CORRUPTION WATCH

OFF THE HOOK: CORPORATE IMPUNITY AND LAW REFORM IN THE UK

September 2015

Corporate Liability Reform: Overview and Options

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EXECUTIVE SUMMARY

Corporate liability reform in the UK is long overdue. The inadequacy of the UK's corporate liability laws has been recognised by the government, the Law Commission and by international bodies such as the OECD. The UK's current laws are based on an outdated model that is not fit for the purpose of holding 21st century globalised companies accountable under the law. These laws:

- seriously disadvantage smaller companies who are far easier to prosecute than larger companies;
- create perverse incentives for large companies to insulate their boards from knowledge of wrongdoing, thus weakening accountability within corporations;
- provide little real deterrent against corporate wrongdoing.

As a result, the UK lags far behind other commercial centres, such as the US, in prosecuting corporate economic crime.

In 2012, the government recognised in introducing Deferred Prosecution Agreements that "*options for dealing with offending by commercial organisations are currently limited and the number of outcomes each year, through both criminal and civil proceedings, is relatively low.*" The Law Commission has called UK corporate liability laws "*inappropriate and ineffective*." Most recently the government recognised in its July 2015 consultation on introducing a new corporate offence of failure to prevent tax evasion that "*under the existing law it can be extremely difficult to hold .. corporations to account for the criminal actions of their agents*." Introducing a new offence of failure to prevent economic crime was a key manifesto commitment of the Conservative Party in the May 2015 elections.

The decision on 28th September 2015 to drop further corporate liability law reform on the basis that "*there is little evidence of corporate economic wrongdoing going unpunished*" is therefore incomprehensible, misguided and a serious failure of political will. Corporate liability law reform, which has been muted for over a decade, must not shelved once again.

This paper looks at the background to and arguments for corporate liability reform and the options for reform. It concludes that an extension of the offence of failure to prevent under Section 7 to economic crime, and possibly more broadly to serious crime, would be a significant step in the right direction of improving UK corporate liability laws. A failure to prevent model of corporate liability would also help ensure that the UK is able to comply with EU Directives which require liability for corporations where there has been "lack of supervision or control". It is questionable whether the UK is currently compliant with several EU Directives which require liability for corporations without such changes to its corporate liability regime. However, extending Section 7 should be done in tandem with a broader and comprehensive review of the UK's corporate liability laws to ensure coherence and consistency in how corporations are held to account.

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CORPORATE LIABILITY REFORM: OVERVIEW AND OPTIONS

BACKGROUND AND CONTEXT

The UK needs changes to its corporate liability laws: on this there is considerable consensus. In the context of the financial crisis and recent scandals about the involvement of UK financial institutions and companies in tax evasion, rate-rigging, false accounting, corruption and money laundering, there is increasing public interest in ensuring that corporations are held to account for their part in these crimes and a common perception that this is not yet happening on any significant scale.

Academics, practitioners and the government have recognised for some time that the current laws relating to corporate liability which are largely based upon the "*identification principle*"[1] are totally inadequate for prosecuting companies, particularly large companies. The identification principle requires the prosecutor to show that a person who is the "*directing*" or "*controlling*" mind of the company, ie someone at the most senior levels of the organisation, intended to commit the criminal act in order to prove a company guilty of that offence.

In the context of large global companies of the modern era, this has proved almost impossible and convictions of large corporations in the UK have been few and far between. Critics have argued that the effect of this principle is that the larger a corporation is, the less likely it is to be prosecuted. In effect, the more economically powerful a company is, the less accountable it is before the law. This is the justice gap.

Law Commission work on corporate liability

In August 2010, the Law Commission produced a consultation paper, Criminal Liability in Regulatory Contexts, that described the identification principle as "an inappropriate and ineffective method of establishing criminal liability of corporations." It noted that the principle created unfairness between large companies and small ones, as it is significantly easier to establish the directing mind in small companies.

The Law Commission proposed in that paper that corporate liability should continue to be decided on a statute by statute basis and that the courts should not presume that the identification principle should apply. Many of the responses to that consultation disagreed with their approach. Many said that exhorting courts not to apply the identification principle in the absence of legislation clarifying the will of Parliament would not work. Judgements on this issue since the Law Commission's report would seem to bolster their concerns and reassert the primacy of the identification principle.[2] Many also argued for clarification of the law so that companies could be clear as to whether they were vulnerable to criminal prosecution.

The Law Commission's plan to undertake a full scale review of corporate liability was dropped from its current 3 year work programme which started in the summer of 2014, suggesting that it is not a political priority.

Deferred Prosecution Agreements and corporate liability

In May 2012, the Ministry of Justice opened a consultation on Deferred Prosecution Agreements (DPAs) for financial crime. DPAs are used extensively in the US, where there are stringent corporate liability laws based on vicarious liability, and bring in significant sums of money to the US Treasury. Between 2013 and 2014, the US Department of Justice and Security and Exchange Commission between them brought in over $1 billion worth of fines in relation to the US Foreign Corrupt Practices Act.

