'Eat, Sleep and Repeat?' Corporate Criminal Liability and Extension of the Failure to Prevent Model

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Abstract

This paper examines the law relating to corporate criminal liability in England and Wales. A doctrinal analysis of case law and legislation is undertaken in order to examine how the law has worked since the seminal case of *Tesco v Nattrass*. The problems experienced by prosecutors in the attribution of corporate criminal liability to larger companies with complex management structures due to the identification doctrine are outlined, with a detailed analysis of the 'failure to prevent' corporate criminal liability offences, introduced to circumvent the problems associated with the identification doctrine. The new failure to prevent fraud offence, together with changes to the identification doctrine, introduced by the Economic Crime and Corporate Transparency Act 2023 are analysed and evaluated. The paper concludes with an assessment of the current state of corporate criminal liability in England and Wales.

Introduction

The identification doctrine frustrates the prosecution of large companies for economic crimes in England and Wales.[1] This is because, while the identification of the 'directing mind and will' of the company and the attribution of criminal intent may be straightforward concerning small companies, prosecutors are often unable to perform this task when dealing with large, complex organisations.[2] It is important to reform or replace the identification doctrine with a more expansive method of attributing liability to companies through their involvement in financial crimes. This paper demonstrates that the enactment of the corporate offences of failure to prevent bribery, failure to prevent the facilitation of tax evasion and failure to prevent fraud have provided an alternative method to attribute responsibility to companies. Accordingly, there may be benefits in extending the failure to prevent offences to a wider range of economic crimes. However, this paper highlights the weaknesses in the operation of failure to prevent offences, including the lack of awareness of them and weaknesses in enforcement. This paper examines the impact of failure to prevent offences on the labelling and signalling functions of the criminal law, identifying the issues caused when companies are disingenuously charged with a 'failing to prevent' offence, rather than the active commission or facilitation of an offence. The paper welcomes the introduction of further failure to prevent offences but suggests that this model of corporate criminal liability is not a complete solution. Accordingly, the first part of the paper focuses on the evolution of the identification doctrine and critically considers the impact of the decision in the *Serious Fraud Office v Barclays Plc* [3] on the seminal House of Lords judgement in *Tesco Supermarkets Ltd v Nattrass*.[4] The changes made to the identification doctrine in the Economic Crime Corporate Transparency Act 2023 are outlined and analysed.[5] The second part of the paper moves on to evaluate the failure to prevent offences under the Bribery Act 2010 before critiquing the failure to prevent the facilitation of tax evasion offences under the Criminal Finances Act 2017. The final part appraises the extension of the failure prevent model to fraud. The conclusion sets out recommendations to improve the ability of the prosecutors to enforce corporate criminal liability in England and Wales.

[1] M Dsouza, 'The Corporate Agent in Criminal law - An Argument for Comprehensive Identification' (2020) Cambridge Law Journal 79 (1), 91, 118 and Law Commission, 'Corporate Criminal Liability: An Options Paper' (10 June 2022) at 39, 40 <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-

Part I – The Common Law Rules

There are three mechanisms through which companies in England and Wales can be prosecuted for a criminal offence committed by those acting on its behalf. Firstly, if Parliament has legislated to create a specific offence for companies, such as the offences of corporate manslaughter and the failure to prevent offences.[6] Secondly, through vicarious liability that does not require proof of fault.[7] Finally, via the common law rules known as the 'identification doctrine'.[8] The doctrine of corporate criminal liability has attracted a great deal of criticism, most of which has been directed at the common law rules.[9] The courts began to consider the application of criminal law to companies in the nineteenth century, which included cases involving public nuisance,[10] criminal libel,[11] statutory offences of non-feasance[12] and misfeasance.[13] In *Lennard's Carrying Company Ltd v Asiatic Petroleum Company Ltd*,[14] the House of Lords began to look at the ways in which a company could be held to be liable for the loss of cargo due to the negligent navigation of one of its vessels.[15] This was one of the first cases that started to develop the identification doctrine, which asks who the directing mind of a company is, in order to attribute criminal liability to the company. Viscount Haldane explained:

> … a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the

11jsxou24uy7q/uploads/2022/06/Corporate-Criminal-Liability-Options-Paper_LC.pdf> accessed 3 February 2024.

[2] See for example the case of *SFO v Barclays* [2018] EWHC 3055 (QB).

[3] *Ibid*.

[4] {1972] A.C. 153.

[5] The Economic Crime and Corporate Transparency Act 2023, s. 196.

[6] See for example the Corporate Manslaughter and Corporate Homicide Act 2007, s.1; Bribery Act 2010, s.7, Criminal Finances Act 2017, ss.45-46 and Economic Crime and Corporate Transparency Act 2023, s.199.

[7] National Lottery Act 1993, s.13. See for example, *London Borough of Harrow v Shah* [2000] 1 WLR 82.

[8] S. Parsons, The Doctrine of Identification, Causation and Corporate Liability for Manslaughter. Journal of Criminal Law (2003) 67(1), 69, 70.

[9] See generally Law Commission above, n 1.

[10] See *Pharmaceutical Society v London and Provincial Supply Association Ltd* (1880) 5 App. Cas. 857, 870.

[11] *Ibid*.

[12] See *R v Birmingham and Gloucester Ry*. (1842) 3 Q.B. 223.

[13] See *R v Great North of England Ry.* (1846) 9 Q.B. 315.

[14] [1915] AC 705.

[15] Also see *Bolton Engineering Co v Graham* [1957] 1 QB 159 and *R v Andrews Weatherfoil* 56 C App E 31 CA.

directing mind and will of the corporation, the very ego and centre of the personality of the corporation.[16]

The doctrine was further extended by three Court of Appeal decisions,[17] which all concluded that a company could be held directly accountable, as opposed to vicariously liable, for the actions of its employees. For example, in *DPP v Kent and Sussex Contractors Ltd,* the Court of Appeal concluded that a company could be held criminally liable where the company had produced false documents and provided false information.[18] In *R v ICR Haulage Co Ltd*, the court held that a company could be held criminally accountable for conspiracy to defraud by the acts of one of its directors.[19] However, the court stated that this will only occur when there a minimum of two conspirators, one of which must have the directing mind and will of the company and acting within their authority.[20] In *Moore v Bresler Ltd,* the Court of Appeal determined that the secretary of the company could be liable for making a false return for revenue purposes with an intent to deceive.[21] However, the leading authority on the doctrine of criminal liability of companies is *Tesco Supermarkets v Nattrass*.[22] Here, the House of Lords concluded that a company is allowed to provide a defence to a prosecution under the Trade Descriptions Act 1968, provided the company had established an effective procedure to avert the commission of a criminal offence.[23] Whilst giving the leading opinion, Lord Diplock stated that when the court considers how it will identify who has the directing mind of the company it can refer to its memorandum and articles of association, thus also to the directors of the company and other senior company officers.[24] Therefore, in order for a company to be found guilty of a criminal offence, a person who has the directing mind of the company and the self-determination of the company must also have criminal intent. This decision cemented the creation of the 'identification doctrine'. Since this decision, prosecutors have faced evidential

[16] See above, n 14.
[17] *DPP v Kent and Sussex Contractors Ltd* [1944] 1 K.B. 146, *R v ICR Haulage Co Ltd* [1944] K.B. 551 and *Moore v Bresler Ltd* [1944] 2 ALL ER 515.
[18] [1944] 1 K.B. 146.
[19] [1944] K.B. 551.
[20] See *Moore v Bresler Ltd [1944] 2 ALL ER 515* and *R v McDonnell* [1966] 1 QB 233, 50 Cr.App.R. 5.
[21] [1944] 2 E.R. 575.
[22] [1972] AC 153.
[23] Here, the company was prosecuted under section 5 and the defence was permitted under section 25 of the Trade Descriptions Act (1968).
[24] [1972] A.C. 153, at 198. The Court of Appeal has reiterated the identification doctrine in *St Regis Paper Co Ltd v R* [2012] 1 Cr App R 14.

difficulties when prosecuting larger companies and companies that have a diffuse structure.[25] Thus the "smaller the corporation, the more likely it will be that guilty knowledge can be attributed to the controlling officer and therefore to the company itself".[26]

This test is the principal reason that prevents prosecutors bringing criminal proceedings against companies. Indeed, Lisa Ososky, the then Director of the Serious Fraud Office (SFO) stated that the identification doctrine was a "…standard from the 1800s, when Mom and Pop ran companies. That's not at all reflective of today's world".[27] The restrictive interpretation and the complex organisational structures of many large companies have been highlighted by several cases including the Herald of Free Enterprise,[28] the Clapham Rail Disaster,[29] the Transco gas explosion,[30] the Hatfield Disaster [31] and the sinking of the Marchioness.[32] In response, the Corporate Manslaughter and Corporate Homicide Act 2007 criminalised harm caused by companies that leads to a person's death.[33] The impact of this offence is negligible with less than 30 corporate manslaughter convictions between 2008 and 2022.[34]

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[25] See generally Wells, C 'Corporate criminal liability: a ten-year review' (2014) Criminal Law Review, 12, 849-878 and Demsetz, H and Lehn, D 'The Structure of Corporate Ownership: Causes and Consequences' (1985) Journal of Political Economy, 93(6), 1155-1177.

[26] See Crown Prosecution Service 'Corporate prosecutions', 12 October 2021, available from < https://www.cps.gov.uk/legal-guidance/corporate-prosecutions>, accessed 13 February 2024.

[27] J Slingo, ''Antiquated' fraud laws thwarting justice, says SFO director', (*Law Society Gazette*, 5 February 2020) available from <https://www.lawgazette.co.uk/news/antiquated-fraud-laws-thwarting-justice-says-sfo-director/5102972.article> accessed 8 February 2024 and C Binham and J Croft, 'Barclays: the legal fight for a company's controlling mind' (*Financial Times,* 8 March 2020) available from <https://www.ft.com/content/f666b592-5a4b-11ea-abe5-8e03987b7b20>, accessed 3 February 2024.

[28] *R. v P&O European Ferries (Dover) Ltd* (1991) 93 Cr. App. R. 72 (Central Crim Ct).

[29] The British Rail Board admitted vicarious liability but there was no corporate manslaughter prosecution. See generally Hidden, A. *Investigation into the Clapham Railway Junction Railway Accident* (Department of Transport: London, 1989).

