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# Progress or stagnation? The evolution and reform of corporate criminal liability in the UK

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ABSTRACT

This article analysis of the progression of corporate criminal liability from its historical foundations to contemporary reforms. It seeks to examine how case law and legislative developments have responded to the challenges posed by the identification doctrine and assess the effectiveness of these reforms in addressing gaps in corporate accountability. The first section of the paper provides a background on the development of corporate criminal liability, starting with the identification doctrine and its evolution through landmark cases. The second part delves into relevant legislative reforms, analysing their effectiveness. The article offers insights into how the legal framework for corporate criminal liability can continue to evolve to ensure accountability and deter corporate misconduct effectively

## Introduction

Corporate criminal liability has undergone a substantial evolution in response to the complexity of modern corporations and the inadequacy of traditional doctrines in attributing responsibility. The common law rules relied on vicarious liability, but this approach was unsuitable for offences requiring *mens rea*. The development of the identification doctrine sought to address these limitations by associating corporate liability with senior management—the 'directing mind and will' of the corporation. However, the identification doctrine's narrow focus on attributing responsibility solely to senior individuals often failed to account for the decentralized decision-making structures common in modern corporations and the inherent difficulty in proving *mens rea*, leaving significant gaps in accountability. These shortcomings have driven significant legislative reforms aimed at modernizing corporate criminal liability frameworks (Wells, 2021).

Reforms have emphasised the need to expand corporate liability mechanisms to better align with the realities of modern business operations. A pivotal development has been the introduction and extension of the failure-to-prevent model, which marks shift away from traditional liability frameworks by moving the focus from individual culpability to systemic accountability. Here, organisations are incentivized to adopt compliance measures to mitigate risks of misconduct, such as bribery, tax evasion, and fraud. This shift represents a fundamental departure from the identification doctrine. Despite these advancements, concerns persist regarding effectiveness of these frameworks and whether these reforms sufficiently address the complexities of corporate criminal liability.

This article analysis of the progression of corporate criminal liability from its historical foundations to contemporary reforms. It seeks to examine how case law and legislative developments have responded to the challenges posed by the identification doctrine and assess the effectiveness of these reforms in addressing gaps in corporate accountability. The first section of the paper provides a background on the development of corporate criminal liability, starting with the identification doctrine and its evolution through landmark cases. The second part delves into relevant legislative reforms, analysing their effectiveness. The article offers insights into how the legal framework for corporate criminal liability can continue to evolve to ensure accountability and deter corporate misconduct effectively.

## Background

The doctrine of vicarious liability was initially used to assign criminal responsibility to corporations, holding them liable for the wrongful acts of their employees committed within the scope of employment. However, this was unsuitable for offences requiring *mens rea*. Consequently, corporations could no longer be held vicariously liable for the actions of their employees in cases requiring a mental element (Bhaskar and Umakanth, 1996). To address this issue, the courts developed the 'identification doctrine', which associated a corporation with its controlling officers. Here, corporations were only found guilty

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when criminal acts were committed by individuals who represented the 'directing mind and will' of the company. This referred to senior management, who are regarded as the 'head and hands' of the company with substantial control. Therefore, the liability and conviction of the corporation depended on the *mens rea* of senior management (Yeoh and Tan, 2022). In other words, those who managed or directed the corporation's affairs were regarded as embodying the corporation itself. When these individuals acted in their controlling capacity, their actions and state of mind were effectively attributed to the corporation (Bhaskar and Umakanth). This doctrine forms the foundation of corporate liability in criminal law for the actions of officers or employees (Yarosky, 1964). Under common law, the identification doctrine has been the primary method used to attribute criminal liability to a corporation (Cavanagh, 2011).

The identification doctrine originates from *Lennard's Carrying Co. Ltd v Asiatic Petroleum Co. Ltd (*AC 705, 1915*)*. Here, a cargo of benzine on board a ship owned by Lennard's company was destroyed by fire, attributed to the unseaworthiness of the ship's boilers. The managing director, Lennard, knew of the defective boilers but failed to act. The House of Lords ruled that Lennard's knowledge and negligence could be attributed to the company because he was effectively the 'directing mind and will' of the company. In delivering the judgment, Viscount Haldane explained that the 'directing mind' of a company, or 'the very ego and centre of the personality of the corporation', may be a person who operates under the direction of the shareholders in a general meeting, the board of directors itself, or, in some companies, an individual who has authority co-ordinate with the board of directors as specified under the articles of association and appointed by the general meeting of the company (Ibid). This case established the foundation of the identification doctrine. Viscount Haldane's speech was historically interpreted as establishing a broad principle for attributing direct fault to a company, distinguishing it from vicariously derived fault. This interpretation allowed corporate liability for certain crimes and torts that were outside the traditional scope of vicarious liability, which had been confined to negligence in torts and regulatory criminal offenses. This doctrine enabled findings that a company could be considered to have acted fraudulently or with criminal negligence (Sullivan, 2009).

In the 1940s, the identification doctrine was adapted from civil law and applied for the first time in a criminal context in *Director of Public Prosecutions v. Kent and Sussex Contractors Ltd* (KB 146, 1944). The development of the identification doctrine in criminal law was further supported by *ICR Haulage* and *Moore v Bresler* (Yeoh and Tan). In *Kent*, the company engaged in fraudulent behaviour by creating false invoices to obtain fuel rations during World War II. This deception was orchestrated by senior managers, including the managing director, leading to criminal charges under wartime regulations (DPP v Kent and Sussex Contractors, 1944a). Similarly, in *Haulage*, the company faced prosecution for conspiracy to defraud, with directors accused of falsifying accounts to deceive creditors (R v ICR Haulage Ltd, 1944). In *Kent*, this liability arose because the company had produced false documents and provided false information, while in *Haulage*, the court held the company accountable for conspiracy to defraud based on the conduct of one of its directors (Ryder, 2018). These decisions reinforced the identification doctrine by recognising that the criminal intent and actions of high-ranking officials could be attributed to the corporation itself.