A particular rationale behind introducing DPAs in the UK was to make it easier for prosecutors to tackle economic crime. The Ministry of Justice acknowledged that:

> "*Options for dealing with offending by commercial organisations are currently limited and the number of outcomes each year, through both criminal and civil proceedings, is relatively low. In part, this is because of difficulties with the law of corporate criminal liability, which does not reflect the 21st century commercial organisation.*"

The foreword to the consultation acknowledged that because of the difficulties of proving criminal liability, "*too few organisations[have been] held to account for their crimes, and too many victims [have been] waiting in vain for restitution.*"[3]

A significant number of the responses to the MOJ's consultation, particularly from private law firms, queried whether DPAs could be a panacea for the lack of clarity in the corporate liability laws and why the MOJ was bringing in Deferred Prosecution Agreements without first addressing the legal architecture.[4] Commentators have also argued that it is unlikely that companies will wish to enter into DPAs "*where the enforcement authority would struggle to achieve the company's conviction at trial.*"[5] The success of the DPA regime therefore depends on whether corporate liability laws allow for companies to be successfully prosecuted in the first place. A majority of lawyers interviewed by the Law Society Gazette in October 2014 believed that "*the success of DPAs in the UK is linked to reforming corporate criminal liability across the board*".[6] David Green has recently said that "*one more step necessary to make DPAs mainstream … involves moving away from the identification principle of corporate liability in English law and embracing something closer to vicarious liability, as in the USA.*"[7]

When the legislation introducing Deferred Prosecution Agreements was put before Parliament, two Labour Lords (Lord Beecham and Lord Rosser) sought an amendment which would have introduced a broad corporate liability offence. The amendment sought to include in the Crown and Courts Act the following clause: "*Criminal liability: A corporation may be held criminally liable for the illegal acts of its directors, officers, employees, and agents where the act is committed during the performance of duties which* *are intended, at least in part, to benefit the corporation.*" This wording is based on US corporate liability laws.

The government rejected the Amendment. Lord Ahmad for the government said in the Lords in December 2012 that the amendment would introduce "*a new and very broad basis for corporate criminal liability*". He went on to say that whether the "*current law of corporate criminal liability can be improved upon by employing the new "failure to prevent" formulation incorporated in the Bribery Act 2010 … is a matter for long-term examination*".

UK Bribery Act changes the corporate liability landscape

Under pressure from the OECD, the government introduced the Bribery Act 2010. The OECD Anti-Bribery Convention requires parties, under Article 2, to establish liability for legal persons for foreign bribery offences. In order to meet this requirement, after repeated criticism from the OECD about the identification principle,[8] the Bribery Act introduced a new offence under Section 7, of "*failure to prevent*" bribery which was specifically aimed at corporate offending. This is a strict liability offence, which means the prosecutor does not have to prove intent. But this is mitigated by a defence that the company had adequate procedures to prevent Bribery.

While this has partly satisfied the OECD,[9] the identification principle remains the principal form of corporate liability governing substantive offences where the prosecutor must prove a mental element (which includes intention, recklessness, or knowledge). For instance, a prosecutor wishing to bring charges against a company under Section 6 of the Bribery Act, which prohibits bribery of a foreign official, would be bound by the identification principle. In practice this means that while a prosecutor could bring charges under both Section 6 and 7 against a smaller company, they would realistically only be able to bring charges against a large company under Section 7. The Bribery Act arguably creates an uneven playing field for companies depending on their size, as long as the identification principle attaches to the substantive offences.

The "failure to prevent" model however has become increasingly recognised as an alternative and potentially attractive model for corporate liability for economic and other offences.

Extending Section 7 to all economic crime

The Director of the SFO, David Green, has made strong public arguments for extending Section 7 of the Bribery Act to all economic crime since he took office in August 2012. In April 2013, Green stated at a colloquium at the LSE that he had "*repeatedly raised the question of whether the bar in relation to corporate criminal liability is set too high in English law*". He pointed out that the identification principle creates perverse incentives for board-level officers to seal themselves off from knowledge of wrongdoing, and that a decision to engage in wrongdoing might be split between different individuals in a firm with different levels of knowledge making it hard to prove that one person had the necessary intent.[10] Green proposed extending section 7 of the Bribery Act to "*a broad range of other criminality committed by a employee or agent in the course of their employment*".[11]

In June 2014, in an interview with the Evening Standard, the Solicitor General said that "*officials across Government are looking very closely at corporate criminal liability, and in particular an offence of failure to prevent financial crime*".[12] This was confirmed by the Attorney General in a speech in September 2014 at the Cambridge Economic Crime Symposium.[13] And in December 2014, the National Anti-Corruption Plan specifically tasked the Ministry of Justice with examining "*the case for a new offence of a corporate failure to prevent economic crime and the rules of establishing corporate criminal liability more widely.*"[14] The plan stated that "*in addition to bribery, there are likely to be other forms of economic crime for which it is appropriate to ensure that senior corporate actors are sufficiently accountable.*"

