved, the burden remains on the prosecution to prove a link between the ill-treatment or neglect and the way that the organisation was managed. Moreover, although the "duty" is identified with a duty under civil law, the breach must be a "gross breach" – that is, the conduct falls far below what can reasonably be expected of a care provider in the circumstances.

8.134 Our terms of reference do not permit us to consider the substance of this offence. We simply say that the degree of fault required for a care provider to be convicted under this legislation is surprisingly high considering the way in which comparable offences in other fields have been formulated, and the fact that this is essentially a regulatory offence, designed to apply to providers who have chosen to operate in a particular field of activity. We understand that no care provider has been prosecuted for this offence, and it may be that this higher burden – which requires the prosecution to prove a gross breach of duty – may be a factor.

8.135 We are satisfied that a "failure to prevent" offence, with a reverse burden of proof would be acceptable to the courts as compatible with the rights in Article 6 of the European Convention. That is, there would not be a principled objection to an offence holding the organisation criminally liable where an individual care worker had engaged in ill-treatment or neglect, unless the organisation could demonstrate that it had in place reasonable procedures to prevent the ill-treatment or neglect. The harm involved is serious, and would be proven to the criminal standard before any liability fell on the organisation; what prevention procedures had been put in place would be something within the peculiar knowledge of the provider.

8.136 If a "failure to prevent" offence were introduced to cover ill-treatment and neglect, we consider that it would make sense to replace, rather than complement the existing care provider offence, as any conduct caught by the existing offence would be covered by the "failure to prevent" offence.

8.137 A particular issue we were urged to consider in relation to care homes and specialist hospitals was that often corporate chains are structured so that each institution is a separate legal entity, owned by a holding company. Failure to prevent offences

therefore have a distinct advantage over the identification doctrine in enabling parent companies to be held to account for criminal conduct taking place within or by a subsidiary.

8.138 Where a subsidiary commits a criminal offence requiring proof of fault, it may be difficult to demonstrate that the parent company is criminally liable, unless it is possible to show that a director or senior officer had the necessary fault – for instance, if there is a common director between the subsidiary and the parent company who possessed the necessary fault. Even then, however, it would be necessary to prove that that director represented a directing mind and will.

8.139 With a failure to prevent offence, however, the subsidiary may be an associated person. For instance, the Bribery Act 2010 explicitly provides that a "person" is associated with the relevant commercial organisation if it performs services for or on behalf of that organisation. "Person" here is not limited to natural person and the legislation states that accordingly that person may be the organisation's subsidiary.[251] Although the Criminal Finances Act 2017 does not state explicitly that the "person" may be a subsidiary, it too defines an associated person as including a person who provides services on behalf of the relevant body.

8.140 Moreover – since the subsidiary itself may not have committed a substantive offence (as opposed to having itself committed a "failure to prevent" offence) – there is nothing to prevent a person who is an employee of the subsidiary from being considered an associated person of the parent company: whether a person provides services for or on behalf of the defendant corporate body is to be determined by reference to all the circumstances and not merely by reference to the relationship between the defendant and the culpable person.[252]

8.141 Were a failure to prevent offence introduced to cover care providers, we think – contrary to our general position – that there should be no requirement that the conduct was intended to benefit the organisation. In general, ill-treatment is not likely to be committed with the benefit of the organisation in mind, and even where neglect is attributable to a desire to cut costs or save money, it is unlikely to be possible to demonstrate that a particular act of neglect was done with that purpose.

8.142 On the face of it, therefore, this would be the imposition of a positive duty. However, given that the care provider would already be under legal duties towards those in its care, and duties under tort law would mean that the care provider would have vicarious liability for the actions of its staff, we would not envisage this as creating substantial new impositions for care providers.

8.143 The issue therefore is whether it is appropriate to impose criminal liability in these circumstances. Given that criminal liability has already been imposed under the existing care provider offence, replacing this with a "failure to prevent" offence would not be a substantial extension of the criminal law.

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251 Bribery Act 2010, s 8.

252 Bribery Act 2010 s 8(4); Criminal Finances Act 2017, s 44(5).

8.144 Ultimately, whether to introduce a "failure to prevent" offence to cover ill-treatment or neglect in care homes is a question of policy. However, we present this as an option for reform which should be considered on its merits.

Option 5.

8.145 An offence of failure to prevent neglect and ill-treatment.

8.146 This would replace the "care provider" offence in the Criminal Justice and Courts Act 2015. We consider that if this option were to be taken forward, the general principle that the underlying conduct should have been intended to confer a business advantage on the organisation would not apply.

Computer misuse, data protection and interception of communications offences

8.147 As part of our consultation on potential projects for our Fourteenth Programme of Law Reform, the Criminal Law Reform Now Network (CLRNN) recommended reform of the Computer Misuse Act 1990 (CMA). They argue that the existing law, in its limited application to companies, does not fulfil the requirements of the Cybercrime Convention. This provides

> 1. Each Party shall adopt such legislative and other measures as may be necessary to ensure that legal persons can be held liable for a criminal offence established in accordance with this Convention, committed for their benefit by any natural person, acting either individually or as part of an organ of the legal person, who has a leading position within it, based on:
>
> a. A power of representation of the legal person;
>
> b. An authority to take decisions on behalf of the legal person;
>
> c. An authority to exercise control within the legal person.
>
> 2. In addition to cases already provided for in paragraph 1 of this article, each Party shall take the measures necessary to ensure that a legal person can be held liable where the lack of supervision or control by a natural person referred to in paragraph 1 has made possible the commission of a criminal offence established in accordance with this Convention for the benefit of that legal person by a natural person acting under its authority.
>
> 3. Subject to the legal principles of the Party, the liability of a legal person may be criminal, civil or administrative.[253]

8.148 CLRNN suggest that while in principle corporations could be criminally liable under the CMA, this would almost certainly be on the basis of the identification doctrine.[254] (There is nothing within the Act that explicitly demonstrates that Parliament intended

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253 Council of Europe, Convention on Cybercrime (2001), Article 12(1)-(3).

254 Criminal Law Reform Now Network, "Reforming the Computer Misuse Act 1990" (2020) para 5.12.

the offences in it to apply to corporations – there is, for instance, no "offences by corporations" clause – but nor is there anything to imply it did not intend the Act to apply to legal persons.)

8.149 CLRNN conclude

> it seems to us that the provisions of the CMA, even taken in conjunction with the ordinary laws of accessorial liability, inchoate liability and vicarious liability, are insufficient to satisfy the requirements of Article 12 of the Cybercrime Convention of providing for a robust framework whereby corporate bodies can be held criminally[255] accountable for the offences of their employees.
>
> Article 12 clearly contemplates that parties to the Cybercrime Convention should create two routes to such an outcome. The first, where the corporate body is liable for the offence committed by the employee (Article 12(1)) and the second where the corporate body is liable in its own right for failing to prevent the employee from offending (Article 12(2))…
>
> With these considerations in mind we recommend the inclusion of a failure to prevent offence in the CMA…[256]

8.150 It is not clear that there is an administrative or civil mechanism which would fully hold corporate bodies liable for the criminal actions of their employees. There will be some circumstances – for instance where damage has been caused to systems or data – where the company would be held liable in civil law for the actions of their employee. There will be some circumstances – for instance where the misuse has consequences for personal data – where regulatory sanctions may be available to the Information Commissioner. However, there would be other situations where the actions of an employee amounted to a criminal offence, but did not give rise to a liability under civil law and was not covered by data protection laws.

8.151 Computer misuse would appear to be an offence that might be particularly likely to occur in a corporate context, and where commission of the offence might be aimed at providing a business advantage to the corporate employer. It is also an offence where it might be reasonable to expect organisational employers to have procedures, including technical restrictions, in place to prevent employees committing a criminal offence.

8.152 The Home Office ran a call for evidence on the Computer Misuse Act 1990 in 2021 and is currently considering whether there is harmful activity that is not currently covered by the Act. Accordingly, we consider that the case for a "failure to prevent" offence would be best considered as part of any such review rather than as a standalone reform.

8.153 If such an offence were to be introduced, we think there are other similar offences which might reasonably be covered by such an offence, such as offences relating to

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255 Criminal Law Reform Now Network, "Reforming the Computer Misuse Act 1990" (2020) para 5.11.

256 Criminal Law Reform Now Network, "Reforming the Computer Misuse Act 1990" (2020) paras 5.11 and 5.18. Note that the Cybercrime Convention does not actually require that corporate bodies by held *criminally* liable – the Convention states that the liability may be criminal, civil or administrative.

interception of communications and unlawfully obtaining communications data under section 3 and section 11 of the Investigatory Powers Act 2016.

8.154 We see no reason to depart from the general principle that the offence should require proof of intent to benefit the organisation, directly or indirectly. However, a failure to prevent offence in relation to offences under the Computer Misuse Act 1990 might raise issues of extraterritoriality. This is not because we think there is a need to address failures by UK-based organisations to prevent computer misuse by employees and agents overseas. Rather it is because the Computer Misuse Act 1990 already contains complex extraterritoriality provisions, reflecting the fact that computer systems transverse international boundaries. Even an unsophisticated case of computer misuse where, for instance, an employee uses a colleague's password to access unauthorised data held on an email server, is likely to involve the transmission of data across several jurisdictions.

8.155 Consequently, any "failure to prevent" offence in relation to computer misuse would have to take account of the complex extraterritoriality provisions that that legislation involves.

Option 6.

8.156 An offence of failure to prevent computer misuse.

8.157

CONCLUSION

8.158 As discussed in Part One, any decision to introduce new "failure to prevent" offences needs to be considered alongside the issue of retention or reform of the identification doctrine. If the identification doctrine is retained as at present, the case for new failure to prevent offences, is inevitably more compelling. We therefore consider that "failure to prevent" offences are an option for reform, but note that the evaluation of this option must take place alongside the evaluation of the options for reforming the identification doctrine.

8.159 We consider that "failure to prevent" offences, should, unless the particular circumstances require otherwise, follow the principles in paragraph 8.91 above.

8.160 We have considered whether there should be an offence of "failure to prevent economic crime". We consider that the list of offences contained in Schedule 17 of the Crime and Courts Act 2013 contains several offences which should not be included in any such offence because

(1) they are either duplicative of offences in respect of which organisations can already be held liable where the offence is committed by an employee under administrative penalties, or

(2) they are ancillary offences, such as attempts and conspiracies, where we consider that imposing corporate liability for failure to prevent could be unfair and counterproductive.

8.161 Accordingly, we consider that should there be a "failure to prevent" offence covering "economic crime" it should, at least initially be limited to a narrow set of core fraud offences.

Chapter 9: Criminal liability of Directors and Managers for Corporate Offending

INTRODUCTION

9.1 Where a director or senior manager is a party to criminal offending, the law will generally enable them to be convicted as either a primary or secondary (accessory) offender. This includes cases where only the corporation can commit the substantive offence: a director may be guilty of encouraging, assisting, or procuring the offence.[257]

9.2 However, it is common for legislation creating criminal offences also to make provision for the liability of directors and other senior officers where the company is guilty of an offence. Our research suggests that there are well over a thousand legislative instruments creating criminal liability on this basis.[258] Typically, these will provide for a director to be personally guilty of the substantive offence where they 'consent to or connive in' the company's offending or, in some cases, where it is attributable to their neglect.[259]

9.3 These provisions raise issues of fairness. They provide for the criminal conviction of individuals on a lower basis of culpability than is normally the case under the law of England and Wales (it is not generally a criminal offence to "connive" – that is, to "turn a blind eye" – to an offence). In many cases, they permit an individual to be convicted of an offence – including some serious offences carrying social stigma and punishable by imprisonment – on the basis of mere negligence. They may, consequently, act as a disincentive to persons becoming directors of corporate bodies.

CONSENT OR CONNIVANCE PROVISIONS

9.4 It is common for statutes creating criminal offences to include a provision extending liability to directors and managers of a corporation where the corporation is guilty of a

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257 One complication should be noted in relation to the law of conspiracy. Although a company can be a party to a conspiracy, conspiracy requires an agreement of all least separate minds. Therefore, a conspiracy cannot exist between (i) an individual director and (ii) the company on the basis of that director's conduct alone. If, however, there is a second natural person who is a party to the conspiracy, both individuals and the company can be prosecuted.

258 A search on legislative.gov.uk found 1,456 instruments (Acts of Parliament, statutory instruments, regulations, and devolved Welsh legislation) containing the phrase "consent or connivance"). Spot-sampling of thirty of these instruments found that in every case the provision concerned criminal liability of directors where a corporate body commits an offence.

259 Pinto and Evans note that the clause in the Trade Descriptions Act 1968, the legislation in issue in *Tesco v Nattrass,* referred to "consent *and* connivance" suggesting that Parliament intended that both would have to be proved. See A Pinto and M Evans (2008) "Corporate Criminal Liability", 2nd ed, p 81.

An alternative explanation would be that the wording represents a drafting error. "Consent or connivance" appears in almost 2,000 enactments, "consent and connivance" in just seven, all of which also allow conviction of a director or manager on the lower basis of negligence. It seems inherently unlikely that Parliament could have intended to allow a director or manager to be convicted on the basis of negligence, without needing to prove consent or connivance, but not for them to be convicted on the *more* culpable basis that they had consented to the conduct or connived in it, without both being proved.

criminal offence, and the company's conduct was with the consent or connivance of the officer, or in some cases attributable to their neglect. These are frequently under a heading "Offences by corporations"[260] or "Liability of directors, etc"[261] or "Liability of company officers for offences by company".[262] There may also be further provision for how this liability is to be understood in relation to partnerships or to bodies managed by their members.

9.5 The presence of such a clause will often be decisive evidence that Parliament did intend a provision couched in terms primarily applicable to a natural person to extend to corporations.

9.6 Conversely, the absence of a clause may indicate that Parliament did not envisage the offences being capable of being committed by bodies corporate – for instance, the Sexual Offences Act 2003 contains no such provision, presumably because sexual offences will generally involve natural persons.[263]

9.7 Nevertheless, it should be recognised that whether legislation creating criminal offences contains such a provision can appear to be rather arbitrary. It may simply mean that legislators did not give thought to whether there should be corporate liability, or if there was to be corporate liability, whether it should extend to directors. This can lead to anomalies: for instance, the Protection of Children Act 1978 (discussed below), which criminalises indecent images of children, contains one; but the Obscene Publications Act 1959 does not. There is a provision covering offences by corporations in the Hunting Act 2004, but not the Fur Farming (Prohibition) Act 2000.

9.8 The discussion paper gives an example of such a provision in section 12 of the Fraud Act 2006, which provides that if an offence under the Act is committed by the corporation with the "consent or connivance" of:

> (a) a director, manager, secretary or other similar officer of the body corporate, or
>
> (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.

9.9 Consent or connivance provisions do not create a separate offence.[264] Rather they extend liability for one or more offences to directors etc, and on a basis distinct from that which applies ordinarily to natural persons for the offence.

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260 For instance, Public Order Act 1986, ss 28 and 29M.

261 For instance, Data Protection Act 2018, s 198.

262 For instance, Fraud Act 2006, s 12.

263 Although there are offences within the Sexual Offences Act 2003 which could conceivably be committed by a body corporate, such as those relating to causing, inciting or controlling prostitution (and repealed offences in the Act relating to trafficking for sexual exploitation).

264 *Michael Wilson v R* [2013] EWCA Crim 1780 34-35.

9.10 "Director, manager, secretary or other similar officer" has been said to include people who have "the management of the whole affairs of the company"[265] and "real authority, the decision-makers".[266] In *R v Boal*, it was held that the deputy manager of a bookstore was not a manager for these purposes as he "could well have been regarded as responsible only for the day to day running of the bookshop rather than enjoying any sort of governing role in respect of the affairs of the company itself". Lord Denning said the term "officer of the company" can be used "whenever anyone in a superior position in a company encourages, directs or acquiesces"[267] in fraudulent activity. "Secretary" is understood to refer narrowly to the Company Secretary.[268]

9.11 Although these provisions extend to managers, company directors and other officers, in the remainder of this chapter we will generally refer, for simplicity, only to directors.

9.12 For the purposes of a "consent or connivance" clause, it is sufficient that the director knew of the acts in question.[269] The director did not need to know they were unlawful. Moreover, in some circumstance, knowledge may be inferred even though the director had not turned his or her mind to the issue: for instance, a director who does not realise that a licence is required for a particular activity can be said to "know" that the company does not have one, even if – because they had not realised one was necessary – they have never considered it. [270]

9.13 It is not necessary for the jury to agree as to whether the director had actually consented to, or merely connived in, the conduct.[271]

9.14 There is a degree of overlap between these provisions and the law on accessory liability. It has been noted, though, that these provisions are wider, because they do not require a positive act of aiding and abetting. Connivance in particular has been likened to "wilful blindness".[272]

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265 *Gibson v Barton* (1875) LR 10 QB 329.

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

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

268 In the Irish case of *DPP v TN* [2020] IESC 26, it was held ""Director" and "secretary" are of course official positions within a company, mandated by statute … as the office of "director" and "secretary" are statutory positions with statutory functions; they should be given the definition as provided for by the Companies Acts". This was based on Denning MR's analysis in *Registrar of Restrictive Practices v WH Smith* [1969] 1 WLR 1460, which had held that the terms "officer", "manager", "director" and "secretary" should be interpreted in line with their interpretation for the purposes of the Companies Acts. However, the Irish Supreme Court noted that while "director", "secretary" are statutory officers and "officer" is defined in the Companies Act, "manager" is not. This is also true for the UK, where Part 12 of the Companies Act 2006 deals with company secretaries.

269 *Attorney General's Reference (No 1 of 1995)* [1996] 1 WLR 970.

270 *Attorney General's Reference (No 1 of 1995)* [1996] 1 WLR 970 at [980].

271 *R v Chargot Ltd* [2007] EWCA Crim 3032 [2008] 2 All E.R. 1077 at [15].

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

Consent, connivance or neglect

9.15 As noted above, some legislation goes further in extending liability to directors, etc, on the basis not only that they consented to or connived in the conduct by the company, but also in circumstances where the conduct was attributable to their neglect.

9.16 Neglect in such clauses does not require knowledge: if the director should have been put on enquiry and failed to take steps, that is sufficient.[273] Nonetheless, it is not the duty of a director to acquaint himself or herself with all the details of the running of a company, and it is perfectly proper for a director to leave matters to another director or to an official of the company.[274]

9.17 However, there can be a proper inference that a duty would lie with a particular director – for instance the Managing Director. Such an inference would be capable of being rebutted by the defendant.[275]

9.18 It is likely, although not altogether clear, that the jury does not need to be agreed as to whether the offending is due to the director's consent or connivance or to their neglect.[276]

9.19 The extension to "neglect" in some provisions is potentially unfair where it applies to an offence with a fault threshold higher than neglect. Although directors' liability provisions including "neglect" are generally reserved for regulatory contexts, and to strict liability and negligence offences, legislation is not consistent, and directors' liability for some fault-based offences extends to "neglect".[277] We were therefore keen to establish whether consultees thought both pathways to individual director liability were necessary, and if so in which formulation of "consent or connivance" provisions were appropriate.

9.20 A director who is convicted on the basis of their consent, connivance or neglect can be sentenced up to the maximum penalty for the offence, notwithstanding that the corporation itself will only be liable to a fine.

9.21 Under the Company Directors Disqualification Act 1986, where a person is convicted of an indictable offence (whether on indictment or summarily) "in connection with the

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273 *R v P* [2007] EWCA Crim 1937. Here the Court of Appeal explicitly rejected a previous finding by Mackay J that neglect "must be construed in the sense of turning a blind eye in circumstances where the defendant had suspicion or belief as to the material facts but, because he feared the answer might be unpalatable, he did not want to know more… It is a subjective test and not equivalent to inadvertence, laziness or even gross negligence". This was the basis on which Mackay had directed the acquittal of directors of Railtrack for health and safety offences relating to the deaths of four passengers in the Hatfield rail crash. The Court of Appeal held that the *Railtrack* judgment had wrongly "equate[d] the test in relation to neglect into the same test that is to be applied when the allegation is connivance. Parliament has chosen quite plainly that there should be a distinction between consent, connivance and neglect."

274 *Huckerby v Elliot* [1970] 1 All ER 189 48.

275 *Motor Depot Ltd and Philip Wilkinson v Kingston upon Hull City Council* [2012] EWHC 3257 (Admin).

276 *R v Chargot*, discussed at para 9.13 above. Although the case concerned a "consent, connivance or neglect" clause, in the specific circumstances of the case, the director either consented to or connived in the offence, and the judgment is framed accordingly. It does not explicitly address the circumstance where the culpability might have been consent or connivance or might have been neglect.

277 One example is the offence in section 1 of the Protection of Children Act 1978.

promotion, formation, management, liquidation or striking off of a company", the court can disqualify them from acting for acting as a company director for up to five years (for a court of summary jurisdiction) or fifteen years (for any other court). Where a company's director or manager is convicted of an indictable offence under a consent or connivance provision, this will inevitably amount to a conviction "in connection with the management of the company", and therefore disqualification as a company director will generally be available.

CONSULTATION QUESTION

9.22 At question 12 of the discussion paper, we asked the following question:

> 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?

9.23 A small majority of respondents to this question expressed support for the existing "consent or connivance" provisions. The main reason given for this was the clarity they provide, being statutory provisions.

9.24 The SFO supported the provisions as a way to capture conduct of senior officers which is culpable of some criminal wrongdoing, saying:

> The current statutory provisions relating to consent, connivance or neglect should remain, as it is intended to reflect the level of responsibility of the director involved – especially where their degree of involvement does not meet the threshold for accessory liability.

9.25 The CPS similarly agreed with the utility of the provisions insofar as they extend further than accessorial liability. They noted, however, that the identification doctrine currently limits the use of the provisions, because the substantive offence by the company must be proved before they are engaged.

9.26 The argument that the identification doctrine impedes the use of these provisions was alluded to by the Fraud Lawyers Association. They suggested that it had the opposite effect – that it is comparatively more attractive to prosecute directors of SMEs because it is easier to apply the identification doctrine to the company. They recommended guidance on when a prosecutor will prosecute individuals, in order to mitigate this issue.

9.27 When comparing the "consent or connivance" provisions with accessorial liability, it is important to note the differences. Alison Cronin pointed this out:

> Mens rea for accessorial liability in the general criminal law differs from that required for liability for consent, connivance and neglect. The additional statutory provisions of consent etc are necessary for the law to conform to fair labelling principles and adequately express the nature of the directors' wrongdoing in given circumstances.

9.28 The SFO echoed the point that these provisions express a certain level of wrongdoing by directors: the provisions are intended to reflect the culpability of the director. There is an argument that the difference in fault requirements is reflected in the severity of the offending: it is less wrongful to have consented to or connived in the company's wrongdoing, compared to possessing the intention to commit the offence or to dishonesty. This is because consent requires reason and deliberation, which implies a positive awareness and action,[278] and connivance has been likened to "wilful blindness".[279] However, in some situations it can be said that the consent or connivance contributes to the wrongdoing just as much as the perpetration of it. Moreover, there will often be situations in which the culpability involved in consenting to or conniving in misconduct is greater than that required to convict of the substantive offence, so it is not necessarily accurate to categorise this type of fault as less culpable.

9.29 The theme of clarity came through in Nicholas Ryder's response, who supported the provisions because:

> Relying on the general law of accessory liability will make it harder for prosecutors in all but the most clear-cut of cases. Clear statutory provisions relating to directors' liability for a company's economic crime, subject to defences, will send a clear message to directors that they have a responsibility to prevent their company engaging in economic crime.

Analysis of the opposition to the provisions

9.30 A minority thought that general accessory liability was sufficient, or otherwise expressed doubt about the consent or connivance provisions. Notably, some key stakeholders expressed doubt because of the associated difficulties of the identification doctrine. Alison Saunders DBE, writing for Linklaters, said

> Arguably these provisions make more sense in respect of quasi-regulatory offences for which corporates can be strictly liable (because where corporate liability requires a "directing mind and will" in any event, there is less need to pursue director liability via an alternative route). This is reflected in the fact that such offences are rarely prosecuted.

9.31 Some consultees argued that criminal liability of directors could dissuade people from serving as directors. GC100 were wary about expanding director liability because

> concerns around reputational loss and existing personal liability already satisfactorily incentivise care and attention by directors. Layered over this are common law and statutory fiduciary duties of directors overseen by the courts, and other statutory obligations enforced by a variety of regulators. The Discussion Paper articulates the use of "consent, connivance or neglect" provisions in various (criminal) statutory contexts, but does not look outside the frame of the criminal law to consider the other mechanisms by which directors can incur liability. We strongly believe that this is a critical aspect to the analysis and that, if this wider context is ignored, the result

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278 Stroud's Judicial Dictionary, 10th Ed, 1st Supplement (2021), "consent".

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

may ultimately be that companies are deprived of key executive and non-executive talent.

9.32 Others commented on the relatively limited use by prosecutors of consent or connivance provisions in general, and then questioned their merit. The Fraud Advisory Panel made this point, suggesting instead that "substantive criminal offences and accessory liability would enable prosecutors to take action against relevant individual employees or responsible directors."

The issue of "neglect" provisions

9.33 Several consultees were opposed to the use of broader provisions extending liability to directors' neglect. Outside our consultation, Professor Jeremy Horder[280] expressed doubt about their appropriateness. In a presentation to the Criminal Law Reform Now Network, Professor Horder argued that neglect is not a sound basis for imposing individual liability on directors for wrongdoing committed by the company. This is because it is not capable of capturing the requisite level of knowing contribution to the crime that is required by general principles of complicity.[281]

9.34 The SFO also commented on "neglect" provisions. They suggested that sometimes "the corporate failure to prevent offence may more appropriately reflect the role of the director in the relevant wrongdoing".

9.35 Similarly, Herbert Smith Freehills and GC100 did not think it was appropriate to extend liability to directors on the basis of their neglect.

9.36 Some consultees, however, have expressed support for these provisions, including Margaret Flynn, Aled Griffiths and Laura Pritchard-Jones who stated that they do not go far enough: they advocated an offence similar to misconduct in public office for the private office of a care provider, and for "a sector-specific director's duty on similar grounds, breach of which would be a ground for director disqualification."

Alternatives

Directors' liability for "failure to prevent" offences

9.37 The CPS also argued that consent or connivance provisions should be attached to the failure to prevent offences, because this would "accurately reflect the nature of the wrongdoing committed by the individual director." They said:

> However, it would be necessary to restrict the offences so that they only apply to directors who bear some personal responsibility – in large companies there will be a large number of directors, and they should not all bear responsibility for the company's failure. One possibility is to impose liability where the company's 'failure to prevent' was committed with the "consent or connivance" of a director ("consent, connivance or neglect" may well be too broad).

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280 Professor Horder was a Law Commissioner for England and Wales, with responsibility for the criminal law, from 2005-2010.

281 Presentation available at https://www.youtube.com/watch?v=hAfDnOAPZek.

9.38 Spotlight on Corruption and the APPG on Fair Business Banking advocated for the creation of an individual failure to prevent offence for directors. Alternatively, the introduction of a 'consent, connivance or neglect' provision to a failure to prevent offence may create a similar liability.

They refer to section 14 of the Bribery Act 2010 (consent or connivance provision) and the fact that it has not been prosecuted, and suggest:

> If the offence were extended to include neglect and applied to a Section 7 offence [corporate failure to prevent bribery] and not just substantive offending, this could be a powerful addition to ensure individuals at a senior executive level are held to account.

9.39 Similarly, Corporate Justice Coalition recommended consideration be given to "the creation of a failure to prevent offence for individual officers."

9.40 The ICAEW appear to support the same idea, suggesting that an alternative to the provisions is "a separate offence of neglect by the directors in failing to implement appropriate procedures".

Principles to guide decisions on the options

9.41 As part of this question we asked consultees what principles should govern the individual criminal liability of directors for the actions of corporate bodies. There were several principles which consultees discussed in their responses to this part of the question: clarity, fair labelling, minimal criminalisation, and appropriate recognition of culpability. These are principles by which we are always guided. For example, in our 2010 Consultation Paper on Criminal Liability in Regulatory Contexts, we proposed general principles that criminalisation is only appropriate for those who have engaged in seriously reprehensible conduct.[282] Further, we said that "clarity and consistency, as well as fairness, should be essential elements of any offence applicable, in particular, to businesses…".[283]

9.42 The statutory provisions of consent or connivance were widely thought to bring clarity, particularly in comparison to the general law of accessory liability. As an example, Professor Nicholas Ryder, Dr Samantha Bourton, Diana Johnson and Demelza Hall. said "clear statutory provisions relating to directors' liability for a company's economic crime, subject to defences, will send a clear message to directors that they have a responsibility to prevent their company engaging in economic crime."

9.43 There was a view that any reform should not overlap with the current regulations for directors in some sectors. UK Finance gave the example of the financial services sector:

> which is already subject to the SM&CR, which has a prescribed responsibility for ensuring that the bank's policies and procedures counter the risk that it might be used to further financial crime. It is important that criminal law reform does not unbalance the SM&CR regime, by effectively reintroducing a reverse burden of proof

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[282] Criminal Liability in Regulatory Contexts (2010) Law Commission Consultation Paper No 195, at para 3.137.

[283] Above at para 4.81.

on senior managers to show that they are not at fault for breaches in their area of responsibility.

DISCUSSION

9.44 We have concluded that there is value in provisions for directors' liability, and that relying on normal principles of accessory liability where companies engage in corporate criminality with the knowledge of their directors would not be satisfactory.

9.45 First, it is not clear that accessory liability can deal with all instances of consent or connivance. As discussed above, "connivance" is taken to refer to "turning a blind eye" or a deliberate failure to take action to stop misconduct.

9.46 In general, for a person to be convicted of aiding or abetting an offence, there must be an act, although in certain circumstances an act can include an omission. There is extensive case law holding that a failure to act where the person has the right to control the actions of another can itself amount to an act of encouragement. For instance, a company and its directors can be convicted of aiding and abetting the false making of tachograph records by drivers if the directors know that their inactivity was encouraging the practice.[284] Likewise, under the Serious Crime Act 2007, failure to act can amount to an act capable of encouraging commission of a crime. In *R v Gaunt*,[285] the Court of Appeal considered the sentencing of a general manager of a waste processing company for racially aggravated harassment of a black employee with learning difficulties, who had pleaded guilty on the basis that although he had not engaged in or witnessed the harassment, he was aware of it, and that by his inaction may thereby have encouraged it.[286]

9.47 However, whether under the Accessories or Abettors Act or the Serious Crime Act provisions, the failure to act must be capable of encouraging the conduct. It is questionable therefore whether a failure to act of which the primary offender was unaware could be capable of encouraging that conduct. It is not clear that accessory liability would capture a director who knew of the misconduct and failed to take action, thereby conniving in it, but where the employee responsible either did not know that the director knew, or knew but had no reason to think the director would be accepting of it. In contrast, in such circumstances the director could unquestionably be found guilty if there were a consent or connivance clause.

9.48 Second, we do not believe that accessory liability can deal adequately with offences of strict liability where the company's conduct is attributable to a director's negligence. Under the common law, for offences of strict liability, although the primary offender can be convicted without proof of fault, an accessory will only be guilty if they have the requisite fault, that is intention to assist or encourage the commission of the crime and knowledge of any facts necessary for it to be criminal.[287] This has the paradoxical consequence that an accessory is not liable for a strict liability offence caused by their

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284 *JF Alford Transport Ltd* [1997] 2 Cr App Rep 326, Crim LR 745.

285 [2003] EWCA Crim 3295.

286 Some caution is required with this case as it was an appeal against sentence, not conviction (the defendant having pleaded guilty).

287 *R v Jogee* [2016] UKSC 8 9; *National Coal Board v Gamble* [1959] 1 QB 11.

negligence, while the primary offender can be convicted despite having taken care to avoid committing the offence.

9.49 Our conclusion is that it is reasonable for directors to be criminally liable where they have consented to or connived in corporate offending, and – in some cases – where that is attributable to their neglect.

Neglect where base offence involves proof of fault

9.50 That said, we agree that the current way in which directors' liability is dealt with in statutes is highly unsatisfactory. This is particularly the case where the basis of directors' liability is extended to include situations where the commission of the offence by the corporate body is attributed to their neglect

9.51 In our 2010 Consultation Paper on Criminal Liability in Regulatory Contexts we proposed the following principle:

> When it is appropriate to provide that individual directors (or equivalent officers) can themselves be liable for an offence committed by their company, on the basis that they consented or connived at the company's commission of that offence, the provision in question should not be extended to include instances in which the company's offence is attributable to neglect on the part of an individual director or equivalent person.

9.52 We made this proposal in the context of a project which aimed "to introduce rationality and principle into the structure of the criminal law"[288] and which proposed a hierarchy of seriousness where negligence would only form a basis of criminal liability if grave harm or a risk of grave harm is involved.[289]

9.53 In the existing context, where the law does continue to provide for strict liability and negligence offences in circumstances which do not necessarily involve grave harm, we do not think that in principle it is wrong for directors to be held liable for the commission by a corporate body of a strict liability or negligence offence on the basis that that offence was attributable to the director's neglect.

9.54 However, we do think that where an offence requires proof of intent, recklessness, knowledge or dishonesty, a director should not be liable to be convicted on the basis that the corporate body's commission of the offence was attributable to their neglect.

9.55 This is all the more so when the offence is one punishable by imprisonment (which cannot apply to a corporate) or which involves strong social stigma or can lead to significant consequences such as registration as a sex offender.

9.56 In our Consultation Paper on Criminal Liability in Regulatory Contexts we drew attention to one example where we considered the law operated unsatisfactorily:

> Consider the offence of taking indecent photographs of children, contrary to section 1 of the Protection of Children Act 1978. Suppose that a photographic company

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288 Criminal Liability in Regulatory Contexts, Law Commission Consultation Paper No 195, para 1.1.

289 Criminal Liability in Regulatory Contexts, Law Commission Consultation Paper No 195, paras. 4.58-4.60.

were to commit this offence. By virtue of section 3 of the Act, the company directors would also be individually liable for the section 1 offence if the commission of the offence was attributable to their neglect.

The offence of taking indecent photographs of children is one that carries very considerable stigma. It is an offence which, following conviction, has applied to it the notification requirements of the Sexual Offences Act 2003 in certain circumstances. It must be highly questionable whether an individual should have on his or her record a conviction for taking indecent photographs of children, and potentially be subject to stigmatising notification requirements, when (a) he or she personally did no such thing, and (b) he or she was wholly unaware that his or her company did any such thing. In our view, section 3 of the Protection of Children Act 1978 involves the use of a measure that is both unjustifiable and disproportionate in the circumstances.

9.57 In that report, we said "we have been unable to discern any rationale behind the imposition of this extended form of liability [consent, connivance or neglect] in some statutes and the imposition of the orthodox form [consent or connivance] in others".[290]

9.58 We observe that typically – but not always – the extended form is used where the legislation creates offences strict liability or offences of negligence, and the orthodox form is used when the offences created require proof of intent, recklessness, knowledge or dishonesty.