In *Bresler*, Sydney Bresler, who was the company secretary, general manager and the sales manager of the company's Nottingham branch was convicted under section 35(2) of the Finance (No. 2) Act (1940) for the offense of making use of a document that was false in a material particular with intent to deceive. The individual defendants (not the corporation) had submitted tax returns showing a lower sales figure than was accurate (The Law Commission, 2010). In this case, the company secretary and the sales manager were identified as being the embodiment of the company (Moore v Bresler, 1944) and the court held Bresler company criminally liable for tax evasion because one of its officers was acting within the scope of his responsibilities (Ryder above). This case differs from the previous two decisions in that, unlike those cases where the fraudulent actions were carried out or authorized by company directors, here the misconduct was committed by individuals of seemingly lower rank—a general manager and a sales manager (Wilkinson, 2003). The decision has faced criticism for resulting in an "undue extension of corporate liability", as it blurred the distinction between the corporation as a legal person and its agents.

The leading authority on the doctrine of criminal liability of companies is *Tesco v Nattrass* (AC 153, 1972). On September 26, 1969, a customer attempted to buy a discounted Giant Size packet of Radiant washing powder advertised at 2 s. 11d. However, the only available packets in the store were priced at 3 s. 11d, and the customer was charged a higher price. This error occurred because the store manager, Mr. Clement, failed to remove the old stock from the shelves after the discounted stock ran out. Additionally, an assistant, Miss Rogers, restocked the display with full-priced packets without informing Mr. Clement, who then incorrectly recorded that all special offers were "OK" without verifying. Following the incident, Tesco faced prosecution under the Trade Descriptions Act 1968 for misleading price information.

The central legal question was whether Tesco could be held criminally liable for a breach of section 11(2) of the Trade Descriptions Act 1968, considering that the issue stemmed from the actions of the store manager, Mr. Clement, (Howells, 1971) or if it could rely on a statutory defence whereby the error was attributed to "another person" (Kaye, n.d.). The Divisional Court upheld the conviction, primarily focusing on the concept of "vicarious liability" and the principle of delegation within corporate structures. They reasoned that Tesco, being a large corporation, had delegated the responsibility of ensuring compliance with the law to its store manager, Mr. Clement. Since Mr. Clement failed to ensure that the special offer was properly managed (by not removing the advertisement for a sale item that was no longer available), the court considered this failure a direct representation of Tesco's own breach, as he was not viewed as "another person" under the law but an integral part of Tesco's operations. However, the House of Lords reversed the decision, ruling that Mr. Clement was "another person" under the Act. Since he was not part of Tesco's "directing mind and will," his actions could not be directly attributed to the company. Tesco was found to have taken reasonable precautions and exercised due diligence to prevent such errors, allowing it to rely on the statutory defence.

The *Tesco* case is a cornerstone for corporate liability cases, and it has become synonymous with the evolution of the identification doctrine. The case reinforced and clarified the identification doctrine by emphasizing that only individuals who represent the 'directing mind and will' of a company can have their actions attributed directly to the corporation for the purposes of criminal liability. The *Tesco* case also resulted in the creation of the test to determine whether corporations are to be held liable for breaches of criminal law (Ryder, n.d.).

During the global financial crisis, Barclays raised significant capital to avoid a UK government bailout. This involved two funding rounds: CR1 in June 2008, which raised £4.4 billion, and CR2 in November 2008, which raised £6.8bn. Most of this funding came from Qatari investors, including Qatar's sovereign wealth fund and a vehicle linked to the Qatari Prime Minister. Barclays disclosed paying commissions of 1.5 % for CR1 and 2–4 % for CR2, along with a £66 m arrangement fee. However, the Serious Fraud Office (SFO) alleged that Barclays also paid hidden, higher commissions through separate "Advisory Service Agreements" (ASAs), amounting to £42 m and £280 m. These payments were allegedly meant to disguise the true cost of securing Qatari investments. The SFO also claimed that Barclays provided unlawful financial assistance by issuing a $3bn loan to Qatar, which was allegedly used to fund Qatar's investment in Barclays' shares. Evidence, including emails and witness statements, suggested that senior executives, including CEO John Varley, were aware of these arrangements. Barclays and its executives were charged with conspiracy to commit fraud and

providing unlawful financial assistance, with accusations that they misled the public and investors.

A critical question in this case was whether the actions and alleged criminal intent of individual Barclays officers could be attributed to the bank itself (Serious, 2020). To establish corporate liability, the SFO needed to demonstrate that these officers were acting as the "directing mind and will" of Barclays when committing the alleged offenses. The SFO argued that these executives acted on behalf of Barclays in arranging these transactions, but the court found insufficient evidence to prove that they intended to deceive investors. Additionally, the SFO could not substantiate that these executives had the requisite autonomy to bind Barclays in these transactions, as they did not have full control over final decisions. In 2018, the Crown Court dismissed charges against Barclays PLC and Barclays Bank PLC, citing insufficient evidence. In 2019, the High Court also dismissed fraud charges against Varley and other senior executives, concluding that the SFO had not demonstrated criminal intent. This case further reinforces the principle that corporate criminal liability requires that the accused individuals have full autonomy and represent the company's "directing mind and will." The directors in this case did not possess the control necessary to attribute their actions to the bank under the Companies Act 2006 (It).