[30] Transco were fined £15m for breaches of the Health and Safety at Work Act 1974. The Appeal Court in Edinburgh rejected the charge of 'culpable homicide', the Scottish equivalent of the corporate manslaughter offence. See *Transco Plc v HM Advocate (No.3)* 2005 1 J.C. 194; 2005 S.L.T. 211; 2005 S.C.C.R. 117; 2005 G.W.D. 4-40.

[31] Here, the directors of Network Rail were acquitted of corporate manslaughter, but Balfour Beatty Rail was convicted for breaching s. 3 of the Health and Safety at Work Act 1974. See *R v Balfour Beatty Rail Infrastructure Services Ltd* [2006] EWCA Crim 1586.

[32] Prosecutions were ruled out by the Crown Prosecution Service in 1989 due to insufficient evidence and two separate prosecutions for negligence (failing to keep an adequate lookout) of the captain of the Bowbelle, Douglas Henderson, also failed as the two juries were unable to reach a verdict. See generally House of Commons *Thames safety inquiry: final report by Lord Justice Clarke*, Cm 4558, February 2000.

[33] Corporate Manslaughter and Corporate Homicide Act 2007, s. 1.

[34] L. Mansfield, 'Fines and prison sentences for health and safety manslaughter offences on the rise', (Bevan Brittan, 4 August 2022) available from < https://www.bevanbrittan.com/insights/articles/2022/fines-and-prison-sentences-for-health-and-safety-manslaughter-offences-on-the-rise/> accessed 3 February 2024.

The common law attribution of criminal responsibility to non-natural persons, following *SFO v Barclays*, was narrowed to a point that it is near impossible to achieve, especially where the criminal activity in question is fraud.[35] Here, it was alleged that, following the 2007 global financial crisis, Barclays raised over £11bn in capital investment from a Qatari state-owned body. The SFO purported that the terms offered by Barclays to the Qatari investor were different from the terms that were contained in the public prospectus. The SFO charged Barclays and four senior executives at Barclays with conspiracy to commit fraud[36] and unlawful financial assistance.[37] Within his judgment Davis LJ stated:

> [T]hat 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.[38]

The court rejected the argument presented by the SFO that the senior executives were the directing mind and will of the company, although they occupied senior roles, including that of Executive Chairman of Investment Banking and Investment Management in the Middle East and North Africa, Chief Executive of Barclays Wealth and investment Management and European Head of Financial Institutions Group.[39] The court concluded that they did not have the authority of the company to conclude relevant agreements.[40] Thus, the ruling sets a very high threshold for prosecutors to meet, whilst allowing companies to essentially evade corporate criminal liability by simply evidencing that the 'Board' retains ultimate control.[41] The decision in *SFO v Barclays* has been described as a "watershed moment" for the attribution of corporate criminal liability [42] and that it "appears to be an impossibly high bar to achieve anything".[43]

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[35] [2018] EWHC 3055 (QB).
[36] Fraud Act (2006), s.2.
[37] Companies Act (1985), s.151.
[38] *Ibid*., [122]
[39] Serious Fraud Office, 'Barclays PLC and Qatar Holding LLC' (SFO, 17 May 2021), <https://www.sfo.gov.uk/cases/barclays-qatar-holding/> accessed 3 February 2024.
[40] See above, n 2.
[41] Spector H, 'SFO v Barclays: Elusive corporate criminal liability in the UK' (*Red Lion Chambers,* 3 December 2020) < https://redlionchambers.co.uk/sfo-v-barclays-elusive-corporate-criminal-liability-in-the-uk/> accessed 3 February 2024.
[42] Rappo, P. 'Corporate Criminal Liability: the death knell' (2021) The Company Lawyer, 42(2), 51-53, at 53
[43] Spector, H. 'SFO v Barclays: elusive corporate liability in the UK' (2020) Arch Rev, 10, 6-10, at 7.

The attribution of criminal liability needs to mirror modern-day decision making, which within multi-national companies is decentralised, so that companies and senior individuals/top level management are prevented from distancing themselves from the reach of prosecutors. An example of this was noted by the then Attorney General when he identified the manipulation of the London Inter-bank Offered Rate (LIBOR) as one of the cases where the prosecutors were unable to obtain convictions due to the decision in *Tesco*, noting that other jurisdictions have been able to hold companies to account.[44] The Attorney General described the effect of the identification doctrine as incentivising "a company's board to distance itself from the company's operations", which has "clear implications for the reputation of our justice system".[45] The SFO did not instigate criminal proceedings against any companies involved in the LIBOR crisis, despite convictions of low-level traders who argued that their actions were known about and even encouraged by their employers.[46] For example, Tom Hayes, a former trader for UBS and Citigroup was sentenced to fourteen years (reduced on appeal to 11 years) for his role in the manipulation of LIBOR.[47] During his trial, Hayes asserted that his managers were aware of his actions, and even condoned them.[48] The SFO stated that the identification doctrine hindered prosecution of the companies involved, "the operation of the identification doctrine meant that prosecutors found it very difficult to prosecute the bank for which he [Hayes] worked whilst manipulating LIBOR".[49] No company was convicted for its role in the

[44] For instance the United States of America found UK companies, including Barclays Bank Plc, liable for crimes relating to the manipulation of LIBOR, see US Department of Justice, 'Barclays Bank PLC Admits Misconduct Related to Submissions for the London Interbank Offered Rate and the Euro Interbank Offered Rate and Agrees to Pay $160 Million Penalty' (US Department of Justice, 27 June 2012), <https://www.justice.gov/opa/pr/barclays-bank-plc-admits-misconduct-related-submissions-london-interbank-offered-rate-and> accessed 8 February 2024.

[45] Jeremy Wright, 'Speech to the Cambridge Symposium on Economic Crime 2016' (GOVUK, 5 September 2016) <https://www.gov.uk/government/speeches/attorney-general-jeremy-wright-speech-to-the-cambridge-symposium-on-economic-crime>accessed 3 February 2024.

[46] Transparency International UK, *Corporate Liability for Economic Crime: submission from Transparency International UK* (Responses to Call for Evidence, 2017).

[47] See *R v Hayes* [2015] EWCA Crim 1944; [2018] 1 Cr. App. R. 10.

[48] D Connett, 'Tom Hayes Libor trial: City trader tells court his bosses had full knowledge of his actions' (*The Independent,* 7 July 2015) < https://www.independent.co.uk/news/uk/crime/tom-hayes-libor-trial-city-trader-tells-court-his-bosses-had-full-knowledge-of-his-actions-10373484.html> accessed 8 February 2024.

[49] David Green, 'Report to the Cambridge Symposium on Economic Crime 2016' (*Serious Fraud Office*, 5 September 2016) <https://www.sfo.gov.uk/2016/09/05/cambridge-symposium-2016/> accessed 3 February 2024.

manipulation of LIBOR, from which they benefitted financially, but several were subjected to civil financial penalties imposed by the Financial Conduct Authority (FCA).[50]

It is worth considering the available methods to attribute corporate criminal liability. There are two primary methods – vicarious and non-vicarious liability.[51] Vicarious liability has a limited application for criminal law, in areas such as health and safety and environmental offences.[52] Therefore, prosecutors for financial crime offences have to look to non-vicarious liability to establish corporate criminal liability. The main mechanism of doing this in is the identification doctrine, which applies to all types of offences, including those that require proof of *mens rea*.[53] This requirement to prove criminal responsibility of some or all of the board of directors, or other senior managers, in order to confer criminal corporate lability has proved difficult, with few corporate convictions in England and Wales.[54] The SFO has outlined its frustration towards the identification doctrine and indicated that it would prefer the broader United States of America (US) concept of vicarious liability to apply to financial crime.[55]

In the US, 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. *Respondeat superior* is based on the principle of vicarious liability. If England and Wales adopted this principle, it would potentially allow the SFO to prosecute the employer-company and employee. Vicarious liability could be a more appropriate model for the prosecution of larger companies with complex structures companies. In the US, the principle of *respondeat superior* underlies federal corporate criminal liability laws.[56] This has been applied broadly and means that a company is responsible for all its employees' actions undertaken in the course and scope of their

[50] See Financial Conduct Authority 'Benchmark enforcement', April 22 2016, available from < https://www.fca.org.uk/markets/benchmarks/enforcement#:~:text=Barclays%2C%20UBS%2C%20RBS%2C%20ICAP,LIBOR%20and%20EURIBOR%20related%20misconduct> accessed 8 February 2024

[51] Crown Prosecution Service, 'Corporate Prosecutions' (The Crown Prosecution Service, May 1 2019) <https://www.cps.gov.uk/legal-guidance/corporate-prosecutions> accessed 3 February 2024.

[52] *Ibid*.

[53] See *St Regis Paper Co. Ltd. v. R.* [2012] 1 Cr App R 14.

[54] Tuson, A. 'Corporate Criminal Liability – Perspectives from the US, UK and France' (*Bryan Cave Leighton Paisner LLP*, 13 April 2018) <https://www.bclplaw.com/en-GB/insights/corporate-criminal-liability-perspectives-from-the-us-uk-and.html> accessed 23 January 2024.

[55] De Silva, C. 'Corporate Criminal Liability, AI and DPAs' (Serious Fraud Office, 21 June 2018) <https://www.sfo.gov.uk/2018/06/21/corporate-criminal-liability-ai-and-dpas/> accessed 23 January 2024.

[56] See *Perdue v. Mitchell*, 373 So. 2d 650 (1979).

employment and, at least in part, for the benefit of the business.[57] *Respondeat superior* is a variation of the vicarious liability doctrine, allowing the imposition of criminal liability on employers for the actions of their employees.[58] This principle enables prosecutors to assign criminal liability to companies with relative ease, even when employees act contrary to corporate policy or even instructions.[59] A further means of assigning criminal liability to a company in the US is the doctrine of "collective knowledge".[60] Prosecutors relying on this doctrine do not have to demonstrate that a single individual had the knowledge to satisfy the intent element of a crime.[61] Instead, that knowledge may be attributed to many employees of the company to form an overall corporate knowledge of the offence. This again increases the chances of US prosecutors establishing corporate criminal liability where a financial crime has been committed. Therefore, the Law Commission noted that the doctrine of *respondeat superior* "makes it easier to prosecute large companies than under the more restrictive identification doctrine".[62] However, the *respondeat superior* rule has been criticised because it dissuades efforts by companies to discourage employees from committing criminal acts.[63] The Law Commission recommended against the adoption of the respondeat superior model and concluded that it was an unsuitable alternative to the identification doctrine.[64]

A significant change was made to the identification doctrine following the introduction of the Economic Crime and Corporate Transparency Act 2023, with the introduction of a new 'senior manager' test. Here, a company can be held liable if a senior manager, 'acting within the

[57] See Tuson above, n 54.