In April 2015, the Conservative manifesto committed the Conservatives to "*making it a crime if companies fail to put in place measures to stop economic crime, such as tax evasion, in their organisations and making sure that the penalties are large enough to punish and deter.*"[15] In July 2015, the HMRC opened a consultation on whether to introduce a new corporate offence of failure to prevent criminal tax evasion.[16] In that document, it recognised that "*under the existing law it can be extremely difficult to hold .. corporations to account for the criminal actions of their agents because of the need under existing law to prove the involvement of the most senior members of the corporation.*" The HMRC consultation noted that these difficulties are "*not unique to tax evasion*" and referred to the government's work under the National Anti-Corruption plan to look at a failure to prevent model in relation to economic crime. However, on 28th September 2015, the government announced through a parliamentary question that it had decided not to undertake any further work, on the grounds that "*there have been no prosecutions under the Bribery Act offence and there is little evidence of corporate economic wrongdoing going unpunished.*"[17]

ARGUMENTS FOR STRONGER CORPORATE LIABILITY IN THE UK

The key arguments for reform of the UK corporate liability laws are as follows:

1. There is an issue of public confidence: the UK lags behind other large financial centres like the US in bringing action against corporations in the field of white collar crime. This is in large part due to the much stronger corporate liability laws in the US which are aggressively enforced.

2. It is inconsistent for there to be effectively stronger corporate liability for bribery, in the form of Section 7 of the Bribery Act, than there is with other financial and economic crime and arguably with other corporate crime in general. Financial and economic crime have as much impact on victims and on the public as does bribery.

3. Fraud and other economic crimes often go hand in hand with corruption. In some instances it might be considerably easier to prove a company has engaged in fraud than corruption. Extending clear corporate liability to other economic crime would significantly improve the prosecutor's tool kit for fighting such crime.

4. The current identification principle for corporate liability is widely recognised to be unfit for the

purpose of prosecuting large complex global corporations. It results in real unfairness to smaller companies who are at far greater risk of prosecution under this principle.

5. Proving the identification principle imposes an additional cost to enforcement authorities, who have to spend considerable extra resources and time to show that there was a controlling mind at a senior level of the organisation.

6. The identification principle provides a perverse incentive for companies to insulate their Board level Directors from knowledge of day to day workings of the company thus reducing accountability within corporations.

7. The new Deferred Prosecution Agreement regime is unlikely to take off without reforms to the corporate liability laws allowing for a greater risk of prosecution to corporations. DPAs are available for a host of economic crimes for which there is no effective corporate liability other than the identification principle.

THE OPTIONS FOR REFORM

A. Extending Section 7 to all economic crime

This could be achieved by amending existing legislation on economic crime or by creating a new stand alone offence of failure to prevent economic crime which would require pre-legislative scrutiny and public consultation.

PROS:

1. This is a relatively straightforward solution to an immediate problem – which prior to the 2015 election had broad backing across the political spectrum.

2. Section 7 is based on a model that correctly identifies the actual wrongdoing committed by a company. Many lawyers argue that a company cannot itself commit a fault crime. As Gobert and Punch put it: "*What is needed is a theory of criminal liability that captures the distinctive nature of corporate fault … Typically, the company's fault will lie in its failure to have put into place protective mechanisms that would have prevented harm from occurring. It is for this failure that the company bears responsibility for the harm.*"[18]

3. Section 7 has encouraged companies to put in place policies to prevent bribery and therefore plays an important role in encouraging good practice.

4. Extension of Section 7 to economic crime would cover the most significant areas of corporate offending that are subject to the restrictive identification principle. Many regulatory offences are covered by a version of vicarious liability already as they do not require proof of a mental element.

5. Companies regulated by the Financial Conduct Authority already have a duty to prevent financial crime. They also have a duty to have Senior Management Arrangements, Systems and Controls in place to do so. Therefore it is questionable whether extending Section 7 to all economic crime would significantly increase the regulatory burden of companies already regulated. On the contrary, it could be argued that introducing a criminal offence of failure to prevent financial crime would significantly enhance good corporate governance already required by regulation by increasing the tools to police it and the risks to the company of failing to have good corporate governance procedures in place.

6. The Sentencing Guidelines for Corporate Offenders, which came into effect from October 2014 include a number of financial crimes including six fraud-related offences. Deferred Prosecution Agreements also cover a host of economic crimes other than Bribery. It makes sense to ensure that corporate liability is harmonised across the range of economic offences where the Sentencing Guidelines and DPAs apply.

7. There is an international trend towards corporate liability based on failure to prevent or supervise, particularly in EU jurisdictions such as Belgium, Italy and Spain. The US and Australia already have a far broader approach to corporate liability.

8. The HMRC is consulting on a new corporate offence of failure to prevent tax evasion, indicating that the model is gaining traction within government as a suitable model for liability. [19] The Consultation noted that a Section 7 style offence offered "*the best model*" as it was recognised by corporations, and therefore would "*help to ensure consistency and minimise the burdens on corporations.*"

CONS:

1. Section 7 is still, 4 years on from its introduction, an untested form of corporate liability as there has yet to be a prosecution under it. The key untested areas of the offence are:

i) *to what extent companies will be liable for offences carried out by third party associates.* Companies rarely pay bribes directly but usually through intermediaries, whether agents, subcontractors, subsidiaries or joint venture partners.[20] The OECD Working Group on Bribery expressed concern that Section 7 lacks clarity as to whether a company would be liable for an agent who pays a bribe on behalf of a company but otherwise performs no other services, and where a company fails to prevent bribery committed on its behalf by a second company such as a subsidiary.[21] Clearly these are potentially large loopholes.

ii) *how easy will it be for companies to use the 'adequate procedures' defence to escape liability.* In general, where wrongdoing has occurred, it would appear that a company's procedures can clearly be argued to have been inadequate. However, some practitioners believe that it will be difficult for prosecutors to persuade juries that large international companies which have spent significant sums of money on compliance regimes certified by external lawyers did not in fact have adequate procedures in place.