*Challenges and limitations*

The widespread criticism of the identification doctrine is its narrow scope and failure to account for the complexities of modern corporation structures. Viscount Haldane's explanation in *Lennard* regarded only 'a person who operates under the direction of the shareholders in a general meeting, the board of directors itself, or, in some companies, an individual who has authority co-ordinate with the board of directors as specified under the articles of association and appointed by the general meeting of the company' as the company's 'directing mind and will' (Lennard's Carrying Co. Ltd v Asiatic Petroleum Co. Ltd, 1915). In practice, this definition has restricted to a small number of directors and senior managers, severely limiting the scope of corporate criminal liability.

In *Tesco*, Clement, a store manager, was deemed to lack the seniority or decision-making authority necessary to qualify as Tesco's directing mind. His actions were therefore classified as those of an independent actor, falling outside the identification doctrine's remit. However, this narrow application of the doctrine failed to consider the impact on the customer, whose legitimate expectation of paying the advertised discounted price was violated. By allowing Tesco to escape liability, the doctrine overlooked the practical reality that customers interact directly with middle and lower-level employees, such as store managers, whose actions directly affect their rights and interests. Moreover, this ruling exposes a significant accountability gap, where corporations can delegate operational responsibilities to employees like store managers, shielding senior management and the company itself from liability for misconduct or negligence at the operational level. In contemporary corporate structures, decisions at the operational level often directly impact consumer welfare. The rigid focus on senior management as the 'directing mind and will' ignores the decentralized nature of modern business operations, where mid-level employees often conduct key actions.

The *Barclays* case further narrowed the identification doctrine, in both a legal and evidential sense, (Spector, 2020) making it even more difficult to attribute criminal liability to corporations. Modern corporations, like Barclays, often operate through decentralized structures where decision-making is distributed across multiple departments, committees, and subsidiaries (Rappo, 2020). This diffusion of authority makes it challenging to identify a single individual. Although CEO John Varley was directly involved in negotiating the Advisory Service Agreements with Qatari investors, the high court ruled that he could not be considered the 'directing mind and will' because these decisions were reviewed and approved by the board and other governance bodies, preventing the attribution of corporate criminal liability to him alone. This ruling also set an extremely high threshold for prosecutors to meet, whilst allowing companies to evade corporate criminal liability by simply evidencing that the Board retains ultimate control (Spector). This gap also possibly demotivates boards to supervise executives directly, as this structure provides a shield against liability (Commission, 2022).

*Bresler* can be contrasted with *Tesco* and *Barclays* by extending liability to individuals of lower rank—a general manager and a sales manager (Wilkinson, n.d.). In this case, these individuals submitted the fraudulent tax returns, and the court held that their actions could be attributed to the corporation, thereby imposing corporate liability. This decision is an exception in the evolution of the identification doctrine and has been criticized for causing an 'undue extension of corporate liability' by blurring the distinction between a corporation as a legal entity and its agents. Critics argue that holding lower-ranking employees accountable undermines the foundational principle of the identification doctrine, which focuses on senior management. However, Yarosky offers a nuanced perspective. While he agrees with the criticism, he notes that the general manager's dual role as company secretary elevated his status within the company's hierarchy. This position connected his actions to the primary organ of the company, aligning with the 'directing mind and will' doctrine. The references to the sales manager's actions, Yarosky argues, appear to be obiter dicta (incidental remarks) rather than central to the court's reasoning, as the general manager's actions were more directly implicated in the fraud. Consequently, the decision, based on its specific facts, does not necessarily conflict with the alter ego doctrine (Yarosky n.d.).

Another limitation in identification doctrine is the difficulty in proving corporate *mens rea*, which also results in a high threshold for prosecutorial success. The judgment in *Kent* was pivotal in raising the issue of intention regarding corporate criminal liability. The court concluded that Mr. Luck's actions and intent could indeed be attributed to the company because he was the 'directing mind and will' of the corporation. As the managing director, he acted in a capacity that represented the corporation itself, and therefore, his fraudulent intent was considered the intent of the company, leading to its conviction for fraud (DPP v Kent and Sussex Contractors, 1944b). This judgment reinforced the application of the identification doctrine by affirming that the intent and actions of senior management could directly implicate the corporation in criminal liability.

While *Kent* set an important precedent, *Barclays* exposed significant challenges in applying this principle to modern corporations. The identification doctrine requires that, for a company to be convicted of a crime, the directing mind and will must possess the requisite mens rea (criminal intent) of the offence (Sarch, 2024). Furthermore, it must be shown that this individual not only performed the *actus reus* or caused its commission but also did so with full knowledge and intent. This strict requirement poses significant practical and evidentiary difficulties for prosecutors. The SFO presented a range of evidence, including emails, recorded calls, and internal documents. However, the court found that these communications were not explicit enough to demonstrate a deliberate intent to mislead. Moreover, while the SFO alleged that Barclays deliberately misrepresented the true costs of the Qatari investments to shareholders, the court emphasized that there was no direct evidence showing an intent to deceive. For example, the commission rates and arrangement fees disclosed by Barclays, although incomplete, were not demonstrably false. The board and governance committees further complicated the attribution of fraudulent intent to individual executives like Varley. The court determined that decisions were made collectively, rather than by one person acting autonomously. This ruling set an extremely high threshold for prosecutors to meet, whilst allowing companies to evade corporate criminal liability by simply evidencing that the Board retains ultimate control (Spector, n.d.).