[58] The court concluded that "vicarious liability is legal responsibility imposed on an employer although he is himself free from blame". See *Lister v Hesley Hall* [2001] UKHL 22. Also *see Catholic Child Welfare Society and Others v Carious Claimants and the Institute of the Brothers of the Christian Schools and Others* [2012] UKSC 56.

[59] Roszkowski, M. and Roszkowski, C. 'Making sense of respondent superior: an integrated approach for both negligent and intentional conduct', (2005) 14(2) Southern California Review of Law and Women's Studies 235-288.

[60] Jezierski, C. 'Corporate Liability in United States' (*Global Compliance News*, 11 July 2019) <https://globalcompliancenews.com/white-collar-crime/corporate-liability-united-states/> accessed 23 January 2024.

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

[62] Law Commission *Corporate Criminal Liability: A Discussion Paper* (Law Commission, 2021) at 64.

[63] *Ibid*. Also see Luskin, R. 'Caring about corporate 'due care.' Why respondeat superior liability outreaches its jurisdiction' (2020) American Criminal Law Review, 57, 302, Alschuler, A. 'Two Ways to Think about the Punishment of Corporations' (2009) American Criminal Law Review, 46, 1359 and Bucy, P. 'Corporate Ethos: a standard for imposing corporate criminal liability' (1991) Minnesota Law Review 1095.

[64] See Law Commission above, n 1 at 72.

actual or apparent scope of their authority' commits a relevant offence.[65] A 'senior manager' has been defined as "an individual who plays a significant role in:

(a) the making of decisions about how the whole or a substantial part of the activities of the body corporate or (as the case may be) partnership are to be managed or organised, or
(b) the actual managing or organising of the whole or a substantial part of those activities".[66]

This test could conceivably cover managers with responsibility over a particular business area, such as a specific region or department. The senior manager test applies to senior managers of a body corporate or a partnership. A body corporate includes companies incorporated outside England and Wales and is not limited to a particular size or type of company.[67] Therefore, the offences will be capable of being committed by senior managers who are UK or foreign nationals who commit an offence in England and Wales or are located in the UK at the time of the offence. This could give rise to a situation whereby a non-UK domiciled company, with UK senior managers, is found liable for an offence committed by those managers. Only specified economic crimes are within the scope of this test including fraud, false accounting, conspiracy to defraud, money laundering, terrorist financing and bribery.[68] A 'relevant crime' also includes attempt, conspiracy, encouraging or assisting, aiding, abetting, counselling or procuring the commission of an offence listed in the schedule.[69] However, the senior manager test is the same as that adopted in the Corporate Manslaughter and Corporate Homicide Act 2007.[70] The term 'substantial' is not defined in either Act, but the courts have considered that it is more than fanciful but less than total and that a one-off offence may not suffice, and systematic failure are likely to be more relevant.[71] It is likely that the definition of 'senior manager' will have to be considered by a court in order to gain greater clarity in the future because the definition is not sufficiently clear.

[65] Economic Crime and Corporate Transparency Act 2023, s. 196(1).
[66] *Ibid*, s. 196(4).
[67] *Ibid*.
[68] *Ibid*, Schedule 12.
[69] *Ibid*, s. 196(2)(b) and s. 196(2)(d).
[70] Corporate Manslaughter and Corporate Homicide Act 2007, s. 1(4)(c).
[71] See *R v Cornish and Maidstone and Tunbridge Wells NHS Trust* (2015) EWHC 2967, at para 99.

The expansion of the identification doctrine to cover the actions of senior managers is significant, however the use of the term 'senior manager' to impose liability for economic crime breaches is not innovative and previous attempts have had little or no impact. For example, following the conduct of financial institutions during the 2007 global financial crisis, the Banking Standards Commission recommended that "there is a strong case in principle for a new criminal offence of reckless misconduct in the *management* of a bank … [to] give pause for thought to the senior officers of UK banks".[72] The Banking Standards Commission added that the offence would be "pursued in cases involving only the most serious of failings, such as where a bank failed with substantial costs to the taxpayer, lasting consequences for the financial system, or serious harm to customers".[73] The Financial Services (Banking Reform) Act 2013 created the criminal offence relating to a decision causing a financial institution to fail.[74] A person commits (S) an offence if:

> "(a) at a time when S is a senior manager in relation to a financial institution ("F"), S—
>
> (i) takes, or agrees to the taking of, a decision by or on behalf of F as to the way in which the business of a group institution is to be carried on, or
>
> (ii) fails to take steps that S could take to prevent such a decision being taken,
>
> (b) at the time of the decision, S is aware of a risk that the implementation of the decision may cause the failure of the group institution,
>
> (c) in all the circumstances, S's conduct in relation to the taking of the decision falls far below what could reasonably be expected of a person in S's position, and
>
> (d) the implementation of the decision causes the failure of the group institution".[75]

The introduction of the 'reckless misconduct' offence was described as a "major milestone" and was said to "mean individuals working in UK firms face some of the toughest sanctions in the world … a senior manager whose actions causes their bank to fail should face jail".[76]

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[72] Parliamentary Commission on Banking Standards *Changing banking for good* (Parliamentary Commission on Banking Standards, London, 2013) at 66 para 1182.
[73] Parliamentary Commission on Banking Standards above, n 72 at 516, para. 1183.
[74] Financial Services (Banking Reform) Act (2013), s. 36.
[75] Financial Services (Banking Reform) Act (2013), s. 36(1).
[76] HM Government 'Senior bankers to face jail for reckless decisions', March 7 2016, available from < https://www.gov.uk/government/news/senior-bankers-to-face-jail-for-reckless-decisions> accessed 8 February 2024.

However, the reckless misconduct offence has never been used against a senior manager of a bank and its introduction must be questioned.

Additionally, the Senior Managers and Certification Regime (SM&CR) was introduced with two objectives – to encourage all staff within the financial services sector to take responsibility for their actions and that authorised firms and employees can clearly illustrate where the responsibility lies.[77] The SM&CR provides that a company's senior management is responsible for the policies, systems and controls that are designed to reduce the threat of financial crime. The SM&CR places the obligation of companies regulated by the FCA to limit the risk posed by financial crime on its senior management. However, there have been only three FCA enforcement decisions against individuals.[78] This is partly due to the length of investigations and the apparent reluctance by the FCA to hold individuals accountable. The expansion of the identification doctrine with a 'new' senior managers test is a step in the right direction. However, the use of the term 'senior manager' to impose liability on those who meet that standard within the SM&CR and the reckless misconduct offence has been ineffective. It remains to be seen whether the new senior manager test, when used to attribute corporate liability on a company, will result in more successful enforcement actions than have been seen when used in relation to the corporate misconduct offence and the SM&CR.

The identification doctrine has hampered efforts by regulators and prosecutors to hold companies accountable for breaches of financial crime legislation for the last fifty years since *Tesco.*[79] The corporate liability laws in the US make it easier to assign liability than in England and Wales, but these laws are not without concerns. The recent changes made to the identification doctrine, could mean that more companies will now be liable to criminal prosecution using the principle of vicarious liability when their senior managers undertake specified economic crimes during the course of their employment, whether or not for the

[77] Financial Conduct Authority, Senior Managers and Certification Regime (7 July 2015). Available at: <https://www.fca.org.uk/ firms/senior-managers-certification-regime> accessed 23 January 2024.
[78] Tom Hine, 'SMCR Enforcement Actions' (Kemp IT Law, 26 January 2024) <https://kempitlaw.com/insights/smcr-enforcement-actions/> accessed 13 February 2024 and Financial Conduct Authority, 'Information on Investigations Opened Under the Senior Managers' Regime - June 2022' (Financial Conduct Authority, 22 June 2022) <https://www.fca.org.uk/freedom-information/information-investigations-opened-under-senior-managers-regime-june-2022> accessed 9 February 2024.
[79] See above, n 4.

benefit of the company.[80] This is a welcome expansion of the identification doctrine and it is to be hoped that prosecutors now find it easier to take action to impose corporate criminal liability on companies when a breach of a specified economic crime can be established. The next section of this paper considers how the Government has attempted to make it easier to prosecute companies through the implementation of a failure to prevent model of corporate liability which has so far been applied to bribery, tax evasion and fraud.

Part II – Failure to Prevent Bribery

Prior to the introduction of the Bribery Act 2010, the criminal offence of bribery was contained in the Public Bodies Corrupt Practices Act 1889, the Prevention of Corruption Act 1906 and the Prevention of Corruption Act 1916.[81] These laws were described as an "untidy and unsatisfactory jumble",[82] which needed replacing with a "concise modern mini-code, which should ensure rather more effective compliance with the UKs international obligations".[83] These statutory provisions were "inconsistent, anachronistic and inadequate" in terms of complying with international anti-corruption obligations.[84] The impetus for the reform was sparked by the recommendation of the Committee on Standards in Public Life, that the Government should clarify the law on bribery.[85] The Law Commission published its proposals in 1998, although it was not until the Bribery Act 2010 that its recommendations were implemented.[86] The Act introduced a new form of corporate criminal liability, the failure to prevent model. Section 7 provides that a commercial organisation can be found guilty of an offence if a person associated with that organisation bribes another with the intention of obtaining or retaining business or a business advantage for the organisation.[87] In essence, this creates an additional direct, rather than alternative vicarious liability when the commission of a section 1 or section 6 bribery offence has taken place on behalf of an organisation. For there to be any liability, the organisation must be stipulated as a 'relevant commercial

[80] Economic Crime and Corporate Transparency Act 2023, s. 196(1).
[81] OECD 'Steps taken to implement and enforce the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions: UNITED KINGDOM' (28 May 2010). < http://www.oecd.org/dataoecd/17/30/48362318.pdf> accessed 8 February 2024.
[82] Editorial 'The Bribery Act 2010' (2010) Criminal Law Review, 6, 439-440, 439.
[83] *Ibid*.
[84] *Ibid.*
[85] Committee on Standards in Public Life, First Report 'Standards in Public Life' (Cm 2850-1, 1995) 43.
[86] Law Commission, *Legislating the Criminal Code: Corruption No. 248* (Law Commission 1998).
[87] Bribery Act 2010, s. 7.