2. Extending Section 7 to economic crimes continues a process of law reform that is essentially on a piecemeal basis and lacks overall coherence and consistency.

3. Some substantive offences will remain subject to the identification principle, so that there will be uneven application of the law, as with the Bribery Act itself.

4. The MOJ would arguably need to provide guidance on adequate procedures for each offence covered by the extension which may be perceived as over-regulation, though FCA rules may already cover much of this ground.

5. Responsibility for prosecution of financial crime is split between the SFO and the FCA (which is funded by fees from the firms it regulates) and the creation of a new offence that cross-cuts the work of both may exacerbate existing co-ordination issues. Some have argued that the FCA's prosecution functions should be transferred to a beefed up SFO to deal with existing problems while the Treasury Committee has called for a formal and comprehensive framework to deal with it.[22] The HMRC has noted in its consultation on a new offence that the proposal to extend Section 7 to all economic crime is "*a complex issue particularly where the same conduct may be addressed by criminal sanctions or civil sanctions under a regulatory regime*."[23] However, it is not clear to what extent the FCA could impose criminal sanctions for the same types of economic crimes being considered by the government for a failure to prevent economic crime offence. And it is arguable that the FCA would struggle to achieve successful prosecutions against companies for economic crimes in the absence of a 'failure to prevent' style offence or corporate liability reform.

B. Creating a wider corporate liability regime.

Wider law reform in relation to corporate liability could be achieved by introducing full vicarious liability as in the US model, or by introducing a model that is based on corporate culture such as those used for federal offences in Australia and in the Netherlands.

US corporate liability

Under US vicarious liability laws , known as *respondeat superior,* companies are liable for the illegal acts of employees and agents wherever those agents act within the scope of their employment and at least in part to benefit the company. These laws have a long history in the US dating back well over a hundred years and are proactively enforced. The US has achieved 2,163 corporate prosecutions since 2000 and brings in a considerable sum of money from corporate fines.[24] In 2013 alone, the US government brought in $8 billion in fines from corporations against costs for enforcement of around$2.8 billion. In 2014, the US brought in closer to $13 billion.[25]

However, US vicarious liability has been controversial in the US where almost all cases against corporations are settled by Deferred Prosecution Agreements (DPAs) or Non Prosecution Agreements (NPAs). This has given rise to arguments that prosecutors act as both judge and jury and are too powerful and that Deferred Prosecution Agreements are losing their deterrent value as the imposition of fines under the DPA regime is increasingly seen as a cost of doing business. Many academics meanwhile argue that *respondeat superior* is "*overbroad*" and unfair as it penalises companies whether or not they have adequate procedures in place or where a rogue employee might have committed an offence.[26]

Australian corporate liability

The Australian federal model of corporate liability[27] has been touted by some as the best form of corporate liability because it addresses corporate fault directly.[28] It legislates that the fault element of an offence can be attributed to a company where the body corporate "*expressly, tacitly or impliedly authorised or permitted the commission of the offence*". This can be established either by proving that the board of directors or a high managerial agent allowed or committed the offence. It can also be established by proving that a corporate culture existed within the body corporate that "*directed, encouraged tolerated or led to non compliance*" with the law OR that the body corporate "*failed to create and maintain a corporate culture that required compliance with the relevant provision.*" However, at the time of the 2012 OECD Working Group on Bribery Phase 3 review, the provisions relating to corporate culture had not been used for a single case whether bribery related or otherwise in the 11 years since they had been introduced.[29]

Corporate liability in EU countries: the Netherlands, Germany and Switzerland

The Netherlands has a long history of corporate liability. A landmark 2003 Supreme Court ruling held that an offence can be attributed to a company where it is reasonable to do so. Factors making it reasonable include whether the conduct took place or was carried out "*in the spirit of the legal entity*", where the offence was committed by an employee of or a person working on behalf of the company, and where the corporate entity could have prevented the conduct but did not, thus "*accepting*" the conduct. Failing to take reasonable care to prevent the wrongdoing can constitute "*acceptance*" of conduct.[30] The law applies to all companies that commit an offence on Dutch territory and to all Dutch companies that commit a crime outside the Netherlands where this offence is also a crime in the territory where the crime is committed.[31] However, corporate prosecutions have been on the decline in the Netherlands. In 1995 it prosecuted 19,728 companies. In 2011, it prosecuted only 4,568.[32] The Netherlands was the only EU country to prosecute Trafigura for the dumping of toxic waste in the Cote D'Ivoire that caused at least 15 deaths and a public health crisis. The company was fined the relatively small sum of Euro 1 million for breaching EU regulations on the shipment of waste and concealing the hazardous nature of waste.[33] It has been criticised by the OECD Working Group on Corruption and the EU for a lack of proactivity with regard to enforcing its anti-corruption laws.[34]