*The corporate homicide and manslaughter act 2007*

The Corporate Manslaughter and Corporate Homicide Act 2007 (CMCHA 2007) attempted to addressed some of the challenges posed by the identification doctrine. The Act seeks to shift the focus from individual intent to systemic failings and collective responsibility. One of the Act's most significant contributions is its emphasis on examining how the organization manages its activities and whether systemic failures contributed to a fatality. This approach departs from the identification doctrine's narrow attribution of liability to specific individuals within senior management, which often failed to account for the complexities of organizational failings (Gobert, 2008). By focusing on systemic issues, the Act ensures that liability is tied to institutional shortcomings rather than solely to individual culpability, (Tombs and Whyte, 2009) directly tackling the accountability gaps seen in *Tesco*, where liability could not be attributed to senior management, and in *Barclays*, where fragmented authority obscured responsibility. The Act creates a criminal offence where "an organisation to which this section applies is guilty of an offence if the way in which its activities are managed or organised – (a) causes a person's death, and (b) amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased" (Corporate, 2007a). This reframes corporate liability by requiring an objective assessment of whether the organization's conduct fell far below what could be expected in ensuring health and safety. For example, if an organization neglects to establish adequate safety protocols or fails to allocate sufficient resources to mitigate known risks, these systemic failings may constitute a gross breach under section 1(1). By adopting this approach, the Act reflects the realities of modern corporate structures, where failings in health and safety management are often rooted in poor policies, inadequate resources, or a culture that deprioritizes safety.

A strength of the Act is its departure from traditional *mens rea* requirements, focusing instead on gross negligence. This means the Act does not require proof of intent or recklessness, which was a significant barrier under the identification doctrine. Instead, the test for liability is objective, assessing whether the organization's actions or omissions amounted to a gross breach of the duty of care. This shift simplifies prosecutions and makes it easier to hold organizations accountable for systemic failings without the need to prove the subjective mental state of individuals within the corporation (Law Commission Report, Legislating the Criminal Liability of Corporations Law Commission, 1996). The introduction of the senior management test under section 1(3) represents another improvement and it provides that "an organisation's activities are managed or organised by its senior management if the persons who play significant roles in – (a) the making of decisions about how the whole or a substantial part of its activities are to be managed or organised, or (b) the actual managing or organising of the whole or a substantial part of those activities" (Corporate, 2007b). Liability under this provision arises when senior management's contribution to the gross breach of duty is deemed substantial. For instance, if senior management ignored reports of unsafe working conditions, failed to act on known risks, or inadequately prioritized health and safety policies, their inaction could satisfy the requirements of s. 1(3). Unlike the identification doctrine, this test focuses on systemic involvement rather than requiring proof of direct intent or culpability.

While the CMCHA 2007 represents a significant improvement over the identification doctrine, it has limitations. First, the Act applies exclusively to fatalities caused by gross breaches of health and safety duties, excluding other forms of corporate wrongdoing—such as fraud, financial misconduct, and environmental harm (Tombs and Whyte). This narrow focus fails to address the broader spectrum of systemic failings evident in cases like *Barclays*, where the primary issue was financial misconduct rather than health and safety breaches. Second, the Act targets organizations rather than individuals, meaning that senior managers or directors cannot be held personally liable under the CMCHA 2007. This exclusion may reduce the deterrent effect on key decision-makers, particularly in cases where systemic failures arise from negligence or poor governance. Third, proving that senior management played a significant role in the failings can still be challenging, particularly in large, decentralized organizations where decision-making authority is dispersed across multiple governance layers. This partial reliance on the identification doctrine may hinder the Act's effectiveness in holding large corporations accountable. Fourth, the requirement for a 'gross breach' of duty imposes a high evidentiary threshold, potentially limiting the Act's applicability in cases of less egregious, yet still significant, failings (House, 2005).

Finally, while the senior management test represents a step forward, its reliance on proving substantial involvement by senior management perpetuates some of the challenges seen under the identification doctrine. In decentralized organizations, where authority is distributed across multiple layers and committees, proving substantial involvement by senior management can be complex. Furthermore, the definition of senior managers under the senior management test remains vague and lacks specificity, exacerbating the challenges of accountability. This ambiguity weakens its effectiveness, as it fails to provide clear criteria for identifying individuals who qualify as senior managers. Notably, this definition is even weaker than the one established in the *Lennard* case, which provided a more structured understanding of the 'directing mind and will'. In cases like *Barclays*, governance structures fragmented decision-making authority, making it difficult to establish a clear connection to senior management. This highlights the need for a more robust and precise definition of senior management to effectively address systemic failings and prevent accountability gaps.

*The bribery act 2010*

Under the Act, a commercial organisation can be found guilty of an offence if a person associated with the organisation bribes another, intending to obtain or retain business or a business advantage for that organisation (Bribery, 2010a). For there to be any liability, however, the organisation in question must be stipulated as a 'relevant commercial organisation' (Bribery, 2010b). An 'associated person' is seen as an individual who 'performs services for or on behalf of' the organisation', (Bribery, 2010c) with the person being the organisation's agent, subsidiary or employee (Bribery, 2010a). This has been stated to be a 'matter of substance rather than form', (Ministry of Justice, 2011) 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. Section 7 applies to a wide range of individuals who may be committing bribery on behalf of a third-party organisation. To be held as an 'associated person', however, "the perpetrator of the bribery 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" (Ibid, n.d.).

There is no requirement to prove that the activity was committed in the UK or elsewhere. Indeed, there is no need to even show a close connection to the UK as is needed for the other bribery offences (Ministry of Justice, n.d.). Section 7 does not affect the common law rules outlined above and prosecuting bodies must prove a *mens rea* or fault element in addition to the actus reus or conduct element. This common law principle, should still be used instead of the Bribery Act 2010, 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' (Ibid, n.d.).

It is a defence if the relevant commercial organisation can prove that it had in place 'adequate procedures' designed to prevent persons associated with the commercial organisation from bribing another person (Bribery, 2010b). The standard of proof here is a balance of probabilities' (Ministry of Justice, n.d.). Section 7 introduced a failure-to-prevent model, which holds organisations strictly liable for bribery committed by associated persons, emphasizing systemic

accountability rather than individual culpability. By eliminating the need to prove senior management's direct involvement or intent, the provision simplifies prosecutions and aligns liability with the realities of modern corporate structures, where decision-making and operational responsibilities are often decentralized or outsourced. The inclusion of an 'adequate procedures' defence incentivizes organizations to adopt robust anti-bribery frameworks, embedding compliance into corporate culture and fostering initiative-taking risk management (Ibid, n.d.).