9.59 However, this is complicated by two factors. First, there is generally a single provision on directors' liability covering *all* the offences created in the particular legislation, even where some of those offences require intent, knowledge, dishonesty or recklessness, and some which do not. Typically, where *any* of the offences are strict liability or negligence offences directors' liability will be extended to neglect for all the offences in the legislation.

9.60 Secondly, this rationale – if indeed it is the rationale – is not consistently followed, possibly because it is not articulated anywhere, and therefore those responsible for drafting legislation are not encouraged to follow it. Ministry of Justice guidance on creation of criminal offences does not address the issue at all.[291] The Office of the Parliamentary Counsel (OPC) guidance on creating criminal offences merely advises drafters to consider

> Are companies, partnerships and unincorporated associations to be capable of committing the offence, or just individuals? If the offence can be committed by a corporation, it is usual to provide for the criminal liability of directors and other senior

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290 Criminal Liability in Regulatory Contexts, Law Commission Consultation Paper No 195, para 7.37.

291 Ministry of Justice / Cabinet Office, "Advice on introducing or amending criminal offences and estimating and agreeing implications for the criminal justice system", https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/481126/creating-new-criminal-offences.pdf.

officers of the corporation, so that they can be prosecuted as well as the corporation...[292]

9.61 It then directs drafters to "see examples at the end of the chapter...". It does not explain on what basis drafters should choose between the approaches in those examples, and all but one of the examples to which drafters are directed include liability on the basis of neglect. There is an obvious danger that this approach will just lead to drafters "copy and pasting" text from an inappropriate statutory provision.

9.62 We know of several recent examples where legislation creating an offence with a requirement for knowledge or intent has included provision for directors to be convicted on the basis of neglect alone. For instance, the Specialist Printing Equipment and Materials (Offences) Act 2015 creates an offence of supplying specialist printing equipment *knowing* it will be used for criminal purposes. The offence can be committed by an organisation, and for these purposes the knowledge of the person with responsibility within the body for the supply that the equipment would be used for a criminal purpose is attributed to the company.

9.63 However, where the company's commission of the offence is attributable to the neglect of a director or manager, that person is also guilty of the offence. This means that the director can be convicted of supplying equipment *knowing* it will be used for criminal purposes, even though they did not actually have the knowledge, and the equipment was knowingly supplied by an employee.

9.64 A particularly unsatisfactory complication is that due to the way in which offences are drafted, where an offence involves a *lower* fault element, a director whose neglect results in the company committing the offence may be able avoid liability. For instance, many statutes create "reverse burden" offences of strict liability, subject to a defence where the defendant can prove or show[293] that they did not know – and sometimes had no reason to suspect – some relevant matter. The complication arises because the usual drafting technique is to include a clause along the lines of "In any proceedings under this section, it is a defence for the accused to show that he did not know and had no reason to suspect" in relation to the matter.

9.65 One such example is found in the Video Recordings Act 1984 (discussed in chapter 2) which makes it an offence to sell a classified video recording in breach of the classification. Where the offence involves selling the recording to someone underage, for instance, there is a defence that the accused "neither knew nor had grounds to believe that the person concerned had not reached that age". As discussed in chapter 2, this offence can be committed by corporations, and *Tesco v Brent* establishes that for these purposes, the relevant knowledge is that of the person making the sale on behalf of the company.

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[292] Office of Parliamentary Counsel, "Common Legislative Solutions: a guide to tackling recurring policy issues in legislation", March 2021.

[293] Typically, where the statue requires the defendant to "prove" some matter, this is a persuasive burden and they must satisfy the court of the matter on the balance of probabilities. If they are required to "show" some matter, this is an evidential burden, and they are only required to show sufficient evidence to put it in issue; the prosecution must then disprove the matter to the criminal standard.

9.66 Section 16 of the Act provides that where commission of the offence is attributable to the neglect of a director, that person is liable to be convicted. However, any director charged under this provision would be able to rely on the fact that they did not know and had no reason to suspect that the purchaser was underage.

9.67 This has the perverse effect that where director liability is the basis of prosecution, it may be easier to convict a director of a *mens rea* offence – where they did not have the requisite knowledge or intent – than it would where the burden is on the director to prove lack of knowledge or intent.

9.68 Our conclusion on this matter is that where director liability is extended to offences requiring proof of intent, knowledge, recklessness or dishonesty, this should be limited to connivance or consent. Director liability on the basis of negligence should be limited to cases where the offence is one of strict liability or negligence (including cases where the offence is one of strict liability subject to a reverse burden).

9.69 We also conclude that where an enactment creates several offences, some strict liability or negligence offences, others requiring proof of intent, recklessness, knowledge or dishonesty, the practice of a single "consent, connivance or neglect" clause covering all offences is not appropriate.

9.70 However, even if this practice were adopted for future legislation, it would not deal with the many "consent, connivance or neglect" provisions in existing legislation.[294] A retrospective review of legislation to identify all such provisions, consider the offences to which they apply, and change the basis of liability where necessary would be immense: such provisions are not only found in primary legislation, but in secondary legislation creating offences, and each provision could relate to many individual offences created by the measure.

9.71 We think therefore that there is a case for examining to what extent a general provision might be put in place to limit the application of neglect provisions to offences requiring proof of fault greater than negligence. This might be through a general legislative measure. Alternatively, it might be possible to address this through CPS guidance. For instance, when considering whether a prosecution is in the public interest, prosecutors might be advised that it will rarely be in the public interest to prosecute a director for an offence requiring proof of fault unless there is evidence that the director consented to or connived in commission of the offence.[295]

Should consent or connivance apply to failure to prevent offences?

9.72 As discussed above, some respondents suggested that it would be appropriate for "failure to prevent" offences to be extended to directors where a corporation's failure

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294 Our analysis suggests that over a thousand legislative instruments (including public and local Acts of Parliament, statutory instruments, regulations and Welsh devolved legislation) create criminal liability for directors on the basis of consent, connivance or neglect.

295 In general we would not support the practice of drafting offences broadly and relying on prosecutorial discretion not to prosecute (see for instance Modernising Communications Offences (2021) LawCom No 546, paras 6.36 and 7.44). However, here we suggest that prosecutorial discretion may be a necessary mechanism to deal with a vast number of existing instruments, including secondary legislation, which create offences with an over-broad basis of liability.

to prevent offending by an associated person was attributable to the consent, connivance or neglect of the director.

9.73 In our Consultation Paper on Criminal Liability in Regulatory Contexts we floated this possibility:

> The real harshness of the [that is, "consent, connivance or neglect"] doctrine comes, of course, from the fact that, on the basis of simple neglect, an individual director may be convicted of the offence itself. It follows that some – if not all – of the force of the objection to criminal liability of this kind could be lost, if, in cases where the company's commission of the offence was due to the neglect of an individual director (or equivalent officer), that director was liable for a separate offence of, say, negligently failing to prevent the commission of the offence by the company.[296]

9.74 In principle, we can see a case for extending directors' liability to "failure to prevent" offences. These are, effectively, negligence offences. The company is liable (if the relevant offence takes place) unless it can demonstrate that it took reasonable steps to prevent it. On this basis, it can be argued that there is no conceptual difficulty in holding an individual director liable if they were personally negligent and that negligence led to an associated person committing the base offence.[297]

9.75 We are concerned that this would involve stretching the chain of causation too far. In effect, it would involve allowing an individual to be personally criminally liable on the basis that their *neglect* had enabled the corporation's employee or agent to commit the substantive offence. However – given that existing failure to prevent offences only take effect where there is a commercial organisation involved, that neglectful director would be liable if the employee was employed by the company, but not if they were directly employed by the director. We cannot see a justification for this discrepancy in treatment.

9.76 If, nonetheless, it was thought desirable to extend director liability to "failure to prevent" offences, we think it is important that the maximum sentence should reflect the much lower level of culpability involved. In particular, recognising that in practice the corporate body would not be at risk of imprisonment or a community sentence, it is questionable whether it would be appropriate for directors to be at risk of imprisonment for such offences.

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296 Criminal Liability in Regulatory Contexts, Law Commission Consultation Paper No 195, para 7.48.

297 In this section we only discuss directors' liability in relation to failure to prevent on the basis of neglect. It is difficult to conceive of circumstances where a director could consent to or connive in a failure to prevent. Moreover, the act element of the failure to prevent offence is the criminal conduct of the employee or agent and not, strictly speaking, the company's failure to prevent it. Therefore the director would have to be consenting to, or conniving in, not commission of the offence by the company (which is the normal basis of such liability) but by the employee. Moreover, it is hard to conceive of circumstances where this would not involve personal accessory liability by the director (although see paragraphs 9.45-9.49 above).

CONCLUSION

Principle 4.

9.77 Where an offence requires proof of intention, knowledge, or dishonesty, directors' personal liability for commission of the offence by a corporation should require proof that the director consented to or connived in the commission of the offence by the corporation. Neglect as a basis of directors' liability should be limited to offences of strict liability or negligence.

Chapter 10: Sentencing non-natural persons

PRINCIPLES OF SENTENCING FOR CORPORATE OFFENDERS

10.1 Under section 57 of the Sentencing Code, the purposes of sentencing adult offenders, to which a sentencing court must have regard, are

(1) the punishment of offenders,

(2) the reduction of crime (including its reduction by deterrence),

(3) the reform and rehabilitation of offenders,

(4) the protection of the public, and

(5) the making of reparation by offenders to persons affected by their offences.

10.2 Under section 37 of the Crime and Disorder Act 1998, the principal aim of the youth justice system is to prevent offending by children and young persons. The Children and Young Persons Act 1933, section 37, also requires that a court dealing with a child as an offender must "have regard to the welfare of the child or young person and shall in a proper case take steps for removing him from undesirable surroundings, and for securing that proper provision is made for his education and training".

10.3 There is no similar statement of principles to be employed when sentencing corporate bodies. We therefore asked a question in the discussion paper about the principles that should apply when sentencing corporate bodies for a criminal offence.

10.4 At paragraph 7.13 of the discussion paper, we discussed Professor Macrory's 2006 proposals for additional sentencing options for corporates. These were referred to by several respondents, so the three options are set out here for reference:

(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 the seriousness of the breach, a profit order would reflect solely the profits made through non-compliance.

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

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

CONSULTATION QUESTION

10.5 The relevant question asked in the Discussion Paper was:

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

10.6 The key principles which recurred in the responses included:

(1) deterrence

(2) removal of benefit from criminality

(3) restitution/compensation for victims

(4) proportionate sentence to harm

(5) parity with principles of individual sentencing (punishment, deterrent, rehabilitation, public protection, restoration/compensation)

(6) consistency – between DPAs and convicted companies, and between individuals and corporates (for statutory offences)

(7) consideration of the economic impact on the corporate of a fine.

10.7 Many respondents addressed the existing Sentencing Guidelines for fraud, bribery and money laundering. Some said they were sufficient and did not need to be altered. Others said they were a good starting point but that they required enhancement, for example by adding other sentencing options along the lines of those suggested by Professor Macrory.[298] Some respondents, including 3 Raymond Buildings, noted that additional sentencing powers might be required, in the form of reporting orders or supervision, to give convicted corporates the same oversight requirements as those who enter a DPA. It could be perverse to have a convicted company with a lesser punishment, in a sense, than one for which prosecution was deferred.

10.8 Some respondents advocated for a significantly wider range of sentencing options. The response from Spotlight on Corruption was echoed by the APPG on Fair Business Banking, Transparency International UK and the UK Anti-Corruption Coalition. These organisations supported the measures recommended by Professor Macrory and at the highest, they advocated for company debarment[299] (which Corporate Justice Coalition also supported), dissolution and director disqualification.

10.9 There was debate about the extent to which the financial viability of the corporate should be considered. Responses from the SFO, Financial Crime Compliance Research Group, Fieldfisher, and Baker McKenzie (in the form of considerations of the impact on employees and shareholders) all included reference to this concept.

10.10 Alison Saunders DBE, Linklaters, said

> For both natural and non-natural persons, sentencing should be governed by the need for transparency, clarity, consistency and predictability. Given the broad range of criminal offences for which corporates can be liable, the sentencing regime would

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298 See Corporate Criminal Liability: A discussion paper (2021), p 55-56.

299 "Company debarment" refers to the banning of companies from bidding for or entering into Government contracts.

benefit from further sentencing guidelines for corporate offending (akin to those that exist, for instance, in relation to certain economic and environmental offences).

10.11 The SFO listed "restitution for victims, deterring crime, removing gain and incentives to commit crime, and penalising criminal conduct" as important principles. They elaborated:

> The SFO frequently uses these [sentencing] guidelines in practice, particularly for the purposes of calculating compensation, disgorgement and financial penalties payable under DPAs. To provide an example of relevance to paragraph 7.3 of the Discussion Paper (as to whether sentencing law or guidelines should provide for consideration of the impact on the corporate's economic viability, its employees and local economy), the court used these guidelines in approving a DPA between the SFO and Sarclad Ltd that allowed for Sarclad to pay the financial penalty in instalments and provided for a modest financial penalty due to the company's financial situation. In entering a DPA, the prosecutor will also take into account the likely disproportionate consequences for the company of a conviction and its collateral effects on the public and the company's employees, shareholders and/or institutional pension holders.

10.12 Financial Crime Compliance Research Group and Mia Campbell, Fraud Advisory Group, said corporate sentencing should reflect the five principles for individuals, as above. The former also recommended bespoke guidelines for sentencing corporations, which considers said "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)." They gave an example:

> A potential model may be found in the enforcement of the civil regime for cartel offences. Under this regime, companies are generally fined a maximum of 10% of their worldwide turnover. There is much academic and practitioner discussion about the deterrent effect of this regime, as some argue that the risks of breaching competition law are not sufficiently high to act as deterrent to companies. Any criminal sanctions would need to be sufficiently predictable to align with the rule of law, but would also need to be sufficiently tailored to the specifics of that individual undertaking.

10.13 Alison Cronin addressed the "collateral damage" argument in relation to determining appropriate corporate sentences:

> for as long as the collateral damage argument is used to constrain the process and disposal of corporate crime, whether through the use of deferred prosecution agreements to avoid conviction altogether or through the imposition of relatively lenient sentences, the criminal law will fail in its deterrent aim.

She referenced the idea that companies are 'too big to fail' and described this as flawed and as meaning that conviction does not signal corporate failure.

> Fines do not work well and, in the wake of an announcement of a fine, the corporation's stock price usually rises significantly. The threat of a fine will not necessarily compel a corporation to cooperate or comply.

10.14 Margaret Flynn, Aled Griffiths and Laura Pritchard-Jones emphasised the need for arms-length sentencing because “it is not negotiated or achieved when regulators are engaged in parallel incremental monitoring and enforcement functions.” They also suggested that the “collateral damage” point made by Alison Cronin could lead to:

> inverse blackmail/coercion … which enables company directors, responsible for complex, multi-level company structures, to assert that their care homes and hospitals cannot be closed because ‘there are no other places for [patients] to go to’ and/or ‘no other service can manage their challenging behaviour,’ for example.

10.15 Jamas Hodivala QC, on behalf of the Fraud Lawyers Association said

> the sanctions imposed on Rolls-Royce and more recently Airbus demonstrate that the courts are able to deploy a range of tools, including substantial financial penalties, that were close, or equal to, those routinely imposed on corporations in the United States of America… we see some merit in having a statutorily defined purpose of sentencing as found in s.57 of the Sentencing Act 2020. Equally we agree that any sentencing framework adopted should not enable commercial organisations to approach criminal sanction as being the "cost of doing business".

The Fraud Lawyers Association supported corporate rehabilitation and publicity orders, because they are similar to monitorship and publication of detailed judgments within the DPA regime. But they said “we are less convinced as to the need for a stand-alone Profit Order as also advocated by Professor Macrory, in that we consider this is broadly covered by the process prescribed by the Sentencing Council and reflected at §7.11 of the Discussion Paper and the overarching guideline cited at §7.12”.

10.16 Spotlight on Corruption and the APPG on Fair Business Banking voiced support for rehabilitation as a core principle of sentencing. They also called for appropriate compensation, publicity orders and the dissolution of companies in “very egregious circumstances”.

10.17 Baker McKenzie proposed:

> Any organisation should be stripped of the actual benefit from the crime;
>
> The level of fine should not be disproportionate to the corporate's means;
>
> The level of fine should take into account any potentially adverse impact on stakeholders who were not involved in the relevant wrongdoing including but not limited to employees, shareholders, service users, customers and the wider economy;
>
> Credit should be available to corporates, particularly if they have (i) voluntarily disclosed the relevant wrongdoing, (ii) co-operated with the investigation of the relevant wrongdoing, and/or (iii) implemented or have committed to implement remedial measures to address the relevant wrongdoing and the underlying circumstances.

10.18 Transparency Task Force supported remediation orders and publicity orders. They also advocated for compensation, saying that the current rule preventing compensation orders in "complex cases" results in injustice. They support calls for a review of whether the concept of "social harm" could be considered within the impact of corporate offending. Finally, they call for consistency between bespoke sentencing guidelines and statutory offences designed for individuals.

10.19 3 Raymond Buildings said the five principles for individuals should apply to corporates. They thought there might be merit in considering supervision or corporate Financial Reporting Orders, to "remove the disparity between companies that have agreed to the requirements of a DPA and convicted companies which are not subject to any ongoing supervision or need to demonstrate post-conviction compliance." Corporate Justice Coalition similarly supported introducing corporate reporting and compliance orders, so that the requirements on companies under a DPA can apply to convicted corporates. CJC also supported debarment from public contracts and director disqualification, and better assessment of victim compensation. On this last point, TI-UK also called for these options.

Retaining the status quo

10.20 Some stakeholders suggested the current sentencing guidelines were sufficient. For example, John Binns, BCL Solicitors, said the current sentencing guidelines also feed into the financial penalties for DPAs, and it is "hard to see a reason why they should be changed or replaced at this stage."

DISCUSSION – PRINCIPLES OF SENTENCING

10.21 In principle, we think that four of the five principles applying to adult offenders can be applied directly to corporations. The exception is "the reform and rehabilitation of offenders". This is not to say that companies cannot be "reformed". Rehabilitation in this context may mean two different things. First, it may be understood as referring simply to the matter of encouraging and ensuring future compliance with legal and regulatory requirements, perhaps by instituting new processes and procedures to monitor compliance. Secondly, however, "reform" of the company might mean replacement of existing management or ownership so that the company is in some sense a very different corporate body to what it was before.

10.22 We think that ensuring good corporate governance so that the company does not offend in future could be an explicit aim.

DISCUSSION – SENTENCING OPTIONS

10.23 With very few exceptions, the criminal law works on the basis that the penalties available in the criminal courts are (i) imprisonment, (ii) community penalties and (iii) fines. Since two of these are not available in respect of corporations, this leaves fines – by default – as the only sentencing option. In some circumstances, other orders are available, but these are essentially ancillary.

Fining corporations

10.24 There is a general power to fine in magistrates' courts, notwithstanding that the enactment creating the offence does not provide for a fine, provided that the enactment does not expressly provide to the contrary.[300]

10.25 There is a general power to fine in the Crown Court.[301] Other than the mandatory life sentence for murder, the exceptions to this all refer to sentencing provisions containing an age criterion – so the exceptions would only apply to a natural person. It follows that the Crown Court has the power to fine a corporation for any offence (other than murder; it therefore also arguably follows that a corporation cannot be convicted of murder).[302]

10.26 The Sentencing Council's guidelines envisage a multi-stage process when fining corporations.[303] 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.

10.27 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.

10.28 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.[304]

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300 Sentencing Code, s 119.

301 Sentencing Code, s 120.

302 See, Corporate Criminal Liability: A discussion paper (2021), p 54.

303 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/.

304 Sentencing Council, "Overarching principles", at https://www.sentencingcouncil.org.uk/overarching-guides/crown-court/item/general-guideline-overarching-principles/.

10.29 We agree with the Sentencing Council on the principles to be taken into account when imposing financial penalties against corporate offenders.

10.30 In particular, we agree that when considering the level of fine, the court should not have regard to the impact on shareholders. Shareholders share in the profits made by companies, including those profits attributable to non-compliance with the law, and it is right that they should also suffer the consequences when the company breaks the law. Moreover, it is the shareholders to whom the board is accountable and therefore who ultimately control the company. Financial penalties should create an incentive for shareholders to ensure that boards have due regard to the need to comply with the law.

Fining charities and public bodies

10.31 Although the focus of this report is on companies, a range of non-natural persons can be convicted of criminal offences, including charities, trade unions, public bodies – including central and local government bodies – and unincorporated associations.

10.32 There are particular challenges involved when fining charities, public bodies and other organisations which provide services to the public. Sentencing guidelines require that when setting a fine the court must have regard to the impact of a fine on the performance of a public or charitable function. A fine should normally be substantially reduced if it would have a significant impact on the provision of their services.

10.33 In *R v Milford Haven Port Authority*,[305] the Court of Appeal said:

> It would be quite wrong to suggest — and counsel for the Port Authority does not suggest — that public bodies are immune from appropriate criminal penalties because they have no shareholders and the directors are not in receipt of handsome annual bonuses. The policy of Parliament would be frustrated if such a notion were to gain currency. But in fixing the amount of a fine it is proper for the judge to take all the facts of the case into account … The judge has to consider how any financial penalty will be paid. If a very substantial financial penalty will inhibit the proper performance by a statutory body of the public function that it has been set up to perform, that is not something to be disregarded.

10.34 In *R v Shrewsbury and Telford NHS Trust*,[306] Mr Justice Haddon-Cave (as he then was) reduced a fine which would have been £666,666 by 50% to "reflect the Trust's financial circumstances and that it is a public health care body."

10.35 In *R v Dudley NHS Trust*, District Judge Graham Wilkinson, said

> In the simplest of terms when does a fine grow so large that it defeats the objects of just sentencing by denying an NHS Trust the ability to hire doctors and nurses or purchase new life saving equipment. Whilst the fines in such a terrible and tragic case must be significant and meaningful they must also not produce such a dramatic effect on the defendant Trust that they potentially put future patients at risk of very

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305 *R (Environment Agency) v Milford Haven Port Authority* [2000] 3 WLUK 432.

306 *R v Shrewsbury NHS Trust* (2017), Sentencing remarks of Mr Justice Haddon-Cave, https://www.judiciary.uk/wp-content/uploads/2017/11/r-v-shrewsbury-nhs-judgment.pdf (2017).

serious harm and I am sure that neither of these families would want a fine to result in future devastation to other families.

10.36 Accordingly, he concluded, "I have chosen to adopt the "NHS reduction" of the, now, Senior Presiding Judge and reduce the fine starting point by 50%".

10.37 Because a fine is the only penalty available, this is likely to give rise to severe disparities when sentencing commercial and non-commercial offenders for similar offences. In our view, this is an argument for making additional measures available to the courts.

Corporate "death penalty"

10.38 One option we considered was whether courts should, *in extremis*, have the power to dissolve a company that is convicted of a serious criminal offence.

10.39 Under Section 124A of the Insolvency Act 1986, it is possible for the Secretary of State to petition the court for a company to be wound up in the public interest.

10.40 The test under this section is that it must appear to the Secretary of State that it is expedient in the public interest that the company should be wound up, on the basis of a report obtained under various, specified, items of legislation. One of those is a report commissioned where "there are circumstances suggesting … that the company's affairs are being or have been conducted … for a fraudulent or unlawful purpose".[307]

10.41 A court may also require the Secretary of State to commission such a report under section 432(1) of the Act. "The court", here, means the court having jurisdiction to wind up the company – generally the High Court – so would not normally include a court sentencing the company in criminal proceedings.

10.42 What this means is that where a company is convicted of a criminal offence, having been used for an unlawful purpose, the Secretary of State can commission a report into the activity, and if, on the basis of this report, the Secretary of State concludes that it is in the public interest for the company to be wound up, may petition the High Court to do so.

10.43 As already noted, sentencing guidelines also envisage that in some circumstances a fine may be appropriate notwithstanding that it would put the firm out of business: "Whether the fine will have the effect of putting the offender out of business will be relevant; in some bad cases this may be an acceptable consequence."[308]

10.44 In 2015, legislation was implemented to increase Level 5 on the Standard Scale from £5,000 to an unlimited fine.[309] Alongside this, all maximum fines of £5,000 or more in the magistrates' court became unlimited fines.[310] This means that in a much wider

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307 Companies Act 1985, s 432.

308 See for instance Sentencing Council, "Corporate Offenders: Fraud, bribery and money lending" (2014).

309 Legal Aid, Sentencing and Punishment of Offenders Act, s 85.

310 Legal Aid, Sentencing and Punishment of Offenders Act, s 85.

range of cases than previously there is the possibility of a fine being imposed at a level which would put the firm out of business.

10.45 Recent years have seen the imposition of some enormous fines, albeit on large enterprises, including £265 million against NatWest for failures relating to money laundering,[311] and £90 million on South East Water in relation to discharging untreated sewage into coastal waters.[312] In the latter, the judge expressly contemplated that the fine may make the company unviable:

> I also recognise that a fine at this level, coming on top of other regulatory action, may trigger a chain of events that might cause the continued viability of the Defendant, in its current form, to be reviewed. If so, that is an acceptable consequence of the seriousness of this offending against a background of a failure over many years to respond to previous court interventions.

10.46 In 2011, Cotswold Geotechnical was fined £385,000 for corporate manslaughter (the first such conviction) in circumstances where it was accepted it would force the company into liquidation. This was upheld by the Court of Appeal:

> The judge also recognised that a substantial fine would inevitably put the company into liquidation and therefore its employees out of work… He came to the conclusion that, in the context of the relatively small scale of the company's operation as reflected in its turnover and its current financial state, a fine of £385,000 would be sufficient to mark the gravity of the offence and to send the necessary message about the need for employers generally to attend to their duties to provide safe places of work. He recognised that the consequence of his decision, even if this fine were to be paid over a period of ten years, would be that the company would go into liquidation. That would unfortunately be the end of the business, but he reached the conclusion that this was unavoidable…
>
> The reality of this case is that the judge took the view, rightly, that in the circumstances as they appeared before him, and indeed as they appear before us now, the fact that the company would be put into liquidation would be unfortunate, but in our judgment, as in his, this was unavoidable and inevitable.[313]

10.47 Given that courts already have the ability to impose a fine that would have the effect of putting a firm out of business in appropriate cases, and given in other circumstances there is available to the government the option of seeking dissolution – a mechanism which enables competing public interests to be taken into account – we have concluded that the option of enabling courts to dissolve a company upon conviction for serious criminal conduct is not something which should be taken forward. There are also some circumstances in which a power to dissolve would, in any event, be unworkable: one example is an NHS Trust.

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311 https://www.judiciary.uk/judgments/r-v-national-westminster-bank/.

312 https://www.judiciary.uk/wp-content/uploads/2021/08/Southern-Water-Sentencing-Remarks.pdf.

313 *R v Cotswold Geotechnical Holdings Ltd* [2011] EWCA Crim 1337.

Publicity orders

10.48 In his review of regulatory sanctions, Professor Macrory recommended the introduction of publicity orders as a sanction available upon criminal conviction, noting that

> Publicity Orders are an effective means of deterring regulatory non-compliance as it can impact the public reputation of a business. A company's reputation and prestige is an important and valuable asset. A company that loses its reputation even for a short time can suffer significant damages to consumer confidence, market share and equity value.[314]

10.49 Subsequent to Professor Macrory's report, publicity orders were introduced as a measure available to courts sentencing for an offence of corporate manslaughter. Under section 10 of the Corporate Manslaughter and Corporate Homicide Act 2007, an organisation can be ordered to publicise its conviction – that is, the fact it has been convicted, specified particulars of the offence, the amount of any fine, and the terms of any remedial order. Sentencing guidelines for the offence say that a publicity order "should ordinarily be imposed in a case of corporate manslaughter".[315]

10.50 Publicity Orders are also available under section 23 of the Criminal Justice and Courts Act 2015 for the "care provider" offence under section 21 of that Act, where an individual ill-treats or wilfully neglects a person, and that ill-treatment or neglect is attributable to the way a care provider managers or organises its activities in a way which amounts to a gross breach of a relevant duty of care to the victim.

10.51 Although publicity orders have now been imposed in a handful of cases,[316] we are unaware of any case law relating to the use of the orders.

10.52 Publicity orders are, however, also available in civil intellectual property disputes[317], and their use in these cases has been the subject of judicial consideration. In *PWS v Lidl*, the High Court articulated a number of principles in relation to the use of publicity orders in intellectual property disputes:

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314 Professor Richard Macrory (2005) "Regulatory Justice: Making Sanctions Effective", p 83.

315 Sentencing Council (2015), Health and Safety Offence, Corporate Manslaughter and Food Safety Offences: Definitive Guideline, 2016.

316 The first order was made in 2014, after the conviction of Mobile Sweepers, requiring them to publicise their conviction in the local press. Following the conviction of Peter Mawson Ltd in 2015, the company was required to take out a half page advertisement in a local newspaper and place a statement on its website. Cheshire Gates Ltd were required to publicise their conviction for corporate manslaughter in two local newspapers in 2015. In 2015 Linley Developments were required to take out an advertisement in the trade press highlighting their conviction.

317 In intellectual property law, Publicity Orders were developed to give effect to Article 15 of the Enforcement Directive 2004/48/EC, by which Member States are required to ensure that judicial authorities "may order at the request of the applicant and at the expense of the infringer, appropriate measures for the dissemination of the information concerning the decision, including displaying the decision and publishing it in full or in part".

(1) The purpose of such an order is not to punish a party, make it "grovel" or lose face. In particular, it is not right to condemn a party to public humiliation before it has had an opportunity to argue its case on appeal.

(2) The court is also likely to take into account the following factors:

(a) The extent of publicity given to the case and its outcome, apart from the publicity order;

(b) Whether any decision the subject of a publicity order may be subject to appeal;

(c) The extent to which there is or may be a dispute or agreement over the terms in which any notice should appear;

(d) Whether the order would involve more than a measured incursion into any publication's freedom to decide what it publishes and does not publish, and is justified in pursuit of a legitimate aim.[318]

(3) Although not subject of prior guidance, it was also appropriate to consider

(a) Whether it is straightforward adequately to encapsulate the effect of a court decision in a brief notice or whether balance requires more by way of narrative;

(b) The risk that the order may result in an inaccurate impression, including as to whether the court has endorsed or criticized the conduct of the parties or third parties;

(c) The overall effectiveness and impact of a publicity order at remedying the matter said to require such an order;

(d) Whether other practical and legal remedies are or may be available to address the issue;

(e) What impact a publicity order may have on third parties

10.53 Not all of these considerations will apply to publicity orders used in the criminal context: for one, punishment *is* likely to be a legitimate reason for making a publicity order, especially if a fine – the only regular punitive measure available against corporations – was likely to prove inadequate.

10.54 In general, there would be little difficulty in encapsulating the decision of the court in a meaningful statement as this is already required for the indictment or information. Section 3 of the Indictments Act 1915 states

> Every indictment shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together

[318] This issue is only likely to arise in the context of publicity requirements imposed against a publisher, broadcaster or similar; merely requiring an offending company to seek to place an advertisement does not interfere with the rights of the publication, since it would be open to them to refuse to carry it.

with such particulars as may be necessary for giving reasonable information as to the nature of the charge.

10.55 We have concluded that publicity orders could be a useful additional sanction available to courts when sentencing non-natural persons. While cases against large corporate offenders are likely to attract substantial coverage in any case, publicity orders may be of particular value in cases of smaller enterprises with a local, but not national, reputation, given the constraints on the ability of local media to cover court cases. Publicity orders have also been made (in both criminal and intellectual property cases) requiring notices to be placed in specialist media, thereby directing attention among users – and potential users – of a company's services to their conviction.

10.56 We also think that publicity orders could be valuable in circumstances where the offender is a public body or charity and where imposition of a large fine would have a detrimental impact on public services or beneficiaries.

10.57 We have considered whether publicity orders would only be appropriate for particular classes of corporate offending. At the very least, we would see value in extending their availability to cover

(1) Environmental offences

(2) Food safety offences

(3) Health and safety offences

10.58 We identified these categories by analogy with two classes of offences which are already covered by publicity orders and remedial orders – corporate manslaughter and the care provider offence in the Criminal Justice and Courts Act 2015. They are analogous in that they are offences where the corporate conduct gives rise to a risk to the public.

10.59 However, we can see no obvious categories for which they would be inherently inappropriate. Accordingly, we consider that there is a strong case for making publicity orders available for any offence when sentencing a non-natural person. Such a change would require primary legislation.

10.60 There may also be value in allowing companies to add to the notice required by the court so that, for instance, they could include a statement of regret or an indication of remedial action that they intend to take. Approving the first Deferred Prosecution Agreement in *SFO v Standard Bank*, Leveson P pointed to the value of a corporation "demonstrating its recognition of its serious failings and its determination in the future to adhere to the highest standards".[319]

10.61 Sentencing guidelines for corporate manslaughter anticipate that the offender corporation may wish to place comment alongside the required announcement, and state that "consideration should be given to stipulating … that any comment placed by

[319] Serious Fraud Office v Standard Bank Plc (Preliminary) [2015] WLUK 802, [65].

the offender alongside the required announcement should be separated from it and clearly identified as such".

10.62 Care would need to be taken to prevent the company adding to a statement in such a way as to deny or minimise its culpability. However, it is likely that the courts have sufficient powers to deal with this were it to occur. In *Samsung v Apple*,[320] the Court of Appeal ruled that where a publicity order was not complied with – here Apple had added "false and misleading material" to the required notice, and its compliance with a requirement to publish in the earliest available issue of the stated publications was found to be "lackadaisical at best" – the Court's inherent jurisdiction enabled it to vary its previous order, so as to make its meaning and intention clear, and thus to require publication of a new notice that was compliant with the order.

10.63 Alternatively, there may be value in allowing the corporate offender to submit to the sentencing court a draft of its proposed statement for approval; the court would be confirming that publication of the statement would amount to compliance with the terms of the publicity order. Again, there is precedent for this in civil law. Under Practice Direction 53 under the Civil Procedure Rules, a party to a media or communications claim may apply for permission to make a statement in open court. The statement that the applicant wishes to make must be submitted for the approval of the court.

10.64 In *Barnet v Crozier*,[321] the trial judge had held that when exercising the discretion to allow a statement, the judge should take account of the interest of all the parties affected and the risks of prejudice to the fair trial of any outstanding issue. Similar issues might arise, if, say, a company was convicted of an offence and wanted to make a statement explaining the remedial actions it proposed to achieve which would explicitly or implicitly blame a third party, especially if that person were facing prosecution.

10.65 In *Associated Newspapers v Murray*,[322] Sharp J, suggested that a proposed statement might be rejected if "a claimant is significantly 'over-egging the pudding', or travelling impermissibly outside the case and exaggerating its effect". A statement should be "fair and proportionate" and "should not misrepresent a party's case". In *Duke of Sussex v Associated Newspapers*, the court rejected the Duke's initial proposed statement as "unduly tendentious".

10.66 Accordingly, we are satisfied that the courts would be able to prevent statements required under publicity orders as being framed in such a way as to minimise culpability, misrepresent the findings of the court or prejudice the interests of third parties.