Ironically, Germany which does not have criminal corporate liability, is classed as an active enforcer of the OECD Anti-Bribery Convention[35], and has prosecuted 88 individuals so far for foreign bribery and fined 6 companies. Companies in Germany are held to account under the Administrative Offences Act

(OWiG). Under this Act, companies can be held liable and subject to regulatory fines where the offence is committed by someone with managerial responsibility, where the duties of the company were breached and the company enriched or intended to be enriched. Companies can also be held liable for failure to take reasonable supervisory measures to prevent an offence.[36] Companies such as Siemens and UBS have received substantial regulatory fines in Germany – UBS for Euro 300 million and Siemens for Euro 201 million.[37] A corporate liability bill has been introduced into the North Rhine-Westphalia Bundesrat but yet to be passed and Transparency International Germany have been pushing for corporate criminal liability for some time.

Switzerland, which is the other active enforcer of the OECD Anti-Bribery Convention, introduced corporate criminal liability in 2003 with a new article (102) to the Swiss Criminal Code. Article 102 establishes that a corporation can be found guilty where the act was committed by one or more employees acting for the enterprise within the scope of its business purpose and in the course of conducting its business, OR where an act cannot be traced back to specific individuals because the company's system of governance was inadequate to identify who was responsible for the wrongdoing. It also establishes that a company can be found guilty of criminal wrongdoing where the crime involves criminal organisation, money laundering or bribery and it can be proved that the organisation did not take "*all necessary and reasonable organisational measures*" to prevent it.[38] Switzerland has however been criticised by the OECD Working Group on Bribery who were concerned that, in contrast to the Bribery Act where the burden of proof is on the defendant to prove it had adequate procedures in place, the burden in Switzerland is on the prosecutor to prove that a company or organisation has not taken '*all necessary and reasonable steps*'. Examiners noted that "*the justice system will probably find it difficult to prove defective organisation.. and this could deter prosecutions.*"[39] As of 2014, there was still no case law to satisfy the OECD Working Group on Bribery that the Swiss were compliant with the Working Group's recommendation that Switzerland clarify the concept of 'defective organisation' for law enforcement.[40]

Alstom corruption tribulations: a tale of different corporate liability systems

Alstom, the French power and transport company, has been under investigation in various jurisdictions for paying bribes to foreign officials in Saudi Arabia, Egypt, Tunisia, Malaysia, Indonesia, Singapore, Egypt, Taiwan, Brazil, Italy, Zambia, Poland, Mexico, Latvia, the Bahamas, Hungary, Slovenia and Taiwan. The investigations started in 2004, when Swiss investigators uncovered questionable payments from shell companies based in Switzerland and Liechtenstein.

In Italy, in 2008, two Alstom subsidiaries were ordered to pay Euro 240,000 (£175,000) for not having taken the appropriate organisational measures to prevent the payment of bribes to Italian officials at Enel, an Italian state company.

In Switzerland in November 2011, the Swiss Office of the Attorney General concluded its investigation into two companies in the Alstom group after one, Alstom's Swiss subsidiary, did not oppose a conviction by summary punishment order and the other company was wound up. Alstom was fined Euro 31 million (£22.5 million) for corporate negligence in relation to bribes paid in Latvia, Tunisia and Malaysia.
In the US in December 2014, Alstom pleaded guilty to violating the Foreign Corrupt Practices Act (FCPA) by falsifying its books and failing to implement adequate internal controls. Alstom agreed to pay a fine of $720 million (£463.9 million) after an investigation by the US Department of Justice. Alstom admitted that it had paid more than $75 million to win $4 billion worth of contracts around the world, including Indonesia, Saudi Arabia, Egypt and the Bahamas between 1998 and 2004. Alstom ceased to be listed in the US from 2004 so no charges for any wrongdoing after 2004 were brought.

In France, where the company is headquartered, despite investigations in Mexico, Italy, Switzerland and the UK, and allegations around the world, only 2 investigations were opened in 2007 and 2009 and both were closed, one for insufficient evidence and the other because stricter criminal laws could not apply retroactively. OECD Working Group on Bribery examiners concluded France's failure to open an investigation in Alstom was in part because of "*the limited scope of the liability of legal persons in France, in so far as it does not seem to allow for parent companies to incur criminal liability for the acts of bribery by their subsidiaries*".

In the UK, there were news reports that Alstom was discussing settling with the UK authorities in the autumn of 2011. It is not clear why these discussions broke down but in June 2014, the Serious Fraud Office began criminal proceedings against Alstom for paying $8.5 million bribes in India, Poland and Tunisia. The SFO has also charged two further Alstom subsidiaries, with bribery in Budapest and Lithuania. Alstom has not pleaded guilty and is fighting the charges all of which relate to pre-Bribery Act offences. It is likely that at least some of the charges are likely to be contested on the grounds that the UK's corporate liability laws make the charges untenable. If that is the case, this would suggest that ongoing weakness in the UK's corporate liability regime are likely to create an incentive for companies to fight charges rather than pleading guilty, particularly under statutes that are reliant on the identification doctrine, such as the UK's older corruption laws and sections 1 and 6 of the Bribery Act.