This innovation directly addresses the challenges in *Tesco*. In *Barclays*, the decentralized governance structure and the diffusion of decision-making authority created significant hurdles for prosecutors attempting to establish liability under the identification doctrine. The court's inability to attribute the requisite *mens rea* to senior executives exposed the inadequacies of existing liability frameworks in addressing systemic issues within complex organizations. Section 7's failure-to-prevent model shifts focus from individual intent to organizational responsibility, offering a practical solution to these enforcement challenges. Similarly, in *Tesco*, the restrictive definition of senior management under the identification doctrine shielded the company from liability for the actions of lower-level employees. Section 7 expands accountability to associated persons, such as employees, agents, and contractors, ensuring that organizations cannot evade liability by delegating high-risk activities to third parties or mid-level staff. This systemic approach eliminates the accountability gap observed in *Tesco* and aligns liability with the operational realities of modern corporations.

Despite its progressive features, Section 7 is not without its challenges. The ambiguity surrounding what constitutes 'adequate procedures' has created uncertainty for organizations. This lack of clarity mirrors the evidentiary hurdles observed in Barclays, where the subjective interpretation of governance failures impeded prosecution. In the context of Section 7, businesses face similar risks due to inconsistent application and interpretation of the "adequate procedures" defence, potentially exposing them to liability despite sincere compliance efforts. Moreover, section 7 does not entirely replace the common law principle requiring *mens rea*, which can lead to overlaps and potential conflicts in prosecutorial strategies. This duality of frameworks was evident in cases like *Tesco*, where reliance on the identification doctrine hindered corporate accountability due to its narrow attribution of liability to senior management. The coexistence of *mens rea*-based liability and the failure-to-prevent model under Section 7 introduces potential uncertainties for both businesses and enforcement agencies, potentially undermining the overall deterrent effect of the Bribery Act.

The Bribery Act adopts the same definition of senior managers as outlined in the CMCHA 2007. This consistency reinforces the legislative focus on systemic and organizational accountability, moving away from the restrictive focus on individual culpability under the identification doctrine. However, while this alignment promotes continuity across both legal frameworks, it does not solve the limitations derived from the *Barclays* case, where the dispersion of decision-making authority among governance bodies complicated efforts to establish corporate liability. The ambiguity surrounding the definition of senior managers can dilute the effectiveness of the accountability mechanism, as it allows organizations to argue that decision-making authority lies within collective or lower-level structures rather than identifiable individuals. This lack of clarity undermines the robust enforcement of liability and presents challenges in addressing the complexities of modern corporate governance. To enhance the efficacy of Section 7 and similar legislative provisions, future reforms should aim to refine the definition of senior managers and provide clear criteria for attributing liability within decentralized organizational structures. This refinement would bridge the gaps in accountability while maintaining the systemic focus that is critical to addressing corporate misconduct.

*The criminal finances act 2017*

This Act 2017 introduced two strict liability corporate criminal offences of failing to prevent the criminal facilitation of tax evasion. These do not directly cover corporation tax, but they do cover cheating the public revenue and fraudulent tax evasion (Criminal Finances Act, 2017a) and for the first time, ensure that companies can be found liable for facilitating tax evasion. For the purposes of the Act a relevant body is defined as a 'body corporate or partnership' (Criminal Finances Act, 2017b) and an associated person can be either an employee, an agent or anyone performing a service for the relevant body (Criminal Finances Act, 2017a). The aim of the Act is to place relevant bodies under an obligation to ensure that there are reasonable procedures in place to prevent those persons associated with it from deliberately and dishonestly helping others to evade the payment of tax. The first of the two offences provides that a 'relevant body (B) is guilty of an offence if a person commits a UK tax evasion facilitation offence when acting in the capacity of a person associated with B' (Criminal Finances Act, 2017b). The second offence is quite similar but its main difference being that it relates to the evasion of foreign tax. Relevant conduct for both offences can take place either in the UK or elsewhere (Criminal Finances Act, 2017c). Here, the relevant body needs to prove that it had reasonable prevention procedures in place or it "was not reasonable in all the circumstances to expect [the relevant body] to have any prevention procedures in place" (Criminal Finances Act, 2017d). To help identify what would be regarded as reasonable prevention procedures, the Act instructs the Chancellor of the Exchequer to prepare and publish guidance on the types of procedures that relevant bodies could put in place to prevent the facilitation of tax evasion. This is like the requirement in section 9 of the Bribery Act 2010 which instructs the Secretary of State to publish guidance, as outlined above. Guidance on reasonable prevention procedures has been published by HMRC, with this formulated around the six guiding principles of risk assessment, proportionality of risk-based prevention procedures, top level commitment, due diligence, communication, and monitoring and review (HM Revenue and Customs, 2017).

The CFA 2017 represents a natural evolution of the corporate liability framework established by the BA 2010, extending the failure-to-prevent model to address tax evasion facilitation. This continuity underscores a concerted effort to expand corporate criminal liability into areas beyond bribery, ensuring organizations are held accountable for systemic failings that facilitate tax evasion. While the CFA 2017 introduces provisions specifically tailored to tax evasion, its structural alignment with the BA 2010 ensures consistency in addressing corporate misconduct.