10.67 We there conclude that the option of making publicity orders available when sentencing non-natural persons should be considered.

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320 *Samsung Electronics (UK) Ltd v Apple Inc* [2012] EWCA Civ 1430.

321 *Barnet v Crozier* [1987] 1 All ER 1401.

322 Professor Richard Macrory, "Making Sanctions Effective" (2006) para 4.55.

Corporate rehabilitation orders (CROs) and remedial orders

10.68 The second new sentencing option proposed by Professor Macrory was the corporate rehabilitation orders. He envisaged the order working in the following way:

(1) On conviction the company would be invited to put forward to the court a plan of action to remedy the matter which caused the harm. This could include a community project or a compliance audit;

(2) The court, in consultation with the regulator would either approve that scheme or appoint its own experts (who would be paid by the company) to design a more robust plan;

(3) The court would make its order;

(4) The relevant regulator would monitor compliance with this order; and

(5) Failure to comply with the order would lead to the company being brought back to court and sentenced in an alternative way, with the court taking into consideration, failure to comply with the CRO.

10.69 A key question that arises in relation to corporate rehabilitation orders is who would oversee compliance? Unlike community penalties for natural persons, which are overseen by the probation service, there may not always be a regulator or other body which could oversee compliance with an order; and where there is a body – they are likely to have established oversight powers which could render the remedial powers in the CRO superfluous.

10.70 Remedial orders are already available under section 9 of the Corporate Manslaughter and Corporate Homicide Act 2007. They may only be made on the application of the prosecution specifying draft terms for the order. Remedial orders are also available under the Health and Safety at Work Act 1974, section 42, for health and safety legislation, and (in relation to the "care provider" offence relating to ill-treatment and neglect) under section 23 of the Criminal Justice and Courts Act 2015.

10.71 In discussions with the Health and Safety Executive, for instance, it became clear that remedial orders were rarely sought by the Executive or imposed by the courts, as generally, where ongoing compliance measures were necessary, the Executive had powers to serve an improvement notice under section 21 of the Act or a prohibition notice under section 22. The penalties for failure to comply with an improvement notice or prohibition notice are twelve months' imprisonment or a fine of £20,000.

10.72 The Care Quality Commission has similar powers to issue requirement notices and warning notices under the Health and Social Care Act 2008.

10.73 The Sentencing Council has noted, in respect of corporate manslaughter, that an offender ought to have remedied any specific failings involved in the offence by the time of sentencing, and if not, it will be deprived of significant mitigation.

10.74 However, we consider that similar issues are likely to arise in any area which is already subject of regulation. In general, a regulator can be assumed to have been

capable of taking regulatory action to secure compliance before an offender corporation is sentenced by the court.

10.75 There will be cases where a company is convicted where the is no regulator capable of taking action to ensure compliance before the company is convicted, and it might be thought that remedial orders could be appropriate in such cases. However, in such cases a different issue arises. Without an appropriate body able to (i) advise the court on what steps should be taken, and (ii) monitor compliance, it is unlikely that a remedial order could be adequately enforced.

10.76 That is to say, if there is no regulator to craft and monitor a remedial order, then such an order is likely to be inappropriate; if there is a regulator, the ability to make remedial orders may well be superfluous.

10.77 Accordingly, we do not recommend that remedial orders should be made routinely available to sentencing courts. Any extension to new classes of offence should be on a case by case basis.

10.78 We also consider that the remaining elements of Professor Macroy's proposed order, such as an offer by the corporate offender to fund a community project, could be dealt with through undertakings to the court put forward as part of mitigation when sentencing. In the event of non-compliance with an undertaking to, say, put in place a community project, the corporation could be the subject of proceedings for contempt.

Profit orders

10.79 Finally, Professor Macrory suggested that profit orders should be introduced. He concluded that

> Identifying and removing the financial benefit from a regulatory breach is something I believe would strengthen enforcement and send a clearer signal to industry that it is not acceptable to make financial gain from non-compliance. It also seeks to provide a more level playing field for business and provides a deterrent for non-compliant businesses.

10.80 Part of the rationale for recommending profit orders was that "Confiscation Orders are strict in that they 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."

10.81 In *R v May*,[323] Lord Bingham held that a defendant "ordinarily obtains a pecuniary advantage if (among other things) he evades a liability to which he is personally subject" – in that case evasion of VAT.

10.82 In *R v Morgan*,[324] the Court of Appeal upheld a confiscation order of £156,000 imposed against a person who had pleaded guilty to three offences relating to unauthorised handling of waste. The basis of plea – which was not initially accepted –

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323 [2008] UKHL 28; 1 AC 1028.

324 [2013] EWCA Crim 1307.

was that the defendant had not been paid to accept the waste. However, the CPS successfully obtained a confiscation order on the basis that had the defendant disposed of the waste lawfully he would have incurred costs related to licensing and landfill tax. Applying *May*, the Court held that the defendant had "evaded a liability to which he was personally subject, viz. the payment of landfill taxes and licence fees."

10.83 It would appear likely, therefore, that courts have greater ability than was appreciated at the time of the Macrory report to make confiscation orders in order to deprive corporate bodies of enhanced profits which they have obtained as a result of regulatory non-compliance. If this analysis is correct, it is likely that introducing Profit Orders would be unnecessary.

CONCLUSION

10.84 The fact that fines are the only sanction available against a company or other non-natural person is a severe limitation.

10.85 However, we have concluded that it would be inappropriate to give courts the power to dissolve a company. We also think there is unlikely to be substantial benefit in giving courts a general power to impose remedial orders, given that these are only likely to be viable where there is a regulatory body to oversee compliance, and in these cases the regulator is likely to have its own powers to take monitoring and compliance action.

10.86 We do think there would be value in making publicity orders available to all courts when sentencing any non-natural person. This could be of particular value when sentencing charities and non-commercial bodies providing services to the public, where, for understandable reasons, large fines are generally inappropriate because of their impact on beneficiaries and service users.

Option 7.

10.87 Make publicity orders available in all cases where a non-natural person is convicted of an offence.

Chapter 11: Regimes of administratively imposed monetary penalties

INTRODUCTION

11.1 This chapter, and chapters 12 and 13 following, are concerned with possible options to reform the liability of legal persons for criminal acts by persons associated with them, but without using the criminal justice system.

11.2 Our terms of reference require us to consider matters including:

(1) the relationship between the criminal and civil law on corporate liability;

(2) the relationship between corporate criminal liability and other approaches to unlawful conduct by non-natural persons, including deferred prosecution agreements and civil recovery of the proceeds of unlawful conduct;

(3) whether an alternative approach to corporate liability for crimes could be provided for in legislation.

11.3 Furthermore, our terms of reference require us to consider whether additional provision for particular criminal offences may be necessary. In order to do that, it is necessary to consider the alternatives. This chapter deals with these alternatives.

Matters outside the terms of reference – whistleblowers

11.4 During our consultation we received several responses from consultees which highlighted the issue of whistleblowers. Our attention was drawn to several calls for reform within the landscape of whistleblowing and corporate self-reporting, which suggested that current protection and incentivisation was inadequate. We have considered some of these issues. However, our terms of reference do not extend to the detection and investigation of corporate crime. As a result of this, we did not ask consultees any questions about these issues, either in the discussion paper or at consultation events. Therefore, our consideration of whistleblowers and corporate self-reporting can be found at Appendix 1 to this report.

OVERVIEW OF THIS CHAPTER

11.5 In this chapter, we will consider options that involve a regime of monetary penalties imposed, in the first instance, by a superintending body (which might also have a prosecutorial role). An advantage of such regimes is that, in many instances, they operate without any recourse to the courts. Instead a penalty is determined through liaison between the superintending body and the subject, with an opportunity for representations to be made. That may save time and money. It may also lead to a more cooperative and less adversarial atmosphere between the corporations involved and the supervising body.

11.6 In the next chapter, we consider different models of regimes that all involve penalties imposed by a court in the first instance. These regimes have the advantage of a greater degree of independent enquiry into the merits of every case compared to a regime of administratively imposed penalties in the first instance. However, this likely comes with greater delay and costs. We will also consider the differences between the costs regime in the criminal courts and the civil courts, and the extent to which differences in these costs regimes may discourage the use of civil remedies.

11.7 In the final chapter in this part, we go on to consider existing models for a possible future regime to require certain corporations to publish their policies to prevent fraud, or to justify publicly the absence of such policies. These models have the advantage of permitting the authorities to be proactive: enforcement action could be taken before any fraud was committed. Furthermore, they promote transparency. By requiring the publication of a company's anti-fraud policies, they permit the public and, for example, charitable anti-fraud organisations, to examine and challenge the adequacy of such policies. That would further promote good corporate governance without recourse to the courts.

Relationship between civil regime options and the criminal law

11.8 All of the *civil* regimes that we discuss in this Part would be intended to operate alongside the law of corporate *criminal* liability. Where there was sufficient evidence that a corporation was guilty of a criminal offence, then, provided it was in the public interest, we would expect the corporation to be prosecuted for it. This might be on the basis of the attribution of the criminal fault of an individual to the corporation. Or it might be because the criminal offence concerned was one of absolute liability (perhaps subject to a due diligence defence) and therefore involving no issue of the attribution of a fault element.

11.9 However, where there was insufficient evidence to prosecute the corporation for a criminal offence, in those circumstances we would expect the authorities to consider the use of new civil enforcement mechanisms, such as the ones we suggest, as possible options.

The consideration of civil options in the discussion paper

11.10 Question 10 of our discussion paper asked in what circumstances consultees thought civil penalties might be an appropriate alternative to commencing criminal proceedings against an organisation. The suggestions in the following three chapters are borne out of the responses to that question, of other stakeholder suggestions, and of our own research. In relation to all these possible options, it must be remembered that they have not had the benefit of being subject to consultation, other than in the very general terms of question 10 as described above.

11.11 In this chapter, we consider three possible options intended to encourage reasonable corporate precautions to prevent fraud through the introduction of regimes of administratively imposed monetary penalties.[325] These penalties would be enforceable

[325] We focus on fraud here for consistency with our conclusions above on the possible scope of any new corporate "failure to prevent" offence.

as civil debts, with a right of appeal to an independent tribunal, and ultimately a right of further appeal to the civil courts.

11.12 In all the three chapters in this part, we focus on "fraud" for consistency with the conclusions in our chapter 8, on a possible new corporate "failure to prevent" offence, and because this is a category of offence that we consider particularly likely to be found in the context of corporate activity (and which, unlike other categories of offence likely to be encountered in corporate activity such as environmental crime or health and safety, is not covered by strict liability offences).

11.13 However, we acknowledge that the civil approaches we discuss below might also be appropriate for other categories of criminal offence encountered in a corporate context.

11.14 Furthermore, when discussing how any administrative regime might work, we refer to an obligation on corporations to take reasonable procedures to prevent an associated person committing fraud intending to benefit the corporation. We use "intending to benefit the company" in a wide sense here, as a convenient means to encompass the ways in which we suggest a proposed "failure to prevent" offence could be committed, as set out above in chapter 8.

Advantages of administrative regimes

11.15 Some advantages of using an administrative regime as we describe include:

(1) It would avoid taking up the resources of the criminal justice system with cases that might be considered to be more "regulatory" or which are more focussed on the adequacy of processes.

(2) It would avoid adding further issues, and defendants, to what already may be long, complicated criminal trials. As Rose LJ said in *Re H (restraint order: realisable property)*:[326]

> The more complex commercial activities become, the more vital it is for prosecuting authorities to be selective in whom and what they charge, so that issues can be presented in as clear and short a form as possible. In the present case, it seems to me that no useful purpose would have been served by introducing into criminal proceedings the additional complexities as to the corporate mind and will which charging the companies would have involved.

(3) An administratively imposed penalty might avoid some of the adverse consequences to a company of a criminal conviction. In particular, receiving such a penalty may not make ineligible to tender for public sector contracts in the UK and abroad. This might be appropriate in cases where the decision makers in the company did not act deliberately or dishonestly, but rather, failed to prevent a crime being committed by certain employees.

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326 [1996] 2 All ER 391.

(4) It would reserve the "stigma" associated with a criminal conviction in the same way.

(5) Corporations would benefit from receiving a reasoned warning as to the possibility of future disciplinary action from the authorities, a reasoned decision notice imposing any penalty, and a reasoned tribunal decision following any first instance appeal. This would make it easier for them to consider the merits of any further appeals. Thus, the regime would be more predictable for all sides.

(6) The incidence of written decision notices from the authorities, and reasoned judgments from the courts, would lead to corporations being able to predict in future what measures were required of them. This is another way in which such a regime would differ from a criminal regime, where first instance decisions by juries would not be accompanied by any reasoning.

(7) A regime of administratively imposed penalties would retain the advantages of the current deferred prosecution agreement system in that it would facilitate discussions and negotiations between the suspect corporation and the authorities, without contested court proceedings. Where it was impossible to resolve the case by way of agreement, then the legal forum for resolving the matter would be, arguably, one more suited to resolving questions of the reasonability or otherwise of corporate compliance regimes.

(8) Law enforcement agencies would benefit from the less constrained rules of evidence in such civil processes, as compared to criminal litigation. In a recent letter from the FCA to the Treasury Select Committee enquiry into Economic Crime, the FCA explained the reasons behind decisions whether to undertake criminal or civil proceedings in two recent cases. It said that, where relevant conduct had taken place outside the UK, then a regime of administrative penalties, where the approach to evidence was not as constraining, ensured law enforcement action could be taken.[327]

Disadvantages of administrative regimes

11.16 Some potential issues with such a regime include:

(1) It might be argued that such a regime would treat individuals and corporations differently. However, as we explain further below, the market abuse regime and anti-competitive practices regimes in the UK already treat individuals and corporations differently. This option would require corporations, but not individuals, to take reasonable precautions to prevent fraud by associated persons. Imposing *greater* obligations on corporations than on individuals would answer some of the criticisms from stakeholders in this regard.

(2) It might be argued that a regime of administratively imposed penalties would amount to responding to a crime without a prosecution. However, where a corporation had the requisite fault for a crime (under the relevant rule of attribution), it could be prosecuted. Otherwise, in circumstances where the corporation had failed to take reasonable precautions to prevent fraud by

[327] FCA, *Letter to Rt Hon Mel Stride MP, Chair, Treasury Select Committee*, (19 January 2022).

associated persons, intending to benefit it, the corporation, but not the individual, would be subject to administrative penalties.

(3) It may be unclear what precautions corporations are required to take to prevent fraud by associated persons for their benefit. We acknowledge this is a serious concern regarding such a regime (as opposed to the financial services regime superintended by the Financial Conduct Authority ("FCA"), for example, where details regarding what is required are set out in the FCA handbook).[328] However, this is an issue that would also arise in relation to the introduction of any criminal "failure to prevent" offence. It might be addressed, to some extent, by the provision of general guidance. An advantage of an administrative system, as we suggest above, is that it would involve reasoned decisions from the authorities and in any appeals. Therefore, a body of case law concerning what was required would more quickly come into existence.

(4) There could be significant adverse costs consequences to the authorities from decisions to impose administrative penalties which are ultimately overturned on appeal. This is a concern that applies to all of our options involving the civil courts. It is a consequence of the differing regimes concerning liability for costs for prosecutors in the criminal and civil courts. However, we anticipate that the costs consequences of an administrative regime might be limited for two reasons: First of all, many cases might be resolved by an uncontested administrative decision. Such cases would not involve any recourse to the courts. Secondly, even where an administrative decision were appealed to the courts and overturned, it might not result in adverse cost consequences.[329] We discuss this principle further in the next chapter.

The options considered in this chapter

11.17 The three possible options for administratively imposed penalties that we consider in this chapter are:

(1) A regime of detailed obligations on corporations, prescribing *how* they should seek to prevent fraud by associated persons for their benefit, and imposing penalties for failures to comply with those obligations, similar to the current regime for the financial services sector superintended by the FCA.

(2) A regime of general obligations to avoid fraud by associated persons for the corporation's benefit, but subject to greater flexibility as to how to achieve this, similar to the current regimes concerning market abuse, anti-competitive practices, breach of financial sanctions, or money-laundering and terrorist financing.

(3) A regime created under the current framework of the Regulatory Enforcement and Sanctions Act 2008.

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328 Financial Conduct Authority, "FCA Handbook", https://www.handbook.fca.org.uk/ (visited 23 March 2022).

329 Eg *British Telecommunications v Office of Communications* [2018] EWCA Civ 2542, [2019] Bus LR 592.

11.18 As we will explain, of these three options, our preferred option, and the only option which we suggest is reasonably practical, is option (2). Therefore, that will be the focus of most of this chapter.

11.19 However, we will begin by explaining our reasons for rejecting option (1):

A REGIME OF DETAILED OBLIGATIONS UPON CORPORATIONS REGARDING THE PREVENTION OF CRIME

Introduction

11.20 In this section, we look at the regime of detailed obligations placed upon firms in the financial services sector, and largely contained in the FCA handbook. We consider whether it might be a suitable model for a wider, non-sector specific regime of obligations and administratively imposed penalties, designed to promote corporate internal procedures to prevent fraud being committed by an associated person for the corporation's benefit.

The current law

11.21 Part IXA of the Financial Services and Markets Act 2000 gives the FCA and Prudential Regulatory Authority ("PRA") power to issue rules and guidance for the financial services sector. The material issued includes the FCA handbook.[330] This is separated into a number of blocks, each of which is divided into a number of modules. The material, if printed, would run to several hundred pages.

11.22 Several of the modules within the FCA handbook have particular relevance to preventing economic crime within corporations. For example: block 1, "high level standards", includes the modules: "principles for businesses", "senior management arrangements, systems and controls", and the code of conduct. Block 3, "business standards", includes the "conduct of business sourcebook". The regulatory guides, included within the handbook, include: "the financial crime guide: a firm's guide to countering financial crime risks", and "the financial crime thematic reviews" module.

11.23 Part XIV of the Financial Services and Markets Act 2000 sets out disciplinary measures the FCA and PRA may take for breaches of the rules. Part XXV gives the FCA and PRA power to seek injunctions and restitution, and Part XXVII contains provisions regarding criminal offences.

11.24 Furthermore, Part V of the Act gives the FCA and PRA particular powers concerning those performing senior management functions and those performing roles which require certification. There are further disciplinary powers concerning the obligations under this Part. This is known as the "Senior Manager and Certification Regime" ("SM&CR").

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330 Financial Conduct Authority, "FCA Handbook", https://www.handbook.fca.org.uk/handbook (visited 22 March 2022).

The problem

11.25 The FCA handbook and the SM&CR apply only to firms within the "regulated sector", typically firms operating in the financial services sector.[331] Therefore, as things stand, they do not impose any obligations to prevent crime on companies operating elsewhere in the economy.

The case for reform

11.26 In one of our webinar events held during our consultation, Professor Jeremy Horder[332] suggested, as a possible alternative to introducing a new failure to prevent criminal offence, extending part of the FCA handbook to firms outside the financial services sector.

11.27 In particular, he suggested extending principle 3 ("PRIN 3") of the FCA handbook to all of the largest companies operating in the UK. PRIN 3 provides that:

> A firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems.

11.28 This suggestion accorded with views expressed by other stakeholders. For example, during our opening seminar, Susannah Cogman of Herbert Smith Freehills suggested that if the aim of any reforms were to encourage companies to have better compliance regimes, then this would be best achieved by legislation to require the introduction of such regimes, as opposed to seeking to encourage such regimes indirectly by making their existence a potential defence to a new corporate criminal offence.

11.29 UK Finance said:

> …we would also recommend rolling out more widely a modified version of the SM&CR regime, underpinned by the right regulatory framework, to other sectors as part of a holistic approach to the promotion of economic crime prevention and corporate good governance. Under this proposal it would apply to all sectors – whether regulated for anti-money laundering purposes or not – who have a role to play in preventing economic crime.

11.30 However, during our discussions with them, the FCA suggested that it would not be practicable to impose part of the high-level obligations under the FCA handbook, such as PRIN 3, more widely, without including the more detailed obligations and guidance that underpin the high-level principle-based obligations.

11.31 Furthermore, the FCA suggested that extending the ambit of their regime across the commercial sphere more generally, would place disproportionate compliance burdens on businesses operating in low-risk sectors. Also, it would risk overlapping with the work of individual regulators currently operating in specialist sectors.

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331 Financial Services and Markets Act 2000, ss 1B, 22, 137A.

332 Professor Horder was a Law Commissioner for England and Wales, with responsibility for the criminal law, from 2005-10.

Possible options for reform

11.32 Were parts of the FCA regime to be extended more widely into the corporate sector, then the FCA would be the obvious agency to superintend this extended regime. Given the FCA's concerns about the practicalities of this, this option seems unrealistic.

11.33 Furthermore, we agree with the FCA that attempting to adapt the obligations in the FCA handbook to create an appropriate and detailed set of obligations upon commercial organisations across the economy would be a huge task. Either the very difficult task of designing obligations that were equally appropriate in all sectors would have to be undertaken, or several sets of detailed obligations would have to be produced, one for each sector. This would require either a considerable expansion in the role of the FCA, or the creation of a new regulator. In both cases, there is a risk of duplication with the work of the sector-specific regulators that already exist, but who do not, at present, have anti-fraud roles.

11.34 For all these reasons therefore, we do not recommend as a potential option the extension of the ambit of the FCA's regime for financial services, including the SM&CR.

11.35 Instead, the remainder of this chapter will focus on the second kind of administrative regime currently operating in the UK, namely: administrative regimes which contain relatively simple obligations not to engage in conduct which, in some circumstances, would be categorised as criminal.

A REGIME OF GENERAL OBLIGATIONS WITH FLEXIBILITY AS TO HOW TO COMPLY WITH THEM

Introduction

11.36 In this section, we consider four existing regimes of monetary penalties that may be imposed by authorities in response to certain economic crimes. We consider to what extent these might serve as a model for a possible new regime of monetary penalties imposed upon corporations who do not take reasonable precautions to prevent associated persons committing fraud for their benefit. The existing regimes that we consider are those concerning:

(1) market abuse including insider dealing,

(2) price-fixing and other anti-competitive practices,

(3) breach of financial sanctions legislation, and

(4) obligations of relevant persons concerning precautions against money-laundering and terrorist-financing.

Generally

11.37 The four existing regimes that we discuss typically have a number of features in common:

(1) An authority, (hereafter "the regulator") is granted certain powers to investigate the wrongdoing concerned.

(2) Where potential wrongdoing is identified, the regulator must issue a warning notice, or similar, to the subject of the intended action, giving them an opportunity to make representations.

(3) A decision notice or similar is issued with any monetary penalty, giving the reasons for the penalty and for its amount.

(4) The monetary penalty is enforceable as a civil debt.

(5) There are also powers to grant injunctive relief (ie to prohibit the person concerned from certain activity, enforceable by further civil penalty or criminal prosecution).

(6) There is a right of appeal from the decision of the regulator, usually to a tribunal and thereafter to a court. Such a right of appeal must have certain features to comply with human rights obligations, as we explain in the next section below.

(7) The regulator is required to publish guidance on the exercise of its enforcement powers and the setting of penalties.

11.38 Other features are more variable between regimes. These include:

(1) Whether any monetary penalty is payable ultimately to the enforcing authority, or to the public purse ("the Consolidated Fund").

(2) Whether there is a power to issue a public censure, as well as, or as an alternative to, a monetary penalty.

(3) Whether there are powers to impose monetary penalties against senior managers directly if there has been wrongdoing by the corporation.

11.39 Next, we will set out the human rights issues which arise in this context. After that, we will consider these four regimes in more detail. We have italicised below examples of particularly significant features of the regimes that we discuss which are not present elsewhere.

Human rights obligations

11.40 Despite the name, human rights are also accorded to legal (non-natural) persons.[333] Furthermore, they are certainly accorded to human owners of legal persons. Therefore, corporations are entitled to the protections of the European Convention on Human Rights ("ECHR").

11.41 Any new regime of administratively imposed penalties therefore would have to comply with such protections, as do the currently existing regimes. The Convention protections most likely to be relevant to a new regime of administrative penalties for failure to prevent fraud by corporations are:

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[333] Eg *Bank Mellat v HM Treasury* (No 2) [2013] UKSC 39, [2014] AC 700, and see Pinto and Evans, *Corporate Criminal Liability* (4th ed 2020), Chapter 12 generally.

Article 6: right to a fair trial

11.42 Article 6 of the Convention is divided into three subsections. Article 6(1) applies to civil and criminal proceedings. Articles 6(2) and 6(3) apply *only* to "everyone charged with a criminal offence". This phrase has been interpreted as including all proceedings that can be characterised as "criminal" in nature. The European Court of Human Rights ("ECtHR") uses its own definition of whether national proceedings are criminal. It applies three general criteria:

(1) The domestic classification of the proceedings.

(2) The nature of the offence; whether there is a punitive or deterrent element to the process.

(3) The severity of the penalty.[334]

11.43 The UK competition law regime has been held to be a "species" of criminal law.[335] It is likely therefore that any newly created administrative regime to deal with corporate failure to prevent fraud would be categorised in a similar way. Therefore, corporations subject to it would be entitled to the protections of articles 6(1), (2) and (3).

11.44 A regime of administratively imposed penalties has been found to comply with the right under article 6(1), to a fair and public hearing by an independent and impartial tribunal established by law. [336] However, that is provided that such administratively imposed penalties are subject to a right of appeal to an independent tribunal. Any such right of appeal must have the following characteristics:

(1) It must be to a judicial body with "full jurisdiction".

(2) The appellate body must have the power to quash the original decision "in all respects on questions of fact and law".

(3) The appellate body must conduct its evaluation of the legality of the decision "on the basis of the evidence adduced" by the appellant.

(4) The existence of a margin of discretion accorded to the administrative authority does not dispense with the requirement for an "in depth review of the law and of the facts" by the appellate body.

11.45 Despite the categorisation of an administrative investigation as being capable of involving the determination of a "criminal charge", compulsory questioning by investigators may still be permissible, but not the use of the material obtained by such questions in subsequent criminal proceedings (as designated by the UK courts).[337]

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334 *Engel v Netherlands* (1979-1980) 1 EHRR 647.

335 *CMA v Flynn Pharma* [2020] EWCA Civ 339, [2020] 4 All ER 934, at [136].

336 See eg above at [140].

337 *Saunders v UK* (1997) 23 EHRR 313.

Article 8: respect for private and family life, and correspondence

11.46 Article 8 of the Convention has been held to apply to a company's registered office, in a case concerning search warrants.[338]

Article 1, Protocol 1 peaceful enjoyment of property ("A1P1")

11.47 A1P1 expressly applies to corporations. It begins "Every natural *or legal person*…" (emphasis added). The imposition of a monetary penalty will interfere with a corporation's right to peaceful enjoyment of its possessions, and therefore any regime imposing such penalties must be *proportionate* within the meaning of the Convention.

11.48 It has been suggested that the requirement of proportionality in this context can be broken down into four questions:[339]

(1) Is the objective sufficiently important to justify limitation of a fundamental right?

(2) Is the measure rationally connected to the objective?

(3) Could a less intrusive measure be adopted?

(4) Has a fair balance been struck between individual (or it would appear, *corporate*) rights and the countervailing interests of the community?

11.49 Having considered some general features of the currently existing regimes of administratively imposed monetary penalties for economic crimes, and the general considerations pertaining to the ECHR, we will now examine in more detail the four examples of currently existing regimes of administratively imposed penalties.

11.50 In the heading for each we set out the criminal activity concerned, and we identify the relevant regulatory body.

The current law

(i) Market abuse including insider dealing: FCA

11.51 "Insider dealing" occurs where a person possesses inside information and uses that to buy or sell financial instruments to which that information relates.[340]

11.52 "Market manipulation" includes any behaviour which is likely to give misleading signals as to the supply, demand or price of a financial instrument or similar.[341]

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338 *Energy Financing Team Ltd v SFO* [2005] EWHC 1626 (Admin), [2006] WLR 1316.

339 *R (on the application of FEDESA) v Ministry of Agriculture, Fisheries and Food* [1991] 1 CMLR 507 at [13], and see *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39, [2014] AC 700 at [20].

340 Market Abuse Regulation of the European Parliament and Council 596/2014, art 8, 14, EU (Withdrawal) Act 2018, Market Abuse Exit Regulations 2019/310, (hereafter referred to generally as "MAR").

341 Above at arts 12, 15.

11.53 Persons participating in insider dealing or market manipulation may be subject to a monetary penalty imposed by the FCA.[342]

Recent examples

11.54 Recent examples of the use of such powers include:

(1) In 2017, the FCA imposed a penalty of £70,000 on Tejoori Ltd for breach of the MAR, for failing to promptly disclose inside information that directly concerned it, namely that it would be required to sell one of its two investments for no consideration. The fine would have been £100,000 had Tejoori Ltd not agreed to settle.[343]

(2) Also in 2017, the FCA imposed a requirement on Tesco to pay restitution to persons who had suffered losses as a result of an inaccurate trading update that Tesco had published in 2014. The FCA recorded that in issuing the trading update, the board of Tesco Plc relied on information provided by Tesco Stores Ltd. This information was not correct but the board of Tesco Plc were not alerted to the inaccuracy. Tesco Plc corrected the inaccurate information one month later. The FCA recorded (although this was never contested) that there was knowledge at a sufficiently high level, but below the level of the Tesco Plc board, as to the false and misleading nature of trading update, for that knowledge to constitute the knowledge of Tesco Plc within the specific context of market abuse.[344]

11.55 The features of the market abuse regime include:

(1) What could be a criminal offence if committed by an individual,[345] may be subject to administrative penalties for both individuals and corporations.[346]

(2) The regulator, (the FCA), has a dedicated set of investigative powers.[347]

(3) There is requirement for a warning notice or similar.[348]

(4) There is a requirement for a decision notice or similar.[349]

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342 Financial Services and Markets Act 2000, s 123, and see Corporate Criminal Liability: a discussion paper (2021) paras 3.40 – 3.41.

343 FCA, *Final Notice to Tejoori Ltd*, (13 December 2017).

344 FCA, *Final Notice to Tesco Plc,* (28 March 2017).

345 Criminal Justice Act 1993, s 52. Furthermore, certain varieties of market manipulation are also likely to constitute criminal offences of fraud by false representation, Fraud Act 2006, s 2.

346 Market Abuse Regulation of the European Parliament and Council 596/2014, EU (Withdrawal) Act 2018, Market Abuse Exit Regulations 2019/310.

347 Financial Services and Markets Act 2000, ss 122A-122F.

348 Above at s 126.

349 Above at s 127.

(5) There is an alternative power to issue a public censure.[350]

(6) There is a power to impose an injunction or similar.[351]

(7) A statement of policy regarding the use of these powers must be issued.[352]

(8) There is a right of appeal to the Upper Tribunal.[353]

(9) There is a further power to apply to the High Court to issue a penalty if the regulator is seeking a court injunction or restitution.[354]

(ii) Price-fixing and other anti-competitive practices: Competition and Markets Authority

11.56 Pursuant to Chapter I of the Competition Act 1998, agreements between "undertakings" (who may be corporations or individuals),[355] decisions by associations of undertakings, or other concerted practices between undertakings, which may affect trade and which are intended to restrict competition, are prohibited, subject to certain exclusions. This is referred to as the "Chapter I prohibition").[356]

11.57 Chapter II of the Act provides that abuse of a dominant market position by one or more undertakings is prohibited, subject to certain exclusions. This is referred to as the "Chapter II prohibition").[357]

11.58 Undertakings intentionally or negligently participating in anti-competitive practices, or abuses of a dominant position, may be subject to a monetary penalty imposed by the Competition and Markets Authority ("CMA").[358]

Recent examples

11.59 Recent examples of the use of such powers include:

(1) In 2016, the CMA imposed penalties of £84.2 million on Pfizer Inc and Pfizer Ltd and £5.2 million on Flynn Pharma Ltd and Flynn Pharma (Holdings) Ltd, relating to alleged unfair pricing in respect of the supply of anti-seizure medicine in the UK. The companies appealed to the Competition Appeal Tribunal, who found that the CMA had not properly established that the prices were unfair. The Competition Appeal Tribunal's decision was upheld by the Court of Appeal

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350 Above at s 123(3).

351 Above at s 123A, s 384, and see *FCA, Final Decision Notice to Tesco plc* (28 March 2017), see above. https://www.fca.org.uk/news/press-releases/tesco-pay-redress-market-abuse

352 Above at s 124, s 125.

353 Above at s 127, s 417 and see Part IX generally.

354 Above at s 129, s 381 - s383, see eg *FCA v Da Vinci Invest* [2015] EWHC 2401 (Ch), [2016] Bus LR 274.

355 See eg *Höfner & Elser v Macrotron* [1991] ECR I-1979.

356 Competition Act 1998, s 2.

357 Competition Act 1998, s 18.

358 Above ats 36.

in 2020.[359] In 2021, the CMA indicated its intention to continue the investigation.[360]

(2) In 2020, the CMA imposed penalties totalling £9 million on companies including Associated Lead Mills, Royston Sheet Lead and HJ Enthoven for entering into anti-competitive agreements relating to the supply of rolled lead. This is used in roofing. Fines were reduced in respect of two of the companies because they did not contest the case. Furthermore, in 2021, three company directors gave undertaking not to act as directors for agreed periods of time, in lieu of disqualification.[361]

11.60 The competition regime has the following features:

(1) What could be a criminal offence if committed by an individual,[362] is subject to administrative penalties for individuals and corporations.

(2) The regulator, (the CMA) has a set of investigative powers.[363]

(3) There is a requirement for a warning notice or similar.[364]

(4) There is a requirement for a decision notice or similar.[365]

(5) A monetary penalty may be enforced as a civil debt.[366] The maximum level of monetary penalty is stated to be 10% of the undertaking's annual turnover.[367]

(6) The proceeds of monetary penalties are paid to the Consolidated Fund.[368]

(7) There is a power to make an injunction or similar.[369]

(8) A statement of policy must be issued.[370]

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359 *CMA v Flynn Pharma* [2020] EWCA Civ 339, [2020] Bus LR 803.

360 CMA, *Phenytoin sodium capsules: suspected unfair pricing*, 5 August 2021, available at: https://www.gov.uk/cma-cases/investigation-into-the-supply-of-pharmaceutical-products.

361 CMA Press Release, *CMA issues fines of over £9m for roofing lead cartel,* 4 November 2020, available at: https://www.gov.uk/government/news/cma-issues-fines-of-over-9m-for-roofing-lead-cartel.

362 Enterprise Act 2002, s 188.

363 Competition Act 1998, ss 25 – 30A.

364 Above at s 31.

365 Above at s 36(6).

366 Above at s 37.

367 Above at s 36. "Turnover" is to be determined in accordance with such provisions as may be specified in an order made by the Secretary of State.