The European Union and corporate liability

The EU requires member states to put in place liability for legal persons in various conventions. One of the earliest of these, the 1999 Council of Europe Criminal Law Convention on Corruption, requires liability for legal persons on two grounds:

- where a person in a "*leading position*" has committed an offence for the benefit of the legal person;

- AND where "*lack of supervision or control*" by a person with a "*leading position*" in the legal person has "*made possible the commission of the criminal offence*".

The UK's identification doctrine would appear compatible with the first ground for legal liability. However, in terms of corruption, it was only with the advent of Section 7 of the Bribery Act that failure to prevent bribery – which is broadly equivalent to a 'lack of supervision and control' offence – became a criminal offence.[41]

This same 2-pronged model of corporate liability is the standard form of liability for legal persons now required in all EU instruments that have a liability for legal persons statute. The 2002 EU Convention on the Protection of the European Communities' Financial Interests for instance requires member states to adopt this model of liability for legal persons for acts of fraud, active corruption and money laundering.[42]A 2008 report from the European Commission on implementation of this Convention noted that in the UK, along with Denmark and Belgium, it was "*doubtful whether they provide for liability where lack of supervision or control made it possible for the offence to be committed or where the offence was committed by a subordinate*."[43] While the UK has now opted out of this Convention,[44] some experts believe that the UK may effectively be bound by it under Article 325 of The Treaty on the Functioning of the European Union.[45]

Other instruments including this form of liability include: the 2002 Council Framework Decision on Combating Terrorism, article 7;[46] the 2004 Council Framework Decision on illicit drug trafficking, article 6;[47] (both of which the UK has opted out of) and the 2011 EU Directive on Human Trafficking, article 5 (which the UK has decided to opt into).[48] The UK has so far chosen not to enact domestic legislation to transpose the 2011 Human Trafficking Directive[49] and it is not clear to what extent the UK can establish full compliance with article 5 of that Directive without either a specific transposing law that establishes liability for legal persons involved in Human Trafficking where there is lack of supervision or control or undertaking broader corporate liability law reform.

The 2014 EU Directive on Criminal Sanctions for Market Abuse also requires member states under article 8 to have liability for legal persons on the standard EU basis. Although the UK has opted out of this Directive, the government has committed to ensuring that the UK criminal sanctions regime for market abuse are at least as strong as the Directive.[50] The Bank of England's, *Fair and Effective Markets Review* of June 2015 recommended that "*the UK criminal sanctions framework for market abuse for individuals and firms be updated*" and particularly extended to a wider range of offences.[51] The Review recommended that the Treasury look at whether further changes are necessary to the corporate criminal liability regime

for market abuse offences once the UK's Ministry of Justice had looked at the options for creating an offence of failure to prevent economic crime. The question is whether the UK's corporate liability framework for market abuse can be as strong as the EU Directive without a shift in corporate liability laws or the introduction of a new corporate offence under market abuse laws to ensure that companies can be held liable where there has been a lack of supervision or control.
The trend in EU Directives to require liability for legal persons based in part on lack of supervision or control suggests that:

- broader corporate liability reform would help the UK meet obligations under EU Directives without needing to enact specific legislation on each EU Directive with regard to liability of legal persons to ensure compliance;
- any broader corporate liability reform must ensure that companies can be held liable for lack of supervision and control which allows an offence to be committed.

PROS

1. Developing a comprehensive law reform of corporate liability would ensure clarity and coherence of the law, rather than having different statutory models of liability for different offences.

2. Comprehensive law reform would address how companies can be liable for substantive offences and clarify how and when fault crimes can be attributed to a company.

3. UK courts already recognise vicarious liability under strict liability regulatory offences such as health and safety and consumer protection laws.

4. There appears to be some significant private sector support for this.

CONS

1. This is a much bigger political ask and the danger is that it would take a long time to reach a consensus on the way forward. Sending this back to the Law Commission would delay any action on it by several years.

2. The different enforcement rates with different models make it hard to establish the effectiveness of each corporate liability regime. It is hard to assess whether this is down to an 'enforcement gap' or inadequacies in the law.

CONCLUSION

Changes to the UK's corporate liability regime are long overdue. Their inadequacy has been recognised by the government itself, the Law Commission and international bodies such as the OECD. Corporate liability laws that are fit for the purpose of holding modern globalised companies to account legally are essential both to act as a real deterrent to corporate crime but also to give the public confidence that corporations are not at the end of the day above the law.

The UK's dismal track record of prosecuting companies is a product of weak corporate liability laws but it also down to a failure of prosecutorial will. At the end of the day, corporate liability laws only have teeth where they are proactively enforced. A review of the barriers to how corporate liability laws are enforced will be essential to any serious corporate liability legal reform.

The 'failure to prevent' model introduced by Section 7 of the Bribery Act is now increasingly recognised as a useful model for holding companies to account. However, its success in doing so remains to be fully tested in the courts. The introduction of a failure to prevent economic crime, or potentially broader to all serious crime, would be a useful first step. But it must be done in tandem with a full review of the coherence of the UK's corporate liability laws. The fact that the UK appears not to be fully compliant with EU instruments requiring criminal liability for legal persons where there has been a lack of supervision or control makes such a review especially important.