Both Acts rely on the failure-to-prevent model, which shifts liability from individual culpability to systemic organizational responsibility. By placing the onus on organizations to prevent misconduct by associated persons, the CFA 2017 extends accountability beyond the confines of senior management, mirroring the BA 2010's systemic focus. Additionally, both Acts define "associated persons" broadly to encompass employees, contractors, and agents, ensuring organizations cannot avoid liability by delegating high-risk activities to third parties. This expansive definition aligns with the operational realities of modern corporations, where complex supply chains and outsourcing are common. A similarity between the two Acts is the inclusion of a defence based on compliance measures. Under the CFA 2017, organizations can avoid liability if they can demonstrate the implementation of 'reasonable prevention procedures', akin to the 'adequate procedures' defence provided in the BA 2010. Both frameworks outline six guiding principles, and the consistency ensures businesses can adopt comprehensive frameworks applicable to both bribery and tax evasion, creating a cohesive approach to risk management.

While the CFA 2017 draws heavily from the BA 2010, it also introduces key advancements. Most notably, the CFA 2017 focuses on tax evasion facilitation, a financial crime distinct from bribery. By

establishing separate offenses for domestic and foreign tax evasion facilitation, the Act broadens its reach to ensure accountability across jurisdictions. This dual approach addresses the global nature of tax evasion and expands the scope of liability compared to the BA 2010. Furthermore, by adopting the term "reasonable" rather than "adequate" procedures, the CFA 2017 introduces greater flexibility for organizations, potentially easing compliance burdens for smaller entities. Moreover, the CFA 2017 includes more detailed guidance on what constitutes reasonable prevention procedures, offering practical clarity for organizations seeking to align with regulatory expectations. However, the definition of 'senior manager' under the CFA 2017 mirrors that used in the BA 2010 and earlier legislation. While this continuity reinforces the systemic accountability focus, it also perpetuates ambiguities associated with the term.

*Economic crime and corporate transparency act 2023*

A failure to prevent fraud offence was introduced by the Economic Crime and Corporate Transparency Act 2023 (ECCTA 2023). Here, large organisations will be held liable if they profit from a fraud committed by an person associated with the organisation (Economic, 2023a). 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 (Ibid). An organisation could be held criminally liable if a fraud offence has been committed by an associated person for the organisation's benefit. The prosecution does not have to illustrate that the organisation's senior management arranged or knew about the fraud. The offence applies to all large corporate bodies and partnerships. Additionally, large non-for-profit organisations such as charities will also be in scope, as well as incorporated public bodies (Economic, 2023a). Only large organisations are in scope, irrespective of their place of incorporation (Ibid). Large organisations will need to meet two out of the three following criteria – more than 250 employees, more than £ 36 m turnover or more than £ 18 m in total assets (A large company).

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 (Economic, 2023b). 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, the Secretary of State has issued guidance on the procedures that can be put in place to prevent fraud (Home Office, 2024). The guidance is similar to that issued by the government for both the failure to prevent bribery and the failure to prevent the facilitation of tax evasion offences. The aim of the guidance is to help organisations evaluate what will amount to "reasonable fraud prevention procedures". To that end, it sets out six general fraud prevention principles that courts will consider when determining whether an organisation had reasonable fraud prevention measures in place.

ECCTA adopts the failure-to-prevent model, holding organizations liable for fraud committed by their associated persons. By defining 'associated persons' broadly—covering employees, agents, subsidiaries, and service providers—the Act ensures that organizations cannot escape liability by outsourcing or delegating high-risk activities. The Act also allows organizations to avoid liability by demonstrating the implementation of 'reasonable procedures' to prevent fraud. This defence aligns with the 'adequate procedures' defence under the BA 2010, ensuring consistency across the legislative framework.

One of the most significant features of the ECCTA 2023 is its strategic focus on large organizations, recognizing their substantial economic influence and the systemic harm they can cause if involved in fraudulent activities. This focus addresses gaps highlighted in the *Tesco* case that demonstrated how lower-level misconduct evaded accountability under the restrictive identification doctrine. Similarly, the *Barclays* case underscored how decentralized governance structures and the diffusion of decision-making authority complicated efforts to attribute liability to senior managers. The ECCTA's emphasis on systemic accountability seeks to close these gaps, ensuring large organizations take responsibility for failures in governance and compliance. Moreover, this focus on large organizations aligns with the broader objective of mitigating the economic ripple effects of fraud. The financial misconduct observed in *Barclays*, for example, revealed how corporate failures could undermine public trust and destabilize market integrity. By requiring robust fraud prevention measures, the ECCTA aims to prevent large-scale misconduct and its associated economic consequences, thereby restoring confidence in corporate governance and accountability.

ECCTA 2023, despite being a significant advancement in corporate criminal liability, retains several limitations that were evident in its predecessors, such as the BA 2010 and the CFA 2017. While the Act builds upon the failure-to-prevent model and addresses specific misconduct like fraud, it does not overcome fundamental issues in its legislative framework, leaving areas of uncertainty and inconsistency. One notable limitation is the ambiguity surrounding the "reasonable procedures" defence. As seen with the 'adequate procedures' defence in the BA 2010 and the 'reasonable prevention procedures' requirement in the CFA 2017, the lack of precise statutory guidance on what constitutes 'reasonable procedures' creates compliance challenges for organizations. This ambiguity leaves corporations uncertain about the standards they must meet to avoid liability, resulting in a potential uneven application of the law. Smaller organizations may struggle to interpret and implement compliance frameworks, thereby increasing the risk of exposure to liability despite genuine efforts to align with regulatory expectations.

Another issue is the coexistence of the failure-to-prevent model with the traditional mens rea-based liability framework under common law. While the failure-to-prevent model shifts the focus to organizational responsibility, the *mens rea* framework continues to attribute liability based on individual intent. This duality creates overlaps and conflicts in prosecutorial strategies, leading to inefficiencies in enforcement. Cases like *Tesco* and *Barclays* underscore how reliance on the *mens rea* standard under the identification doctrine often impedes successful prosecutions due to its narrow focus on senior management.