368 Above at s 36(9).

369 Above at ss 32, 33, 35.

370 Above at ss 31D, 38, and see further CMA, Guidance on the CMA's investigation procedures in Competition Act 1998 cases: CMA8 (January 2022) https://www.gov.uk/government/publications/guidance-on-the-cmas-

(9) The subject of any penalty may appeal to the Competition Appeal Tribunal, and from there to the Court of Appeal.[371]

(iii) Breach of UK, EU or UN financial sanctions: Office of Financial Sanctions Implementation

11.61 Part 8 of the Policing and Crime Act 2017 expanded the options for UK authorities to enforce financial sanctions imposed by the UK Government, the EU or the UN, by introducing a new regime of monetary penalties that can be imposed on individuals and corporations for breach of those sanctions. These monetary penalties operate as a possible alternative to the pre-existing criminal penalties. Monetary penalties pursuant to these provisions are imposed by HM Treasury, acting for these purposes through its internal body, the Office for Financial Sanctions Implementation ("OFSI").[372]

Recent examples

11.62 Two recent examples of the imposition of such monetary penalties are:

(1) In 2020, OFSI imposed two penalties totalling £30.8m against Standard Chartered Bank (reduced by the Minister on appeal to £20.5m).[373]

(2) In 2021, OFSI imposed a £50,000 penalty against TransferGo Ltd.[374]

11.63 The features of the financial sanctions regime include:

(1) What could be prosecuted as a criminal offence for individuals or corporations[375] may be subject to administrative penalties for individuals and corporations.

(2) The regulations made under the Sanctions and Money Laundering Act 2018 provide powers for OFSI to request and take copies of information where they believe it is necessary for the purpose of monitoring compliance with or detecting evasion of the regulations. OFSI largely relies on referrals from other agencies investigating suspected criminal offences concerning breaches of financial sanctions, or on self-reporting by those who discover that they may be in breach of sanctions (as happened in the Standard Chartered Bank case, above).

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investigation-procedures-in-competition-act-1998-cases/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases#appointment-of-a-case-decision-group (last visited 28 April 2022).

371 Above at ss 46, 49, 59.

372 Policing and Crime Act 2017, s 146, and see Corporate Criminal Liability: A discussion paper (2021) paras 3.45 to 3.49.

373 OFSI, *Report of Penalty for Breach of Financial Sanctions Regulations*, 31 March 2020, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/876971/200331_-_SCB_Penalty_Report.pdf.

374 OFSI, , *Report of Penalty for Breach of Financial Sanctions Regulations*, 5 August 2021, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1008859/050821_-_TransferGo_Penalty_Report.pdf.

375 See eg Crime and Courts Act 2013, Sch 17, para 26A.

(3) There is a requirement for to inform a person of OFSI's intention to impose a monetary penalty.[376]

(4) There is a requirement for consideration of any representations before issuing a final decision.[377]

(5) *A monetary penalty may also be imposed on a company officer personally*.[378]

(6) There is currently no alternative power to issue a public censure. However, the Economic Crime Act 2022 will permit OFSI to publish a report where satisfied on the balance of probabilities that a breach of financial sanctions has occurred, but OFSI has not imposed a monetary penalty.

(7) A statement of policy must be issued.[379]

(8) There is a right of administrative appeal to a Minister and thereafter to the Upper Tribunal.[380]

(9) The standard of proof required is explicitly stated to be the civil standard.[381]

(10) The monetary penalty is recoverable as a civil debt.[382]

(11) It is paid into the Consolidated Fund.[383]

The identification doctrine and administrative regimes

11.64 The nature of the financial sanctions regime superintended by OFSI illustrates that using a civil law system of administratively imposed penalties doesn't *necessarily* avoid the issues associated with the identification doctrine in the criminal law.

11.65 This problem occurs where, as was previously the case under the Policing and Crime Act 2017, the administrative regime incorporates fault elements. Section 146 of the 2017 Act originally provided:

(1) The Treasury may impose a monetary penalty on a person if it is satisfied, on the balance of probabilities, that –

(a) the person has breached a prohibition, of failed to comply with an obligation, that is imposed by or under financial sanctions legislation, and

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376 Policing and Crime Act 2017, s 147(1).

377 Above at s 147(3).

378 Above at s 148.

379 Above at s 149, and see OFSI, *Monetary Penalties for Breaches of Financial Sanctions Guidance* (January 2022).

380 Above at s 147(6).

381 Above at s 146(1).

382 Above at s 146(11).

383 Above at s 146(12).

(b) the person knew, or had reasonable cause to suspect, that the person was in breach of the prohibition or (as the case may be) had failed to comply with the obligation.

11.66 This wording, in particular "knew" and "had reasonable cause to suspect", on one interpretation certainly, introduces a fault element into the circumstances in which a person (including a corporation) might be liable to pay a monetary penalty.

11.67 Section 146 was amended by the Economic Crime (Transparency and Enforcement) Act 2022 to read (emphasis added):

(1) The Treasury may impose a monetary penalty on a person if it is satisfied, on the balance of probabilities, that –

(a) the person has breached a prohibition, or failed to comply with an obligation, that is imposed by or under financial sanctions legislation.

(1A) In determining for the purposes of subsection (1) whether a person has breached a prohibition, or failed to comply with an obligation, imposed by or under financial sanctions legislation, *any requirement imposed by or under that legislation for the person to have known, suspected or believed any matter is to be ignored*.

11.68 The corresponding *criminal* offences however retain the fault element, eg regulation 12 of the Russia (Sanctions) (EU Exit) Regulations 2019:

A person ("P") must not make funds available directly or indirectly to a designated person if P knows, or has reasonable cause to suspect, that P is making the funds so available.

(iv) Money-laundering and terrorist financing obligations of relevant persons: FCA and HMRC

11.69 The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 ("MLR 2017") apply to individuals and corporations operating in certain sectors (eg financial institutions, independent legal professionals, estate agents or crypto asset exchange providers). Such "relevant persons" are subject to a range of "relevant requirements". These include taking appropriate steps to identify and assess the risks of money laundering and terrorist financing to which their business is subject.[384]

11.70 Failure to comply with such relevant requirements is a criminal offence, unless the person took all reasonable steps and exercised all due diligence to avoid committing the offence.[385]

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384 Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 ("the MLR 2017"), r 75, Sch 6.

385 Above at r 86.

11.71 Alternatively, however, failure to comply with such relevant requirements may be made subject to a monetary penalty imposed by the FCA or HMRC. This is subject to the same due diligence defence.[386]

Recent examples

11.72 Recent examples of the use of such powers include:

(1) In 2019, the FCA imposed a penalty of £102 million on Standard Chartered Bank ("SCB"). This figure included a 30% discount for not contesting the case. The penalty related to breaches of MLR 2017 and the predecessor regulations, the Money Laundering Regulations 2007 ("MLR 2007") in relation to its branches in the United Arab Emirates between 2009 and 2014, and in relation to its UK wholesale banking business between 2010 and 2013.[387]

(2) In 2021, the FCA imposed a penalty of £64 million on HSBC Bank. This also included a 30% discount for not contesting the matter. Again, this related to breaches of the MLR 2007. Between 2010 and 2018 the policies and procedures for two of HSBC's transaction monitoring systems were not appropriate, or sufficiently risk sensitive.[388]

11.73 The features of the regime of monetary penalties under the MLR 2017 include:

(1) As stated above, the regime applies to activity which would otherwise be a criminal offence. Where a person is convicted of an offence, they are not also liable to a civil sanction.[389]

(2) There is a requirement for a warning notice or similar.[390]

(3) There is a requirement for a decision notice or similar.[391]

(4) There is an alternative power to issue a public censure.[392]

(5) There is a power to make an injunction or similar (suspension and removal of authorisation to operate in the sector).[393]

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386 Above at r 76, r 76(4).

387 FCA, *Decision Notice for Standard Chartered*, (5 February 2019).

388 FCA, *Decision Notice for HSBC,* (14 December 2021).

389 Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 ("the MLR 2017") r 86(3).

390 Above at r 81(4)-(5), r 83.

391 Above atr 81(6)-(8), r 83.

392 Above at r 76(2)(b).

393 Above at r 77 and see r 80.

(6) *There are specific powers to take action against individual company officers who were knowingly concerned in the breaches. They may be prohibited from working in a management role in the sector temporarily or permanently.*[394]

(7) There is a right of appeal to the Upper Tribunal, or in the case of action by HMRC, potentially to the First-tier Tribunal.[395]

(8) The proceeds of the monetary penalty are paid to the regulator.[396]

(9) It is recoverable as a civil debt.[397]

11.74 Having now summarised the features of four examples of regimes of administratively imposed penalties for certain economic crimes, we will discuss how these regimes might provide a model for a solution to some of the problems our project seeks to address.

The problem

11.75 Some stakeholders have expressed reservations about extending the criminal law to encompass corporations who fail to prevent associated persons committing economic crimes intending to benefit the corporation. However, to some extent, some of these reservations might be addressed by a regime of administratively imposed monetary penalties.

11.76 Turning to two particular issues raised by stakeholders in turn:

The issue in principle

11.77 Failing to prevent another committing an economic crime might be regarded, by its nature, as being more suited to the imposition of an administrative penalty, rather than being further criminalised. That is both because it is relatively remote from the criminal conduct itself and because of the *type* of loss typically caused by it. In our 2010 Consultation Paper on Criminal Liability in Regulatory Contexts, we made the provisional proposal that:

> Fault elements in criminal offences that are concerned with unjustified risk-taking should be proportionate. This means that the more remote the conduct criminalised from harm done, and the less grave that harm, the more compelling the case for higher-level fault requirements such as dishonesty, intention, knowledge or recklessness.[398]

11.78 In this project we are primarily (but not exclusively) concerned with economic crime. The harm caused by such economic criminal offences is usually limited to financial harm. Historically, this has been treated as less serious than, for example, personal

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394 Above at r 78.

395 Above at r 93, r 99; Value Added Tax Act 1994, s 82.

396 MLR 2017 at r 76(7).

397 Above at r 101.

398 Criminal Liability in Regulatory Contexts (2010) Law Commission Consultation Paper No 195, at para 4.6.1.

injury.[399] Furthermore, failing to prevent another committing the offence that causes the harm is remote from that harm in relevant terms. It is more remote than, for example, assisting another to commit an offence, or conspiring with another to commit an offence.

The practical issue

11.79 A second issue is the practical problem of whether the criminal justice system is the best forum to deal with wider issues of the reasonableness of corporate processes to prevent economic crime by associated persons. This argument relates both to questions of resourcing and to questions of suitability. In relation to resources, the concern is what effect the introduction of potentially lengthy trials concerning corporate precautions would have on available resources elsewhere. In relation to suitability, the concern is whether juries are best placed to determine whether corporate processes were reasonable or not.

11.80 These concerns, and others raised during our consultation, are further discussed below. First of all, however, we consider certain historic calls for the use of an administrative regime or similar to deal with economic crime in the corporate context:

The case for reform

Historically

11.81 There are a number of instances of high-profile calls for a regulatory or administrative system to be used in preference to the criminal law for certain economic wrongdoing:

11.82 In 1993, (so before the establishment in 2001 of the, then, Financial Services Authority – which was created arguably to address some of these concerns), the Royal Commission on Criminal Justice, "the Runciman Commission" stated:

> In some cases of fraud and related offences, it can be argued that the public interest would be best served not by prosecution but by regulatory action….Where the offence is of a technical nature, there has been no specific loss or risk to any member of the public (or if there has, where restitution can be made), and the predominant issue relates to the protection of the integrity of the markets rather than to serious dishonesty as such, then it may be that regulatory action is both appropriate and sufficient. Indeed, it may also be that in such cases regulatory action will be quicker, cheaper and more likely to succeed.[400]

11.83 In 2001, in his "Review of the Criminal Courts of England and Wales", Auld LJ said:

> Certainly, there is now a proliferation of financial and market controls supported by criminal sanctions that might be more appropriately and better dealt with in a regulatory system tailored to meet the disciplines and understanding of individual markets… The [then] Director of the Serious Fraud Office[401] favours decriminalisation of frauds, but only for regulatory offences, that is, "those that can

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399 The maximum sentence for fraud is 10 years' imprisonment. The maximum sentence for intentionally inflicting grievous bodily harm, or robbery, for example, is life imprisonment.

400 Report of the Royal Commission on Criminal Justice (1993), chapter 9, para 63.

401 In 2001, the Director of the SFO was Rosalind Wright CB QC.

be dealt with by, effectively, taking someone off the road by removing their licence."[402]

11.84 In 2010, in our Consultation Paper on Criminal Liability in Regulatory Contexts , we made a provisional proposal that, as a general principle:

> The criminal law should only be employed to deal with wrongdoers who deserve the stigma associated with criminal conviction because they have engaged in seriously reprehensible conduct. It should not be used as the primary means to promote regulatory objectives.[403]

11.85 No final report was published as part of this project, in anticipation of a further dedicated project on corporate criminal liability. However, we did publish an analysis of responses to our consultation paper. This included, for example, one from the Criminal Sub-Committee of the Council of HM Circuit Judges (in summarised form). It stated:

> The role of the CJS (Criminal Justice System) arises where regulatory breach involves a truly criminal act. Concerned about the increasing use of criminal law as a way of promoting regulatory objectives and public interest goals. A criminal offence is only needed where conduct or action regulated involves really serious consequences for public and breach is intentional or reckless. Otherwise inappropriate. Support idea of variable Monetary Administrative Penalties outside criminal process for regulatory breaches enforced by way of civil remedy.[404]

11.86 This perhaps is also reflected in current Ministry of Justice and Cabinet Office guidance:

> When creating a new offence, departments must be satisfied that the creation of a new criminal offence is both proportionate and necessary to the policy objective they are trying to achieve.[405]

Consultation

Comments in favour

11.87 Stakeholders identified the following arguments in favour of using an administrative regime in this context:

(1) It would be more effective.

> For example, during one of the webinars, Richard Lissack QC suggested that the desired result of expanding the regime of corporate criminal liability would be more easily achieved by regulatory action. He suggested that a corporation might be more ready to concede liability in a regulatory context where such

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402 Review of the Criminal Courts of England and Wales (2001), Lord Justice Auld, chapter 9, para 48.

403 Criminal Liability in Regulatory Contexts (2010) Law Commission Consultation Paper No 195, at para 3.137.

404 Criminal Liability in Regulatory Contexts: Responses (2010) Law Com at para 1.59.

405 Ministry of Justice, Cabinet Office, "Advice on introducing or amending criminal offences and estimating and agreeing implications for the criminal justice system." (2015) (emphasis in the original).

concessions would be less likely to encourage individual criminal liability. The ultimate remedy in both regimes was identical.

Robin Barclay QC proposed the introduction of a regulatory scheme to address corporate fraud, similar to that currently operated by the FCA in connection with market abuse. He suggested this could take advantage of the best aspects of the FCA regime and the deferred prosecution agreement scheme.

Greg Brandman of Eversheds Sutherland said that a regime similar to the one which operates under the MLR 2017 would be a cheaper and quicker way of holding corporations to account than the criminal law.

Baker McKenzie stated that in their experience, civil regimes could work very effectively alongside criminal enforcement. They were faster, more flexible and more cost-effective. They gave the example of the financial sanctions' regime superintended by OFSI. However, they said it had to be clear when a prosecutor would impose civil rather than criminal penalties, and, where the penalties were in the form of a fine, how such a fine would be calculated, with reference to appropriate factors.

However, certain stakeholders disagreed: David Flack, also of Eversheds Sutherland, said that it might not necessarily lead to greater corporate cooperation and willingness to settle. He said that the equivalent system in Italy is nominally civil but because of its nature, certain international regulators treat an adverse finding against a company under the Italian system as a criminal conviction. Therefore, the consequences of such a conviction, for example, potential disqualification from government tendering processes, could follow.

(2) It might make it easier to reduce the compliance burden on firms in low-risk sectors.

The City of London Law Society, Corporate Crime and Corruption Committee said:

> Rather than legislative reform that applies to all companies in all sectors, specific issues and concerns in what are perceived to be "higher risk" sectors may be best addressed by the relevant regulator or on a much more targeted basis.

(3) It might be a more direct means of encouraging good corporate governance.

The Institute of Chartered Accountants in England and Wales, ("ICAEW") said generally:

> We believe that possible civil or regulatory approaches should be considered further in addition to possible reform of the criminal regime, particularly where the underlying objective is to improve corporate culture and controls… We would like to see further analysis of whether existing laws that might address the concerns are being enforced as effectively as they might be or could be modified to achieve the desired outcomes.

Nick Barnard of Corker Binning, in a personal response, took the view that this was the area in which the most ground could be gained for the least upheaval and the smallest risk of creating further uncertainty. He said the aims of a wider regime of corporate criminal liability might be achieved by improving the recognition and perceived value of regulatory and administrative penalties.

(4) It could operate alongside a criminal regime reserved for the most serious cases.

The All-Party Parliamentary Group on Fair Business Banking said:

> Increased use of civil penalties is appropriate and would be desirable where criminal prosecutions cannot be pursued owing to the standard of evidence, where it is not in the public interest to prosecute, among other reasons. We would support ensuring that there is a strong civil penalty regime for corporate misconduct where it does not currently exist. However, we do not believe that such a regime should be used as a substitute for criminal action particularly where the wrongdoing is egregious, sustained, causes significant harm, forms a system of conduct by a corporate, or is repeated.

The Financial Crime Compliance Research Group of Northumbria University submitted:

> Any introduction of a parallel civil regime to criminal offences must be carefully considered as they will inevitably alter the prosecutorial practice of the relevant enforcement agency. Civil regimes may be more cost effective to impose, as well as being more predictable in outcome. In particular, risk averse enforcement agencies may favour civil rather than criminal enforcement. Such an example may be the Competition and Markets Authority and their enforcement of the criminal cartel offence.

Fieldfisher LLP suggested:

> a civil regulatory framework that sits alongside the identification principle or a slightly expanded version may be the best solution. This regulatory framework is already in existence for regulators such as the FCA, HMRC and the HSE [Health and Safety Executive]… they have greater tools in their arsenal and from a corporate defendant's perspective, this will ensure that only the most serious of offending is prosecuted in the criminal courts.

Comments against

11.88 Stakeholders submitted the following arguments against using an administrative regime in this context:

(1) It would lead to confusion and unfairness as regards when criminal or administrative proceedings would be appropriate.

The Fraud Lawyers Association indicated that they were concerned that the introduction of a civil regulatory system for corporate fraud might mean large corporations were able to resolve cases by means of civil penalties whereas smaller corporations would be more likely to face prosecution. They were also

concerned about how the existence of such a civil regime would affect the circumstances in which prosecutors would commence criminal proceedings.

(2) Civil or administrative penalties were not an effective deterrent, in other words they were regarded as a "cost of doing business". Put another way: civil penalties lacked the stigma attached to criminal penalties.

The CPS noted:

> The criminal law provides a real incentive to improve corporate governance, as is recognised under the Bribery Act. Whilst the financial penalties following prosecution are not necessarily more severe than those that could be imposed by a Regulator, the potential for prosecution has a different impact. For example, conviction may mean that a company is barred from bidding for government contracts, and therefore potential prosecution provides a powerful deterrent for companies that rely on such contracts. Even outside of the context of government contracts, the stigma of a conviction has a powerful deterrent effect.

(3) In circumstances where individuals would be prosecuted, corporations should not be subject only to civil penalties.

For example, Lord Garnier QC said:

> I am not as a matter of principle in favour of the imposition of criminal penalties disguised as civil remedies. If a company has done something for which it ought as a matter of justice to be prosecuted it should be prosecuted under the criminal law to the criminal standard of proof. It might be easier and administratively convenient to deal with it through civil processes but the public interest, I suggest, is not served by short cuts. I also suggest that we cannot deal with an individual through the criminal law and his employer through a civil process for the same unlawful act or omission.

However, what we are proposing in this chapter is for employees and employers who have committed criminal offences to be dealt with identically, that is to say, to be prosecuted. Only in circumstances where a prosecution was not possible, for example because the decision-makers in the employer had not participated in the offence, would consideration be given to imposing an administrative penalty for failing to take reasonable precautions to prevent the offence that the employee, but not the employer had committed.

(4) Giving prosecutors the power to impose civil penalties would blur the distinction between prosecutors and judges.

Alison Saunders DBE, on behalf of Linklaters, said:

> Conferring broad powers upon authorities to impose civil and administrative penalties would cause separation of powers issues, blurring the distinction between the executive and the judiciary. For example, if the SFO were able to impose administrative penalties "as an alternative to commencing a criminal case", such penalties would strongly suggest criminality on the part of the

penalised company in circumstances where there has been no oversight by courts. A cornerstone of the UK's sentencing and DPA regimes is the role played by the court in ensuring that the interests of justice are met. Giving criminal authorities (as distinct from regulatory bodies) the power to impose administrative penalties would be at odds with this important safeguard.

Nevertheless, as we have discussed above, the dual-roles of agencies such as the FCA, the CMA and OFSI indicate that there are circumstances where an agency can operate both as a prosecutor and a regulator.

The most serious cases

11.89 Overall, there appeared to be significant opposition among stakeholders to the option of using civil penalties in cases of serious crimes committed by the corporation (which raises the question of when a crime is *committed by the corporation* as opposed to by an employee, or employees, of it – which we have discussed already in our chapters on the identification doctrine). There was less opposition to the prospect of a civil regime operating alongside a criminal regime, and where the latter was reserved for the most serious corporate wrongdoing.

11.90 For example, Spotlight on Corruption opposed the use of civil penalties in response to serious crime by corporations. They said that the global trend in OECD countries was away from civil or administrative penalties. (However, we would add, for jurisdictions that do not have jury systems, the distinction may be a blurred one).

Possible options for reform

Overall

11.91 For the reasons given, we suggest that a possible option for reform in this area is by means of the introduction of a further regime of administratively imposed monetary penalties. This could be similar to the four regimes which already exist, and which we have discussed above.

11.92 For example, legislation might be introduced providing that where a fraud is perpetrated by an associated person to a corporation, and intended to benefit the corporation, the corporation should be liable to pay a monetary penalty unless it could show that it took reasonable precautions to prevent such an offence occurring.[406]

The suggested superintending authorities: the CPS and the SFO

11.93 Were any such administrative regime to be introduced, the question would arise as to what agency might superintend it. One option would be the creation of a new regulatory agency. Alternatively, such a regime could be placed under the joint responsibility of the CPS and the SFO. In that case, they would both be granted powers to impose monetary penalties.

11.94 This would be consistent with the current shared responsibility between the CPS and the SFO for prosecuting cases of suspected criminal fraud. We suggest that it would be expedient for any "civil" investigations into corporate failures to prevent fraud to be

[406] Using "fraud" and "benefit of the corporation" in a sense consistent with our proposals in chapter 6.

carried out by those carrying out the criminal investigation into linked suspected criminal offences.

11.95 Some stakeholders raised the issue that granting the CPS and SFO such powers would give what are currently prosecutorial agencies a quasi-judicial function. However, we do not regard this concern as insurmountable. Under the provisions of the administrative regimes we have set out above, the CMA and FCA already act as prosecutors and administrative regulators. Furthermore, by making corporate failure to prevent fraud a civil wrong only, there would be no issue concerning whether the authorities were going to take criminal or civil action. Instead, there would be a clear dividing line between fraud (a crime) and failure to prevent fraud (a civil wrong if committed by a corporation).

11.96 Furthermore, the CPS and SFO already have powers and mandates to act in the civil sphere alongside their prosecutorial responsibilities. For example, the CPS, under the auspices of the Director of Public Prosecutions, already has a duty to conduct certain non-criminal proceedings which are connected to criminal proceedings, such as extradition proceedings and applications for football banning orders made on complaint. The CPS is also required to discharge the duties conferred upon it by Parts 5 and 8 of the Proceeds of Crime Act 2002.[407]

11.97 There is a further general duty upon the Director of Public Prosecutions, "to discharge such other functions as may from time to time be assigned to him by the Attorney General…"[408]

11.98 The SFO, under the auspices of its Director, has functions conferred upon it in relation to civil recovery of the proceeds of crime and investigations for the purposes of such civil recovery proceedings under Parts 2, 4, 5, 7, and 8 of the Proceeds of Crime Act 2002. Furthermore, similarly to the CPS, it is provided that the Director of the SFO,

> shall discharge such other functions in relation to fraud as may from time to time be assigned to him by the Attorney General.[409]

11.99 Furthermore, as noted elsewhere in this options paper, both the SFO and CPS already have powers to seek Serious Crime Prevention Orders in the High Court, irrespective of whether any criminal proceedings have taken place or are contemplated.[410]

The potential necessity for further investigatory powers

11.100 As set out above, most of the administrative regimes we have discussed include dedicated investigative powers for the regulator to gather material that might justify the issuing of a warning notice. At present, the police, HMRC and the SFO all have

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407 Prosecution of Offences Act 1985, ss 3(2)(ea), (faa), (ff).

408 Prosecution of Offences Act 1985, ss3(2)(g).

409 Criminal Justice Act 1987, ss 1(6), (6A).

410 Serious Crime Act 2007, ss 1, 8.

considerable investigatory powers, but at least in the main, these relate to suspected *crime*.

11.101 Therefore, should an administrative regime as we have discussed be created, provision may have to be made regarding the authority and mandate of the police, and possibly other investigatory agencies, to investigate suspected cases of corporate failure to prevent fraud by associated persons.

The necessity of restructuring the CPS and SFO to facilitate them imposing monetary penalties

11.102 As well as considering any necessary expansion to their mandate, and their powers, any new authority of the CPS and/or SFO to impose monetary penalties upon corporations would require significant restructuring of those organisations, or at least the creation of a new division or divisions for this purpose. The agencies who already combine prosecutorial and regulatory functions have discrete internal bodies to make regulatory decisions and it is likely that the CPS and SFO would need to create something similar. The FCA, for example, has an internal Regulatory Decisions Committee to ensure a degree of independence in its disciplinary function.[411] The CMA appoints a Case Decision Group.[412] OFSI, in contrast, has a less formalised structure. However, their enforcement procedure does use an internal "decision maker" who considers enforcement recommendations.[413]

Overlap with existing administrative regimes

11.103 As noted by stakeholders, introducing a new regime of administratively imposed penalties would risk further compliance burdens upon firms already subject to the detailed requirements of Part IXA of the Financial Services and Markets Act 2000 or the MLR 2017.

11.104 One option to avoid this might be to introduce an administrative regime which explicitly did not apply to such regulated firms. However, a new regime to prevent economic crime which did not apply to the highest-risk sectors would arguably be undesirable.

11.105 The National Economic Crime Centre of the National Crime Agency, ("NECC"), already exists to coordinate the UK's response to economic crime. It helps identify and prioritise the most appropriate type of investigation.

11.106 Some of the regimes we have discussed above already involve two different regulators with shared responsibility, for example the FCA and HMRC in relation to the MLR 2017.

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411 FCA Handbook, Regulatory Processes, DEPP Decision Procedure and Penalties Manual, DEPP 3 the nature and procedure of the RDC.

412 CMA, Guidance on the CMA's investigation procedures in Competition Act 1998 cases: CMA8 (updated 31 January 2022), paras 11.35 to 11.37.

413 OFSI, *Monetary Penalties for Breaches of Financial Sanctions Guidance* (2022), p 17.

11.107 Furthermore, certain of the regimes we have discussed above already overlap; see for example, the £30.8m penalty imposed by OFSI in 2020 (reduced by the Minister to £20.5m on appeal) against Standard Chartered, a bank regulated by the FCA.

11.108 In all the circumstances, therefore, were a new regime of administratively imposed monetary penalties to be introduced for failing to prevent fraud, we suggest it should apply equally outside and within the sectors regulated by Part IXA of the Financial Services and Markets Act 2000 and the MLR 2017. Where a corporation within the financial services sector was suspected of failing to prevent economic crime by an associated person for its benefit, then liaison between agencies, perhaps under the auspices of the NECC, could prevent unnecessary duplication of enforcement action.

Conclusion

11.109 For all these reasons therefore, we suggest that one possible option for addressing concerns regarding corporate criminal liability would be a regime of administratively imposed monetary penalties, perhaps superintended by the CPS and the SFO. A corporation would be liable to such a penalty where a person associated with it committed a fraud, intending to benefit it. There would be a defence for the corporation to show that it reasonable procedures in place to prevent such frauds occurring.

11.110 The CPS have indicated that they would not support this option because it would give them a quasi-judicial function and thereby have significant resource and structural implications.

11.111 The CPS believe that it is also unlikely to address the issues of Corporate Criminal Liability. They consider that introducing a new model for fraud, which is a criminal offence, risks making the operational landscape for pursuing fraud unwieldy. In contrast, the CPS consider that the “failure to prevent” model, which has been shown to work in the UK and is now quite well established, would be favourable as it can achieve both regulatory (preventative) and criminal justice objectives.

Option 8.

11.112 A regime of administrative monetary penalties against companies. This could operate where a fraud was committed by an employee or agent, with the intention of benefitting the company. In such cases the company would be liable to pay a penalty unless it could show that it had taken reasonable steps to prevent the wrongdoing.

11.113 We consider that further work would be needed to establish which agency could superintend any such regime.

THE REGULATORY ENFORCEMENT AND SANCTIONS ACT 2008

Introduction

11.114 In this section, we consider whether the Regulatory Enforcement and Sanctions Act 2008 ("RESA 2008") might be used to introduce a regime of administrative penalties for corporations who do not take reasonable precautions to prevent fraud.

Current law

11.115 RESA 2008 was introduced primarily to implement three reports. One of those was the 2006 report by Professor Richard Macrory, "Regulatory Justice: Making Sanctions Effective". Professor Macrory concluded that:

> The criminal law still has an important role to play in achieving regulatory compliance. I am also clear that where a regulatory breach justifies a sanction, the system should be less reliant on criminal prosecutions, making greater use of other types of sanctions such as Monetary Administrative Penalties or Statutory Notices.[414]

11.116 Pursuant to Professor Macrory's suggestions, part three of RESA 2008 introduced a power of the Minister of the Crown to permit a regulator to impose civil sanctions on a person instead of taking criminal proceedings for an offence.

The problem

11.117 The CPS is currently excluded from the operation of RESA 2008.[415] We have considered the possibility that an option for reform in this area might be to amend the RESA 2008 to permit the CPS (and SFO, or other appropriate agencies) to impose monetary penalties administratively on corporations for certain criminal offences. This might include, for example, any new offences concerning failure to prevent fraud by associated persons with an intent to benefit the corporation.

11.118 However, the power of Ministers to specify offences where regulators may impose civil sanctions only applies to offences existing at the time of the coming into force of the 2008 Act.[416] This is because it was anticipated that, if criminal offences of a regulatory nature were to be created in future, then where it was appropriate, provisions would be included within the future legislation itself for any administrative penalties.[417]

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414 Professor Macrory, *Regulatory Justice: Making Sanctions Effective, Final Report* (2006).

415 Regulatory Enforcement and Sanctions Act 2008, s 37(3).

416 Above at ss 37(2), 38.

417 In this regard, see the Environment Act 2021, s 116 and Sch 17 para 13(4) which provide for regulations to be made to introduce civil sanctions of a kind for which provisions made by made under Part 3 of the 2008 Act.

Possible options for reform

11.119 It might be possible to amend RESA 2008 to remove the prohibition on it being used in relation to legislation that post-dates its coming into force. However, this would be contrary to the original intention in passing the Act.

11.120 Therefore, we do not suggest any options for reform based on the Regulatory Sanctions and Enforcement Act 2008.

CONCLUSION

11.121 Economic crime in the corporate sphere is dealt with in England and Wales in a number of different ways. Bribery, and the facilitation of tax evasion, are dealt with by "failure to prevent" criminal offences. We discuss that elsewhere. Market abuse, price-fixing, breach of sanctions, and breach of money-laundering and terrorist-financing requirements may be dealt with by criminal prosecutions. However, they may also be dealt with by regimes of administratively imposed monetary penalties.

11.122 Giving the authorities the option to deal with other economic wrongdoing by means of administratively imposed monetary penalties may also be appropriate.

11.123 In particular, a regime of administratively imposed monetary penalties may be an option for the reform of corporate criminal liability, to apply where a corporation has failed to take reasonable precautions to prevent an associated person from committing a crime, such as fraud, with intent to benefit the corporation.

Chapter 12: Civil actions in the High Court

INTRODUCTION

12.1 In this chapter, we consider a number of possible options for reform by using civil actions in the High Court. The possible options we consider are:

(1) Introducing High Court penalties for corporations who conduct themselves in an unreasonable way, likely to facilitate fraud by associated persons intending to benefit them; based on features of the regime for Serious Crime Prevention Orders under the Serious Crime Act 2007.

(2) Introducing a statutory duty on corporations to take reasonable precautions to prevent fraud being committed by associated persons intending to benefit them; based on section 951 of the Financial Institutions Reform, Recovery and Enforcement Act 1989 in the USA.

(3) Civil recovery orders under Part 5 of the Proceeds of Crime Act 2002: We consider the extent to which these might, as they stand, address concerns regarding corporations benefitting from fraud committed by their employees or agents and for the corporation's benefit.

(4) Reform of the civil costs regime: we consider the differences between the costs regimes for law enforcement agencies in criminal and civil proceedings, the possible practical effect of this, and an option for reform.

12.2 As in the previous chapter, in this chapter we will focus on the liability of corporations for fraud committed by associated persons and intended to benefit the corporation. In this context, we are using "fraud" to denote the six fraud offences outlined in our chapter on a proposed failure to prevent offence. "Intended to benefit" is intended to define the category of frauds that a corporation might be liable for, in the same way as is set out in our chapter on a proposed failing to prevent offence.

HIGH COURT PENALTIES FOR CORPORATIONS WHO CONDUCT THEMSELVES IN AN UNREASONABLE WAY, LIKELY TO FACILITATE FRAUD

Introduction

12.3 The High Court has existing powers to make orders intended to combat serious crime, under the Serious Crime Act 2007. A possible option for reform might be a regime sharing some of the characteristics of those existing powers. This would be intended to sit alongside the existing criminal law, or alongside any new criminal law provisions. Such a reform might share some of the characteristics of a new failure to prevent offence, but it would not require showing that an offence had been committed, and any contested cases would be determined by a High Court judge, not a jury.

12.4 Presently the High Court has the power to impose requirements on an individual, or corporation, to ensure it does not facilitate serious crime in the future. These powers

might provide a model for a new power of the High Court to *penalise* a company who has facilitated serious crime (such as fraud) in the past.

12.5 Such a proposed power might even be exercised by a High Court judge sitting in the Crown Court. One example might be a case in which a High Court judge has presided over the criminal trial of individuals for offences committed in the course of their employment for a corporation. Upon the invitation of the prosecutor, following the sentencing of individuals, the judge could go on to consider whether a financial penalty should be imposed upon the corporation as a result of the way in which it has conducted itself.

12.6 Such a post-sentencing exercise could involve the judge taking cognisance of the evidence that emerged during the criminal trial or sentencing exercise. The judge could receive further evidence (if necessary during a contested hearing sitting without a jury), before making a determination and passing the appropriate civil financial sanction. In this regard, such proceedings might be somewhat similar in nature to proceedings for a confiscation order following a trial.

Advantages

12.7 This option would have the advantages of:

(1) building on existing powers of the High Court;

(2) keeping the proceedings for such a sanction against a company, linked to the associated criminal proceedings where possible; but,

(3) avoiding burdening a jury with questions concerning the reasonableness or otherwise of a company's procedures, in addition to the issues that the jury are required to consider during any criminal trial for the substantive offence.