organisation'.[88] An 'associated person' is any individual who 'performs services for or on behalf of' the organisation,[89] such as the organisation's agent, subsidiary or employee.[90] This has been stated to be a "matter of substance rather than form",[91] with it being necessary for all surrounding circumstances to be taken into account, although a presumption will exist if the associated person is an employee of the organisation. The scope of section 7 is intentionally broad, so as to encompass the whole range of individuals who may be committing bribery on behalf of a third-party organisation. To be held as an 'associated person', "the perpetrator of the bribe must be performing services for the organisation in question and must also intend to obtain or retain business or an advantage in the conduct of business for that organisation".[92] The Bribery Act provides that a "commercial organisation will be liable to prosecution if a person associated with it bribes another person intending to obtain or retain business or an advantage in the conduct of business for that organisation".[93] There is no requirement to prove that the activity was committed in the UK or elsewhere. Indeed, there is not even a need to show a close connection to the UK, as is necessary for the other bribery offences under the Act.[94] Section 7 does not affect the identification doctrine. Here, prosecuting bodies must prove a *mens rea* (or fault element) in addition to the *actus reus* (or conduct element). Indeed, this common law principle, should still be used instead of section 7 where it is possible to prove "that a person who is properly regarded as representing the 'directing mind' of the body in question possessed the necessary fault element required for the offence".[95] Applicable only to section 7 offences, it is a defence if the relevant commercial organisation can prove that it had in place 'adequate procedures' that were designed to prevent persons associated with the organisation from bribing another person.[96] The Ministry of Justice (MoJ) stated that "in accordance with established case law, the standard of proof which the commercial organisation would need to discharge in order to prove the defence, in the event it was prosecuted, is the balance of probabilities".[97] The MoJ

[88] Bribery Act 2010, s.7(5).
[89] Bribery Act 2010, s.8(1).
[90] Bribery Act 2010, s.8(3).
[91] Ministry of Justice, *Bribery Act 2010*, Circular 2011/05 (2011), para 23.
[92] *Ibid*.
[93] Ministry of Justice, *The Bribery Act 2010: Guidance* (2011), 15.
[94] See Ministry of Justice above, n 91 at para 22.
[95] *Ibid*., at para 18.
[96] Bribery Act 2010, s. 7.
[97] See Ministry of Justice above, n 93.

published guidance to commercial organisations to enable the Bribery Act to take effect from July 2011.[98] The SFO has thus been keen to emphasise that section 7 does not provide an offence of strict liability, due to the availability of the defence of adequate procedures. That is, if there are adequate procedures, then no offence has been committed. This is a complete defence, not merely mitigation.[99]

The enforcement mechanism for breaches of section 7 are Deferred Prosecution Agreements (DPAs),[100] which the SFO, along with the Director of Public Prosecutions are permitted to use.[101] A DPA is a court-approved agreement between the SFO or the Crown Prosecution Service and the company, partnership or unincorporated association that is used when it is thought to be in the public interest not to prosecute.[102] They can be used in cases of bribery and corruption, conspiracy to defraud, fraud, tax evasion and money laundering, but they apply only to companies. DPAs are concluded under the supervision of the judiciary and are used to avoid expensive and time-consuming trials.[103] The first DPA was *Serious Fraud Office v Standard Bank PLC*. Here, Standard Bank was accused of breaching section 7, but the proceedings were halted as soon as the DPA was approved by the court. Standard Bank agreed to pay financial orders totalling US$25.2m, an additional US$7m to the Tanzanian government and the SFO's costs.[104] The second case, *Sarclad Limited*, was settled with a DPA and the company agreed to pay "financial orders of £6.5m, comprised of a £6.2m disgorgement of gross profits and a £352,000 financial penalty".[105] Under the terms of the third DPA, Rolls-Royce agreed to pay £671m for "12 counts of conspiracy to corrupt, false

[98] *Ibid*.
[99] Serious Fraud Office, 'Richard Alderman speech: the Bribery Act 2010 – the SFO's approach and international compliance' (9 February 2011), <www.sfo.gov.uk/about-us/our-views/director's-speeches/speeches-2011/the-bribery-act-2010---the-sfo's-approach-and-international-compliance.aspx> accessed 8 February 2024.
[100] Crime and Courts Act 2013, s. 45 and Schedule 17.
[101] *Ibid*.
[102] Serious Fraud Office, 'Deferred Prosecution Agreements', (SFO, October 2020) <www.sfo.gov.uk/publications/guidance-policy-and-protocols/guidance-for-corporates/deferred-prosecution-agreements-2/> accessed 23 January 2024.
[103] Serious Fraud Office, *Deferred Prosecution Agreements*, <www.sfo.gov.uk/publications/guidance-policy-and-protocols/guidance-for-corporates/deferred-prosecution-agreements-2/>, accessed 5 August 2017.
[104] Serious Fraud Office, 'SFO agrees first UK DPA with Standard Bank' (30 November 2015), <www.sfo.gov.uk/2015/11/30/sfo-agrees-first-uk-dpa-with-standard-bank/>, accessed 23 January 2024.
[105] Serious Fraud Office, 'SFO secures second DPA' (8 July 2016), <www.sfo.gov.uk/2016/07/08/sfo-secures-second-dpa/<, accessed 23 January 2024.

accounting and failure to prevent bribery".[106] In December 2019, Güralp Systems Ltd was subjected to a DPA after the company accepted "charges of conspiracy to make corrupt payments and a failure to prevent bribery by employees".[107] Güralp Systems Ltd agreed to play over £2m for disgorgement of the profits to the SFO.[108] In July 2021, Amec Foster Wheeler Energy Limited entered into a DPA for using corruption agents in the oil and gas sector.[109] In July 2021, two companies entered into DPAs for bribery offences.[110] Finally, in December 2023, the CPS entered into its first DPA with Entain Plc, for failing to prevent bribery following an investigation by HM Revenue & Customs (HMRC). Here Entain Plc agreed to pay a fixed penalty plus disgorging profits totalling £585m.[111]

Therefore, the MoJ asserted that the section 7 offence provides a "powerful incentive for the inclusion of bribery prevention procedures as a component of corporate good governance. Its utility as an enforcement tool has been recently demonstrated".[112] The Act "reinforces the UKs reputation as a leader in the global fight against corruption".[113] The restrictive common law interpretation in *Tesco* and *Barclays* has closed the door on the ability of the SFO to prosecute companies using the identification doctrine, illustrating the importance of this model and the use of DPAs. DPAs were hailed as the preferred option for tackling illicit conduct by companies, nevertheless, they have been used on 13 occasions.[114] DPAs lack

[106] Serious Fraud Office, 'SFO completes £497.25m Deferred Prosecution Agreement with Rolls-Royce PLC' (17 January 2017), <www.sfo.gov.uk/2017/01/17/sfo-completes-497-25m-deferred-prosecution-agreement-rolls-royce-plc/>, accessed 3 February 2024.
[107] Serious Fraud Office 'Three individuals acquitted as SFO confirms DPA with Güralp Systems Ltd', December 20 2019, available from <https://www.sfo.gov.uk/2019/12/20/three-individuals-acquitted-as-sfo-confirms-dpa-with-guralp-systems-ltd/> accessed 8 February 2024.
[108] *Ibid*.
[109] Serious Fraud Office 'SFO enters into £103m DPA with Amec Foster Wheeler Energy Limited', July 2 2021, available from < https://www.sfo.gov.uk/2021/07/02/sfo-enters-into-103m-dpa-with-amec-foster-wheeler-energy-limited-as-part-of-global-resolution-with-us-and-brazilian-authorities/>, accessed 5 February 2024.
[110] Serious Fraud Office 'SFO secures two DPAs with companies for Bribery Act offences', July 20 2021, available from <https://www.sfo.gov.uk/2021/07/20/sfo-secures-two-dpas-with-companies-for-bribery-act-offences/>, accessed 2 February 2024. It is important to note that reporting restrictions apply to both DPAs under the Contempt of Court Act 1981.
[111] Crown Prosecution Service 'First ever CPS deferred prosecution agreement for £615 million', December 5 2023, available from < https://www.cps.gov.uk/cps/news/first-ever-cps-deferred-prosecution-agreement-ps615-million>, accessed 11 January 2024.
[112] Ministry of Justice *Corporate Liability for Economic Crime Call for Evidence* (Ministry of Justice: London, 2017) at 6.
[113] Ministry of Justice, 'UK clamps down on corruption with new Bribery Act' (30 March 2011), www.justice.gov.uk/news/press-release-300311a.htm, accessed 11 January 2024.
[114] See Serious Fraud Office above, n 102.

sufficient deterrent effect and that the fines imposed as part of DPAs need to be higher in order to deter future illegal conduct. Nonetheless, the failure to prevent model continues to be the preferred option to tackle corporate criminal liability. Therefore, the next section of the paper discusses the failure to prevent tax evasion offences.

Part III Failure to Prevent the Facilitation of Tax Evasion

Many tax evasion offences are capable of capturing both those who perpetrate, and those who facilitate, tax offences.[115] Additionally, traditional doctrines of secondary and inchoate liability apply to tax evasion offences, criminalising the aiding and abetting, counselling or procuring,[116] as well as the encouraging or assisting,[117] of such an offence. However, owing to the difficulties in attributing criminal liability to companies, as well as lacklustre enforcement efforts, the UK has persistently failed to address the facilitation of tax evasion offences, both by professional facilitators and their corporate employers. For instance, despite the UK having one of the highest numbers of intermediaries involved in the Panama Papers,[118] and identifying nine "potential professional enablers of economic crime",[119] there has yet to be a single prosecution arising from the Panama Papers, irrespective of the multitude of civil and criminal investigations carried out into the tax affairs of more than 190 individuals.[120] Moreover, little action was taken by the FCA against any intermediary named in the Panama Papers.[121] Similarly, following the revelations contained in the HSBC (Suisse)

[115] See for instance, the common law offence of cheating the public revenue, which was expressly preserved in the Theft Act 1968, s. 32(1)(a).

[116] Accessories and Abettors Act 1861, s. 8, *R v Jogee and Ruddock v Queen* [2016] UKSC 8; [2017] AC 387.

[117] Serious Crime Act 2007, ss. 44-46.

[118] European Parliament, 'Report on the Inquiry into Money Laundering, Tax Avoidance and Tax Evasion (2017/2013(INI))' (8th November 2017) <https://www.europarl.europa.eu/cmsdata/131460/2017-11-08%20PANA%20Final%20Report.pdf> accessed 1 February 2024, p.27. The UK was second on the list of 'top ten countries where intermediaries operate', ICIJ, 'Data: Explore the Panama Papers Key Figures' (31 January 2017) <https://www.icij.org/investigations/panama-papers/explore-panama-papers-key-figures/> accessed 5 February 2024.