Additionally, the ECCTA perpetuates reliance on the same definition of "senior managers" as used in the BA 2010 and CFA 2017. This definition fails to fully account for the decentralized and collaborative decision-making processes typical of large corporations. In cases like *Barclays*, where governance structures were fragmented, the difficulty in identifying a single individual as the 'directing mind and will' highlighted the challenges of attributing liability. By retaining this definition, the ECCTA 2023 risks diluting its accountability mechanisms, as organizations may argue that responsibility lies within lower-level or collective structures, thereby evading liability.

Moreover, while the ECCTA 2023 targets large organizations, its exclusion of smaller entities limits its scope. Smaller organizations collectively contribute significantly to economic activity and are not immune to misconduct, yet they are often left outside the purview of these legislative frameworks. This exclusion creates an enforcement gap, as misconduct in smaller entities can have cumulative adverse effects on market integrity and public trust.

*Criminal justice bill 2024*

The Criminal Justice Bill 2024 is at the report stage and has not yet been formally enacted (UK Parliament, 2024). It is anticipated to target specific areas of corporate crime that have historically been challenging to regulate effectively. Clause 16 of the Criminal Justice Bill 2024 (CJB 2024) introduces criminal liability for bodies corporate and partnerships when a senior manager commits an offence within the scope of their actual or apparent authority (Criminal, 2024a). The provision seeks to hold organizations accountable for offences committed by

senior managers acting on behalf of the organization. While the broader CJB 2024 emphasizes the failure to prevent model, Clause 16 retains a focus on senior manager liability attribution. By doing so, it maintains a connection to the identification doctrine. However, this approach risks replicating the limitations of the identification doctrine, particularly in organizations with distributed decision-making structures, where authority is delegated across multiple levels or committees.

A central challenge with Clause 16 lies in its reliance on senior managers acting within their actual or apparent authority—powers explicitly granted by the organization or those implied by their position. This creates significant ambiguity, especially in modern corporations where decision-making authority is often delegated across multiple layers and individuals. Proving the scope of such authority and its connection to the misconduct often becomes a major enforcement challenge. This limitation has been shown in Barclays case. In this case, decision-making authority was delegated among the board, governance committees, and senior executives. This collective structure made it difficult to identify any single individual as the corporation's 'directing mind and will '. Consequently, despite evidence of systemic governance failures, *Barclays* avoided liability under the identification doctrine because no specific individual could be shown to embody the corporation's authority or intent (See, n.d.). Similarly, in Tesco case, a store manager failed to remove outdated promotional materials, but their actions were not attributed to *Tesco* because the manager lacked sufficient seniority and delegated authority to represent the organization's will. Cases like *Kent* further emphasize the evidentiary burden on prosecutors when dealing with delegated authority. In *Kent*, fraudulent activities by senior managers were only linked to the company after significant hurdles were overcome to prove that these managers acted within their delegated roles. The case underscores how organizations can shield themselves by fragmenting authority, making it challenging to attribute liability to a single manager or executive. Therefore, the reliance on proving a senior manager's authority and its scope perpetuates accountability gaps, especially in decentralized organizations where authority is broadly delegated to committees, teams, and operational units.

Another significant issue is the vague definition of senior managers. Clause 16 replicates the definition of senior managers in the BA 2010, CFA 2017 and ECCTA. It defines 'senior manager', in relation to a body corporate or partnership, means 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 partnership are 20 to be managed or organised, or (b) the managing or organising of the whole or a substantial part of those activities (Criminal, 2024b). This definition lacks clarity and specificity, making it difficult to determine who qualifies as a senior manager. In modern corporate governance, decision-making often occurs across multiple layers, including general meetings, boards of directors, and management teams, with responsibility frequently distributed among specialized committees, operational teams, and external agents and the decision-making is a collective process. For instance, in the *Barclays* case, decision-making was heavily distributed among various governance bodies, making it difficult to pinpoint any single individual or group as the targeted senior manager. As a result, Barclays was able to evade liability under the identification doctrine, despite clear evidence of systemic governance failures (See, n.d.). Clause 16 attempts to address these gaps by focusing on broader organizational accountability, but it still fails to provide clear statutory guidance on what constitutes a senior manager. Moreover, terms like "substantial parts" are undefined, creating ambiguity about whether mid-level managers, regional leaders, or other roles qualify. Without clearer criteria, corporations can argue that certain roles do not meet the threshold of seniority, thereby escaping liability. These ambiguities weaken its effectiveness in holding organizations accountable for collective decision-making and systemic misconduct. This approach continues to tie liability to individual actions rather than addressing systemic issues, perpetuating the limitations of the identification doctrine.

While the previous legislations such as the ECCTA 2023 adopts the failure to prevent model, addressing the limitations of the identification doctrine by shifting focus from individual actors to broader organizational systems, the CJB 2024 retains a traditional approach to criminal liability. Clause 16 of the CJB 2024 continues to rely on senior manager liability, tying organizational accountability to the actions of specific individuals. This approach does not fundamentally alter the existing model of criminal liability attribution for organizations where a senior manager commits an offense, leaving the underlying challenges of the identification doctrine—such as accountability gaps in decentralized governance structures—unaddressed.