Disadvantages

12.8 Some potential issues include:

(1) Any such new powers of the High Court would go significantly beyond those already existing. Those existing powers were introduced to seek to prevent the future facilitation of serious crime. What we are considering would be a power, at least in part, to punish the facilitation of past serious crime (and thereby deter future crime). To mitigate the draconian nature of such a power, we suggest that it might be restricted to making such orders against corporations. However, this would mean treating legal persons differently from natural persons.

(2) Any new such power would still (potentially) only apply to cases where *unreasonable* actions of a corporation had *facilitated* crime, (whether or not such a crime had actually occurred). Whether a corporation's actions, or policies, were "reasonable" or not might be a very difficult question, causing considerable uncertainty. However, this might be mitigated by published guidance, or through the dissemination of reasoned High Court judgments in the early cases.

(3) Similar to the above, the appropriate level of monetary "punishment" might be very uncertain at first. However, the relevant factors and appropriate levels might be established through court judgments as has happened with the deferred prosecution agreement regime.

(4) The power to impose such an order against a corporation in the Crown Court would only be available in cases presided over by High Court Judges. However, the Criminal Practice Direction already provides for the allocation of cases, where appropriate, to High Court Judges.[418] These provisions might be updated to seek to ensure that a High Court judge presided over a Crown Court trial which was likely to be followed by an application for an order against a corporation alleged to have unreasonably facilitated the fraud.

(5) Permitting such orders to be made by a High Court Judge sitting in the Crown Court might lead to a company requiring its legal representatives to be present throughout any trial, and potentially seeking to cross-examine witnesses. On the other hand, it is not uncommon under the current law for the interests of third parties to be affected by evidence heard during a criminal trial. For example, sometimes criminal prosecutions overlap with ongoing internal disciplinary proceedings or pending private civil-law actions. In those circumstances, arrangements can be made for, at least, a note to be taken for the benefit of interested third parties.

(6) There might be a concern regarding perceived unequal treatment between natural persons and legal persons. In particular there may be concerns that natural persons were being prosecuted in circumstances where legal persons were being made subject to a civil penalty only. As we explain in the introduction to chapter 11, in our view, where there was evidence that a legal person had committed an criminal offence, perhaps because the fault elements of the decision maker in it could be attributed to the legal person, then, in accordance with the Code for Crown Prosecutors, we would expect it to be prosecuted of the offence in the criminal courts just like a natural person. However, where there was insufficient evidence that a legal person had committed an offence, then a legal person only, and not a natural person, might be subject to a civil penalty where it was found that the way in which it had unreasonably conducted itself had facilitated serious crime.

The current law

Part 1 of the Serious Crime Act 2007

12.9 As noted in our discussion paper,[419] Part 1 of Serious Crime Act 2007 introduced a new power of the *Crown Court* to make a Serious Crime Prevention Order ("SCPO") upon sentencing an offender.

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418 Criminal Practice Direction, Division XIII.

419 Corporate Criminal Liability: A discussion paper, paras 7.19 to 7.24

12.10 Additionally, it created a power of the *High Court* to make an SCPO against any person – including a corporation. The High Court's power does not depend on the existence of any criminal conviction.

12.11 Only the CPS or the SFO can apply to the High Court for an SCPO.[420]

12.12 The criteria for the making of such a High Court SCPO are that:

(1) the person concerned has been "involved" in serious crime (whether in England and Wales or elsewhere); and

(2) there are reasonable grounds to believe that the order would protect the public by preventing, restricting or disrupting involvement by the person in serious crime in England and Wales. [421]

12.13 Importantly, the definition of being "involved" in serious crime is very wide. It is much wider than "committing" serious crime. Being *involved* in serious crime includes:[422]

(1) committing it;

(2) facilitating the commission of serious crime by another; or

(3) having conducted oneself in a way that was likely to facilitate the commission by oneself, or another, of serious crime in England and Wales (whether or not such an offence is committed).

12.14 It is the third of these ways of being "involved" in serious crime that might be most pertinent to the use of these, or similar, powers against corporations.

12.15 When deciding whether a person has conducted themselves in a way that was likely to facilitate the commission of a serious offence, the court must ignore:[423]

(1) any act that the person can show to be reasonable in the circumstances.

(2) subject to this, the person's intentions or any other aspect of his mental state, at this time.

12.16 In other words, the court can only take account of "unreasonable" actions. However, once the action has been found to be unreasonable, then it makes no difference why the person concerned undertook the action concerned. Therefore, subject possibly to any bearing on the question of "reasonableness", whether or not the person intended or foresaw that any serious crime might take place as a result of their actions is irrelevant.

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420 Serious Crime Act 2007, s 8.

421 Serious Crime Act 2007, s 1.

422 Serious Crime Act 2007, s 2.

423 Serious Crime Act 2007, s 4.

12.17 Thus, this ambit of this jurisdiction would appear to be apt to capture instances where a corporation operates a "permissive" attitude towards the commission of crime.

12.18 The definition of what is a "serious crime" under the 2007 Act is also wide. It includes, for example, all instances of:[424]

(1) slavery, servitude or forced or compulsory labour;

(2) money laundering;

(3) false accounting, fraud;

(4) fraudulent evasion of VAT or income tax;

(5) bribery, being bribed or bribing a foreign public official (but not failing to prevent bribery); and

(6) certain intellectual property offences, and certain environmental offences.

12.19 SCPOs may last for up to 5 years.[425]

12.20 There is no restriction on the kind of provision that can be included in an SCPO. The Act gives a list of examples.[426] Perhaps the key limiting factor is that, at present, any restriction must be appropriate to protect the public from future serious crime.[427]

12.21 Perhaps of particular interest for present purposes, the Act gives specific examples of prohibitions, restrictions or requirements which might be imposed *on corporations* in particular. These include prohibitions, restrictions and requirements on:

(1) Financial, property or business dealings.

(2) The types of agreements that might be entered into.

(3) The provision of goods or services.

(4) The employment of staff.[428]

12.22 Furthermore, the Act specifically provides that SCPOs made against *corporations only* may include provision for law enforcement agencies to engage monitors to monitor the compliance of the corporation with the SCPO, and for the law enforcement agencies to recover the costs of engaging such monitors from the corporation.[429]

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424 Serious Crime Act 2007, s 2(2), Part 1, Schedule 1.

425 Serious Crime Act 2007, s 16.

426 Serious Crime Act 2007, s 5.

427 Serious Crime Act 2007, s 1(3).

428 Serious Crime Act 2007, s 5(4).

429 Serious Crime Act 2007, s 40.

12.23 There are provisions concerning appeals, enforcement and compulsory winding-up of corporations who breach SCPOs.[430] There are particular provisions regarding the application of the Act to unincorporated associations (possibly due to the use of similar legislation against the Teamsters trade union in the USA).[431] There are further powers to make secondary legislation in order to make the Act applicable to overseas bodies, including overseas information society service providers.[432]

12.24 The standard of proof for such High Court applications is the civil standard.[433] However, there is reason to believe that in practice the onus on an applicant for such an order is higher than in the civil law generally. In the context of applications for civil recovery orders under Part 5 of the Proceeds of Crime Act 2002 (see below), the High Court has emphasised the necessity for an applicant to provide "clear and cogent evidence" in order to be successful. This is said to be on account of the gravity of the allegations, and the consequences of a finding made against a defendant.[434] It seems likely that the same requirement of clear and cogent evidence might apply to contested civil SCPO proceedings.

The genesis of SCPOs

12.25 SCPOs have their origins in the Home Office's Command Paper, "New Powers Against Organised and Financial Crime", published in 2006. That paper described them as an option for law enforcement agencies falling somewhere between a criminal prosecution and taking no action. It also said that they constituted a further development of the series of civil orders that had been introduced over the years for crime-prevention purposes. Other similar orders at the time included: the then-called Anti-Social Behaviour Orders and Football Banning Orders.[435]

12.26 The 2006 Home Office paper indicated that the new variety of order proposed would not be punitive, but instead, would be intended to prevent the future facilitation of serious crime.[436] The paper anticipated the need to ensure proportionality, particularly where the degree of complicity by the intended subject of the order was unclear, or where the order would affect third parties.

12.27 It was explicitly anticipated in the 2006 paper that SCPOs would apply to organisations. The authors of the paper noted:

> …many activities necessary to facilitate crime take place in sectors which are currently unregulated, and imposing regulation on them simply in order to catch the

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430 Serious Crime Act 2007, ss 25 – 29.

431 Home Office, "New Powers on Organised and Financial Crime" 2006, p 35.

432 Serious Crime Act 2007, ss 30 – 34.

433 Serious Crime Act 2007, s 35.

434 *SOCA v Namli* [2013] EWHC 1200, at [17], applying *Re D* 2008 UKHL 33, [2008] 1 WLR 1499.

435 And see more recently, Sexual Risk Orders under the Sexual Offences Act 2003 ss 122A-136ZD (introduced by the Anti-Social Behaviour, Crime and Policing Act 2014).

436 Home Office, "New Powers Against Organised and Financial Crime", Cm 6875, p 29.

tiny minority of operators who are engaged in serious crime risks being disproportionate.[437]

12.28 The proposal to introduce SCPOs was inspired by the powers in the USA to make civil orders under the Racketeer Influenced and Corrupt Organisations legislation ("RICO"). That legislation permitted law enforcement agencies to impose restrictions, within reason, on the future activities of a person, or in to order to encourage the dissolution or reorganisation of any enterprise.[438]

The problem

12.29 A focus of the current SCPO regime is persons who conduct themselves in such a way as is likely unreasonably to facilitate the commission of serious crime by others. As such, the SCPO regime would appear well-suited to be used as a model for a regime to operate against corporations who engender cultures which tolerate economic crime.

12.30 However, our informal discussions with stakeholders suggest that, hitherto, applications to the High Court to make an SCPO have been very rare. In fact, the only such civil SCPO we are aware of is one obtained in 2013 by the CPS against the drug-trafficker Curtis Warren. This order was obtained using the High Court summary judgment procedure. Ultimately it was not contested.[439] In 2018, an application was made for a civil SCPO in another case, but was not pursued due to a change in circumstances.

12.31 Thus, it appears that the powers introduced in 2007 to combat organised and financial crime may not be as effective and attractive to law enforcement agencies as was anticipated.

12.32 The reasons that such High Court orders have not proven popular may include:

(1) They may only be made in circumstances where they appear necessary to prevent *future* crime. In cases where corporations of any size are alleged to have facilitated serious crime by the way they conduct their affairs, by the time the crime has been identified, and where there has possibly been a prosecution, the corporation will either have been dissolved, or will be in a position to say that it has already taken remedial steps to prevent any repeat of the offending behaviour.

As noted by the SFO in response to our consultation:

> Many of the SFO's cases involve historical misconduct and it may not be possible or appropriate in such cases – and particularly in the case of corporates – to seek an SCPO based on the risk of further involvement in serious crime or a specific threat of future harm to the public.

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437 Above, at p 34.

438 Above, at p 34.

439 'Drug dealer Curtis Warren accepts court order', BBC News, 4 October 2013, https://www.bbc.co.uk/news/uk-england-merseyside-24397836 (accessed 7 June 2022).

Note of course that the taking of such voluntary pre-emptive action by corporations might be regarded as demonstrating that the legislation is having its intended effect.

(2) Also as noted by the SFO in response to our consultation, under the 2007 Act, monitors appointed to ensure compliance with SCPOs are engaged by the law enforcement agency. It is up to them to then recoup the cost of appointing such monitors from the subject of the SCPO.

In contrast, deferred prosecution agreements under the Crime and Courts Act 2013 have not only included provision for compliance programmes, but also for the company concerned to pay the cost of monitors of such programs directly, without any initial outlay by the law enforcement agency concerned.

(3) The anticipated cost of High Court proceedings, plus the degree of uncertainty involved given the lack of precedent for civil SCPOs, may mean that such orders are only likely to be attractive to law enforcement agencies in cases involving substantial corporations.

(4) As noted above, the jurisdiction to make an SCPO only arises where a person has acted "unreasonably". The uncertainty surrounding whether actions can be shown to be unreasonable or not may be a further factor that makes applying for such orders unattractive.

(5) Another issue raised by the SFO is that where there is sufficient evidence of criminal activity in a case, then it will normally be in the public interest to launch a prosecution. Therefore, taking civil proceedings instead would be inappropriate. However we suggest above at paragraph 12.16- to 12.17 this should not operate as a bar to using SCPOs in circumstances where, although there might be ample evidence that a crime has been committed, there is insufficient evidence that the corporation has committed the crime (whether on account of the identification doctrine or otherwise).[440]

The case for reform

12.33 The existing jurisdiction of the High Court to make an SCPO, even in the absence of a conviction, was something we included in our discussion paper; we also raised it with stakeholders informally on a number of occasions.

12.34 Almost half the responses to our consultation were in favour of some kind of extension to the civil regime for dealing with corporate crime. Many stakeholders suggested civil penalties would provide more efficient and comprehensive justice for less serious wrongdoing – which is perhaps consistent with the sort of "facilitative", but non-criminal, conduct that this reform would address.

12.35 For example, the SFO noted:

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[440] See also the concerns of certain stakeholders during our consultation that civil penalties should not be used for corporations where individuals would face a criminal prosecution, eg Dr Alison Cronin and Lord Garnier QC.

> …any effective corporate liability regime should include a range of interventions that can be employed as appropriate to reflect the responsibility of the relevant corporate

12.36 However, stakeholders have also told us that High Court litigation is unlikely to prove attractive to prosecution authorities. We will discuss this further below.

12.37 As regards other stakeholders:

(1) The GC100 were concerned about the loss of protections to companies through greater use of the civil law. In response, it might be said that the reduced protections available to corporations under the civil law may be a factor that makes civil law remedies more attractive to advocates of tough action against corporate wrongdoers. From the point of view of the corporate defendants, we suggest that the disadvantage of fewer protections available to defendants in civil proceedings should be balanced against the possibly greater consistency and transparency of reasoned judgments in the civil courts. Any regime, based on SCPOs or otherwise, would have comply with the Human Rights Act. We will return to that issue below.

(2) UK Finance said that any extension of civil powers should identify and address overlapping FCA procedures. (The desire to avoid overlapping burdens on corporations, especially those in the already heavily-regulated financial services sector, was a common concern).

In response to this concern, we would repeat what we say in the previous chapter regarding the role of the National Economic Crime Centre of the National Crime Agency to provide some coordination between law enforcement agencies. Should High Court powers be introduced along the lines of what we suggest in this section, then legislation or guidance could be introduced to indicate that the level of any monetary penalties should take account of any other current or anticipated regulatory proceedings against the corporation.

(3) Three Raymond Buildings chambers recommended "a proper system of regulatory supervision that recognises that the benefits of corporate limited liability ought to carry consequentially strict requirements for compliance."

(4) The CPS said that there was no reason why regulatory and criminal action could not be taken in respect of the same misconduct. Any new civil powers should be considered alongside reform of the criminal law, not as an alternative. They said they were not aware of any precedent for an SCPO being used against a corporation and queried whether there would be any circumstances in which seeking a High Court SCPO would be an appropriate response to serious economic crime.

As we suggest above, perhaps such a civil SCPO against a corporation might be appropriate where corporate decision-makers have not participated in a crime, but where the unreasonable way in which the corporation has conducted itself has facilitated the crime.

(5) Herbert Smith Freehills LLP said that no compelling evidence had been presented of any "enforcement gap" that required reform of the criminal or civil regimes in this regard.

(6) The FCA said that an "industry-by-industry, sector-by-sector" approach was appropriate.

This reform would not be consistent with that suggestion as the power to impose extended SCPOs would apply across the board. However, companies in low-risk sectors might be better able to defend applications for such extended SCPOs by arguing that their actions were reasonable in the context in which they operated.

12.38 Elsewhere, certain stakeholders supported the increased use of the civil law, save where the corporate misconduct concerned is egregious or involves systemic or repeated failures.

Options for reform

12.39 As discussed above, an option for reform might be a new regime which shares some of the features of Serious Crime Prevention Orders under the 2007 Act, but which includes powers to punish the facilitation of serious crime through monetary penalties, recoverable as civil debts.

12.40 Such a regime would also share features of the current power of the criminal courts to approve deferred prosecution agreements in that:

(1) It would facilitate orders being made following agreement between the parties.

(2) The orders could contain punitive and preventative measures.

(3) An agreed statement of facts could accompany any proposed order.

(4) A court would have oversight of the process in every case. In fact, since all DPAs entered into so far have been approved by High Court judges or even more senior judges, it could be anticipated that the identity of the judges dealing with any new civil regime sharing features of SCPOs would be similar to those who deal with DPAs.

12.41 A key difference between the current criminal regime including DPAs, and a potential High Court regime sharing features of SCPOs, is that in the latter case, in the absence of agreement, the matter would be resolved by a High Court judge as opposed to by a judge and jury.

12.42 As stated above, we would propose that any new power to impose such orders could be restricted to applications for orders against corporations. This might allay some fears concerning civil liberties. We have discussed the Human Rights implications of a regime of civil penalties in chapter 6 above. The involvement of the High Court in any application for such an order would satisfy the necessity of a hearing before an independent and impartial tribunal.

12.43 It would also be necessary to demonstrate that such a regime was proportionate within the meaning of the ECHR case-law. As we have noted previously, there are already a number of other regulatory regimes in the UK of a similar nature. They all involve monetary penalties for criminal conduct, and non-criminal conduct in the case of, for example, the financial services regime superintended by the FCA.

12.44 As was discussed at 11.42-45 additional requirements apply under Articles 6(2) and 6(3) of the European Convention on Human Rights where a case amounts to a criminal charge, and how the case is characterised domestically is not determinative of whether a case is criminal or not. Where a matter involves the imposition of a penalty, and involves laws of general application, it is more likely that this would be considered to amount to a criminal charge than where the matter is regulatory.

12.45 At present, SCPOs may be made to prevent corporations whose unreasonable actions facilitating crime *by anyone.* If a regime were to be introduced sharing the features of SCPOs, but with provision for monetary penalties against corporations, then a further reform might be to restrict the ambit of the High Court's powers in this regard to the facilitation of crime *by persons associated with the corporation and committed with the intention to benefit the corporation*. In other words, such orders could be given an ambit with restrictions similar to those discussed in chapter 6 on a possible new failure to prevent offence.

Other reforms

12.46 Whether or not the option we suggest above is pursued, we suggest that the Serious Crime Act 2007 could usefully be amended to provide that:

(1) Monitors appointed to ensure corporate compliance with the terms of any such orders should be paid for directly by the corporation concerned.

(2) If necessary, there be specific provisions for High Court Judges sitting in criminal trials in the Crown Court to be able to exercise the power to make such orders.

12.47 During our consultation, it was suggested to us that the Crown Court power to grant SCPOs[441] might be extended to certain situations where a defendant has been acquitted by the Crown Court of a criminal offence. Similar powers already exist in relation to restraining orders.[442] Such a power might be useful where, for example, a corporation is acquitted of an offence in circumstances where the issue was whether the individual concerned was sufficiently senior within the corporation for their fault element to be attributed to the corporation using the identification doctrine. Such a reform might have considerable merit. However, we note that, in the absence of a punitive element, it may not be sufficient to deter corporate misconduct falling short of criminality elsewhere.

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441 Serious Crime Act 2007, s 19.

442 Protection from Harassment Act 1997, s 5A.

Conclusion

12.48 We suggest that an option for reform is the introduction of a new High Court order with penal and preventative elements. Such an order could share features of the current SCPO regime, but with an additional power to include a monetary penalty.

12.49 Such a High Court power would also share a number of features with the option, considered elsewhere, of introducing a new corporate "failure to prevent" offence. However, introducing such a new High Court power might have the advantage of avoiding the need to place issues of corporate compliance in front of a jury, on top of the issues they would be dealing with anyway in a case involving serious crime committed within the corporate context. Instead, the corporate defendant would have the benefit of a reasoned decision from a professional judge. The existence of such reasoned judgments might also serve quickly to reduce uncertainty as regards what was expected from corporations in the future.

12.50 The threshold for making such a High Court order, demonstrating: "unreasonable behaviour that facilitated serious crime", would be different from the threshold for a finding of guilt for a failing to prevent corporate criminal offence, however in practice they might operate similarly. However, a High Court order along the lines that we have discussed, would have the benefit that, unlike a failure to prevent criminal offence, there would be no need to show that a criminal offence had in fact been committed before the order could be obtained.

Option 9.

12.51 Civil actions in the High Court, based on Serious Crime Prevention Orders, but involving a power to impose monetary penalties as well as preventative measures that the company would be required to take.

GIVING LAW ENFORCEMENT AGENCIES A CIVIL CLAIM AGAINST COMPANIES WHOSE ASSOCIATED PERSONS COMMIT FRAUD FOR THEIR BENEFIT

Introduction

12.52 Certain law enforcement authorities in the United States of America have a statutory right to make a civil claim against persons committing certain criminal offences, in certain circumstances. This civil claim has been used to obtain very large financial settlements with corporations following the financial crisis of 2008, in particular in relation to mortage fraud, and more recently, in relation to the fraudulent obtaining of COVID-19 Government support.

12.53 This section explores whether a similar civil claim might work in England and Wales.

Financial Institutions Reform, Recovery and Enforcement Act 1989, section 951

12.54 In the USA, section 951 of the Financial Institutions Reform, Recovery and Enforcement Act ("FIRREA 1989")[443] permits the Attorney General 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 standard of proof applies.[444] The remedy available is a civil penalty. The maximum such penalty is the value of any gain or loss caused. Where there is no such gain or loss, the statute provides for a maximum penalty of $1,000,000 or $5,000,000 for a continuing offence. Changes in the value of money, which under US law are taken account of when considering such maxima, mean that these figures are now approximately $2,000,000 and $10,000,000 respectively.[445]

12.55 Section 951 provides for specific investigative powers in pursuance of such a claim. The Attorney General may:

(1) summon witnesses and take evidence under oath;

(2) require the production of relevant material.

12.56 However, this being a civil claim, there are no associated powers of arrest, or search and seizure. Claims under FIRREA therefore often follow investigations by the authorities using other investigative powers, or they run alongside criminal investigations and benefit from the evidence obtained during those investigations.[446]

12.57 There is currently no equivalent provision to section 951 in England and Wales.

The case for reform

12.58 A central problem that this paper is intended to address is the question of the attribution of fault elements present in certain criminal offences to non-natural persons.

12.59 However, that problem does not arise typically in the civil law. It is well established for the purposes of the civil law that corporations, and other employers, can be vicariously

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443 12 USC § 1833a.

444 12 USC § 1833a (f), and see Corporate Criminal Liability: A discussion paper (2021), para 6.17. For an example of a recent article on the Act see Kirk and Spalding, "Prosecutors using FIRREA to Investigate Pandemic Conduct", (2021) available at: https://www.jdsupra.com/legalnews/prosecutors-using-firrea-to-investigate-3087004/#_edn7.

445 28 Code of Federal Regulations, section 85.5. In *United States v Menendez* (United States Central District Court of California 6 March 2013), *United States ex rel O'Donnell v Countryside Home Loans* (United States Southern District Court of New York 2014), and *United States v Americus Mortgage* (United States Southern District Court of Texas 14 September 2017) the US courts provided some guidance on setting the appropriate level of civil penalties under s 951 FIRREA 1989.

446 Eg *United States v Hackett* (2021) where the civil claim followed an investigation by the Department of Agriculture and ran alongside a criminal case, or United States v Slidebelts (2021) where the investigation was conducted by the Office of the Inspector General for the United States Small Business Administration.

liable for certain wrongs committed by their employees, regardless of any fault or absence of fault on the part of the employer.

12.60 Therefore, in England and Wales, the use of the civil law against corporations might avoid the problems associated with attributing to them fault elements present in offences under the criminal law.

12.61 FIRREA 1989 was introduced in the USA in response to the Savings and Loans crisis in the 1980s. Originally it was part of an overall package to help protect financial institutions from risks to them, including fraud. However, it was little used until the aftermath of the financial crisis of 2008 to 2009. Around that time, prosecutors began to use it against financial institutions on the basis of actions by their employees. Those prosecutors included, in particular, the United States Attorneys' Offices for the Southern and Eastern Districts of New York. The use of section 951 in this way led to billions of dollars of financial penalties being imposed, and compensation where victims were identifiable. Examples arising out of the financial crisis, and more recently, include:

(1) $25bn settlement with Bank of America, JP Morgan Chase, Wells Fargo, Citigroup and Ally Financial concerning mortgage loan servicing and foreclosure abuses (2012).[447]

(2) $16.65bn settlement with Bank of America (2014)[448] $2bn settlement with Barclays (2018), [449] and $7.2bn settlement with Deutsche Bank (2017),[450] concerning the mis-selling of Residential Mortgage-Backed Securities ("RMBS").

(3) $1.2bn settlement with Wells Fargo Bank, concerning the fraudulent certification of mortgages as qualifying for federal government insurance (2016).[451]

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447 Department of Justice, "$25 Billion Mortgage Servicing Agreement Filed in Federal Court", 12 March 2012, https://www.justice.gov/opa/pr/25-billion-mortgage-servicing-agreement-filed-federal-court (visited 7 March 2022).

448 Department of Justice, "Bank of America to Pay $16.65 Billion in Historic Justice Department Settlement for Financial Fraud Leading up to and During the Financial Crisis", 21 August 2014, https://www.justice.gov/opa/pr/bank-america-pay-1665-billion-historic-justice-department-settlement-financial-fraud-leading (visited 7 March 2022).

449 Department of Justice, "Barclays Agrees to Pay $2 Billion in Civil Penalties to Resolve Claims for Fraud in the Sale of Residential Mortgage-Backed Securities", 29 March 2018m https://www.justice.gov/opa/pr/barclays-agrees-pay-2-billion-civil-penalties-resolve-claims-fraud-sale-residential-mortgage (visited 13 April 2022).

450 Department of Justice, "Deutsche Bank Agrees to Pay $7.2 Billion for Misleading Investors in its Sale of Residential Mortgage-Backed Securities", 17 January 2017, https://www.justice.gov/opa/pr/deutsche-bank-agrees-pay-72-billion-misleading-investors-its-sale-residential-mortgage-backed%20 (visited 13 April 2022).

451 Department of Justice, "Wells Fargo Bank Agrees to Pay $1.2 Billion for Improper Mortgage Lending Practices", 8 April 2016, https://www.justice.gov/opa/pr/wells-fargo-bank-agrees-pay-12-billion-improper-mortgage-lending-practices, https://www.justice.gov/opa/file/839796/download (visited 7 March 2022).

(4) $1.25m settlement with an individual called Ralph Hackett concerning a fraudulent crop insurance claim (2021).[452]

(5) $100,000 settlement with Slidebelts and an individual called Brigham Taylor concerning COVID-19 fraud (2021).[453]

12.62 Among the key recommendations of Dr Samantha Bourton, Demelza Hall, Diana Johnson and Professor Nicolas Ryder, in their response to our consultation, was that England and Wales should implement legislation based on the FIRREA 1989.[454]

12.63 However, a practitioner in the USA to whom we have spoken indicated that section 951 of FIRREA 1989 is still only used in a small minority of cases by prosecutors. More common are settlements connected to non-prosecution agreements or deferred prosecution agreements for criminal offences.

12.64 Another US practitioner, Stefan Cassella, of Asset Forfeiture Law LLC, suggested that although the Department of Justice in the USA had a number of enforcement tools under the civil law, it appeared to be generally reluctant to use those in circumstances where it could obtain a criminal conviction. Also, he said that prosecutors, being less familiar with civil litigation, were hesitant about using it. Where a civil option was considered then seeking civil forfeiture of certain relevant assets was considered by prosecutors to be more attractive.

12.65 In their response to our consultation, the SFO said that commenting on the introduction of legislation similar to FIRREA 1989 in England and Wales would be outside their remit. However, they did note that the US law enforcement authorities did benefit from a range of criminal and other interventions and did not rely solely on civil proceedings.

12.66 The CPS in their written response to our consultation said generally:

> There is no reason why regulatory and criminal action cannot be taken in respect of the same action, when appropriate, to add to that deterrent effect. The more pertinent point for the CPS is that a "failure to prevent" model for wider economic crime would help address the challenges in proceeding with a prosecution against a corporate. This may well compliment any further enhancement of existing regulatory powers. Therefore, any new civil powers should also be considered alongside reform of the criminal law, not as an alternative.

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452 United States Attorney's Office, "Central Valley Fruit Broker Member Pleads Guilty and Agrees to Pay $1.25 Million to Resolve Criminal and Civil Allegations of Fraudulent Crop Insurance Claims", 9 August 2021, Central Valley Fruit Broker Member Pleads Guilty and Agrees to Pay $1.25 Million to Resolve Criminal and Civil Allegations of Fraudulent Crop Insurance Claims | USAO-EDCA | Department of Justice (visited 9 June 2022).

453 United States Attorney's Office, "Eastern District of California Obtains Nation's First Civil Settlement for Fraud on Cares Act Paycheck Protection Program", 12 January 2021, https://www.justice.gov/usao-edca/pr/eastern-district-california-obtains-nation-s-first-civil-settlement-fraud-cares-act (visited 7 March 2022).

454 And see also the written evidence of Professor Nic Ryder and Demelza Hall to the Treasury Select Committee during its enquiry into economic crime, Economic Crime, Report of the House of Commons Treasury Committee HC 145, (2021-22), EC0010.

12.67 Responding to the suggestion that the CPS could be given a civil right of action similar to prosecutors in the USA in a webinar our consultation, Max Hill QC, the Director of Public Prosecutions said that he was not sure there was a future to an approach of having regulatory, criminal and civil enforcement tools all within one organisation. The CPS's focus was the use of effective prosecution tools.

Possible options for reform

12.68 A possible option for reform in this area might be, for example, to introduce a new statutory duty on corporations to take reasonable precautions to prevent fraud being committed by associated persons, intending to benefit the corporation.

12.69 This statutory duty might be enforced by a new *civil* right of action for the appropriate authorities.

12.70 The available remedies for such a civil claim could include a monetary penalty, commensurate with the seriousness of the statutory breach of duty. The court could also be granted associated powers to grant interim and final injunctive relief.

12.71 Alternatively, as is the case in the USA, a civil liability could be created on the basis of vicarious liability for the criminal actions of an employee, acting in the course of their employment and without any due diligence defence. This would most closely mirror the effect of section 951 of the 1989 Act as it stands.

Advantages

12.72 We have dealt with the possible advantages of using the civil law above. The advantages of using something similar to section 951 of FIRREA 1989 in particular are that it would not require the authorities concerned to introduce new internal procedures in order to make administrative decisions to impose penalties in the first instance.

12.73 In other words, the agencies that we have referred to in the previous chapter as having prosecutorial and quasi-judicial roles, are structured in such a way so as to facilitate this. As we refer to in the previous chapter: the FCA, for example, has an internal Regulatory Decisions Committee to ensure a degree of independence in its disciplinary function.[455] The CMA appoints a Case Decision Group.[456] OFSI has an internal appeals process, by which a person may seek a review of the decision to impose a monetary penalty against them. This review will be conducted by a different reviewer to the original decision maker.[457] Were the CPS, or the SFO, to acquire a power to impose administrative penalties then it is likely they would have to restructure themselves to create such an internal decision-making body. However, were they instead to be granted civil-law powers to bring claims to the High Court, then less internal reorganisation of those agencies would be necessary.

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455 FCA handbook, Regulatory Processes, DEPP Decision Procedure and Penalties Manual, DEPP 3 the nature and procedure of the RDC.

456 CMA, Guidance on the CMA's investigation procedures in Competition Act 1998 cases: CMA8 (updated 31 January 2022), paras 11.35 – 11.37.

457 OFSI, *Monetary Penalties for Breaches of Financial Sanctions Guidance* (2022), p 17.

Disadvantages

12.74 As noted elsewhere, there are questions over the attractiveness to prosecutors to bring actions in the High Court if there is a higher associated risk of adverse legal costs orders. There might also be an issue over the willingness of prosecutors to pursue a species of litigation with which they were less familiar.

12.75 A further issue arising in relation to this reform in particular might be in relation to the available investigative powers. On the face of it, as a civil claim, the powers available to investigate crime would not be available. Therefore, there would be no power to search premises, to seize material, to arrest suspects, or to question them under caution.

12.76 Therefore, consideration would have to be given to what investigative powers should be provided for to assist in the pursuance of such civil claims. Otherwise claimants would have to rely on civil disclosure provisions, and potentially material generated by connected investigations into criminal offences. As we have noted in the previous chapter, this issue has been overcome in relation to the regimes of administratively imposed penalties for certain offences by the introduction of new dedicated investigative powers for those regimes. Section 951 of FIRREA 1989 itself provides for certain dedicated investigative powers.

USING CIVIL RECOVERY ORDERS TO STRIP CORPORATIONS OF PROFITS MADE THROUGH ECONOMIC CRIMES COMMITTED BY ASSOCIATED PERSONS

Introduction

12.77 In this section we consider to what extent the presently existing High Court powers to make civil recovery orders against persons holding the proceeds of unlawful conduct are sufficient to address some of the concerns regarding crime in the corporate context.

Current law

12.78 Part 5 of the Proceeds of Crime Act 2002 concerns civil recovery of the proceeds of unlawful conduct. Focussing on the provisions for England and Wales, they are divided into:

(1) The recovery, in the High Court, of property generally that represents the proceeds of unlawful conduct.

(2) The recovery, in the magistrates' courts, of cash, and other "listed assets".

The recovery of property that represents the proceeds of crime in the High Court

12.79 An enforcement authority[458] may take proceedings for a recovery order in the High Court against any person who holds property which represents, directly or indirectly, the proceeds of unlawful conduct.[459]

12.80 If the court finds that any property is recoverable then, subject to certain exceptions, it must make a recovery order, which has the effect of vesting the property in a person appointed by the court to secure the property and realise its value for the benefit of the enforcement authority.[460]

Limitations on the power to make recovery orders

12.81 The exceptions to the circumstances in which the High Court must make a recovery order are: [461]

(1) The detriment exception:[462] where the respondent (the holder of the property) obtained the recoverable property in good faith, they took certain steps in relation to it without notice that the property was recoverable and, as a result of those steps, if a recovery order were made it would be detrimental to the respondent. In these circumstances, the court may not make a recovery order where it would not be just and equitable.

(2) The ECHR exception: where a provision of the recovery order would be incompatible with any right under the European Convention of Human Rights. The rights most likely to be engaged here are article 1 of Protocol 1 (the right to peaceful enjoyment of property) and article 8 (the right to respect for one's private and family life, one's home and correspondence).[463]

(3) The multiple recovery exception: The court will not make an order where the right to recover property has already been satisfied by an order made in relation to other property that equally represents the proceeds of criminal conduct. The ability to trace the proceeds of unlawful conduct into other property that represents it means that once the original property obtained through unlawful conduct has been sold, there may be a number of different items of property that represent it. Once the value of the original property has been recovered through the recovery of one or more of those items of property, the value may not be recovered again.[464]

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458 Enforcement authorities under the Proceeds of Crime Act 2002 are, in England and Wales, the Financial Conduct Authority, HM Revenue and Customs, the National Crime Agency, the Director of Public Prosecutions and the Director of the Serious Fraud Office.