[119] HM Revenue & Customs, 'News Story: Taskforce Launches Criminal and Civil Investigations into Panama Papers' (8 November 2016) <https://www.gov.uk/government/news/taskforce-launches-criminal-and-civil-investigations-into-panama-papers> accessed 5 February 2024.

[120] These investigations were predicted to generate £190 million, HM Revenue & Customs, *Annual Report and Accounts 2018-19 (For the year ended 31 March 2019* (HC 2018-19, 2394) p.30.

[121] Soon after the revelations were published, the Financial Conduct Authority wrote to financial institutions to ask them to identify and explain their involvement in the Panama Papers. Yet, little action has been taken as a result, see O'Connor, D. 'Panama Papers – No Banks to Blame, Say Top European Regulators' (KYC 360, 28 June 2018) <https://www.riskscreen.com/kyc360/article/panama-papers-no-one-blame/> accessed 5 February 2024. However, other regulatory authorities acted against their members, see M Walters, 'Panama Papers Solicitor Fined £45,000' (The Law Society Gazette, 15 January 2019)

Scandal, no civil or criminal action was taken against the bank, notwithstanding evidence that the bank assisted its UK clients to evade taxation.[122] In this respect, the bank was accused of "actively helping its clients" to break the law, by enabling them to access funds that had been concealed from tax authorities, as well as providing advice on the avoidance of preventative measures.[123]

As has been stated above, the identification doctrine frustrates the prosecution of companies for economic crimes.[124] This is because, while the identification and attribution of criminal intent may be straightforward in cases concerning small companies, prosecutors are often unable to perform this task when dealing with large, complex organisations, which may deliberately or inadvertently obscure the involvement of those identified as the directing mind from participation in criminal activities.[125] The identification doctrine has hindered the UK's ability to combat the facilitation of tax offences by large companies, as demonstrated by the UK's tepid response to the organisations at the heart of recent tax evasion scandals. Accordingly, the failure to prevent offences were introduced to remedy the UK's inability to combat the facilitation of tax evasion offences by companies.

The corporate offences of failing to prevent the facilitation of UK and foreign tax evasion were introduced in the Criminal Finances Act 2017.[126] Modelled on the corporate offence contained in the Bribery Act, the new offences extend liability to companies beyond the commission or facilitation of tax evasion offences, to encompass the failure to prevent the facilitation of this

<https://www.lawgazette.co.uk/law/panama-papers-solicitor-fined-45000-/5068873.article> accessed 5 February 2024.

[122] BBC News, 'HSBC Bank "Helped Clients Dodge Millions in Tax"' (10 February 2015) <https://www.bbc.co.uk/news/business-31248913> accessed 24th August 2023. See also, J Treanor, 'HSBC Escape Action by City Regulator following Swiss Tax Scandal' (The Guardian, 4 January 2016) <https://www.theguardian.com/business/2016/jan/04/hsbc-escapes-regulatory-action-swiss-tax-scandal> accessed 5 February 2024.

[123] *Ibid*.

[124] See for instance, Law Commission above, n 1.

[125] See Ministry of Justice above, n 112. This was demonstrated by the SFO's attempted prosecution of Barclays bank, which was thwarted on the basis that the senior executives suspected of playing a significant role in the criminality were not to be regarded as the directing mind and will of the company, owing to their lack of complete autonomy in decision-making, *Serious Fraud Office v Barclays Plc and Another* [2018] EWHC 3055; [2020] 1 Cr App R 28.

[126] Criminal Finances Act 2017, ss. 45-46; HM Revenue & Customs, 'Tackling Offshore Tax Evasion: A New Corporate Offence of Failure to Prevent the Facilitation of Tax Evasion' (Consultation Document, 16 July 2015) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/445534/Tackling_offshore_tax_evasion_-_a_new_corporate_criminal_offence_of_failure_to_prevent_facilitation_of_tax_evasion.pdf> accessed 1 February 2024, at p.8-9.

financial crime. As such, the offences increase the scope of responsibility for facilitation offences, as opposed to altering the nature of the substantive offence.[127] The s. 45 offence provides that 'relevant bodies',[128] will commit an offence if an associated person commits a UK tax evasion facilitation offence,[129] while acting in an associated capacity.[130] Similarly, the s. 46 offence provides that 'relevant bodies', will commit an offence if an associated person carries out a foreign tax evasion facilitation offence,[131] while acting in an associated capacity.[132] For the latter offence to apply, there must be dual criminality,[133] as well as a sufficient connection between the organisation or the offence and the UK.[134] For both offences, it is a defence for the organisation to prove that it had reasonable prevention procedures in place, or that it 'was not reasonable in all the circumstances' to require the body to adopt such procedures.[135] Upon conviction for the offence, a company could face an unlimited fine.[136] Alternatively, the offences are capable of being addressed via a DPA, specifically, an agreement between a prosecutor and a suspected organisation to suspend the prosecution for a certain period of time and ultimately discontinue the prosecution upon the fulfilment of certain conditions.[137]

[127] Corfield, T. and Schaefer, J. 'The Taxman Cometh: The Criminal Offences of Failure to Prevent Tax Evasion' (2017) 23(10) T&T 1030, 1031. Ashworth notes that this may be regarded as a vertical, rather than horizontal, expansion of the criminal law, 'in effect, adding (…) extra layers of criminal responsibility'. See Ashworth, A. 'The Diffusion of Criminal Responsibility: A Cause for Concern?' [2017] QLY 170, 180.

[128] "Relevant body" means a body corporate or partnership (wherever incorporated or formed)', Criminal Finances Act 2017, s. 44(2).

[129] As defined in s. 45(5), *Ibid*.

[130] *Ibid*, s. 45(1). Associated persons include 'an employee of B who is acting in the capacity of an employee, (b) an agent of B (other than an employee) who is acting in the capacity of an agent, or (c) any other person who performs services for or on behalf of B who is acting in the capacity of a person performing such services', *Ibid* s. 44(4).

[131] *Ibid.*, s. 46(6).

[132] *Ibid.*, s. 46(1)(a).

[133] *Ibid.*, s. 46(6).

[134] *Ibid.*, s. 46(1)(b) 'The conditions are (a) that B is a body incorporated, or a partnership formed, under the law of any part of the United Kingdom; (b) that B carries on business or part of a business in the United Kingdom; (c) that any conduct constituting part of the foreign tax evasion facilitation offence takes place in the United Kingdom', s. 46(2).

[135] *Ibid*., s. 45(2), s. 46(3). See also, HM Revenue & Customs, 'Tackling Tax Evasion: Government Guidance for the Corporate Offences of Failure to Prevent the Criminal Facilitation of Tax Evasion' (1st September 2017) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/672231/Tackling-tax-evasion-corporate-offences.pdf> accessed 5 February 2024.

[136] *Ibid*., s. 45(8), s. 46(7).

[137] Crime and Courts Act 2013, s. 45, Schedule 17. See also, SFO, CPS, 'Deferred Prosecution Agreements Code of Practice: Crime and Courts Act 2013' <https://www.cps.gov.uk/sites/default/files/documents/publications/dpa_cop.pdf> accessed 5 February 2024.

The strict liability nature of the offences renders the identification doctrine inapplicable. Instead, the offences comprise of three stages, namely, the criminal tax evasion by a taxpayer, the facilitation of this crime by an 'associated person' acting in such capacity, as well as a failure to prevent the facilitation.[138] The offences improve the law pertaining to tax evasion in the UK by providing a mechanism to address tax-related offending on the part of companies, such as, the facilitation of tax evasion seemingly demonstrated by HSBC (Suisse) amongst others. The offences will also provide a mechanism to address the facilitation of tax offences through the provision of advice and services to avoid the application of anti-tax evasion measures, such as the Common Reporting Standard.[139] However, thus far, the offences have had a negligible impact; not a single organisation has been charged with an offence.[140] Further, a HMRC commissioned survey found that only around a quarter of businesses surveyed were aware of the Criminal Finances Act 2017 and its offences.[141] Therefore, the second key aim of the offences is also not presently being realised, specifically, prompting changes in governance and behaviour by companies who wish to aver themselves of the reasonable procedures defence.[142] Nevertheless, investigations into corporate economic crimes committed by large organisations are notoriously complex and take a long time to come to fruition.[143] There are signs that prosecutions or DPAs might soon be

[138] HM Revenue & Customs, 'Tackling Tax Evasion: Government Guidance for the Corporate Offences of Failure to Prevent the Criminal Facilitation of Tax Evasion' (1st September 2017) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/672231/Tackling-tax-evasion-corporate-offences.pdf> accessed 5 February 2024, p.6.

[139] HM Revenue & Customs, 'Tackling Offshore Tax Evasion: A New Corporate Offence of Failure to Prevent the Facilitation of Tax Evasion' (Consultation Document, 16 July 2015) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/445534/Tackling_offshore_tax_evasion_-_a_new_corporate_criminal_offence_of_failure_to_prevent_facilitation_of_tax_evasion.pdf> accessed 5 February 2024, at p.10.

[140] HM Revenue & Customs, FOI Release: Number of Live Corporate Criminal Offences Investigations' (Updated 26 May 2021) <https://www.gov.uk/government/publications/number-of-live-corporate-criminal-offences-investigations/number-of-live-corporate-criminal-offences-investigations> accessed 8 February 2024.

[141] IPSOS Mori Social Research Institute, 'Evaluation of Corporate Behaviour Change in Response to the Corporate Criminal Offences Research Report 529' (December 2018, published March 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/781334/Evaluation_of_corporate_behaviour_change_in_response_to_the_corporate_criminal_offences__HMRC_research_report_529_.pdf> accessed 8 February 2024, p.4.

[142] HM Revenue & Customs, 'Tackling Offshore Tax Evasion: A New Corporate Offence of Failure to Prevent the Facilitation of Tax Evasion' (Consultation Document, 16 July 2015) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/445534/Tackling_offshore_tax_evasion_-_a_new_corporate_criminal_offence_of_failure_to_prevent_facilitation_of_tax_evasion.pdf> accessed 5 February 2024, p.10.