*Commentary*

The legislative reforms spanning the CMCHA, BA 2010, CFA 2017, ECCTA, and the proposed CJB 2024 collectively represent significant strides toward addressing the limitations of the identification doctrine in corporate criminal liability. The CMCHA 2007 was a major milestone, targeting organizational failings and focusing on gross breaches of duty rather than intent. It shifted liability from individual actions to collective accountability, reflecting the complexity of modern corporations. Similarly, the BA 2010 introduced the groundbreaking failure-to-prevent model, which expanded liability to associated persons and incentivized the implementation of anti-bribery frameworks. The CFA 2017 and ECCTA 2023 extended this model to new areas, such as tax evasion and fraud, further promoting accountability across various corporate sectors. These reforms collectively ensure that organizations cannot evade liability by delegating high-risk activities or responsibilities to third parties or lower-level employees. Moreover, the introduction of defences such as "adequate procedures" in the BA 2010 and "reasonable procedures" in the CFA 2017 and ECCTA 2023 has incentivized organizations to adopt robust compliance frameworks. These defences promote an initiative-taking culture of risk management and compliance, pushing organizations to prioritize ethical conduct and prevent misconduct. Furthermore, the ECCTA 2023's focus on large organizations reflects a strategic shift, recognizing their potential for systemic harm and significant economic influence. By setting specific thresholds for scope—based on employee count, turnover, and asset value—the Act ensures proportional accountability while balancing compliance burdens.

Despite these advancements, significant challenges remain. One persistent issue is the vague and inconsistent definition of 'senior manager' across the legislative framework, as seen in the CMCHA 2007, BA 2010, CFA 2017, ECCTA 2023, and CJB 2024. This ambiguity complicates efforts to attribute liability, particularly in decentralized organizations where decision-making authority is diffused. The reliance on terms such as 'substantial part' leaves room for interpretation, allowing corporations to argue that certain roles fall outside the scope of senior management, as seen in cases like *Barclays*. Another limitation is the evidentiary burden posed by terms like 'gross breach' under the CMCHA 2007 and 'reasonable procedures' under later statutes. Proving that an organization's actions amounted to a gross breach of duty or that compliance measures were insufficient often requires extensive evidence, creating enforcement challenges. The *Barclays* case highlighted how decentralized governance structures can obscure accountability, allowing corporations to evade liability under the identification doctrine, despite systemic governance failures. Furthermore, the CJB 2024, while introducing targeted provisions for senior manager liability, retains the traditional model of attribution under the identification doctrine. Clause 16's reliance on proving a senior manager's authority perpetuates accountability gaps, particularly in complex organizations where authority is distributed among committees and operational teams. This approach does not fundamentally address the systemic failings evident in cases like Tesco and Barclays, where decision-making authority was fragmented, complicating efforts to attribute liability.

## Conclusion

The evolution of corporate criminal liability in the UK reflects a critical response to challenges identified in high-profile case studies, including *Lennard, Kent, Haulage, Bresler, Tesco* and *Barclays*. These cases underscored the limitations of the identification doctrine. A critical limitation of the doctrine is its narrow focus on senior management, which excludes middle-level employees and operational managers from liability. This issue was evident in *Lennard* and *Tesco*, where misconduct at lower levels escaped accountability because those involved were not part of the corporation's 'directing mind and will'. The gap in operational accountability is further highlighted by the *Tesco* case, where a store manager's actions directly impacted consumers. Despite this, Tesco avoided liability due to the rigid confines of the identification doctrine, which failed to account for failures at the operational level. Similarly, decentralized corporate structures, as seen in *Barclays*, pose additional challenges. The fragmentation of decision-making across governance layers made it difficult to attribute liability to any single individual, exposing a significant accountability gap that allowed the corporation to evade responsibility. Another key finding is the high threshold for proving *mens rea* under the identification doctrine. In *Barclays*, prosecutors struggled to demonstrate deliberate intent among senior executives due to the collective nature of decision-making. This evidentiary challenge further highlights the limitations of the doctrine in addressing corporate misconduct in complex, modern organizations. The *Kent* case set an important precedent by holding that a managing director's intent could be attributed to the corporation itself. Nonetheless, the practical difficulties of applying this principle in decentralized corporations, as shown in *Barclays*, underscore the challenges of ensuring accountability within the current framework.

To deal with these issues identified from case law, subsequent legislations, including the BA 2010, the CFA 2017, the ECCTA 2023, and the proposed CJB 2024, shifted the focus from individual culpability to systemic accountability, addressing some of the gaps highlighted in these cases. The legislative reforms introduced the failure-to-prevent model, addressing these gaps by imposing strict liability on organizations for misconduct committed by associated persons. BA 2010 pioneered this model, which was extended to tax evasion under the CFA 2017 and to fraud under the ECCTA 2023. These frameworks broadened the scope of liability by including employees, agents, and contractors under the definition of associated persons, ensuring organizations cannot evade accountability through outsourcing or delegation. Additionally, the introduction of defences such as 'adequate procedures' and 'reasonable procedures' incentivized organizations to implement robust compliance measures to mitigate risks.

Despite these advancements, several limitations remain. The ambiguity surrounding compliance standards, such as what constitutes 'adequate" or "reasonable' procedures, creates uncertainty for organizations. Furthermore, the reliance on the definition of senior managers, shared across these frameworks, perpetuates challenges in attributing liability in decentralized organizations. For example, in *Barclays*, the dispersion of decision-making authority among governance bodies created difficulties in holding senior managers accountable. Moreover, the coexistence of common law *mens rea* based liability with the failure-to-prevent model risks overlapping enforcement strategies. Addressing these challenges requires detailed statutory guidelines to clarify compliance requirements and refinement of the senior manager definition to reflect modern governance structures. Additionally, harmonizing *mens rea*-based liability with the failure-to-prevent model would ensure consistent enforcement and reduce overlaps in prosecutorial strategies.

## CRediT authorship contribution statement

**Yuyun Ma:** Writing – original draft. **Ryder Nic James:** Writing – original draft.

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Professor Nic Ryder is the editor in chief of the Journal and will not be involved in the reviewing or editorial process.

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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.

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