459 Proceeds of Crime Act 2002, s 266.

460 Above, s 267.

461 Mitchell, Taylor and Talbot on Confiscation and the Proceeds of Crime, Vol 2, Chapter XIII.

462 Proceeds of Crime Act 2002, s 266(4).

463 Above, s 266(3)(b).

464 Above, s 278.

(4) The bona fide purchaser for value exception: Property ceases to be recoverable if it is disposed of to a person who obtains it in good faith, for value, without notice that it was recoverable.[465]

(5) The civil claim exception: Property ceases to be recoverable once it is subject to a recovery order, or where the defendant has made a payment to the claimant following a judgment in civil proceedings concerning the property.[466]

(6) The criminal proceedings exception: property is not recoverable where it has been restrained, detained or forfeited in criminal proceedings, including confiscation proceedings.[467]

(7) The cash-only exception: property may not be recovered under these provisions if it is cash only. In these circumstances it may instead be forfeited under the magistrates' courts powers in Part 5 of the 2002 Act.

(8) The £10,000 exception: an enforcement authority may not commence proceedings for a recovery order unless it reasonably believes that the value of the property taken together is over £10,000.[468]

(9) The limitation exception: no proceedings for a recovery order may be brought more than 20 years after the cause of action accrued.[469] That period is extended in cases of fraud.[470]

(10) The victim exception: where a victim claims that the property subject to an application for a recovery order belongs to them, they may obtain a declaration to that effect, in which case the property is not recoverable.[471]

(11) Certain further technical exceptions, e.g. the property is held by a person in their capacity as an insolvency practitioner.[472]

Ancillary powers

12.82 The High Court has a number of powers ancillary to the jurisdiction to make such recovery orders. These comprise the power to make:

(1) property freezing orders;[473]

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465 Above, s 308(1).

466 Above, s 308(2), (3).

467 Above, s 308(8), (8A), (9).

468 Proceeds of Crime Act 2002, s 287.

469 Above, s 288; Limitation Act 1980, s 27A.

470 Limitation Act 1980, s 32; *SOCA v Gale* [2010] EWCA Civ 759.

471 Proceeds of Crime Act 2002, s 281.

472 Above, s 282.

473 Above, ss 245A – G.

(2) interim receiving orders;[474] and

(3) orders to assist in investigations for the purpose of contemplated civil recovery orders: production orders, search and seizure orders, disclosure orders, unexplained wealth orders, customer information orders, and account monitoring orders.[475]

12.83 The Economic Crime (Transparency and Enforcement) Act 2022 makes a number of changes associated with applications for unexplained wealth orders, including the introduction of a new section 362U of the Proceeds of Crime Act 2002. We will deal with this below in the section on costs.

The problem

12.84 The existing civil recovery powers appear to be potentially sufficient to achieve some of the goals of our current project, namely: to remove from corporations the net proceeds they have obtained through crime, including (but not limited to) economic crimes committed by associated persons.

Stakeholders' views

12.85 However, since the introduction of these powers 19 years ago,[476] they appear to have been used sparingly. Our discussions with relevant stakeholders suggested several reasons:

12.86 First, despite the Act providing that the civil standard of proof applies,[477] there is a line of authority to the effect that something closer to the criminal standard is required. For example, Males J in *SOCA v Namli* said:[478]

> It may be said that in practice there will often be little difference between a conclusion that criminal conduct is proved to the criminal standard (so that the tribunal of fact is, "sure" or is satisfied "beyond reasonable doubt") and a conclusion reached on the balance of probabilities but only after careful and critical consideration and requiring "cogent" evidence.

12.87 The necessity for what is sometimes described as "clear and cogent" evidence in civil cases involving criminal allegations was memorably explained by Lord Hoffmann in *Secretary of State for the Home Department v Rehman*:[479]

> The civil standard of proof always means more likely than not. The only higher degree of probability required by the law is the criminal standard. But, as Lord Nicholls of Birkenhead explained in *In re H (Minors) (Sexual Abuse: Standard of Proof) [1996] AC 563, 586*, some things are inherently more likely than others. It

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474 Above, ss 246 – 255.

475 Proceeds of Crime Act 2002, Part VIII.

476 Proceeds of Crime Act 2002, s 243 came into force on 24 February 2003, SI 2003 / 120.

477 Proceeds of Crime Act 2002, s 243(3).

478 [2013] EWHC 1200 (QB), and see generally *Re D* [2008] UKHL33, [2008] 1 WLR 1499.

479 [2003] 1 AC 153, at 55; quoted in Re D [2008] UKHL 33, [2008] 1 WLR by Lord Brown of Eaton-under-Heywood saying, "it bears repetition as few such statements do."

would need more cogent evidence to satisfy one that the creature seen walking in Regent's Park was more likely than not to have been a lioness than to be satisfied to the same standard of probability that it was an Alsatian. On this basis, cogent evidence is generally required to satisfy a civil tribunal that a person has been fraudulent or behaved in some other reprehensible manner. But the question is always whether the tribunal thinks it more probable than not.

12.88 Secondly, ascertaining that property in the possession of the relevant person has been obtained through unlawful conduct, in circumstances where there is insufficient evidence to prosecute the person for a criminal offence (including money laundering) is difficult. Where there is sufficient evidence, it seems likely that a criminal prosecution would be launched instead of civil recovery proceedings.

12.89 Thirdly, even where it can be established that the relevant person possesses property obtained through unlawful conduct, establishing what, among all the different assets that person holds, the property representing unlawful conduct is, can be very difficult.

The victim exception and the detriment exception

12.90 The existence of the various exceptions to the High Court's power to make civil recovery orders means that the use of these powers to remove the profits accrued by corporations as a result of, for example, fraud by persons associated to the corporation and acting for its benefit, is problematic:

12.91 For example, in all instances of fraud, the victim exception may be significant. In such cases, there are likely to be one or more identified victims who may wish to take private civil law claims against the corporation and therefore may seek declarations to prevent the proceeds of the fraud being vested in a trustee on behalf of a law enforcement agency.

12.92 Furthermore, it is possible that the corporation, upon receiving the proceeds of the fraud, and assuming that it was unaware of the fraud, may have acted on the receipt of such funds to its detriment, for example by making investments or paying dividends that it wouldn't otherwise have paid. Therefore, it might avail itself of the detriment exception.

Costs

12.93 A disadvantage in practice for law enforcement agencies in using the powers under Part 5 of POCA is likely to be the one we have identified elsewhere when considering the civil law: the potential adverse costs consequences to law enforcement agencies of unsuccessful applications in the High Court.[480] As we discuss further below, the amendments to the Proceeds of Crime Act 2002 contained within the Economic Crime (Transparency and Enforcement) Act 2022 may go some way towards mitigating this, but do not entirely solve the problem.

The case for reform

12.94 In response to our consultation, the CPS said that they already considered their use of civil powers under the Proceeds of Crime Act. However, given the greater deterrent

[480] See eg *NCA v Baker* [2020] EWHC 822 (Admin), referred to above.

effect of the criminal law, they did not consider it to be an alternative to criminal prosecution.

12.95 The SFO said that it determined the most appropriate measure (whether civil or criminal) on a case-by-case basis. However, it said that it should not be assumed that the path to civil asset recovery was straightforward. In cases of financial crime, the proceeds of unlawful conduct were often mixed with other income within a complex corporate structure. Provisions exist for tracing and therefore recovering the proceeds of unlawful conduct in these circumstances, but they carry a high evidential burden. Therefore, civil asset recovery powers could not, in their current form, be viewed as a replacement for criminal investigation and prosecution of corporations.

12.96 The Fraud Advisory Panel said that resolutions such as civil recovery under the Proceeds of Crime Act meant that there were already alternatives to commencing criminal cases. As such it was unclear what additional alternatives were being suggested during our project, and whether they were needed.

12.97 Jonathan Pickworth, of Paul Hastings LLP said that those advocating reform in this area should provide evidence of why available civil remedies, such as civil recovery orders, were not adequate.

Possible option for reform

12.98 Options to reform Part 5 of the Proceeds of Crime Act were not part of our consultation and they are beyond the practical scope of this project.

12.99 Our review of the civil recovery powers suggests that:

(1) They do not operate in practice, at least currently, as a satisfactory alternative approach to addressing unlawful conduct by non-natural persons. This is not a reflection of the perceived merits of any particular case, but because the comments of stakeholders suggest that these powers are not in fact used frequently by law enforcement agencies. Furthermore, although we received details of ten examples of potential corporate wrongdoing for the purposes of our discussion paper,[481] it does not appear that the existing civil recovery powers were used in any of them.

(2) As to the question of whether the present civil recovery powers could be conveniently reformed to address the concerns of stakeholders in this project, our tentative response would be “no”. The focus of the civil recovery powers is on “property”. Therefore the central issue in applications under Part 5 of Proceeds of Crime Act is identifying and quantifying the property held by an individual which has been obtained through unlawful conduct. This, we suggest, is a complicating factor which can be appropriately avoided by a corporate criminal liability regime based on monetary penalties. Such monetary penalties could take account of the apparent value of the property obtained by the legal person concerned. However, questions as to the precise value of that property, and what happened to it after it was obtained by the legal person need not arise. The anticipated advantages of such a more streamlined regime we

[481] See Corporate Criminal Liability: A discussion paper (2021), appendix 1.

suggest, would outweigh the disadvantages of any perceived unfairness in not necessarily identifying the precise value of the property involved or its ultimate destination.

REMOVING THE CURRENT COSTS DISINCENTIVE ON PROSECUTORS TO USE THE CIVIL COURTS

Introduction

12.100 At present, the regime concerning a prosecutor's liability to pay a successful corporate defendant's legal costs is significantly more favourable for prosecutors in criminal proceedings than in most civil proceedings.

12.101 In this section we consider the potential consequences of this, and suggest an option for reform.

Current law

The costs regime in criminal cases

12.102 In criminal cases, an order to pay a defendant's costs is payable from central funds and not by the unsuccessful prosecutor.[482] The only exceptions to this are where wasted costs orders are made against a prosecutor directly, or against a representative or third party on the grounds of an unnecessary or improper act, or serious misconduct.[483]

12.103 In practice, however, while natural persons are able to recover (capped) legal costs from central funds where they are acquitted,[484] legal persons are generally unable to do so. Moreover, legal aid in criminal proceedings is only available to legal persons in limited circumstances.[485]

12.104 Thus, in criminal proceedings, it will be rare for a corporate defendant to be entitled to legal aid to meet the legal costs of defending itself. Furthermore, in the absence of serious wrongdoing by the prosecutor, legal representatives or third parties, it will be impossible for a successful corporation to recover the costs of defending itself. In the limited circumstances where a successful corporate defendant may recover its costs (following proceedings in the Supreme Court) any costs recovered will be paid out of central funds and not by the prosecutor.

12.105 Note that successful prosecutors may recover their costs, (and often do), from a corporate defendant who has been convicted of an offence.[486]

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482 Prosecution of Offences Act 1985, s 16.

483 Prosecution of Offences Act 2985, ss 19, 19A, 19B.

484 Under the Prosecution of Offences Act 1985, s 16A, a defendant's costs order may not require payment out of central funds in respect of legal costs. However, this is subject to various exceptions, all of which (other than proceedings in the Supreme Court) require that the defendant is an individual.

485 Legal Aid, Sentencing and Punishment of Offenders Act 2012, s31, Sch 3.

486 Prosecution of Offences Act 1985, s 18.

The costs regime in civil cases subject to the Civil Procedure Rules

12.106 In civil proceedings, the award of costs is at the discretion of the court. The court has full powers to determine by whom and to what extent costs are paid.[487] If the court makes an order about costs, the general rule, in proceedings where the Civil Procedure Rules apply, is that the unsuccessful party will be ordered to pay the costs of the successful party.[488]

Regulatory or disciplinary bodies carrying out regulatory functions

12.107 A different practice regarding costs has arisen in the context of certain litigation involving regulators. This is sometimes referred to as "the principle in *Perinpanathan*", after one of the leading cases in which it was applied.[489] The ambit of the principle was recently considered, in the context of proceedings before the Competition Appeals Tribunal, by the Court of Appeal in *CMA v Flynn Pharma*.[490] The Court of Appeal said that the principle meant that "where a power to make an order about costs does not include an express general rule or default position, an important factor in the exercise of the discretion is the fact that one of the parties is a regulator exercising functions in the public interest."

12.108 It concluded that in such cases the default position is that no order for costs should be made against a regulator who has brought or defended proceedings acting purely in its regulatory capacity; the default position may be departed from for good reason; but that the mere fact that the regulator has been unsuccessful is not, without more, a good reason. It went on that a good reason would include unreasonable conduct on the part of the regulator, or substantial financial hardship likely to be suffered by the successful party if a costs order is not made, but there may be additional factors, specific to a particular case, which might also permit departure from the default position.

12.109 On appeal, however, the Supreme Court, held that "there is no generally applicable principle that all public bodies should enjoy a protected status as parties to litigation where they lose a case which they have brought or defended in the exercise of their public functions in the public interest".[491]

12.110 Rather, courts or tribunals must take into account the risk that there will be a chilling effect on the conduct of the public body if costs orders are routinely made against it in those kinds of proceedings.[492] Upholding the Competition Appeals Tribunal's practice of a default rule that "costs follow the event", the Supreme Court held that this does not mean that the court has to consider the point afresh in every case. The Competition Appeals Tribunal was found to have had regard to the possibility of a

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487 Senior Courts Act 1981, s 51.

488 CPR, r 44.2.

489 *R (Perinpanathan) v City of Westminster Magistrates' Court* [2010] EWCA Civ 40, per Lord Neuberger MR, and see also *British Telecommunications v Office of Communications* [2019] Bus LR 592.

490 [2020] EWCA Civ 617, [2020] Costs LR 695.

491 *Flynn Pharma Ltd v Competition and Markets Authority* and *Pfizer v Competition and Markets Authority* [2022] UKSC 14, at [97].

492 Above at [97].

"chilling effect" in adopting a starting point that costs would follow the event where it is possible to identify a clear winner, and its practice therefore was lawful.

Conclusion regarding the current law of costs

12.111 In criminal proceedings, there is little risk to the public purse of having to meet a successful defendant's legal costs. Furthermore, there is even less risk to the prosecutor directly.

12.112 By contrast, in civil proceedings governed by the Civil Procedure Rules, there is a considerable risk to a claimant of paying the legal costs of a successful defendant.

12.113 The risk of an adverse costs order being made against a regulatory body is less in proceedings where the principle in *Perinpanathan* applies. However, such a risk still exists. The existence of this principle regarding regulatory bodies is the subject of an outstanding appeal.

The problem

12.114 The potentially serious costs consequences of High Court litigation for law enforcement agencies are illustrated by the National Crime Agency ("NCA")'s ultimately unsuccessful litigation concerning obtaining unexplained wealth orders (to support potential civil recovery orders) against a number of respondents associated with Dariga Nazarbayeva, a daughter of the president of Kazakhstan, Nursultan Nazarbayev, and previously the wife of Rakhat Aliyev, who held a number of senior Government posts in the government of Kazakhstan.[493]

12.115 In 2020, the High Court lifted unexplained wealth orders previously obtained by the NCA against the respondents. As a result, the respondents submitted a claim for what they said was £1.5m in legal costs. They claimed to have obtained an order for an interim payment of £500,000.[494] The details of any final costs award or settlement are not public. However, stakeholders have suggested to us that the NCA may have ultimately been liable to pay around £800,000 towards the respondents' legal costs and a newspaper report suggested the NCA anticipated having to pay the remaining £1m claimed, in full (if so, the legal costs in the case would amount to more than a third of the NCA's international anti-corruption unit's annual budget).[495]

12.116 In total, the NCA has obtained nine such orders in four cases[496] since their introduction in 2018. No other enforcement body has obtained any UWOs.[497]

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493 *NCA v Baker* [2020] EWHC 822 (Admin).

494 https://www.reuters.com/article/uk-britain-kazakhstan-idUKKBN24012X.

495 See also The Times 13 July 2020 "£1.5m legal bill forces rethink over McMafia wealth orders", https://www.thetimes.co.uk/article/1-5m-legal-bill-forces-rethink-over-mcmafia-wealth-orders-x02gc8s23 (last visited 20 April 2022).

496 Fact Sheet: Unexplained wealth order reforms, Department for Business, Energy and Industrial Strategy, HM Treasury and Home Office (4 March 2022).

497 Unexplained Wealth Orders, House of Commons Library Research Briefing (14 Aril 2022) CBP 9098, and see Andrew Campbell-Tiech QC, Criminal Law Week, issue 11 (2022) p13-14.

12.117 In the Economic Crime (Transparency and Enforcement) Act 2022, Parliament legislated to limit recovery of costs in unsuccessful applications for UWOs and related proceedings. The court may not now order costs to be recovered from an enforcement authority unless the authority acted unreasonably in making or opposing the application in question or acted dishonestly or improperly in the course of the proceedings.[498]

The case for reform

12.118 The discrepancy between the criminal regime for liability for an opposing party's legal costs and the corresponding civil regime is not directly within our terms of reference. However, the relationship between the criminal and civil law on corporate liability is.[499]

12.119 The responses to our consultation did not include any suggestions for reforming the various costs regimes. However, during informal discussions, one stakeholder noted that the existing civil costs regime, while not a primary factor in encouraging the use of criminal powers, may play a secondary role in doing so. It was suggested to us that an extension of the principle in *Perinpanathan* might ameliorate this. However, it seems unlikely that this would completely solve the problem: The principle in *Perinpanathan* requires the court to explore whether the law enforcement agency has acted unreasonably during the proceedings in question. There is considerable incentive for the respondent to identify circumstances where the law enforcement agency's actions could be so characterised. Therefore, the broadening of the application of the principle in *Perinpanathan* would be likely to lead to significant satellite litigation on the reasonableness of law enforcement agency actions.

12.120 Nevertheless, Parliament has recently moved to expand the ambit of the rule in *Perinpanathan* to applications for unexplained wealth orders, and similar investigative tools.[500]

Possible option for reform

12.121 We do not put forward any options for reform in this area. We simply note the practical effect of the various costs regimes is to incentivise law enforcement agencies to use criminal proceedings as opposed to civil proceedings to achieve their goals.

12.122 Elsewhere in this options paper we have suggested a number of means by which the civil law might be used, or further used, as alternative to expanding the criminal law. However, in order for any future expanded civil law regime to be successful, consideration should be given as to whether the costs regimes associated with it makes it attractive to law enforcement agencies. Where the associated costs regime is unattractive to law enforcement agencies, in comparison with the criminal costs regime, reform providing that law enforcement agencies should only face orders to pay the opposing parties' costs on the basis of the principle in *Perinpanathan* warrants consideration.

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498 Economic Crime (Transparency and Enforcement) Act 2022, s 52; Proceeds of Crime Act 2002, s 362U.

499 Terms of Reference para 1.5(2).

500 Economic Crime (Transparency and Enforcement) Act 2022, s 52, Proceeds of Crime Act 2002, s 362U.

CONCLUSION

12.123 In this chapter we have discussed two possible options for using civil litigation to achieve some of the same goals as might be achieved by extension of the criminal law of corporate liability:

(1) High Court penalties for corporations which conduct themselves in an unreasonable way, likely to facilitate serious crime.

(2) Introducing a statutory duty on corporations similar to section 951 of the American Financial Institutions Reform, Recovery and Enforcement Act 1989, enforceable by a civil claim including a remedy of a monetary penalty.

12.124 We have also discussed the efficacy of an existing option:

(3) Civil recovery orders under Part 5 of the Proceeds of Crime Act 2002.

12.125 We have concluded that Part 5 of the Proceeds of Crime Act is not an adequate alternative to extension of the criminal law in this regard.

12.126 Finally, we have considered three costs regimes and the extent to which they incentivise the use of the criminal law where there is a choice between that and the civil law. We conclude that any proposals to use the civil law should consider the applicable costs regime and how this might incentivise, or disincentivise its use.

Chapter 13: Regimes based on obligations to disclose policies and procedures

INTRODUCTION

13.1 In this chapter, we will discuss a number of options to address crime in the corporate context by directly encouraging certain, (typically larger), companies to introduce internal policies to prevent economic crime. These options require such companies to publish the details of the policies they have in this regard, or to justify publicly the absence of such policies.

13.2 For the purposes of this chapter, we will focus on the offences of fraud.[501] However, our comments are applicable to other economic criminal offences.

13.3 The possible options for reform we will consider are:

(1) A regime requiring publication of an annual statement of steps taken to prevent fraud, applying to large corporations; based on the regime concerning modern slavery and human trafficking under the Modern Slavery Act 2015.

(2) A regime requiring the non-financial and sustainability information statements, currently published by companies which are categorised as "Public Interest Entities", to include information concerning steps taken to prevent fraud; based on sections 414CA and 414CB of the Companies Act 2006.

13.4 We will also consider recent EU draft legislation directing Member States to institute regimes for the creation and disclosure of corporate internal policies relating to the impact of their operations on human rights and the environment. This may be relevant to the UK because larger UK companies, which have substantial operations in the EU, are likely to have to comply with this legislation, to the extent that they trade within the EU, if it is introduced.

13.5 Turning to the first possible option for reform:

AN ANNUAL STATEMENT OF STEPS TAKEN TO PREVENT FRAUD – THE MODERN SLAVERY ACT APPROACH

Introduction

13.6 This section considers whether the provisions in section 54 of the Modern Slavery Act 2015 might serve as a model for a new regime requiring certain larger companies to disclose details of what anti-fraud precautions they take, or to seek to justify publicly the absence of such measures.

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501 As "core fraud offences" are the ultimate focus of our chapter on failure to prevent offences, for the reasons given in that chapter.

The current law

13.7 Section 54 of the Modern Slavery Act 2015 provides that commercial organisations carrying on at least part of their business in the UK, with a total annual turnover of not less than £36m, are required to prepare an annual "slavery and human trafficking statement".[502]

13.8 Commercial organisations are defined for these purposes as corporate bodies and partnerships (wherever incorporated or formed) carrying on a business in any part of the UK, and which supply goods or services.[503]

13.9 Such a statement must set out the steps that the organisation has taken to ensure that slavery and human trafficking are not taking place in any of its supply chains or in any part of its business; or a statement that it has taken no such steps.[504]

13.10 There are also provisions concerning further contents of such a statement that organisations may *choose* to include.[505] These are:

(1) information about the organisation's structure, its business and supply chains;

(2) its policies in relation to slavery and human trafficking;

(3) its due diligence processes;

(4) the parts of its business and supply chains where there is a risk of slavery and human trafficking taking place, and the steps the organisation has taken to assess and manage that risk;

(5) its effectiveness in ensuring that slavery and human trafficking is not taking place, measured against such performance indicators as it considers appropriate; and

(6) the slavery and human trafficking training available to staff.

13.11 Where the organisation concerned is a corporation, such a statement must be approved by the board or directors, or equivalent; and signed by a director, or equivalent.[506]

13.12 The statement must be published in a prominent place on the organisation's website or be provided on request.[507]

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502 Modern Slavery Act 2015, s 54(1)-(3), (12), Modern Slavery Act 2015 (Transparency in Supply Chains) Regulations SI 2015 2015 No 1833, and see Corporate Criminal Liability: A discussion paper (2021), para 3.55-3.58.

503 Modern Slavery Act 2015, ss 54(2), (12).

504 Above at s 54(4).

505 Above at s 54(5).

506 Above at s 54(6).

507 Above at s 54(7), (8).

13.13 The Home Office has issued statutory guidance as to what steps an organisation might be expected to take.[508]

13.14 As things stand, there are no sanctions for breach of the obligations concerning slavery and human trafficking statements. Rather, the Government may compel compliance by seeking an injunction to that effect in the High Court.[509] To date, no such injunctions have been sought.

13.15 However, the Government is considering introducing financial penalties for non-compliance; see paragraph 13.20 below. In the meantime, stakeholders have suggested to us that there are already two important practical incentives on companies to comply with these obligations:

(1) The potential reputational damage to large corporations of being seen to be failing to comply with their obligations to address modern slavery.

(2) The reluctance of directors of large companies to sign a public document which is inaccurate.

13.16 These factors, it is suggested, encourage corporations to publish comprehensive and accurate slavery and human trafficking statements. More importantly, they encourage corporations to take appropriate steps to reduce the risk of modern slavery and human trafficking in their supply chains. We refer to three examples of slavery and human trafficking statements produced by large UK companies in section two of this chapter, below.

Reviews and announced reforms

13.17 The final report of the Independent Review of the Modern Slavery Act was published in May 2019.[510] It commented that section 54 was the first national legislation of its kind.[511] It found that section 54 of the 2015 Act had contributed to a greater awareness of modern slavery in companies' supply chains. However, the report said that a number of companies were approaching their obligations as a mere tick-box exercise. Furthermore, it referred to a Home Office estimate from 2018 that 40% of applicable companies had not provided such a statement.[512]

13.18 In July 2019, the Government published a consultation paper on proposals to reform section 54. It published its response in 2020.[513] The Government promised the

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508 Home Office, *Transparency in Supply Chains etc. A practical guide* (updated version 2017).

509 Above at s 54(11).

510 Home Office, *Independent Review of the Modern Slavery Act 2015: Final Report* (May 2019) CP 100. The review was chaired by Frank Field MP and aided by Expert Advisers including Peter Carter QC and Caroline Haughey QC.

511 Similar legislation has since been passed elsewhere, eg the Modern Slavery Act 2018 in Australia.

512 Home Office, *Home Office tells business: open up on modern slavery or face further action,* 18 October 2018, available at: https://www.gov.uk/government/news/home-office-tells-business-open-up-on-modern-slavery-or-face-further-action.

513 Home Office, *Transparency in supply chains consultation, Government Response* (22 September 2020).

following reforms, where, insofar as it would be necessary, Parliamentary time allowed:

(1) The currently voluntary further contents of slavery and human trafficking statements to become mandatory.

(2) Updated guidance to be published.

(3) All slavery and human trafficking statements to be published by the same date annually, and to be placed together on a Government-run platform (this platform has now been created, see below).

(4) Statements to include the date on which they were approved by the board of directors, and on which they were signed by the director concerned.

(5) Statements issued on behalf of groups of corporate entities explicitly to identify the entities covered.

(6) The obligation to provide a statement to be extended to the public sector, to be approved and signed by equivalent public sector management bodies and individuals.

13.19 In 2021, the Government launched its registry of modern slavery statements. By October 2021, the date of the publication of the most recent annual report on modern slavery, 6,250 statements covering over 21,000 organisations had been submitted. This was greater than the 16,000 organisations the Home Office considered to be within the scope of section 54 at the time of the registry's launch.[514]

13.20 Also in 2021, the Government announced its intention to introduce two reforms: First of all, to introduce financial penalties for organisations that failed to meet their obligations under section 54. Secondly, to create a single enforcement body for employment rights, that would impose those penalties.[515]

13.21 Furthermore, the Social Value Model launched in 2020. Under this model, most new central Government procurement exercises will place weight on the social value of bids. Determining the social value of a bid includes making an assessment of the bidder's modern slavery due diligence processses.[516]

The case for reform

13.22 Our terms of reference include the relationship between corporate criminal liability and other approaches to unlawful conduct by non-natural persons. As such, the approach of section 54 of the Modern Slavery Act is of relevance.

13.23 The offence of holding another person in conditions of modern slavery shares some characteristics with the offences that have been the focus of our project. In particular,

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514 Home Office, *2021 UK Annual Report on Modern Slavery* (October 2021), para 2.3.11.

515 Department for Business, Energy and Industrial Strategy, *Establishing a new single enforcement body for employment rights, Government Response* (June 2021).

516 Home Office, *2021 UK Annual Report on Modern Slavery* (October 2021), paras 2.3.1 to 2.3.27.

the nature of modern slavery means that that is often committed in order to maximise profits for the economic entity concerned.

13.24 Therefore, it seems sensible to consider whether the regime introduced by section 54 of the 2015 Act might serve as a model for a possible regime to address other crimes, such as a fraud, particularly where such offences are committed for the benefit of corporations.

13.25 At the same time, it is recognised that one of the main reasons for imposing disclosure requirements on large companies is to counter the risk of modern slavery within supply chains, including overseas suppliers, rather than criminal conduct directly involving the companies themselves.

13.26 A number of stakeholders have expressed general support for the possibility of extending the Modern Slavery Act approach to other criminal offences that might be committed to benefit a commercial organisation:

13.27 In the final webinar of our consultation, Katherine Tyler of Kingsley Napley said that extending the approach of the Modern Slavery Act, to include other offences, "could be effective, politically palatable and would soon become irresistible".

13.28 In their submission to the consultation, Baker McKenzie commented:

> It is not clear to us that the promotion of positive compliance cultures is a sufficient reason in and of itself to introduce new criminal offences, particularly in circumstances where there are other methods of achieving that outcome; for example, via requirements to publish compliance statements (cf section 54 of the Modern Slavery Act 2015) or the introduction of civil fines (cf Office of Financial Sanctions Implementation ("OFSI") powers under the UK sanctions regime, under the Policing and Crime Act 2017) or even through market regulation.

13.29 Herbert Smith Freehills said:

> If the focus of reform is not to deter wrongdoing (as a general matter) but instead to require particular corporate behaviours, this should be effected by regulation. If the aim is to ensure that companies have a particular form of compliance programme, then there should be a clear expression of what companies should or must do in this regard: options in this regard would also include disclosure obligations (for example, adopting a similar model to that taken under the Modern Slavery Act 2015) by way of driving behaviour.

13.30 The Modern Slavery Act approach has also attracted some significant support from business generally: In its 2019 response to proposals to reform the Modern Slavery Act, the Confederation of British Industry ("CBI") commented:

> Businesses must, and the vast majority do, play their part in the collective duty to tackle modern slavery. This responsibility starts with effective due diligence, which the Modern Slavery Act has successfully put on board agendas across the UK…
>
> The strength of the current narrative approach is that it has compelled companies to be transparent about, establish or improve due diligence processes relative to their

> individual business. Its emphasis on transparency as a mechanism to change behaviour, rather than as a compliance exercise, has contributed to increased scrutiny on modern slavery among company directors…
>
> Business fully supports the effective enforcement of the MSA as the best means to drive up compliance.[517]

13.31 The CBI's point was echoed by Katherine Tyler during our consultation, who said that businesses supported the extension of this approach because it provided for "legal certainty, a level playing field and a harmonised and non-negotiable standard."

Possible options for reform

The option

13.32 One option for reform in this area might be to introduce an obligation on commercial organisations over a certain size to produce an annual statement of steps they have taken to ensure that crimes such as by a person associated with the organisation acting with the intention of benefitting the organisation.[518]

Restricted to "associated persons"

13.33 We have suggested that such a new obligation to produce such a corporate annual "anti-fraud statement" be restricted to steps that organisation has taken in relation to "associated persons", not "throughout their supply chain". This is intended to achieve broad consistency with the ambit of corporate criminal responsibility for connected persons under the Bribery Act and the Criminal Finances Act.

13.34 Furthermore, it is likely that frauds committed within the supply chains of commercial organisations in the UK, may be committed with an intention to benefit the *suppliers* of the UK commercial organisation, but are unlikely to be committed to benefit, at least directly, the UK commercial organisation itself.

13.35 As is the case for modern slavery, any new obligation on certain commercial organisations to publish anti-fraud statements could be accompanied by g?overnment guidance as to what steps a commercial organisation might be expected to consider and in what circumstances.

13.36 Furthermore, as is currently the case with slavery and human trafficking statements, there could be provision for such an annual anti-fraud statement to be signed by a director or equivalent and to be approved by the board of directors, and for the issuing of such a statement, duly approved, to be enforceable by an injunction in the High Court.

13.37 Were the Government's proposals to reform the modern slavery supply chains regime to be enacted, for example to extend it to public sector organisations, then it might seem reasonable for any future anti-fraud reporting regime also to be so extended.

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517 CBI, *Transparency in Supply Chains, Response to the Government's Consultation on Strengthening the UK's Modern Slavery Act* (2019).

518 See further discussion about the definition of these terms in our chapter on a potential failure to prevent offence, chapter 8 above.

13.38 In conclusion, introducing a reform to require commercial organisations above a certain size to publish an annual statement of steps taken to prevent associated persons committing a fraud for their benefit would have the following positive advantages:

(1) Unlike the introduction of new failure to prevent offences, this reform would promote transparency: commercial organisations would be incentivised, not only to have anti-fraud procedures, but also to make them public. Therefore, both members of the public, and interested stakeholders such as civic groups, would have the opportunity to assess and comment on the adequacy of the published procedures.

(2) It would achieve some consistency between the approach to modern slavery and human trafficking, and fraud, where the latter offence is committed with an intention to benefit the organisation concerned. Such consistency is desirable for its own sake, but it would also mean that the commercial organisations involved would be taking on new obligations which were similar in nature to obligations with which they were already familiar.

13.39 Furthermore, it could have certain other advantages:

(1) It would avoid imposing a disproportionate burden on small companies, by applying only to commercial organisations above a certain size.

(2) It would not involve any further burden on the criminal justice system. Any further burden on the civil justice system may also be limited because the primary means of compelling compliance with the obligations under the regime would be the potential public opprobrium and reputational damage of failure to comply. The anticipated reluctance of a director of a large commercial organisation to sign a document that was inaccurate or incomplete, and of the board of directors of such a company to endorse a statement of this kind, may act as an effective means of promoting compliance with the obligations.

(3) It would permit the authorities to intervene to compel the production of such corporate statements, and also therefore potentially the introduction of appropriate corporate due diligence against certain kinds of offending, without having to wait until an offence was committed by a person associated with the corporation. As such it could be described as being proactive as opposed to reactive.

13.40 Some potential disadvantages of such a reform might be:

(1) Creating a new *specific* legislative regime for reporting on anti-fraud policies would be to treat anti-fraud matters differently from other corporate due-diligence reporting obligations. Those are contained within the Companies Act 2006. As Katherine Tyler said, during our consultation:

> As section 54 is not integrated into reporting obligations under the Companies Act 2006, there is no scrutiny from the Financial Reporting Council in respect of the adequacy of any of the disclosures – plainly this would be a logical focus…

(2) The sanctions under section 54 of the Modern Slavery Act for non-compliance as they currently stand, and even potentially after reform, would be less powerful than, for example a new corporate criminal offence of failing to prevent fraud.

(3) As suggested by the 2019 report on the Modern Slavery Act, there may be some commercial organisations, and some company directors, who would treat the production and publication of any future corporate anti-fraud policy statement as a "tick-box exercise". Furthermore, at least as things stand under the modern slavery regime, provided such a statement is published, then the commercial organisation concerned would be in compliance with its legal obligations.

13.41 In conclusion, the current lack of enforcement powers under section 54 of the Modern Slavery Act may be seen as a significant drawback. There are greater enforcement powers attached to the second reporting regime that we consider in this chapter. We have touched on it above. It is the regime for corporate reporting of due-diligence policies under Part 15 of the Companies Act 2006.