[143] Laird, K. 'Deferred Prosecution Agreements and the Interests of Justice: A Consistency of Approach?' (2019) 6 Crim LR 486, 499.

forthcoming, with HMRC currently conducting 14 investigations into suspected offences, with another 14 'opportunities' under review.[144] If enforcement of the tax evasion offence replicates the enforcement of the comparable bribery offence, it is likely that the offence will lead to the conclusion of DPAs, as opposed to convictions of offending companies.[145]

The multitude of tax evasion exposés that have taken place over the past two decades demonstrate the need for tough enforcement action on the corporate facilitators of tax offences. Indeed, the 'expressive' or 'communicative' function of criminal liability,[146] is particularly important in a tax evasion context, where strong enforcement action, particularly criminal prosecutions, can have a positive impact on compliance by others.[147] In this respect, the failure to prevent offences constitute an improvement to the law pertaining to tax evasion in the UK by providing a method to attribute liability to companies for their involvement in the facilitation of tax crimes, a formerly near-impossible task. However, these scandals also demonstrate that it is often disingenuous to label such corporate offending as 'failing to prevent' tax evasion. In fact, the revelations often depict large divisions of these organisations as actively facilitating tax offences. In such cases, attributing liability to the company for the facilitation offence, rather than its omission in preventing it, would provide a clearer message to the public as to the severity of the company's conduct. Accordingly, it is important to enable liability to be attributed to the most egregious corporate offenders for the facilitation of the primary offence, rather than simply a failure to prevent it, which can only be achieved through repeal or reform of the identification doctrine.

The need to reform the doctrine of corporate criminal liability, alternatively or in addition to, the introduction of further failure to prevent offences is also supported by comparing UK efforts to combat corporate tax crimes with those employed by other countries.[148] In

[144] HM Revenue & Customs, FOI Release: Number of Live Corporate Criminal Offences Investigations' (Updated 26 May 2021) <https://www.gov.uk/government/publications/number-of-live-corporate-criminal-offences-investigations/number-of-live-corporate-criminal-offences-investigations> accessed 5 February 2024.

[145] See Serious Fraud Office, 'SFO Secures Two DPAs with Companies for Bribery Act Offences' (20 July 2021) <https://www.sfo.gov.uk/2021/07/20/sfo-secures-two-dpas-with-companies-for-bribery-act-offences/> accessed 5 February 2024.

[146] See Dsouza above, n 1 at 93 and Diamantis, M., E. 'Corporate Criminal Minds' (2016) 91(5) Notre Dame L Rev 2049, 2062-4.

[147] 'Although it has yet to be proven that prosecution has a greater or lesser impact on these offenders, increased prosecution might be justified for purposes of moral retribution as well as perceived social fairness'. See Levi, M. 'Serious Tax Fraud and Noncompliance' (2010) 9(3) Criminology and Public Policy 493, 493.

[148] See, W Fitzgibbon, 'Germany Seeks Arrest of Panama Papers Lawyers' (ICIJ, 21 October 2020) <https://www.icij.org/investigations/panama-papers/germany-seeks-arrest-of-panama-papers-lawyers/>

particular, the UK position contrasts sharply with that of the US, which has persistently taken criminal and civil actions against banks and other organisations that facilitate tax evasion. As discussed above, under US federal law, corporate criminal liability is imposed under the *respondeat superior* doctrine, which attributes criminal liability to a company based on the acts of its employees. The *respondeat superior* doctrine provides for a much wider basis of corporate criminal liability than the identification doctrine in the UK.[149] In fact, the effect is similar to the imposition of the failure to prevent offence in the UK, without the concomitant defences.[150]

In sharp contrast to the UK, the expansive scope of corporate criminal liability in the US has led to impressive results in combatting the evasion of taxation, as well as the facilitation of tax crimes. The US has prosecuted several companies for evading corporate taxes.[151] The US has also reached DPAs with high-profile law and accounting firms, as well as insurance companies, for their facilitation of the use of fraudulent tax shelters.[152] The US has also used corporate liability to combat offshore tax evasion in a manner incomparable to other countries. A significant number of DPAs have been concluded with foreign banks for their facilitation of tax evasion by US citizens through offshore accounts.[153] For instance, the US

accessed 5 February 2024. In 2017, HSBC agreed to pay £300million following action by the French authorities, see BBC News, 'HSBC to Pay €300m to Settle Tax Investigation' (15 November 2017) <https://www.bbc.co.uk/news/business-41992985> accessed 14 January 2024.

[149] See Luskin above, n 63 at 313.

[150] In *Dollar SS Co,* the court held that regardless of the company's prevention policies and procedures, liability would be imposed for the company 'failed to prevent the commission of the forbidden act' *Dollar SS Co v United States,* 101 F2d 638 (9th Cir 1939). S

[151] Department of Justice, 'Manhattan US Attorney Announces $95 Million Recovery from Deutsche Bank in Fraudulent Conveyance Case Related to Federal Income Tax Avoidance' (4 January 2017) <https://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-announces-95-million-recovery-deutsche-bank-fraudulent-conveyance> accessed 13 January 2024.

[152] See for instance, US Department of Justice, 'KPMG to Pay $456 Million for Criminal Violations in Relation to Largest-Ever Tax Shelter Fraud Case' (29 August 2005) <https://www.justice.gov/archive/opa/pr/2005/August/05_ag_433.html> accessed 5 February 2024; Department of Justice, 'Manhattan U.S. Attorney Announces Agreement With Ernst & Young LLP To Pay $123 Million To Resolve Federal Tax Shelter Fraud Investigation' (1 March 2013) <https://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-announces-agreement-ernst-young-llp-pay-123-million-resolve> accessed 5 February 2024; Department of Justice, 'Zurich Life Insurance Company Ltd and Zurich International Life Limited Enter Agreement with US Regarding Insurance Products' (25 April 2019) <https://www.justice.gov/opa/pr/zurich-life-insurance-company-ltd-and-zurich-international-life-limited-enter-agreement-us> accessed 5 February 2024.

[153] See the DPA concluded with one of Israel's largest banks Department of Justice, 'Mizrahi-Tefahot Bank Ltd Admits its Employees Helped US Taxpayers Conceal Income and Assets' (12 March 2019) <https://www.justice.gov/opa/pr/mizrahi-tefahot-bank-ltd-admits-its-employees-helped-ustaxpayers-conceal-income-and-assets> accessed 5 February 2024.

reached a DPA with UBS in 2009 for conspiring to defraud the IRS, which resulted in the imposition of a $780m penalty, as well as unprecedented levels of information exchange between Switzerland and the US.[154] The US also indicted Switzerland's oldest bank, Wegelin, which admitted guilt and paid a penalty of $74m leading to the collapse of the bank.[155] The US also charged six large and eight small banks with tax evasion offenses before establishing the Swiss Bank Program in 2013.[156] The Program required Swiss Banks to disclose criminal activities, provide information on US taxpayers, close US taxpayer accounts, and pay significant penalties, in exchange for a non-prosecution agreement.[157] By the end of the Program, the US had reached NPAs with 80 banks and imposed over $1.36bn in penalties.[158] In this respect, not only has the US been able to obtain significant financial benefits in taking criminal action against companies that facilitate tax evasion, but through its action against Swiss banks, the US dramatically enhanced international cooperation in tax matters and ultimately accelerated the fall of Swiss bank secrecy for foreign account holders.[159] In contrast to the UK, the US has reached a significant number of agreements with companies in respect of tax crimes, with 38 DPAs/NPAs relating to tax fraud agreed in the final 20 months of the Obama Administration alone.[160] Two DPAs and two NPAs relating to tax fraud were reached in 2019, accounting for over 10% of all DPAs/NPAs reached by the DoJ in that year, with penalties exceeding $400millon.[161] This includes a DPA with HSBC Private Bank (Suisse) in

[154] United States District Court Southern District of Florida, 'Case No.09-60033-CR-COHN United States of America vs. UBS AG: Deferred Prosecution Agreement' (19 February 2009) <https://www.justice.gov/sites/default/files/tax/legacy/2009/02/19/UBS_Signed_Deferred_Prosecution_Agreement.pdf> accessed 5 February 2024.

[155] Department of Justice, 'Swiss Bank Pleads Guilty in Manhattan Federal Court to Conspiracy to Evade Taxes' (3 January 2013) <https://www.justice.gov/usao-sdny/pr/swiss-bank-pleads-guilty-manhattan-federal-court-conspiracy-evade-taxes> accessed 6 February 2024. Emmenegger notes that this indictment was of 'high symbolic importance' and was likely to result in comparatively minimal collateral consequences (at least for the US). See Emmenegger, P. 'The Long Arm of Justice: US Structural Power and International Banking' (2015) 17(3) Bus Polit 473, 486.

[156] Lengwiler, Y. and Saljihaj, A. 'The US Tax Program for Swiss Banks: What Determined the Penalties?' (2018) 154(23) Swiss Journal of Economics and Statistics 1, 1.

[157] Department of Justice, 'Swiss Bank Program' (Announced 29 August 2013) <https://www.justice.gov/tax/swiss-bank-program> accessed 6 February 2024.

[158] Department of Justice, 'Justice Department Announces Final Swiss Bank Program Category 2 Resolution with HSZH Verwaltungs AG' (27 January 2016) < https://www.justice.gov/opa/pr/justice-department-announces-final-swiss-bank-program-category-2-resolution-hszh-verwaltungs> accessed 6 February 2024.

[159] Emmenegger, P. 'Swiss Banking Secrecy and the Problem of International Cooperation in Tax Matters: A Nut Too Hard to Crack?' (2017) 11 Regulation & Governance 24, 26; see Lengwiler and Saljihaj above, n. 80 at 2.

[160] Garrett, B. 'Declining Corporate Prosecutions' (2020) 57 American Criminal Law Review 109, 145.

[161] Dunn, G. '2019 Year-End Update on Corporate Non-Prosecution Agreements and Deferred Prosecution Agreements' (8 January 2020) <https://www.gibsondunn.com/2019-year-end-npa-dpa-update/> accessed 24th August 2023, Appendix; BL Garrett, J Ashley, 'Corporate Prosecution Registry' (University of Virginia School of

2019, including an accompanying penalty of $192.35m, for its facilitation of tax evasion by US citizens.[162] This US approach to attributing criminal liability to companies, as well as its approach to enforcement, is far more effective in redressing tax-related corporate misconduct than its UK counterpart.