REFERENCES

[1] The identification doctrine applies where there is a 'fault' or mental element to an offence. In strict liability offences, such as under consumer protection, health and safety and other regulatory regimes, vicarious liability applies to companies. This means the company is liable for any offences committed by any of its employees. See Celia Well, "Corporate Criminal Liability: Exploring Some Models", Appendix C, Law Commission Consultation Paper, No. 195, *Criminal Liability in Regulatory Contexts,* August 2010.
[2] See: *R v Regis Paper Co Ltd [2012] 1 Cr. App.R. 14, (http://uk.practicallaw.com/4-547-9466?q=*&qp=&qo=&qe=#a508225)*
[3] Ministry of Justice, Consultation on a new took to deal with economic crime committed by commercial organisations: Deferred Prosecution Agreements, May 2012.
[4] Responses to consultation, obtained by Corruption Watch in an Freedom of Information request.
[5] Fisher, Blottiaux, Daniel and Oliveira, "The global financial crisis: the case for a stronger criminal response", Law and Financial Markets Review, May 2013.
[6] http://www.lawgazette.co.uk/law/economic-crime-corruption-conundrum/5044646.fullarticle
[7] David Green, Speech to Cambridge Economic Crime Symposium 2015, 7th September.
[8] OECD Working Group on Bribery, Phase 3 Report on UK Implementation of the Anti-Bribery Convention, March 2012, para 32. The OECD's criticism of the identification principle is that it restricts liability to where the directing mind is represented by a board director or senior manager of a company and that it does not allow for aggregation of the knowledge and states of mind of different people.
[9] The OECD Working Group on Bribery (WGB) said in its Phase 3 report, "*as prosecutors begin to rely on this new provision [section 7], concerns over the identification theory may recede*" (para 34). They expressed concern however over the fact that Section 7 will not apply to non-partnership unincorporated bodies, and the extent to which Section 7 applies in a fashion that creates a level playing field among companies from all Parties to the Convention. In the UK's Phase 1ter report by the OECD WGB, the OECD raised concerns that the substantive offences at Section 1 and 6 of the Bribery Act were still covered by the identification theory (see OECD Working Group on Bribery, United Kingdom: Phase 1ter, December 2010, para 36).
[10] See also Elly Proudlock, who notes that decision making in companies is "*increasingly decentralised*" (see: http://www.inhouselawyer.co.uk/index.php/fraud-and-corporate-crime/10012-establishing-the-criminal-liability-of-corporations)
[11] David Green, Presentation at LSE Colloquium, "The global financial crisis: the case for a stronger criminal response", May 2013, Law and Financial Markets Review
[12] http://www.standard.co.uk/news/politics/firms-could-face-fines-for-failing-to-prevent-fraud-9573279.html
[13] https://www.gov.uk/government/speeches/attorney-generals-keynote-address-to-the-32nd-cambridge-international-symposium-on-economic-crime-on-tuesday-2-september-2014
[14] UK Anti-Corruption Plan, December 2014, action point 36. https://www.gov.uk/government/publications/uk-anti-corruption-plan
[15] https://www.conservatives.com/manifesto
[16] https://www.gov.uk/government/consultations/tackling-offshore-evasion. "*Tackling offshore tax evasion: a new corporate criminal offence of failure to prevent the facilitation of evasion*", 16 July 2015, HMRC Consultation Document.
[17] http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2015-09-09/9735/
[18] Allens Arthur Robinson, *"Corporate culture" as a basis for the criminal liability of corporations*, February 2008, Report for the UN Special Representative of the Secretary General on Business and Human Rights
[19] https://www.gov.uk/government/consultations/tackling-offshore-evasion. "*Tackling offshore tax evasion: a new corporate criminal offence of failure to prevent the facilitation of evasion*", 16 July 2015, HMRC Consultation Document.
[20] Some lawyers might argue that if a UK parent company has adequate procedures in place and no-one in the parent company knew about suspected bribery or intended for bribes to be paid, then a UK company has no liability for bribes paid by a subsidiary under the Bribery Act. See Money Laundering Bulletin, December 2013, Tony Woodcock and Alan Ward of Stephenson Harwood, "Bribery Act Enforcement: walking quietly with a big stick".
[21] OECD Working Group on Bribery, United Kingdom: Phase 1ter, December 2010, para 83
[22] Fisher, Blottiaux, Daniel and Oliveira, "The global financial crisis: the case for a stronger criminal response", Law and Financial Markets Review, May 2013. See also, Treasury Committee, 9th August 2012, "Fixing Libor: Some Preliminary Findings",
[23] https://www.gov.uk/government/consultations/tackling-offshore-evasion. "*Tackling offshore tax evasion: a new corporate criminal offence of failure to prevent the facilitation of evasion*", 16 July 2015, HMRC Consultation Document.
[24] Brandon Garrett, quoted in The Economist, 30th August 2014, "*Criminalising the American company.*" This figures does not includes corporate prosecutions by independent federal agencies.
[25] The Economist, 30th August 2014, "*Criminalising the American company.*"