ADDING A REQUIREMENT TO REPORT ON ANTI-FRAUD DUE DILIGENCE POLICIES TO THE OBLIGATION TO PRODUCE A NON-FINANCIAL AND SUSTAINABILITY INFORMATION STATEMENT UNDER THE COMPANIES ACT 2006

Introduction

13.42 This section considers whether Part 15 of the Companies Act 2006 might serve as an alternative model for certain larger companies to be obliged to report details of their policies to prevent fraud. In doing so, we consider certain reforms to the Act proposed by the Government in 2021.

13.43 We also consider three examples of the due-diligence disclosures made by well-known British companies under the present law.

The current law

13.44 The Companies Act 2006 applies to all companies formed and registered under that Act or previous Companies Acts. In other words, it applies to all companies formed and registered in the UK, and only such companies.[519] Naturally, such companies will include any UK subsidiaries of foreign companies.

13.45 Part 15 of the Companies Act 2006 concerns company accounts and reports.

Strategic reports

13.46 Chapter 4A of Part 15, concerns the obligation on directors of companies to prepare an annual "strategic report" for the company.[520] The requirement applies to all companies save for certain small ones.[521] A strategic report is intended to assist

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519 Companies Act 2006, s 1. There are exceptions but they are not relevant for our purposes.

520 Failure to prepare a strategic report is a criminal offence committed by all directors who failed to take all reasonable steps to comply with the requirement; Companies Act 2006, s 414A(5).

521 Companies Act 2006, ss 381, 382, 414A(2), 414B.

investors in the company to assess how the directors have performed in their duty to promote the success of the company.[522] A company director's duty to promote the success of the company is defined by statute.[523] It is thus defined to includes having regard to matters including the need to foster the company's business relationships with suppliers, customers and others; the impact of the company's operations on the community and the environment; and, the desirability of the company maintaining a reputation for high standards of business conduct. Thus, information concerning, for example, the impact of the company's operations on the community and the environment, comes within the ambit of information that directors are required to provide.

Strategic reports and quoted companies

13.47 Strategic reports published by quoted companies must contain certain further information.[524]

13.48 Quoted companies for the purposes of the 2006 Act are companies formed and registered in the UK and whose shares are listed on the main market of the London Stock Exchange, or the New York Stock Exchange, the NASDAQ or one or more of the equivalent stock exchanges in the EU.[525]

13.49 For quoted companies, strategic reports must contain information about the impact of the company's business on the environment, on the company's employees and on social, community and human rights issues. The details given must be sufficient to impart an understanding of the development, performance or position of the company's business.[526]

NFSI statements

13.50 For a different, but overlapping set of companies, such a strategic report must include a "non-financial and sustainability information statement", or "NFSI statement". The NFSI statement must contain the climate-related financial disclosures of the company.

13.51 This obligation applies to larger companies within the following categories: traded companies, banking companies, insurance companies, companies whose shares are traded on the Alternative Investment Market, and any other companies with a turnover of more than £500m pa. [527]

13.52 "Traded companies" for the purposes of the 2006 Act means companies whose shares are traded on a UK regulated market, eg the London stock exchange.[528]

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522 Above ats 414C.

523 Above at s 172. Common law rules or equitable principles are still relevant however, s 170(4).

524 Above at s 414(7)

525 Above at s 385 and s1(1).

526 Above at s 414C(7).

527 Above at s 414CA as amended, see s414CA(1B) and (3) to (7), which excludes companies subject to the small companies regime and medium-sized companies.

528 Above at s 474.

NFSI statements including information on anti-bribery and anti-corruption matters

13.53 For a further subset of companies, such NFSI statements must be more detailed. This obligation applies only to those companies with over 500 employees in the first three of the categories above, namely:

(1) traded companies,

(2) banking companies, and

(3) insurance companies.[529]

13.54 These three categories of company correspond closely to the definition of public interest entities "(PIEs)" in Part 16 of the Act.[530] Therefore that phrase is often used to describe them. However, these obligations only apply to such PIEs if they have more than 500 employees.[531]

13.55 PIEs with more than 500 employees must provide information concerning the company's activity and:

(1) Environmental matters.

(2) Social matters.

(3) Respect for human rights.

(4) *Anti-corruption and anti-bribery matters.*[532]

13.56 It is this smallest subset of companies that we are most interested in: PIEs with more than 500 employees. That is because the presently existing obligation upon them to report on anti-corruption and anti-bribery matters might serve as a model for a potential *future obligation to report on anti-fraud matters*.

13.57 Before going any further it should perhaps be noted that banking and insurance companies are also likely to be subject to the heavy regulation of the Financial Services and Markets Act 2000 and the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017.

13.58 There are further provisions concerning large, limited liability partnerships ("LLPs"), but these do not include obligations to provide statements concerning anti-corruption or anti-bribery policies and so we will exclude LLPs from the discussion here.[533]

13.59 Drawing together the paragraphs above therefore we can see that: for UK companies with over 500 employees, and either quoted on the main market of the London Stock

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529 Above at s414CA.

530 Above at s 494A, the phrase originates in Directive 2006/43/EU on statutory audits of annual accounts and consolidated accounts.

531 Above at s 414CA(4)-(6).

532 Above at s 414CB(1) (emphasis added).

533 For reference see the Limited Liability Partnerships (Climate-related Financial Disclosure) Regulations 2022.

Exchange or being banking or insurance companies, there is currently an annual obligation to report on anti-bribery and corruption policies.

Nature of the information required in an NFSI statement

13.60 There are further provisions in the Companies Act 2006 concerning the ambit of the contents of information contained in such NFSI statements.[534] Note that the obligation to provide NFSI statements is limited to providing information "necessary for an understanding of the company's development, performance and position and impact of its activity." In this respect therefore, the detail required in an NFSI statement is limited in a similar way to the level of detail required to be included in a strategic report, see above. If the company does not pursue policies in relation to one or more of the matters to be included in an NFSI statement, then the company must provide a clear and reasoned explanation for not doing so.[535]

13.61 Guidance on companies' obligations to provide NFSI statements is provided by the Financial Reporting Council, [536] and (specifically in relation to the climate-related financial disclosure provisions, introduced in 2022) by the Department for Business, Energy and Industrial Strategy.[537]

Enforcement under the 2006 Act

13.62 The enforcement provisions under the Companies Act are substantially stronger than under the Modern Slavery Act: A strategic report, published pursuant to the Companies Act, and therefore a NFSI statement where one is made, must be approved by the board of directors and signed by a director or the secretary of the company. Directors may commit an offence if they fail to provide a strategic report when required, or approve an inadequate strategic report.[538]

13.63 Where the company's accounts are audited, the auditor must review the contents of any strategic report, and therefore any NFSI statement where one is included, and state whether the information given is consistent with the accounts, whether it has been prepared in accordance with the legal requirements, and whether the auditor has identified any material misstatements within it.[539]

Examples of NFSI statements

13.64 A sample of three large, quoted companies outside the financial sector illustrates how each comply with their obligations to provide NFSI statements in different ways. Overall, each appears to give considerable detail as to its anti-bribery and anti-corruption policies and to provide detailed slavery and human trafficking statements. Furthermore, they appear to go beyond what is directly required under the 2006 Act by referring to wider anti-economic crime policies. To the extent that one of the

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534 Companies Act 2006, s 414CB(2).

535 Above at s 414CB(1), (4).

536 Financial Reporting Council, *Guidance on the Strategic Report* (July 2018).

537 BEIS, *Mandatory climate-related financial disclosures by publicly quoted companies, large private companies and LLPs, non-binding guidance* (February 2022).

538 Companies Act 2006, ss 414A(5), 414D.

539 Companies Act 2006, s 496.

objectives of our project may be characterised as seeking to promote internal corporate procedures to prevent crime, the NFSI statements of these three companies suggest that, in their cases, to an extent, such internal procedures already exist.

Tesco

13.65 Tesco is a leading UK retailer. Tesco's NFSI statement can be found in its 2021 Annual Report.[540] It includes a reference to Tesco's slavery and human trafficking statement (which is published in full elsewhere).[541] There is also a paragraph concerning anti-bribery policies. It says that Tesco conducts due diligence in relation to its suppliers, in particular those who engage public officials on its behalf, and that it trains its staff on bribery every year. Bribery risk management is discussed at senior leadership groups in each business unit, and twice a year with the Audit Committee.

13.66 On its website, Tesco provides links to a number of ethics and compliance policies, including its anti-bribery policy,[542] its whistle-blowing policy,[543] and its Code of Business Conduct. This code includes sections on fraud and bribery, as well as advice for employees.[544]

13.67 Tesco's slavery and human trafficking statement 2020/21 is available via its website. It is signed by the Group Chief Executive and is 27 pages long.[545]

Capita

13.68 Capita is an outsourcing, consulting and IT services business. Its recent contracts include designing training for the Royal Navy and administering the Teacher's Pension Scheme. Its most recent annual report includes a specific NFSI statement.[546] It provides references to further relevant paragraphs throughout the annual report. There is a single paragraph concerning bribery and corruption. It states that its anti-bribery and corruption policy applies to all its businesses, employees and suppliers. The Risk and Compliance team monitors compliance and ensures that all parts of the business are aware of their responsibilities. All employees are required to complete financial crime training annually. Elsewhere in the annual report, Capita says that responsibility for reviewing the effectiveness of its risk management and internal control systems is delegated to its Audit and Risk Committee by the board of directors. During the year, the committee received reports on themes including anti-bribery and corruption.[547]

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540 Tesco, *Annual Report and Financial Statements 2021*, strategic report p 29 to 39, and see p 100.

541 Tesco, *Modern Slavery Statement 2020/21* (27 pages).

542 Tesco, *Group Anti-Bribery policy* (14 September 2021), available at: https://www.tescoplc.com/sustainability/documents/policies/group-anti-bribery-policy/.

543 Tesco, *Group Whistleblowing policy* (12 June 2019), available at: https://www.tescoplc.com/sustainability/documents/policies/group-whistleblowing-policy/.

544 Tesco, *Our Code of Business Conduct* (2021), available at https://www.tescoplc.com/media/757929/tesco-cobc_sept-2021.pdf.

545 Tesco, Modern Slavery Statement 2020/21 (May 2021).

546 Capita, *Annual Report 2020*, p 49.

547 Capita, *Annual Report 2020*, p 87.

13.69 Capita has a separate anti-bribery and corruption policy[548] and a Financial Crime policy.[549] Its slavery and human trafficking statement is also referred to in the annual report.[550] It is available separately and is 19 pages long.[551]

Barratt Developments

13.70 Barratt Developments, ("Barratt"), is a leading domestic housebuilder. It is a UK traded company with over 6,000 employees, and which describes itself as supporting over 45,000 jobs.[552]

13.71 Barratt's most recent annual report was published in September 2021.[553] There is no separate NFSI statement. However, Barratt deals with the matters that are required to be included in an NFSI statement throughout the annual report.

13.72 Barratt gives details of its anti-bribery and corruption group policy and its policies intended to ensure compliance with human rights at page 33 of the annual report. It says it has policies and procedures in place to support the core values of the United Nations Universal Declaration of Human Rights and the UN Guiding Principles of Business and Human Rights. Barratt says that any concerns may be raised via its whistleblowing process.[554] It says it has a strict anti-bribery and corruption policy. All employees are required to be undertake training under it at regular intervals. It works closely to ensure its standards are applied to its extended workforce. It is a condition of all its supplier and sub-contractor contracts that they comply with the Bribery Act.

13.73 Within the Audit Committee report section of the annual report, Barratt describes the work of the Audit Committee that year to review directors' responsibilities relating to fraud. The Audit Committee agreed that fraud prevention should be reviewed annually including giving consideration to areas for potential fraud, fraud mitigation and controls adequacy.[555]

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548 Capita, *Anti-Bribery and Corruption Policy* (2019), available at https://www.capita.com/sites/g/files/nginej291/files/2019-11/capita-anti-bribery-and-corruption-policy.pdf.

549 Capita, *Financial Crime Policy* (2021), available at https://www.capita.com/sites/g/files/nginej291/files/acquiadam/2021-04/capita-financial-crime-policy.pdf.

550 Capita, *Annual Report 2020*, p 49.

551 Capita, *Modern Slavery and Human Trafficking Statement 2021,* available at: https://www.capita.com/modern-slavery-statement.

552 Barratt Developments, *Who we are*, available at: https://www.barrattdevelopments.co.uk/about-us/who-we-are/our-people.

553 Barratt Developments, Annual Report and Accounts 2021 (September 2021), pp 2 to 67.

554 Above, p 88, and see further details of the whistleblowing policy in the ethics policy document. Barratt subscribes to an independent telephone number and email address for potential whistleblowers to contact securely.

555 Barratt, *Annual Report and Accounts 2021* (September 2021), p 86.

13.74 Barratt's anti-bribery and corruption policy is two pages long. It is dated 12 October 2021 and is available on Barratt's website.[556]

13.75 Barratt also has a six page ethics policy. It is also dated 12 October 2021 and is available via the company's website.[557] In it, Barratt says it reviews the ethics policy annually. This is approved by the Group Board. The ethics policy is communicated to key stakeholders and is made available on the website. It includes provisions requiring all employees to behave honestly and fairly, to comply with all legal and regulatory requirements, and to safeguard the assets and property of the group.

13.76 Barratt's slavery and human trafficking statement is dated 12 October 2021 and is available on its website. It is five pages long. It is recorded as being approved by the board and signed by the Chief Executive.[558] Among the details of the policy set out there, it states, for example, that Barratt mandates elearning training to all Directors and Function Heads, Contracts Managers, the Group Procurement Team and Group Commercial Team. Its Key Performance Indicators show that it had delivered training to 415 of 436 eligible persons by 25th August 2021 and that it had carried out 351 risk assessments of sub-contractors thought to carry a higher risk of being concerned in modern slavery.

The Department for Business, Energy and Industrial Strategy's consultation

13.77 In 2021, the Department for Business, Energy and Industrial Strategy published a consultation on proposals to reform auditing and corporate governance.[559] We understand that BEIS's response to the comments of consultees will be available shortly. A number of proposals within the consultation may be of relevance to corporate criminal liability.

A new regulator

13.78 BEIS proposes creating a new regulator, the "Audit, Reporting and Governance Authority (ARGA)" as a successor to the Financial Reporting Council ("FRC").[560] It would be funded by a new statutory levy to replace the existing voluntary levy.[561] It would be given new powers to strengthen its corporate reporting review function,[562] its

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556 Barratt Developments, *Anti-Bribery and Corruption Policy* (12 October 2021), available at: https://www.barrattdevelopments.co.uk/~/media/Files/B/Barratt-Developments/policies/2021/anti-bribery-and-corruption-25022022.pdf.

557 Barratt Developments, Ethics Policy (2021), available at: https://www.barrattdevelopments.co.uk/~/media/Files/B/Barratt-Developments/policies/2021/ethics-policy-25-02-2022.pdf.

558 Barratt Developments, Modern Slavery and Human Trafficking Statement (2021), available at:https://www.barrattdevelopments.co.uk/~/media/Files/B/Barratt-Developments/policies/2021/modern-slavery-statement-2021-011021.pdf.

559 BEIS, *Restoring Trust in Audit and Corporate Governance* (2021) CP 382, and see Corporate Criminal Liability: A discussion paper, para 9.18(3).

560 BEIS, *Restoring Trust in Audit and Corporate Governance* (2021) CP 382, see the summary at p 18 onwards and throughout the consultation.

561 Above at chapter 10.

562 Above at chapter 4.

oversight of audit committees[563] and to enforce the corporate reporting duties of directors. [564] It would also have responsibility for deciding which individuals and firms should be approved to audit Public Interest Entities.[565]

Expanding the definition of PIEs

13.79 BEIS proposes treating private companies as PIEs in the same circumstances as public companies are treated as PIEs.[566] BEIS put forward two alternative options; that PIEs should include either:[567]

(1) all companies with either more than 2,000 employees, or a turnover of more than £200 million pa and a balance sheet of more than £2 billion; or

(2) all companies with more than 500 employees and a turnover of more than £500 million pa.

13.80 Furthermore, BEIS suggested that the definition of a PIE should also include all companies traded on the Alternative Investment Market ("AIM") with market capitalisations above 200 million euros.[568]

The duties of directors

13.81 Chapter 6 of the consultation document concerns Audit Purpose and Scope. It includes a section on tackling fraud. In this section, BEIS notes that company directors are responsible for safeguarding the assets of the company and therefore are expected to take reasonable steps to prevent and detect any material fraud. BEIS says that such actions may include undertaking an appropriate fraud risk assessment and responding appropriately to identified risks; promoting an appropriate corporate culture and corporate values, and ensuring appropriate controls are in place and operating effectively.[569]

13.82 BEIS proposes to legislate to require directors of PIEs to report on the steps they have taken to prevent and detect material fraud. It says that it will discuss with the Financial Reporting Council and other interested parties the need for supporting guidance for directors to be developed and issued (for example, for premium listed companies, through the UK Corporate Governance Code). [570]

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563 Above at chapter 7.

564 Above at chapter 2, chapter 5, and chapter 10.

565 Above at chapter 9.

566 Above at chapter 1.

567 Above at p 33.

568 Above at p 34 to 35.

569 Above at para 6.4.1.

570 Above at para 6.4.2.

13.83 “Material fraud” for these purposes is not defined within the BEIS consultation, but relates to the lowest value of a transaction which would be expected to be included in an auditor’s review.[571]

13.84 If the proposed directors’ obligation to report on steps taken to prevent and detect material fraud applies to directors of all PIEs, and if the definition of a PIE is extended as proposed elsewhere in BEIS’s consultation, then it might apply to around 3,000 or 4,000 companies in the UK.[572] (Note that this is significantly smaller than the number of organisations who have complied with the reporting obligations under the Modern Slavery Act, see above).

figure 1: Number and turnover of VAT and PAYE registered enterprises in the UK (2021)

	Count	Employment	Turnover (£000`s)
0-9 Micro	1,824,140	4,066,276	797,944,226
10-49 Small	187,900	3,651,722	663,887,183
50-249 Medium	34,570	3,375,632	976,190,693
250+ Large	7,640	10,621,314	3,162,319,917
Total	**2,054,250**	**21,714,944**	**5,600,342,019**

Source: ONS request

13.85 The data indicate that there are over 7,000 organisations in the UK with over 250 employees. These organisations have a total annual turnover of £3.1tn. This represents around 56% of the total annual turnover of commercial corporate organisations in the UK. They provide around 48% of the total employment in this area. Should the BEIS proposals be enacted it would appear that around half of these organisations might be covered by obligations to report on their anti-fraud policies. These would generally represent the organisations in the large category in table 1 above that which have over 500 employees (or 2,000 employees depending on which definition BEIS ultimately choose to adopt).

The duties of auditors

13.86 BEIS also proposes to legislate to require auditors of PIEs, as part of their statutory audit, to report on the work they have performed in order to conclude whether the proposed directors’ statement regarding actions taken to prevent and detect material fraud is factually accurate.

13.87 To assist in achieving this, the consultation indicates that BEIS supports:

(1) Previously published plans by the Financial Reporting Council to liaise with professional bodies for auditors to ensure that fraud awareness and forensic accounting skills training is strengthened.[573]

(2) The creation of a case study register of corporate frauds for auditors.[574]

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571 Sir Donald Brydon CBE, *Improving Audit Quality and Effectiveness* (2019) p 66.

572 Above at paras 1.3.5, 1.3.21.

573 BEIS, *Restoring Trust in Audit and Corporate Governance* (2021) CP 382, para 6.4.9.

574 Above at at 6.4.10.

13.88 In conclusion therefore concerning the current law under the Companies Act and previously announced reforms: the proposals contained within BEIS's consultation, if enacted, would lead to a significantly more wide-ranging, and stronger regime of supervising the activities, directors and auditors of large UK companies.

The problem

13.89 At present, and leaving aside for now the current BEIS proposals, there are requirements for certain large companies to include within their NFSI statements information concerning anti-corruption and anti-bribery matters. However, there are currently no requirements for companies to provide information about any anti-fraud procedures that they might have. Nevertheless, certain companies, such as Tesco and G4S do publish such policies. Furthermore, as indicated, BEIS propose to require reporting on anti-fraud procedures from larger public and private companies.

13.90 Therefore, summarising the contents of this chapter so far: the position in relation to the obligation of companies to publish details of their polices to prevent crime is a somewhat fragmented one. Criminal offences might be grouped as follows:

(1) Modern slavery: All companies operating in the UK with a turnover above £36m required to publish details of policies or explain lack of policies, but with very limited legal powers of enforcement.

(2) Bribery and corruption: Traded companies, banking and insurance companies with over 500 employees required to publish details of policies or lack of policies, subject to enforcement against directors by criminal prosecution.

(3) Fraud: Currently no obligation on companies. However, proposals exist to introduce an obligation and to extend it equally to public and private companies.

(4) Money-laundering, facilitation of tax evasion, false accounting and all other offences: no obligation under the Companies Act 2006 on any company to publish details of policies or lack of policies. (Obligations may exist elsewhere, in the financial services sector or in companies subject to stricter anti-money laundering and anti-terrorist financing regimes, see chapter 6).

Comparison of the regimes under the Modern Slavery Act and the Companies Act

13.91 The differences between the regimes under section 414CA and 414CB of the Companies Act 2006, and section 54 of the Modern Slavery Act include:

(1) The Modern Slavery Act provisions apply more widely. In particular, they apply to many more private companies and other organisations: The modern slavery obligations apply to all commercial organisations (so not just companies) with an annual turnover over £36m. The Companies Act obligations concerning anti-bribery and anti-corruption apply only to those traded companies, banking companies and insurance companies with over 500 employees.

This difference is perhaps explicable on the basis that the Companies Act is primarily concerned with the protection of investors, and the general public (hence the inclusion of large banks and insurance companies which are

regarded as more likely to have systemic economic importance). The Modern Slavery Act, on the other hand, is focussed on the protection of individuals.

(2) The enforcement powers under the Modern Slavery Act are significantly weaker than those under the Companies Act 2006. The Modern Slavery Act relies principally, for now at least, on the risk of public criticism and the consequent reputational damage to compel companies to comply with those requirements. The obligations under the Companies Act are backed up by criminal offences which might be committed by directors for non-compliance.

13.92 However, a similarity between the regimes under both Acts is that neither actually requires the institutions subject to them to institute the policies they concern. Instead, those institutions may give a reasoned statement as to why such policies are not necessary.[575]

The case for reform

13.93 As noted above, the reporting obligations under section 414CA and CB Companies Act 2006 have been recently amended, principally to include obligations relating to the climate change risks and opportunities associated with a company's operations.

13.94 Subject to the result of its consultation, BEIS has already announced its intention to legislate to strengthen further the obligations under section 414CA and 414CB to include obligations concerning anti-fraud policies.

13.95 In response to our consultation, the Financial Crime Practice Group of Three Raymond Buildings chambers of barristers suggested that, instead of reforming the identification doctrine, more would be achieved by:

> a proper system of regulatory supervision that recognises that the benefits of corporate limited liability ought to carry consequentially strict requirements for compliance with the criminal law being used to support the regulatory system through prosecutions for failure to submit accurate returns, to make modern slavery statements, anti-bribery policies and strategic reports, and in appropriate cases in respect of appropriate offences, the use of the failure to prevent approach…

Possible options for reform

13.96 Two proposals announced last year by BEIS are of particular relevance to our project. They are, first of all: the proposal to require PIEs to publish details of polices adopted to prevent material fraud. Secondly, the proposal to expand the definition of PIEs to include private companies. These two proposals might achieve one of the goals of our project. Namely, they might significantly improve corporate governance.

13.97 A possible means whereby BEIS might add an obligation to report on anti-fraud procedures could be to add them to the currently existing subsection 414CB(1) of the Companies Act.

13.98 Alternatively, a new subsection of section 414CB could be introduced to set out in some detail the level of anti-fraud disclosure required. This would be consistent with

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575 Modern Slavery Act 2015, s 54(4)(b), Companies Act 2006, s 414CB(4).

the provisions introduced with effect from 6 April 2022 in relation to climate-related financial disclosures.[576]

13.99 Whichever of these potential options were chosen, the advantages of such a reform might be:

(1) Inclusion of such a reporting obligation would require very limited further legislation. The enforcement mechanisms for compliance with the obligation already exist within the Companies Act 2006.

(2) It would enable the authorities to enforce compliance with the obligation without waiting for a crime, such a fraud, to be committed by a person associated with the company concerned.

13.100 Issues with such a reform might include:

(1) Even if the proposed reforms to the definition of PIEs were enacted, the obligation to publish details of an anti-fraud policy would only apply to companies with at least 500 employees. However, it might be argued, that companies with fewer than 500 employees are perhaps those most likely to be subject to prosecution for any substantive offending, either on the basis of the identification doctrine as it stands, or following reform. While therefore, small companies and large companies could both be prosecuted for criminal offences with fault elements if the decision-makers in the company committed the offence, and while large companies would have additional obligations, this might be seen as creating a situation in which smaller firms were more likely to be prosecuted for criminal conduct by their representatives whereas large firms, in practice, merely had to publish details of their policies.

(2) Adding such reporting obligations to the Companies Act would not actually compel companies to institute, or to enforce, anti-fraud policies. The obligation is simply, should they choose not to do so, to provide a "clear and reasoned" explanation why.[577] However, it could equally be said that the failure to prevent offences under the Bribery Act 2010 and Criminal Finances Act 2017 do not compel companies to have procedures to prevent bribery or the facilitation of tax evasion: they just make it unlikely that the company will be able to avail itself of the statutory defence should someone associated with it commit a relevant offence. However, both might encourage companies to put in place preventative procedures – in the case of the "failure to prevent" offences by providing a potential defence, and in the case of disclosure requirements because of the potential reaction from shareholders or other stakeholders.

13.101 When considering the drawback of the Companies Act provisions – that sanctions are limited to companies who breach their *reporting* obligations, and not companies who breach their *due diligence* obligations – then recently proposed developments in the law of the EU may be of relevance.

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576 Companies Act 2006, s 414CB(2A).

577 Companies Act 2006, s 414CB(4).

DRAFT EU LEGISLATION: THE DRAFT DIRECTIVE ON CORPORATE SUSTAINABILITY AND DUE DILIGENCE

Introduction

13.102 The requirements on certain companies to publish non-financial and sustainability information statements under the Companies Act 2006 derive from EU legislation: the Non-Financial Reporting Directive of 2014.[578]

13.103 In relation to corporate reporting obligations on certain topics, a draft EU directive proposes a new, significantly tougher regime. Companies would no longer simply be required to publish policies regarding these risks, or to justify the absence of such polices. Instead, Member States would be required to ensure that Public Interest Entity companies actually carried out due diligence exercises, identified risks and either brought them to an end or minimised their extent. Companies would be required to report on the extent to which they have complied with these obligations on an annual basis. [579]

13.104 The EU's proposals in this draft directive relate to obligations in two areas: adverse human rights and environmental impacts.[580]

13.105 The scope of this draft directive is intended to include companies formed in accordance with the legislation of third countries (such as the UK), but which have a turnover within the EU over a certain amount.[581] The explanatory memorandum to the draft directive suggests these thresholds will cover approximately 4,000 third-country companies.[582] It can perhaps be inferred that a significant proportion of these will be companies formed in the UK.

13.106 Member States are required to designate supervisory authorities to ensure that PIEs comply with these obligations. Such supervisory authorities are required to be given adequate investigatory and enforcement powers. Where the legal system of a Member State does not provide for administrative sanctions, provision should be made for sanctions, including pecuniary sanctions, to be imposed by the courts.[583] PIEs in breach of their obligations should also be liable to pay damages.[584]

Possible options for reform

13.107 We do not consider an option for reform of the law concerning obligations to publish policies to address economic crime based on this proposed EU directive.

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578 Companies, Partnerships and Groups (Accounts and Non-Financial Reporting) Regulations 2016/1245, Directive 2014/95/EU, amending Directive 2013/34/EU.

579 European Commission, *Proposal for a Directive on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937* (23 February 2022).

580 European Commission, *Proposal for a Directive on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937* (23 February 2022), art 1.

581 Above, art 2(2).

582 Above, explanatory memorandum, p 16.

583 Above at art 18(6), art 20.

584 Above at art 22.

13.108 The proposed directive does not include any reference to anti-fraud due diligence, or anti-bribery and anti-corruption due diligence. Its direct relevance to our project is therefore limited.

13.109 However, if this draft directive is passed, it will represent a significant toughening of the enforcement of corporate due diligence obligations within the EU. The EU's starting position on such obligations required publication of statements concerning due diligence policies or the lack of them. That was back in 2013. However, were this directive to be implemented, its effect would be to require such due diligence policies to be in place and companies to have taken proportionate measures to reduce or eliminate the risks concerned. Failure to do so would be met with penalties including administratively imposed monetary sanctions.

13.110 If this directive is passed and implemented, UK companies with substantial business in the EU will have to comply with these obligations to that extent. Furthermore, it may be possible to conceive of a time when the EU obligations on companies concerning their anti-corruption and bribery policies are also enforced in a like manner. If the EU were ever to impose corporate reporting obligations concerning anti-fraud and other economic crime policies, then one might expect those also ultimately to be enforced in the same way.

CONCLUSION

13.111 In this chapter, we have discussed three regimes concerning obligations on certain corporations to report on the extent to which they have carried out due diligence in relation to certain matters:

(1) on modern slavery and forced labour;

(2) in the UK, on anti-bribery and anti-corruption; and,

(3) (according to draft legislation), in the EU, on adverse environmental and human rights implications of their operations.

13.112 Perhaps the strongest overall impression from these three regimes is the extent to which they are all subject to recent or proposed reform intended to strengthen them.

13.113 The Modern Slavery Act regime is subject to announced proposals to add enforcement powers.

13.114 The UK and EU regimes of obligations on certain companies in relation to due-diligence policies are also in the process of being strengthened:

(1) In the UK, it is proposed to strengthen the regime by *broadening* it: first, by adding an obligation to report on anti-fraud policies to the existing obligations to report on anti-bribery and anti-corruption policies. Secondly, by applying the obligations to private companies as they currently apply to traded companies.

(2) In the EU, the proposals might be characterised as *deepening* the nature of the obligations and the penalties for non-compliance: moving away from obligations to disclose due-diligence policies or justify their absence, with penalties for

failing to make appropriate disclosure; and towards obligations to have, monitor and update due-diligence policies, with monetary penalties if they are inadequate.

13.115 In the circumstances, it may be possible to envisage a future where the path of reform in the EU and UK converges, leading to obligations on all companies over a certain size (perhaps 500 employees) to have due diligence policies for risks, including the risk of fraud, and administratively imposed penalties for any inadequacies in them. However, that is still some way in the future.[585]

13.116 Furthermore, we have seen how, in relation to three large UK companies, the current UK reporting regimes, despite all their limitations, have led to the publication of significant levels of detail of corporate policies to prevent crime.

13.117 If one of the central purposes of any proposed extension of the law of corporate criminal liability is to improve corporate governance, and due diligence, in respect of certain economic crimes, then section 54 of the Modern Slavery Act 2015, and sections 414CA and 414CB of the Companies Act 2006, either as they stand, or following potential further amendments, would appear to provide two attractive models to achieve this.

Option 10A.

13.118 A reporting requirement based on section 414CB of the Companies Act 2006, requiring public interest entities to report on anti-fraud procedures.

Option 10B.

13.119 Introduce a reporting requirement based on section 54 of the Modern Slavery Act 2015, requiring large companies to report on their anti-fraud procedures.

[585] However, see now the Environment Act 2021, s 116 and Sch 17, which provide for regulations to be made to introduce a regime of due diligence and reporting obligations on legal persons with an annual turnover above a threshold amount working with forest risk commodities. Regulations may provide for such obligation to be enforced by criminal offences and civil sanctions. At the time of writing, no such regulations have been introduced.

Chapter 14: Summary of principles and options

CHAPTERS 2-7: ATTRIBUTION OF CRIMINAL RESPONSIBILITY TO CORPORATIONS

14.1 **Principle 1.** We conclude that there is a need for one or more general rules of attribution to cover offences generally.

14.2 **Option 1.** Retain the identification doctrine as interpreted by recent case law.

14.3 **Option 2A.** Allowing conduct to be attributed to a corporation if a member of its senior management engaged in, consented to, or connived in the offence. A member of senior management would be any person who plays a significant role in the making of decisions about how the whole or a substantial part of the organisation's activities are to be managed or organised, or the actual managing or organising of a substantial part of those activities.

14.4 **Option 2B.** As 2A, with the addition that the organisation's chief executive officer and chief financial officer would always be considered to be members of its senior management.

14.5 **Principle 2.** For offences of negligence, we conclude that it should be possible to convict a corporation on the basis of collective negligence even if it is not possible to identify an individual whose conduct was personally negligent. A corporation might be collectively negligent, precisely because there was no individual with the necessary responsibility.

CHAPTER 8: "FAILURE TO PREVENT" OFFENCES

14.6 **Principle 3. "Failure to prevent" offences should reflect the following general principles.**

(1) Organisations should generally only be liable for failure to prevent commission of an offence that was

(a) intended to confer a business advantage on the organisation, or

(b) intended to confer a benefit on a person to whom the associated person provides services on behalf of the organisation,

but the organisation should not be liable under the second of these where the conduct was intended to cause harm to the organisation.

(2) Organisations should have a defence available on the basis of "reasonable", rather than "adequate", procedures to prevent commission of the underlying offence(s).

(3) There should be provision along the lines of section 45(2)(b) of the Criminal Finances Act 2017 to the effect that it might be reasonable in the circumstances not to have any procedures at all.

(4) The burden of proving that the organisation had put in place reasonable prevention procedures, or that it was reasonable not to have any such procedures, should lay with the defence.

(5) There should be a duty on Government to publish guidance on the procedures that organisations can put in place to prevent commission of the underlying offence(s).

(6) There should be a power for Government to publish additional guidance on prevention procedures for particular sectors or issues.

(7) There should be a power for Government to approve guidance on prevention procedures published by third parties.

(8) Whether failure to prevent offences should extend to extra-territorial commission of the underlying offences should be considered on a case-by-case basis.

(9) Failure to prevent offences should only extend to substantive criminal offences, and not to inchoate offences such as attempts and conspiracies.

14.7 **Option 3.** An offence of failure to prevent fraud by an associated person. The offence would be committed where an associated person (who might be an employee or agent) commits an offence of fraud with intent to benefit the corporation, or to benefit another person to whom they provide services on behalf of the corporation.

14.8 **Option 4.** An offence of failure to prevent human rights abuses.

14.9 **Option 5.** An offence of failure to prevent ill-treatment or neglect.

14.10 **Option 6.** An offence of failure to prevent computer misuse.

14.11 If any of options 4-6 were taken forward, further work and consultation would be necessary on the scope of the offences.