Nonetheless, US commentators have expressed concerns at the expansive scope of criminal liability in the US, suggesting that it lacks proportionality,[163] and may be counterproductive from a deterrence perspective.[164] Indeed, the criminal law will struggle to perform its communicative function without an insistence on personal culpability. This has been noted in respect of the US model of vicarious liability; "once *respondeat superior* is applied to crimes, however, the stigma of conviction becomes weakened as the public begins to recognise that criminal liability may not signify lack of good faith".[165] In this respect, the US' persistent enforcement actions against companies may be a case of pursuing "quantity over quality", or the presentation of a "façade of enforcement".[166] However, the UK demonstrates that low quality enforcement actions are better than no action at all, particularly considering the magnification of the harm caused by criminal corporate entities and the importance of taking visible enforcement actions in the tax compliance context. The US model should not be adopted without modification, yet the US approach convincingly illustrates why the identification doctrine should be modified or replaced with a more expansive form of corporate criminal liability in the UK. A balance must be struck between facilitating law enforcement and criminalising non-culpable violations of criminal law. In this respect, several US commentators have suggested retaining the *respondeat superior* model but incorporating a defence of taking reasonable care to prevent the offence.[167] This would seem to have a

Law and Duke University School of Law) <https://corporate-prosecution-registry.com/browse/> accessed 5 February 2024.

[162] United States Department of Justice, 'Justice Department Announces Deferred Prosecution Agreement with HSBC Private Bank (Suisse) SA' (10 December 2019) <https://www.justice.gov/opa/pr/justice-department-announces-deferred-prosecution-agreement-hsbc-private-bank-suisse-sa> accessed 23 January 2024.

[163] Vu, Sn 'Corporate Criminal Liability: Patchwork Verdicts and the Problem of Locating a Guilty Agent' (2004) 104 Columbia Law Review 459, 466.

[164] See Luskin above, n 63 at 317.

[165] Note 'Criminal Liability of Corporations for Acts of their Agents' (1946) 60 Harvard LR 83, 286 cited in Mays, R. 'Towards Corporate Fault as the Basis of Criminal Liability of Corporations' (1998) 2(2) Mountbatten Journal of Legal Studies 31, 37.

[166] Koehler, M. 'Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement' (2015) 49 UC Davis Law Review 497, 527; Rakoff, J. 'The Problematic American Experience with Deferred Corporate Prosecutions' (2019) 13(1) Law and Financial Markets Review 1.

[167] See Luskin above, n 63 at p. 330.

similar effect to the failure to prevent offence in the UK, yet the label attaching to such criminal activity would often more accurately reflect the harm caused by the company – the commission of a substantive offence, rather than simply a failure to prevent one.

The failure to prevent tax evasion offense has had a negligible impact on addressing the problems associated with the identification doctrine. The limited enforcement of these offences is exacerbated by the 'tax gap', which is the difference between the amount of tax collected and that which is theoretically due. HMRC estimated the tax gap is 4.8%, or £35.8 bn for the 2021/2022 tax year, of which tax evasion accounted for £5.5bn per annum.[168] Additionally, it has been estimated that 11% of the loans (£4.9bn) provided by the Government during the Covid 19 pandemic were fraudulently obtained,[169] and that the annual amount of revenue lost to tax evasion is £70bn per year.[170] HMRC have not pursued a case for potential breaches of the criminal offences created by the Criminal Finances Act 2017, despite the accusations of tax evasion following the publication of the Panama Papers and other related documents.

Part IV – Failure to Prevent Fraud

Fraud is the most prevalent crime in the UK, accounting for over 40% of reported crime,[171] and it has been estimated that the annual UK fraud losses exceed £200bn per year.[172] In order to address the threat presented by fraud to and by/on behalf of companies, the Law Commission were asked to undertake a review of the law on corporate criminal liability.[173] Specifically, the Law Commission were asked to investigate the appropriateness of the identification doctrine, the association between criminal and civil corporate liability and

[168] HM Revenue and Customs 'Tax gap summary', n/d, available from < https://www.gov.uk/government/statistics/measuring-tax-gaps>, accessed 11 January 2024.
[169] National Audit Office *The Bounce Back Loan Scheme: an update* (National Audit Office: 2021) at 4.
[170] Murphy, R *The tax gap – tax evasion in 2014 and what can be done about it* (Public and Commercial Services Union: 2015) at 5.
[171] Office of National Statistics 'Crime in England and Wales: Appendix tables,' July 20 2023, available from < https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/datasets/crimeinenglandandwales appendixtables>, accessed 2 February 2024.
[172] Tim Robinson, Jonathan Tickner, Professor Mark Button and Jim Gee *Annual Fraud Indicator 2023* (Crowe, Peters & Peters and Portsmouth University: 2023) at 4. For a more detailed discussion see Mark Button, Davud Shepherd, Branislav Hock and Paul Gilmour 'Understanding the rise of fraud In England and Wales through field theory: blip or flip?' (2023) Journal of Economic Criminology, 1, 1-10.
[173] Law Commission 'Law Commission Begins Project on Corporate Criminal Liability' (3 November 2020) <https://www.lawcom.gov.uk/law-commission-begins-project-on-corporate-criminal-liability/> accessed 24 January 2024.

supplementary ways that criminal law could be used in relation to companies.[174] In June 2021, the Law Commission published its Discussion Paper [175] and in June 2022, the Law Commission published its Options Paper, which did not make any specific recommendations, but outlined the options for reform.[176] Therefore, the Law Commission suggested the introduction of a new corporate offence for the failure to prevent fraud.[177]

The Government introduced a new failure to prevent fraud offence which would "make it easier to prosecute a large organisation if an employee commits fraud for the organisation's benefit".[178] Under this offence, a large organisation will be held accountable if they profit from a fraud committed by an person associated with the organisation.[179] An associated person has been widely defined as a person who is an employee, agent or subsidiary undertaking of the organisation, or the person otherwise performs services on behalf of the organisation.[180] Specifically, an organisation could be held criminally liable if a fraud offence has been committed by an associated person for the organisation's benefit.[181] Importantly, the prosecution does not have to illustrate that the organisation's senior management arranged or knew about the fraud. The offence "will discourage organisations from turning a blind eye to fraud by employees which may benefit them. The offence will encourage more companies to implement or improve prevention procedures, driving a major shift in corporate culture to help reduce fraud".[182] The offence applies to all large corporate bodies and partnerships. Additionally, this means that large non-for-profit organisations such as charities will also be in scope, as well as incorporated public bodies.[183] Whilst the offence will apply to all sectors, to ensure burdens on business are proportionate, only large organisations are in

[174] *Ibid*.
[175] See Law Commission above, n 62.
[176] See Law Commission above, n 1.
[177] *Ibid*.
[178] Home Office 'New Crackdown on Fraud Introduced by the Home Office' (11 April 2023) <https://www.gov.uk/government/news/new-crackdown-on-fraud-introduced-by-home-office> accessed 24 January 2024.
[179] Economic Crime and Corporate Transparency Act 2023, s. 199(1).
[180] *Ibid*, s. 199(7).
[181] For the fraud offences in scope, see Economic Crime and Corporate Transparency Act 2023, s. 199(6) and Schedule 13.
[182] Gov.Uk 'Factsheet: Failure to Prevent Fraud Offence' (11 April 2023) <http://Factsheet:%20failure%20to%20prevent%20fraud%20offence%20-%20GOV.UK%20(www.gov.uk)> accessed 3 February 2024.
[183] Economic Crime and Corporate Transparency Act 2023, ss. 201 and 201.

scope, irrespective of their place of incorporation.[184] Large organisations will need to meet two out of the three following criteria:

- more than 250 employees
- more than £36m turnover
- more than £18m in total assets.[185]

Furthermore, the offence can be committed where the associate commits any of the offences listed in the 2023 Act, or if the person aids, abets, counsels or procures the commission of the offence.[186] These offences include:

- Fraud by false representation, by failing to disclose information, or by abuse of position,[187]
- Obtaining services dishonestly,[188]
- Participation in a fraudulent business,[189]
- False accounting,[190]
- False statements by company directors,[191]
- Fraudulent trading,[192]
- Cheating the public revenue.[193]

An organisation can avoid prosecution if they have 'reasonable procedures' in place to prevent fraud. Consistent with the approach taken to the existing UK 'failure to prevent' offences under the Bribery Act 2010 and Criminal Finances Act 2017, it is provided that the Secretary of State

[184] *Ibid*; Herbert Smith Freehills, 'Corporate Crime Briefing: Failure to Prevent Fraud – An Introduction to the Proposed New Offence' (13 April 2023) <https://marketing.hsf.com/20/29354/landing-pages/corporate-crime-briefing---failure-to-prevent-fraud-offence.pdf> accessed 23 January 2024.
[185] A large company is a company that does not qualify as medium-sized under section 465 of the Act or is excluded from being treated as medium-sized as it is ineligible under section 467 of the Act.
[186] Economic Crime and Corporate Transparency Act 2023, ss. 199(6).
[187] Fraud Act 2006, ss.2-4.
[188] Fraud Act 2006, s.11.
[189] Fraud Act 2006, s.9.
[190] Theft Act 1968, s.17.
[191] Theft Act 1968, s.19.
[192] Companies Act 2006, s.993.
[193] See Gov.Uk above, n 182.

must issue guidance on the procedures that can be put in place to prevent fraud.[194] There are no territorial qualifications on who will be caught within the definition of an "associate", and it remains to be seen whether this will be clarified in the guidance. However, "if an employee commits fraud under UK law, or targeting UK victims, their employer could be prosecuted, even if the organisation (and the employee) are based overseas".[195] This suggests that, in addition to the ability for foreign companies to be liable where they maintain a UK presence or subsidiary, there is also the possibility of liability where an offence is committed within the UK regardless of the domicile of the body corporate or partnership. The jurisdiction will be predicated on the underlying offence committed. This may mean that a relevant body can be liable under a failure to prevent offence, even where it has no UK presence, if an associate commits an in-scope offence. This would allow a foreign organisation to be prosecuted under the failure to prevent offence where, for example, it fails to prevent an associate, whether they are a UK-based associate or not, from committing an offence outside of the UK where there is an intended loss or gain in the UK. Where a large organisation is found guilty of the offence of failure to prevent fraud, it will be liable to an unlimited fine.[196]

The new failure to prevent fraud offence is narrower than that proposed by the Law Commission and the House of Lords, which will limit its effectiveness in addressing fraud facilitated by companies.[197] The proposed offence only applies to large companies, which only make up 0.1% of all business in the UK.[198] Indeed, given the criteria for inclusion, data released by the Office for National Statistics suggests that only 5,815 companies would fall within the scope of the new offence.[199] Despite the laudable aim of reducing the burdens imposed on companies, given the high prevalence of fraud and the harm it causes, this severely dilutes the potential impact of the offence. Similar restrictions were not imposed on the application