[26] Sara Sun Beale, "*The Development and Evolution of the US Law of Corporate Criminal Liability*", paper presented at German Conference on Comparative Law, September 2013.
[27] Australian states and territories mostly retain the identification principle leading Clifford Chance to conclude that the landscape for corporate liability in Australia "*remains fragmentary and constantly changing*". See Clifford Chance, March 2015, Corporate Criminal Liability.
[28] Allens Arthur Robinson, *"Corporate culture" as a basis for the criminal liability of corporations*, February 2008, Report for the UN Special Representative of the Secretary General on Business and Human Rights. See also Alistair Craig on the FCPA Blog who says of the Australian model that it is perhaps the best at present, "*as it steers a course between the restrictive directing mind test [England] and the somewhat unfair U.S. vicarious test*". See more at: http://www.fcpablog.com/blog/2013/1/10/differing-views-of-corporate-criminal-liability-complicate-a.html#sthash.lazkxPsj.dpuf
[29] OECD Working Group on Bribery, Phase 3 review on implementing the OECD Anti-Bribery Convention in Australia, October 2012, paras 18-22
[30] Clifford Chance, Corporate Criminal Liability, March 2015.
[31] BF Keulen and E Gritter, "*Corporate Criminal Liability in the Netherlands*", December 2010, Electronic Journal of Comparative Law, vol 14.3,
[32] OECD Working Group on Bribery, Phase 3 review on implementing the OECD Anti-Bribery Convention in the Netherlands, December 2012, para 34.
[33] The Routledge Handbook of White-Collar and Corporate Crime in Europe, Ed Judith van Erp, Wim Huisman, Gudrun Vande Walle, 2015. Amnesty International and Greenpeace have argued that the UK should investigate the company as the UK arm of Trafigura took key decisions that led to the dumping of the waste. Amnesty International Press Release, 25 September 2012, "*Report slams failure to prevent toxic waste dumping in West Africa*," https://www.amnesty.org/en/latest/news/2012/09/report-slams-failure-prevent-toxic-waste-dumping-west-africa/; Amnesty International, 23rd July 2015, "*Too Toxic to Touch: the UK's response to Amnesty International's call for a criminal investigation into Trafigura Ltd*", https://www.amnesty.org/en/documents/eur45/2101/2015/en/.
[34] Transparency International, 20 August 2015, "Enforcement of the OECD Convention on Combating Foreign Bribery", https://www.transparency.org/whatwedo/publication/exporting_corruption_progress_report_2015_assessing_enforcement_of_the_oecd
[35] Transparency International, 20 August 2015, "Enforcement of the OECD Convention on Combating Foreign Bribery", https://www.transparency.org/whatwedo/publication/exporting_corruption_progress_report_2015_assessing_enforcement_of_the_oecd
[36] T Markus Funk, "*Germany's Foreign Anti-Corruption Efforts: Second-Tier no longer*," ZDAR, 1/2014
[37] This compares to fines for UBS in the US of $1.7 billion, in the UK of £160 million for LIBOR and £234 million for FOREX (a total of $606 million).
[38] See Walder Wyss and Partner, "Corporate Criminal Liability comes to Switzerland", No 45, November 2003, https://www.walderwyss.com/publications/280.pdf.
[39] OECD Working Group on Bribery, "Switzerland: Phase 2," December 2004, para 112.
[40] OECD Working Group on Bribery, "Switzerland: Follow up to the Phase 3 report and recommendations", June 2014, para 5.
[41] The 2004 GRECO evaluation of UK compliance with the Criminal Law Convention found that the UK was in compliance with the Convention because under civil laws of negligence a plaintiff could sue a legal person on the grounds that the legal person owed him or her a duty of care and had failed to fulfil it, resulting in damage to the plaintiff. Despite the fact that this would appear to apply to a very limited number of people in relation to corruption, civil law liability satisfied the evaluation team.
[42] http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:41997A0719%2802%29
[43] http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52008DC0077
[44] The UK decided in July 2013 to exercise its right to a block opt out from all EU acts under the third pillar (justice and home affairs), which had not been amended since the Lisbon Treaty came into force. These acts therefore ceased to apply to the UK from 1 December 2014.
[45] http://eulawanalysis.blogspot.be/2015/09/the-italian-job-cjeu-strengthens.html
[46] http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32002F0475. The UK Terrorism Act 2006 which transposes this Directive, only appears to provide for liability of legal persons where there is consent and connivance of a Director (Part 1, 18).
[47] http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32004F0757. The March 2013 evaluation of the transposition of the Directive found that the UK was compliant with regard to the liability of legal persons, showing that there is some inconsistency in EU evaluations of the UK's compliance with the same form of liability for legal persons (http://ec.europa.eu/justice/anti.../evaluation-study-drug-trafficking_en.pdf).
[48] http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32011L0036

[49] It made provisions in the Protection of Freedoms Act 2012 to enact certain parts of the Directive that were not clearly covered by existing UK laws. The government acknowledged that there were other areas which might require secondary legislation, although corporate liability was not among them. See, House of Commons Library Note SN/HA/4324, Human Trafficking: UK responses, January 2014, *www.parliament.**uk**/briefing-papers/sn04324.pdf*
[50] Bank of England, Fair and Effective Markets, June 2015, para 19.
[51] Ibid, para 22, Recommendation 1d.