CHAPTER 9: CRIMINAL LIABILITY OF DIRECTORS AND SENIOR MANAGERS

14.12 **Principle 4.** Where an offence requires proof of intention, knowledge, or dishonesty, directors' personal liability for commission of the offence by a corporation should require proof that the director consented to or connived in the commission of the offence by the corporation. Neglect as a basis of directors' liability should be limited to offences of strict liability or negligence.

CHAPTER 10: SENTENCING OF NON-NATURAL PERSONS

14.13 **Option 7.** Make publicity orders available in all cases where a non-natural person is convicted of an offence.

CHAPTERS 11-14: CIVIL OPTIONS

14.14 **Option 8.** A regime of administrative monetary penalties against companies. This could operate where a fraud was committed by an employee or agent, with the

intention of benefitting the company. In such cases the company would be liable to pay a penalty unless it could show that it had taken reasonable steps to prevent the wrongdoing.

14.15 **Option 9.** Civil actions in the High Court, based on Serious Crime Prevention Orders, but involving a power to impose monetary penalties as well as preventative measures that the company would be required to take.

14.16 **Option 10A.** A reporting requirement based on section 414CB of the Companies Act 2006, requiring public interest entities to report on anti-fraud procedures.

14.17 **Option 10B.** A reporting requirement based on section 54 of the Modern Slavery Act 2015, requiring large corporations to report on their anti-fraud procedures.

Appendix 1: Whistleblowers, informants and corporate self-reporting

INTRODUCTION

A1.1 Whistleblowing, informing and corporate self-reporting are all aspects of the detection and investigation of crime, linked by the voluntary provision of information about wrongdoing to regulators or law enforcement bodies. They can all be important to the detection of wrongdoing by corporations.

A1.2 Whistleblowers are individuals who work within an organisation and report wrongdoing they are aware of, either to another member of the organisation, or to an external body. They can assist crime detection in corporations because they have often seen the wrongdoing from within the company.

A1.3 Informants are individuals who do not necessarily work for an organisation but who, in the context of corporate criminal liability, report wrongdoing they become aware of being committed by an organisation (for example, informants reporting tax evasion to HMRC can be former employees).

A1.4 Corporate self-reporting refers to instances where a corporation alerts the relevant regulator or prosecuting body, such as the Financial Conduct Authority ("FCA") or the Serious Fraud Office ("SFO"), to wrongdoing it has detected taking place within the company.

A1.5 We did not ask any questions in our discussion paper about these forms of crime detection, or the guidance which governs them. However, we received responses from several consultees which raised related issues and which called for reform.

A1.6 Our attention has been drawn to several calls for reform within the landscape of whistleblowing and self-reporting, which aim to redress what is sometimes perceived as inadequate protection and incentivisation. The calls can be categorised as follows:

a. Whistleblowers put their reputations at risk when reporting the conduct of other or senior employees, so they should be financially rewarded beyond the employment protection they are entitled to if they are unfairly dismissed.

b. Whistleblowing, informing and corporate self-reporting should be encouraged because they are important mechanisms for detecting corporate wrongdoing. This includes calls for awareness raising efforts, such as with an Office for the Whistleblower, and calls for leniency to incentivise reporting.

A1.7 There are several ways in which these issues could be dealt with, noting the approaches taken in different contexts and sectors. We have been made aware of several overlapping models:

(1) Employment protections, which compensate individuals for detriment suffered following a disclosure of information.

(2) Requirements for firms to appoint a whistleblowers' champion and implement other protective measures (as mandated by the FCA for regulated businesses).

(3) Remuneration of whistleblowers, as is done by HMRC, the Competition and Markets Authority ("CMA") and in the United States of America.

(4) Leniency and immunity in civil and criminal investigations conducted by the CMA, in exchange for information.

(5) "Qui tam" actions for the UK, as an alternative method of rewarding whistleblowers.

(6) A centralised body with responsibility for whistleblowers, such as an Office of the Whistleblower.

Recent evidence of whistleblowing in the context of corporate wrongdoing

A1.8 One high-profile example of the potential power of whistleblowers is the discovery of the Danske Bank money laundering scandal, which was revealed by a whistleblower who was employed by the bank.[586] The British whistleblower, Howard Wilkinson, was head of Danske Bank's trading unit in the Baltic region from 2007-2014. During this time, he raised concerns that the Estonian branch of Danske Bank was effectively being used to launder over $200 billion. The funds primarily came from Russia and surrounding states, and were subject to insufficient due diligence measures. Ultimately, the whistleblowing led to the bank acknowledging its failings, referring thousands of suspicious transactions to their regulator, and donating the gross income from the relevant period, which was DKK 1.5 billion (in recognition of the absence of an exact value of suspicious transactions).[587]

A1.9 The All-Party Parliamentary Group ("APPG") on Whistleblowing reported that 6.9% of whistleblowers who responded to their survey reported cases related to the banking and finance sector. Notably, disclosures are made in a range of sectors, including education and local government. The APPG reported the largest single sector in which reports were made was public health and social care: 42% of those surveyed reported cases relating to this sector.[588] As a potential indicator of scale, it was reported by a separate survey that only 7 of 21 organisations surveyed had internal reporting processes which had been used by whistleblowers.[589]

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586 Reuters, "Danske whistleblower says big European bank handled $150 billion in payments", 19 November 2018, available at https://www.reuters.com/article/us-danske-bank-moneylaundering-idUSKCN1NO0ZR.

587 Danske Bank, "Findings of the investigations relating to Danske Bank's branch in Estonia", 19 September 2018, available at: https://danskebank.com/news-and-insights/news-archive/press-releases/2018/pr19092018.

588 All-Party Parliamentary Group on Whistleblowing, "Whistleblowing: The personal cost of doing the right thing and the cost to society of ignoring it", July 2019, p 13. The report is based on 336 responses received to the survey.

589 David Lewis, "A survey of whistleblowing/confidential reporting procedures used by persons prescribed under the Public Interest Disclosure Act 1998", Comms. L. 2007, 12(4), 125-130.

Particular risks associated with whistleblowing

A1.10 The nature of whistleblowers' activities, as observers and reporters of corporate wrongdoing, can put them in a difficult position. Making disclosures can risk whistleblowers' job security, and potential reputational and financial damage to their employer. As an example of the potential risks to whistleblowers when they report wrongdoing, it has been claimed that Dankse Bank investigated Howard Wilkinson in an attempt to discredit him.[590] The APPG on Whistleblowing reported that "in 2018, nearly 40% of whistleblowers report going on sick leave".[591] This indicates the potential harm that whistleblowers can suffer.

Voluntary disclosures and disclosures under compulsion

A1.11 A key feature of whistleblowing is the voluntary nature of any decision to report wrongdoing. By contrast, sometimes disclosures of information are made because there is a statutory duty to report suspicions or evidence of a particular type of wrongdoing. One example is the duty on those in the regulated sector to make a suspicious activity report ("SAR"), as part of the anti-money laundering regime, at sections 330-332 of the Proceeds of Crime Act 2002.[592] Though this may be a form of whistleblowing, it does not form part of the following analysis because disclosures are made with, in the case of SARs, the threat of criminal sanction for a failure to report.

CURRENT LAW AND MODELS FOR REFORM

Employment protections

A1.12 There are already some protections in English law for whistleblowers. The Employment Rights Act 1996 protects disclosures made by workers to employers, or to other people where the wrongdoing relates to the conduct of someone who is not their employer, or for which another person has legal responsibility.[593] The protection is provided in the form of a remedy for detriment suffered as a result of disclosures. Disclosures are also protected if they are made to a legal adviser in the course of obtaining legal advice,[594] or someone prescribed by the Secretary of State.[595] The list of prescribed persons under this provision includes Commissioners of HMRC, the Director of the SFO, the CMA and the Care Quality Commission.[596]

A1.13 A disclosure can still fall within the remit of the Act even though it is not made to one of the groups of people listed above, if it is made:

(7) in good faith;

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590 Financial Times, "Danske Bank sought to discredit whistleblower, lawyer claims", 4 July 2019, available at: https://www.ft.com/content/32d2023c-9e6f-11e9-9c06-a4640c9feebb.

591 All-Party Parliamentary Group, "Making whistleblowing work for society", June 2019.

592 See also Anti-money laundering: The SARs regime (2019) Law Com No 384.

593 Employment Rights Act 1996, s 43C (inserted by the Public Interest Disclosure Act 1998).

594 Above, s 43D.

595 Above, s 43F.

596 Public Interest Disclosure (Prescribed Persons) Order 2014/2418, sch 1.

(8) with reasonable belief in truth;

(9) not for personal gain;

(10) with reasonable belief that the whistleblower will be subjected to a detriment imposed by their employer on making a disclosure; or in circumstances where they reasonably believe it is likely that evidence relating to the wrongdoing will be concealed or destroyed if they disclose to their employer; and

(11) it is reasonable in all the circumstances to make the disclosure.

A1.14 In addition to the person to whom the disclosure is made, there are also restrictions on the content of the disclosure. A person will only fall within the Act if they disclose information which concerns:

(12) a criminal offence that has been committed, is being committed, or is likely to be committed (in the UK or in any other country);

(13) a person failing to comply with any legal obligation to which they are subject;

(14) a miscarriage of justice;

(15) the endangerment of the health or safety of any individual;

(16) damage to the environment; or

(17) any matter falling within one of the above categories which has been, is being or is likely to be deliberately concealed.[597]

A1.15 The requirements for good faith disclosures and an absence of personal gain reinforce the need for disclosures to be made in the public interest, in order for them to be protected. In line with this, grievances and complaints have been distinguished from disclosures of information indicating wrongdoing, and are not included in the list of protected disclosures.[598]

A1.16 The protection offered to whistleblowers under this legislation is designed to prevent them suffering detriment, as an employee, because of their disclosure. A worker who makes a protected disclosure has the right not to be subjected to any detriment, by any act or any deliberate failure to act, made by another employee or agent of the worker's employer.[599] This is aimed at protecting whistleblowers against victimisation as a result of disclosures they have made.[600] Moreover, whistleblowers can claim unfair dismissal if their contracts are terminated due to the disclosure they made.[601] If their claim is successful, a whistleblower can claim wages for the period during which

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597 Employment Rights Act 1996, s 43B(1)(a)-(f).

598 Department for Business, Innovation and Skills, *Whistleblowing, Guidance for Employers and Code of Practice,* March 2015.

599 Employment Rights Act 1996, s 47B(1A).

600 IDS Employment Law Handbook, Vol 14, para 5.1.

601 Employment Rights Act 1996, s 103A.

they were wrongfully excluded from work. This is distinct from payment for the information a whistleblower provided, which is dealt with below at paragraphs A1.24-A1.30.

A1.17 As is clear from the wording of the legislation, it only applies to workers. This means it does not give protection to those not in an employment relationship, and in any event the protections against suffering detriment and unfair dismissal are not suitable outside such relationships. This distinguishes whistleblowers from individuals who may inform on a company from outside. It should be noted, however, that "worker" is given a broader meaning for the purposes of public interest disclosures than other areas of employment law,[602] and includes, for example, contractors and trainees.

The FCA approach – whistleblowing champions

A1.18 Beyond this framework of protection, there have been an increasing number of measures aimed at encouraging whistleblowing. For example, some organisations subject to the FCA's Senior Managers and Certification Regime ("SM&CR") are required to appoint a whistleblowers' champion. This should be someone with authority, independence and access to resources and information within the firm, and for insurers specifically, should be a senior manager or non-executive director.[603] The designated person is responsible for "overseeing the integrity, independence and effectiveness of the firm's policies and procedures on whistleblowing".[604] They are also responsible for policies and procedures which should protect whistleblowers from victimisation as a result of their disclosures of "reportable concerns".[605] It is notable that "reportable concerns" – the disclosures which qualify for protection under this regime – is a wider concept than protected disclosures in the Employment Rights Act. It includes anything which falls into this category, in addition to a breach of the firm's policies and behaviour which is likely to harm the reputation or financial well-being of the firm. Training of managers, not just those who are whistleblowers' champions, in recognising and protecting whistleblowers is also required.[606]

A1.19 An example of this framework being used is the fine imposed on James Staley, Chief Executive of Barclays Group, by the FCA and Prudential Regulation Authority ("PRA"). Mr Staley tried to identify an anonymous author of a letter which made allegations about him; an attempt which was found to be in breach of the requirement to act with due skill, care and diligence under the SM&CR.[607] Notably, an FCA

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602 Comparison of the definition of "worker" between section 43K and section 230 Employment Rights Act 1996, the former of which relates to public interest disclosures and which has a broader remit than the latter.

603 FCA Handbook, Senior Management, Arrangement, Systems and Controls ("SYSC"), 18.4.1, 5.

604 Above, 18.4.4.

605 Above, 18.4.4.

606 Above, 18.3.4.

607 FCA Final Notice, Mr James Staley, 11 May 2018, available at: https://www.fca.org.uk/publication/final-notices/mr-james-edward-staley-2018.pdf.

director said, in relation to the fine, that "whistleblowers play a vital role in exposing poor practice and misconduct in the financial services sector."[608]

A1.20 Protect, a whistleblowing charity, reported on the impact of the FCA's whistleblowing rules in 2020. They collated data from 352 callers they received to their legal advice hotline between January 2017 and December 2019.[609] The increase in reports they received from banks, finance and insurance companies, compared with data collected in 2012, indicates the FCA's rules may have raised the profile of whistleblowing in the sector.[610] The report also found there had been a drop in the number of whistleblowers who faced victimisation, dismissal or resignation after making a disclosure.[611]

A1.21 However, the APPG on Whistleblowing noted in its 2019 report that the FCA had been criticised by respondents to their survey. The criticisms they cited did not focus on the regime it has implemented through the SM&CR, but instead on the FCA's conduct as a prescribed person. This means it is authorised under the secondary employment legislation[612] to receive reports of wrongdoing directly from individuals. The criticisms included claims that the FCA had failed to act on protected disclosures.[613]

A1.22 Accounting for time to establish the practical requirements of the regime within firms,[614] it appears that the whistleblowing requirements sit in line with other rules the FCA has established for firms it regulates. It is noteworthy that action has been taken over failure to prevent whistleblowing already, against a Chief Executive of Barclays, which may indicate the potential in the new rules.

A1.23 A broader question, however, is whether this regime could and should be extended to other sectors. The provisions for whistleblower protection are embedded within the FCA's wider regime regulating senior managers. As a broader system, this is not replicated by other regulators in other sectors. As such, it is not clear that other sectors could be subjected to the same requirements, without the context of wider regulation. Companies which do not have a designated regulator would also not be subject to the same provisions, so this would not be a solution to unify all whistleblowing protection. Practically, the FCA has invested in the SM&CR which

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608 FCA Press Release, "FCA and PRA jointly fine Mr James Staley £642,430 and announce special requirements regarding whistleblowing systems and controls at Barclays", published 11 May 2018, available at: https://www.fca.org.uk/news/press-releases/fca-and-pra-jointly-fine-mr-james-staley-announce-special-requirements.

609 Protect, "Silence in the City", 2020, p 6.

610 Above, p 13.

611 Above, p 32. Notably, the rates for both before and after the introduction of the FCA rules are high, at 77% and 70% respectively.

612 See paragraph A1.12 above and the Public Interest Disclosure (Prescribed Persons) Order 2014/2418, sch 1.

613 All-Party Parliamentary Group on Whistleblowing, "The personal cost of doing the right thing and the cost to society of ignoring it", July 2019, p 39.

614 The FCA accounted for some criticisms of partiality to banks over whistleblowers by noting the regime is still "bedding in", above p 39.

may have reduced the financial and administrative burden of this additional regulation, which is a position unique to the FCA.

Remuneration for whistleblowers

A1.24 The next model of reform is payment for information given by whistleblowers. Such schemes are already operated by certain agencies.

HMRC

A1.25 As noted at A1.12, whistleblowers can report information they have found to someone within the company they work for, or to the relevant investigative agency if they are a prescribed person. For example, a person who becomes aware of the company they work for attempting to commit or committing tax evasion, may report that wrongdoing directly to HMRC. Some Government departments, such as HMRC, remunerate whistleblowers who voluntarily offer information about company wrongdoing. Jonathan Fisher QC wrote that HMRC paid whistleblowers over £300,000 and £400,000 in 2018 and 2019 respectively. However, there was no clarity about to whom, for what and in what sums this money was paid.[615] In 2021, it was reported that HMRC had paid informants[616] £397,950 that year.[617] The payments are currently not reported in HMRC's annual reports.

CMA

A1.26 The CMA is another Government body which remunerates whistleblowers. They offer financial incentives of up to £100,000 (in exceptional circumstances) for information about cartel activity. The reason they give for this reward is that cartel activity is harmful to "businesses and the economy and cost consumers money" but cartels are often operated secretly, and therefore are difficult to detect.[618]

A1.27 The CMA's guidance makes it clear that giving a reward is entirely discretionary. If the information provided has been useful for the CMA, they state that they will consider several factors – including the value of the information, the harm avoided by the disclosure, and the effort and risk the whistleblower has endured – to decide how much to award. These factors indicate that the reward is payable after the information has been received by the CMA and used in its investigation. It is notable that the CMA's rewards are explicitly linked to the potential harm suffered by the whistleblower in disclosing information. This is perhaps the strongest justification for having a reward system. However, as noted at paragraph A1.11, there are instances

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615 Jonathan Fisher QC, "Remunerated whistleblowers", Counsel Magazine, April 2019, available at: https://www.counselmagazine.co.uk/articles/remunerated-whistleblowers.

616 Comparison of these two figures should account for the fact that informants are a potentially wider group than whistleblowers.

617 FT Adviser, "HMRC pays informants £400k for tax fraud tip-offs", 29 November 2021, available at: https://www.ftadviser.com/regulation/2021/11/29/hmrc-pays-informants-400k-for-tax-fraud-tip-offs/#:~:text=HM%20Revenue%20%26%20Customs%20paid%20informants,as%20of%20June%20this%20year.

618 Competition and Markets Authority Guidance, "Rewards for information about cartels", published 31 March 2014, available at: https://www.gov.uk/government/publications/cartels-informant-rewards-policy/rewards-for-information-about-cartels.

in which no reward is payable because the information is required by statute, with the threat of the criminal law rather than the incentive of money.

Federation Against Software Theft

A1.28 A further example of financial rewards offered to whistleblowers is a scheme set up by the Federation Against Software Theft ("FAST"), a not-for-profit organisation. The organisation offers cash rewards to those who provide information about the illegal use of software, where the report leads to the successful identification of such use. In the event of success, the whistleblower will be paid at a rate of five per cent of the retrospective payment recovered by FAST.[619] Notably, FAST introduced financial rewards several years after initiating a whistleblower scheme to uncover historic misuse of software.

The US model

A1.29 Remuneration for whistleblowers is well-established in the US. Our attention was drawn to the Securities and Exchange Commission's 2019 report on its whistleblower programme, which declares awards were made to eight whistleblowers in 2019 of approximately $60 million.[620] This information led to investigations being started, or contributed to successful enforcement actions. This sum of money, paid to only eight individuals, is far greater than the amounts it is reported HMRC paid in 2018 and 2019.[621] It also dwarfs the CMA's cap of £100,000 to any individual. It is therefore not directly analogous to the UK, but in broad terms it might be taken to indicate the assistance whistleblowers are providing in investigations. The financial incentives appear to have influenced the number of disclosures the Commission has received: "since August 2011, the Commission has received over 33,000 whistleblower tips."[622] The utility of such a volume of disclosures is unclear.

A1.30 There is an argument that financial incentives for information encourage people to provide information they might not have otherwise. However, the counterargument is that financial incentives encourage false, exaggerated or otherwise unreliable information, which could cost investigation time. The US model does not definitively prove that payments for whistleblowers are beneficial to crime detection, but rather serves as an example of a potential model for reform. In the same vein as "qui tam" actions (see paragraphs A1.39-A1.41), the possibility of large payments for a small number of individuals is not in line with the way English law and guidance has developed.

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619 Federation Against Software Theft, "FAST launches Incentive Payment Agreement to reward whistle blowers", 25 October 2016, available at: https://fast.org/?q=news/fast-launches-incentive-payment-agreement-reward-whistle-blowers.

620 Securities and Exchange Commission, 2019 Annual Report to Congress, "Whistleblower Program", p 9, available at: https://www.sec.gov/files/sec-2019-annual-report-whistleblower-program.pdf.

621 See paragraph A1.25.

622 Securities and Exchange Commission, 2019 Annual Report to Congress, "Whistleblower Program", p 22, available at: https://www.sec.gov/files/sec-2019-annual-report-whistleblower-program.pdf.

Leniency and immunity

Regimes specific to certain law enforcement agencies – the CMA

A1.31 Another form of incentive the CMA offers, and another potential model to encourage whistleblowing and corporate self-reporting, is a "leniency policy", to which several consultees drew our attention. Under this, a person or company which has been directly involved in cartel activity can still report the wrongdoing and can "gain complete civil and criminal immunity" from sanctions imposed as a result of CMA investigations. The CMA can grant leniency in civil investigations it conducts into infringements by corporations of the prohibition in the Competition Act 1998 against cartel activity.[623] It can provide immunity from criminal investigations into cartel offences by related individuals under the Enterprise Act 2002, section 190(4).[624] The CMA's power to provide leniency is limited to corporations (called "undertakings" mirroring terminology in the Companies Acts) and individuals who have participated in cartel activity.[625] It should be noted that this power does not extend to all types of wrongful conduct the CMA investigates as part of its wider remit, and it does not extend beyond investigations the CMA itself carries out.

A1.32 The CMA sets out the types of leniency it will grant in different circumstances, depending on whether the information it receives is new and the quality of the information. As an example, the maximum level of protection the CMA grant is:

(18) Guaranteed corporate immunity from financial penalties.

(19) Guaranteed 'blanket' immunity from criminal prosecution for individual employees or officers.

(20) Guaranteed immunity from proceedings for directors' disqualification orders.

A1.33 There are conditions for companies to meet before receiving such full immunity from the CMA's penalties. The conditions are:

(21) The company is the first applicant for immunity for the particular activity, and there is no pre-existing investigation into the activity.

(22) The information must provide a sufficient basis for taking forward a credible investigation.

(23) The company must:

(a) Accept participation in a cartel activity, which means accepting they breached the section 2 Competition Act 1998 prohibition.

(b) Provide all relevant information, documents and evidence.

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623 Competition Act 1998, ss 2, 36.

624 Office of Fair Trading, Applications for leniency and no-action in cartel cases, July 2013 (Guidance on CMA's investigation procedures in Competition Act 1998 cases, updated 31 January 2022) p 7.

625 Above, p 14.

(c) Maintain continuous and complete cooperation throughout the investigation.

(d) Refrain from further participation in the cartel activity.

(e) Not have coerced another to take part in the cartel.[626]

Discounts for guilty pleas

A1.34 More generally, the concept of a more lenient penalty in exchange for cooperation is a familiar concept in criminal law. For individuals and corporations, it is well-established that a sentence can be reduced for an early guilty plea,[627] in recognition of the time and resources which are saved by not having a trial.

Eligibility for deferred prosecution agreements

A1.35 A closer analogy is the DPAs corporations can enter with the SFO and CPS. These enable a corporation to accept the wrongdoing – such as fraud or bribery – and to improve compliance measures within their organisation, without receiving a conviction. Full cooperation with SFO investigations has, historically, been required,[628] which is analogous to the CMA's requirement for full cooperation before granting leniency. DPAs offer leniency in allowing a company to avoid conviction for a crime, and to benefit from the discount to any fine applicable to an early guilty plea.

A1.36 The SFO has produced guidance designed to clarify the effect of full cooperation on the availability of a DPA for the company, and the ultimate fine a company receives. The SFO deals with companies according to the level of their "genuine cooperation", which includes identifying wrongdoing and reporting suspicions within a reasonable time. The guidance is not necessarily designed to encourage more reporting, because it states that "even full, robust cooperation – does not guarantee any particular outcome".[629]

A1.37 An example of discounted fines in light of company cooperation is the DPA agreed with Airbus. The court imposed a fine at a fifty per cent discount, which is higher than the usual one third discount, in recognition of the "exemplary cooperation" Airbus had provided to the investigation. This cooperation included conducting an internal review where suspicions were raised, reporting itself to the SFO and providing analysis of relevant people and business relationships.[630]

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626 Above, p 11 (see chart, under 'Type A').

627 Sentencing Act 2020, s 73.

628 See the more recent DPA agreed with G4S Ltd, in which the overall level of cooperation was considered, which allowed a DPA to be agreed despite G4S cooperating at a relatively late stage; *Serious Fraud Office -and- G4S Care and Justice Services (UK) Ltd* [2021] Crim LR 138; Archbold Criminal Pleading Evidence and Practice 2022, 1-394.

629 Serious Fraud Office, "Corporate co-operation guidance", 2020, available at: https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/guidance-for-corporates/corporate-co-operation-guidance/.

630 *Director of the Serious Fraud Office v Airbus SE*, 31 January 2020, Southwark Crown Court, [74].

Discussion

A1.38 It is a matter for other investigative bodies as to whether a leniency policy to the extent employed by the CMA would be appropriate or helpful. Plainly, the core concept is familiar. Both the CMA's policy and DPAs start with a corporation self-reporting wrongdoing it has detected within its ranks. Both measures reward self-reporting, in the sense that they offer more lenient, or no, punishment for the wrongdoing if it were to be proved at trial. There are invariably financial and reputational savings made by companies who cooperate. As well as securing fines and cooperation from these companies, there may be longer-term benefits for investigators if the measures encourage more companies to self-report.

Qui tam actions

A1.39 *Qui tam* ("who as well") actions are those which are taken partly by the Crown, and partly by an informer. In English law, they were an action which could be taken against a wrongdoer, in part by an individual who had acted as an informant of the wrongdoing, so that the informant could recover part of the penalty or forfeiture resulting from the action. Receiving part of the penalty was a form of reward for the informer, for the information they had provided to the Crown. They were abolished by section 1 of the Common Informers Act 1951, and as such are no longer used in English law. However, they remain popular in the US as a way of rewarding whistleblowers for their information.

A1.40 One form of *qui tam* action in the US allows a private person to bring a claim against another where they have information that the other committed fraud against state programmes and contracts (with the exception of tax fraud, for which the IRS has a separate whistleblowing regime). Whistleblowers are entitled to awards of between 15 and 30 per cent of the recovery from the case.[631]

A1.41 This is an alternative to remuneration for whistleblowers being given on a discretionary basis, with additional discretion between relevant Government departments as to whether, and how much, to award. There may be an argument that, as an alternative, the availability of *qui tam* actions could provide more certainty and transparency than ad hoc guidance and discretion to award payment for information. However, they place the responsibility for receiving any financial reward on the whistleblower, because they are responsible for bringing, or at least starting the action (in the US, the state can take over the action but it does not always do so).[632] The common risks of litigation mean that their costs are not guaranteed to be reimbursed, and the time and effort expended would be significantly greater than that required to report information to the relevant investigative body.

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631 Peter Yeoh, "Whistleblowing: motivations, corporate self-regulation, and the law", Int. J.L.M. 2014, 56(6), 459-474; Freshfields, "Whistleblower protection: global guide", December 2018, available at: https://www.freshfields.com/49f7fd/globalassets/services-page/people-and-reward/whistleblower-protection-global-guide-may-2019.pdf.

632 Peter Yeoh, "Whistleblowing: motivations, corporate self-regulation, and the law", Int. J.L.M. 2014, 56(6), 459-474, 467.

Office of the whistleblower

A1.42 A further option for reform in this area might be the creation of an overarching Government agency to protect whistleblowers.

A1.43 There was a Private Members' Bill which sought to regulate the remuneration and protection of whistleblowers. Though it is no longer progressing through Parliament, the proposals it contained had some merit. It would have established an Office of the Whistleblower, to be responsible for the administration of arrangements to facilitate whistleblowing. It would have the power to direct the activities of bodies using disclosed information, be a point of contact for whistleblowers, and maintain a fund to support whistleblowers. It would also provide financial redress to individuals whose disclosure has harmed their employment, reputation or career.[633]

A1.44 The proposal to maintain a fund to support whistleblowers might be beneficial. Maintaining a central fund from which to pay whistleblowers would add a step in between the whistleblower and the prescribed person to whom they are reporting. This would aid the standardisation of the treatment and payment of whistleblowers across investigative bodies, which would improve fairness. There does not appear to be a principled reason why some whistleblowers are paid and not others. If this centralisation also allowed for compliance measures to be taken on whistleblowers, concerns about false information may be allayed. Additionally, if the fund was focused on support – which could deal with the emotional and reputational harm some whistleblowers face – rather than payment for information, the motivation for disclosures might be to aid the public interest, rather than personal gain. This would address concerns with the principle of Government bodies paying for information.

Recent developments

Developments in the UK

A1.45 The creation or formalisation of the reward provision for whistleblowers has been considered by the Government. The 2013 Serious and Organised Crime Strategy said:

> BEIS, the Ministry of Justice and the Home Office will consider the case for incentivising whistleblowing, including the provision of financial incentives to support whistle blowing in cases of fraud, bribery and corruption. As part of this work we will examine what lessons can be drawn from the successful 'Qui Tam' provisions in the US where individuals who whistleblow and work with prosecutors and law enforcement can receive a share of financial penalties levied against a company guilty of fraud against the Government.[634]

A1.46 In June 2014 the Government responded to BEIS' call for evidence on the whistleblowing framework. Its position was that financial incentives should not be "introduced as an integral part of the whistleblowing framework to reward

633 Office of the Whistleblower (HL) Bill 2020.

634 HM Government, "Serious and Organised Crime Strategy", October 2013, p 61.

whistleblowers."[635] This is the basic position of the Government in relation to the broad question of remunerating whistleblowers, but it did say that it may consider financial incentives "in specific organisations or in very specific types of cases". It referred to the 2013 Serious and Organised Crime Strategy, noting that it had committed to consider the case for remuneration in fraud, bribery and corruption cases. It appears that these might qualify as specific cases in which remuneration might be appropriate.

A1.47 However, later in 2014, the FCA and PRA conducted research from which they concluded financial incentives for whistleblowers were unlikely to increase the number or quality of disclosures they received.[636] They analysed the US position, discussed at A1.29, noting that whistleblowers are only rewarded in the few cases in which their disclosure led to a successful regulatory or criminal prosecution, with funds recovered. They found no empirical evidence to suggest the US system increases the number or quality of disclosures.

A1.48 In analysing the UK's position, it said that HMRC, the CMA and "law enforcement" do provide rewards for information. Notably, it classified the recipients as covert human intelligence sources, or informants, in order to distinguish them from whistleblowers.[637] This may be the way in which the Government's stated position against financial rewards is squared with the sums paid by these organisations.

The EU Directive

A1.49 In 2019 a new EU Directive on Whistleblowing was passed by the European Parliament.[638] Plainly, the UK is not bound to implement this directive, but it may represent standard-setting and it will affect businesses operating within the UK and the EU. It bears significant similarity to the existing provisions of the Employment Rights Act 1996 in the UK (as inserted by Public Interest Disclosure Act 1998 see above), but there are some differences.

A1.50 One difference is that the Directive categorises disclosures by industry – such as public procurement, financial services and public health[639] – rather than types of wrongdoing. The scope of protection is wider: alongside employees it includes self-employed people, non-executive board members and sub-contractors.[640]

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635 Business, Energy and Industrial Strategy Department, Government Response to Whistleblowing Framework Call for Evidence, June 2014, p 20, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/323399/bis-14-914-whistleblowing-framework-call-for-evidence-government-response.pdf.

636 Financial Conduct Authority and Prudential Regulation Authority, "Financial incentives for whistleblowers", July 2014, available at: https://www.fca.org.uk/publication/financial-incentives-for-whistleblowers.pdf. See page 3 for a list of their objections to remuneration in principle.

637 Above, p 5.

638 Directive (EU) 2019/1937 on the protection of persons who report breaches of Union law [2019].

639 Directive (EU) 2019/1937 on the protection of persons who report breaches of Union law [2019], Article 2.

640 Above, Article 4.

CALLS FOR REFORM

A1.51 We did not consult directly on the question of whistleblowers, but we asked consultees at Question 13 of our discussion paper whether there were any other matters we should consider. We received several responses from consultees which suggested that whistleblowing was an issue in need of further regulation. Their responses point to several ways in which this might be done. As an example, Herbert Smith Freehills recommended both extending support for whistleblowers and corporate self-reporting. The reason for this was that natural persons, through whom companies necessarily act, are influenced to act by the risks and consequences to which they may personally be exposed.

A1.52 With reference to the compensation schemes discussed above, it was suggested in response to our consultation, by Professor Nicholas Ryder, Dr Samantha Bourton, Diana Johnson and Demelza Hall, of the University of the West of England Bristol, that the core benefit whistleblowers can bring in terms of detecting and reporting crime can be enhanced by remuneration. They indicated support for broadening the reward regime:

> Financial reward systems for whistle-blowers could have the effect of forcing firms to ensure better compliance programmes were implemented to prevent wrongdoing; self-reporting of corruption might also be encouraged. Further, such a system could increase employee awareness that wrongdoing should be reported. It would also allow whistle-blowers, who may not be incentivised by the public interest factors alone, to feel that associated risks such as dismissal from employment and retaliation when speaking out against wrongdoing might be outweighed.

A1.53 Doctor Alison Cronin, of Bournemouth University, similarly expressed support for remuneration, citing the CMA's strategy for detecting anti-competitive behaviour. She said:

> Since whistle-blowers play an integral role in the identification and investigation of corporate crime,[641] an obvious solution may be to employ the strategy developed in the context of cartels and anti-competitive behaviour and to incentivise witnesses to come forward by providing immunity or leniency. Much as individuals need to be induced to report criminal corporations, corporations need to be induced to turn in criminal senior officials and employees. Incentives to give evidence against the other could, it is suggested, be maximised using the "prisoner's dilemma" approach and competition to cooperate created by showing leniency for a confession and harsh treatment for a failure to do so.[642] Considered in this context, corporate criminal liability becomes a means to an end and not an end in itself.

A1.54 Herbert Smith Freehills also referenced the CMA's guidance:

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641 Australian Law Reform Commission, Corporate Criminal Liability, (ALRC Report 136) April 2020, para 1.61, p 63.

642 John C. Coffee Jr, *Corporate Crime and Punishment: The Crisis of Underenforcement* (Berrett-Koehler Publishers, Inc 2020) p 13, 76, 147.

We see the potential for substantial benefit from better incentivising corporate self-reporting by creating more certainty as to the consequences of any self-report, perhaps akin to the leniency regime which operates in relation to breaches of competition law.

A1.55 These responses add to the assessment of the issue of remuneration and leniency, above at 1.24-1.33. They reinforce the idea that the encouragement of whistleblowers, informants and self-reporting could be beneficial to criminal investigations, aiding their efficiency and efficacy.

CONCLUSION

A1.56 The questions raised by stakeholders on whistleblowing and corporate self-reporting are outside our terms of reference. A broad range of approaches are currently being taken, including employment protections and agency-specific policies on payments for whistleblowers. Recent interest in the area is demonstrated by the attempted Office of the Whistleblower Bill and innovation taken by the FCA in relation to whistleblower champions. As such, a more in-depth review of whistleblowing and corporate self-reporting may be of benefit.