[194] See Herbert Smith Freehills above n 184.
[195] See Gov.Uk above, n 182.
[196] Economic Crime and Corporate Transparency Act 2023, s. 12.
[197] Fraud Act 2006 and Digital Fraud Committee, *Fighting Fraud: Breaking the Chain* (HL 2022-23, 87) and Law Commission above, n 1.
[198] G Hutton, 'Business Statistics' (House of Commons Library, 6 December 2022) <https://researchbriefings.files.parliament.uk/documents/SN06152/SN06152.pdf> accessed 24 April 2023, p.4.
[199] Office for National Statistics, 'Analysis Showing the Count of VAT and/or PAYE Based Enterprises in the United Kingdom with a Turnover in Excess of £36 Million and Employees Greater than 250 by UK SIC 2007 Section Letter' (26 July 2022) <https://www.ons.gov.uk/businessindustryandtrade/business/activitysizeandlocation/adhocs/14922analysisofenterprisesintheukwithaturnoverinexcessof36millionandemployeesgreaterthan250byuksic2007sectionletter2021> accessed 8 February 2024.

of the failure to prevent bribery and tax evasion offences.[200] In the case of the failure to prevent bribery offence, concerns about compliance burdens have been mitigated in the guidance around the level of prevention procedures expected from small medium enterprises (SMEs), which is a preferable approach.[201] Large businesses already have some incentives to combat fraud, with, for instance, banks having a financial incentive to combat fraud owing to their reimbursement of fraud victims.[202]

The failure to prevent fraud offence replicates the provisions of the Bribery Act, without considering the implications of such an approach in cases of fraud. As noted by the House of Lords,

> it may be difficult to identify an individual who has committed a fraud before pursuing a company. While it would be straightforward to prove loss to a customer or consumer, identifying a specific person responsible for that loss could be difficult. Further, proving that this specific unidentified individual was dishonest at the time of their actions could be more difficult again. For example, a technician sending bulk messages on behalf of his employer may unknowingly be assisting in perpetrating a fraud.[203]

In this respect, the failure to prevent fraud offence represents a lost opportunity to design a failure to prevent offence that adequately addresses fraud. Moreover, the offence restricts liability to fraud that benefits the large organisation.[204] The offence will address the criminality revealed in major cases, such as the LIBOR scandal, in which large corporate bodies escaped criminal sanction. However, a broader version of the offence would capture a wider range of fraud cases involving companies and would better incentivise all companies to prevent and address fraud within their organisations. Indeed, the failure to prevent the

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

[201] "Reasonable procedures for a relevant body to adopt to prevent persons acting in the capacity of a person associated with it from criminally facilitating tax evasion will be proportionate to the risk the relevant body faces of persons associated with it committing tax evasion facilitation offences. *This will depend on the nature, scale and complexity of the relevant body's activities*." Emphasis added, HM Revenue & Customs, 'Tackling Tax Evasion: Government Guidance for the Corporate Offences of Failure to Prevent the Criminal Facilitation of Tax Evasion.' (1 September 2017) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/672231/Tackling-tax-evasion-corporate-offences.pdf> p.21.

[202] See Fraud Act 2006 and Digital Fraud Committee above, n 197 at 140.

[203] *Ibid*, p.145.

[204] See Gov.Uk above, n 182.

facilitation of tax evasion offences do not require the crime to benefit the company in question and would be a more suitable model than the failure to prevent bribery offence.[205]

During the legislative process that preceded the 2023 Act it was noted that "it is vital that any reform can be used by law enforcement agencies, does not duplicate what already exists and avoids placing unnecessary burdens on legitimate businesses."[206] In this respect, it is unclear why cheating the public revenue is included as a predicate offence to failure to prevent fraud,[207] when this is explicitly included as an underlying offence to failure to prevent the facilitation of tax evasion under the Criminal Finances Act 2017.[208] While the aim may be to task other law enforcement authorities with enforcement of failure to prevent offences concerning cheating the public revenue, particularly given the SFO and HMRC's lacklustre enforcement efforts to date,[209] this aim will not be achieved without extending enforcement powers, such as the negotiation of DPAs, to other law enforcement authorities.[210] Therefore, while the introduction of a failure to prevent fraud offence in the ECCTA is a welcome development, the offence is limited in scope and consequently represents a missed opportunity to reform the law relating to the attribution of corporate criminal liability for fraud. The new failure to prevent fraud corporate criminal liability offence has not received overwhelming praise from commentators, with Spotlight on Corruption stating that "the carve out for SMEs is… desperately short-sighted and entirely unnecessary".[211] The failure to prevent model is inappropriate for fraud, "the idea that there is a template out there we can just dust off and adapt is not just wrong, but dangerously so".[212] Furthermore, the Home

[205] Criminal Finances Act 2017, s.45 and s.46.
[206] R Taylor, 'Economic Crime and Corporate Transparency Bill HL Bill 96 of 2022–23' (House of Lords Library Briefing, 2 February 2023) <https://researchbriefings.files.parliament.uk/documents/LLN-2023-0008/LLN-2023-0008.pdf> accessed 24 February 2024, p.29.
[207] See Gov.Uk above, n 182.
[208] Criminal Finances Act 2017, s.45(4)(a).
[209] HM Revenue & Customs, 'FOI Release: Number of Live Corporate Criminal Offences Investigations' (Updated 26 January 2023) <https://www.gov.uk/government/publications/number-of-live-corporate-criminal-offences-investigations/number-of-live-corporate-criminal-offences-investigations> accessed 24 April 2023. See also, S Bourton, N Ryder, 'Corrupt Corporations and the Facilitation of Tax Crimes: A Review of the United Kingdom's Enforcement Mechanisms' (2023) 85(4) Law and Contemporary Problems 213.
[210] Crime and Courts Act 2013, Schedule 17, para 3.
[211] Spotlight on Corruption, 'Statement on Introduction of the Failure to Prevent Fraud Offence', (Spotlight on Corruption, 11 April 2023), <https://www.spotlightcorruption.org/statement-failure-to-prevent-fraud/> accessed 9 January 2024.
[212] Michael Cross, 'Sector Specialists Cool on Failure to Prevent Fraud Offence' (*Law Society Gazette*, 14 April 2023) <https://www.lawgazette.co.uk/news/sector-specialists-cool-on-failure-to-prevent-fraud-offence/5115729.article#:~:text=Legal%20experts%20agreed%20that%20this,in%20the%20House%20of%20Lords.> accessed 4 February 2024.

Office stated that "additional court cases are expected to be low".[213] Therefore, nothing significant has changed with the introduction of the new failure to prevent fraud offence; it's simply another 'failure to prevent' offence introduced in an increasing line of failure to prevent offences – eat, sleep and repeat.

Conclusion

The state of corporate criminal liability in the UK can be described as 'eat, sleep and repeat', in relation to the introduction of a further 'failure to prevent' corporate criminal liability offence. The failure to prevent fraud offence introduced in the ECCTA 2023 is not a significant change to corporate criminal liability in the UK. It applies to an extremely limited number of companies and requires the fraud to benefit the organisation before the offence applies. Even when caught by the offence, a large organisation can avail itself of the statutory defence of having put in place 'reasonable procedures' to prevent fraud, which is not as high a test as the defence of 'adequate procedures' for the failure to prevent bribery offence. However, the Economic Crime and Corporate Transparency Act 2023 does introduce a significant alteration to the identification doctrine with the introduction of a new 'senior managers' test, which significantly increases the pool of people who can attribute criminal liability to the company by their actions for certain crimes. This is a distinct change in pace and policy because it amends the identification doctrine. This amendment to the identification doctrine was suggested by the Law Commission and, despite not being as widely applicable as the US vicarious liability/respondeat superior principle and despite the change being limited to selected crimes, it represents a welcome boost to the enforcement agencies and could result in a rise of prosecution. However, previous attempts to attribute liability to senior managers for financial misconduct have not been entirely successful, with only three successful enforcements having been taken under the SM&CR against a senior manager since 2016.[214] This indicates that there may be problems ahead in enforcing the new senior managers test.

[213] The Home Office, 'Impact Assessment: The Home Office' (Parliament.UK, 13 June 2023) < https://bills.parliament.uk/publications/51649/documents/3598> accessed 4 February 2024.

[214] Tom Hine, 'SMCR Enforcement Actions' (Kemp IT Law, 26 January 2024) <https://kempitlaw.com/insights/smcr-enforcement-actions/> accessed 13 February 2024 and Financial Conduct Authority, 'Information on Investigations Opened Under the Senior Managers' Regime - June 2022' (Financial Conduct Authority, 22 June 2022) <https://www.fca.org.uk/freedom-information/information-investigations-opened-under-senior-managers-regime-june-2022> accessed 9 February 2024.

The definition of ‘senior managers’ in the Economic Crime and Corporate Transparency Act 2023 will hopefully be clarified following the issuance of guidance by the Government. The SFO has already stated that it believes that litigation will have to be pursued in order to establish the meaning of ‘senior managers’, so taking the pre-emptive action of issuing further detailed guidance as to its meaning will save the public prosecutor time and money. The amendment of the identification doctrine to allow the actions of senior managers, rather than just people who have the ‘directing mind and will’ of the company, is a welcome one. However, this amendment applies just to a list of economic crimes set out in the Economic Crime and Corporate Transparency Act 2023.[215] The amendment to the identification doctrine should apply to all crimes, not just those selected economic crimes. This appears to be an approach that the Government has adopted following the publication of the draft Criminal Justice Bill, which included a provision which extends the reform of the identification doctrine to all criminal offence.[216] This provision is passed into law then it will be a further extension to the identification doctrine. An additional recommendation to improve the state of corporate criminal liability in the UK is to legislate to widen the reach of the new failure to prevent fraud offence so that it applies to all companies, rather than just to ‘large organisations’. By extending the failure to prevent fraud to all companies in the England and Wales, all companies would be forced to take preventative measures and to be more vigilant against fraud. The statutory defence of taking all ‘reasonable precautions’ for the failure to prevent fraud offence should also be amended to ‘adequate procedures’, the higher level of defence which was used for the failure to prevent bribery offence. Should these recommendations be implemented, there would be a greater scope for prosecutors and regulators to enforce and prevent financial and other crime committed by companies in England and Wales, which should directly lead to a reduction in those crimes.

[215] Economic Crime and Corporate Transparency Act 2023, Schedule 12.

[216] Parliament, 'Criminal Justice Bill' (Parliament UK Publications, 14 November 2023) clause 14 <https://publications.parliament.uk/pa/bills/cbill/58-04/0010/230010.pdf> accessed 9 February 2024.