

CORPORATE CRIMINAL LIABILITY AND THE IDENTIFICATION DOCTRINE – A CRITICAL REFLECTION

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SOMMARIO: 1. Introduction. – 2. The Doctrine of Corporate Criminal Liability. – 3. Failure to Prevent. – 4. Corporate Criminal Liability for Bribery. – 5. Corporate criminal liability for tax evasion. – 6. A civil or criminal approach to corporate criminal liability? – 7. Civil and criminal penalties imposed following the LIBOR and Forex crisis. – 8. Libor – US and UK approaches to enforcement. – 9. Forex – US and UK approaches to enforcement. – 10. Civil penalties – how to make these more effective. – 11. Strengthening Senior Management Certificate Regime (SM&CR). – 12. Conclusion.

Abstract

The identification doctrine frustrates the prosecution of companies for economic crimes in the United Kingdom (UK). This is because, while the identification and attribution of criminal intent may be straightforward in cases concerning small companies, prosecutors are often unable to perform this task when dealing with large, complex organisations. This chapter provides examples of corporate perpetration or facilitation of economic crimes, which have gone unpunished owing to the identification doctrine. This chapter demonstrates that the “failure to prevent” bribery and the “facilitation of” tax evasion offences have provided a more effective method to attribute responsibility to companies for their involvement in these financial crimes. However, this chapter also highlights the weaknesses in the operation of “failure to prevent” offences, including the lack of awareness on the part of businesses potentially affected and lacklustre enforcement efforts. Ultimately, the chapter highlights the value in taking criminal, as opposed to merely civil, action against offending companies, while also acknowledging the importance of retaining a comprehensive suite of civil penalties to tackle less egregious forms of corporate misconduct.

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1. Introduction.

This chapter will examine the doctrine of corporate criminal responsibility and how it has been implemented in the UK. Comparisons will be made to the methods used in the US to punish corporate bodies for criminal actions and recommendations will be made for ways in which the UK can improve its punishment of corporate bodies. The current legal regime for the punishment of corporate criminal actions consists of the identification principle together with recent legislation creating specific criminal offences for tax evasion and bribery. This chapter will examine the pros and cons of both the identification principle and the “failure to prevent” offences for tax evasion and bribery and will consider whether more needs to be done in order to impose criminal liability on corporate bodies for a wider range of financial crimes, such as market manipulation, which led to the financial crisis of 2008 and the later LIBOR and FX benchmark manipulation crises. This chapter will analyse the use of Deferred Prosecution Agreements (DPAs) as a prosecutorial tool when corporate criminal liability has been established. DPAs are used extensively in the US and to a much lesser extent in the UK. Alternative civil penalties to the fines typically imposed on corporate bodies by the FCA for financial misconduct will also be considered and evaluated to determine whether they are a viable alternative to corporate criminal prosecution.

2. The Doctrine of Corporate Criminal Liability.

The doctrine of corporate criminal liability has attracted a great deal of criticism from existing literature, most of which has been directed at the common law rules. The courts began to consider the restrictive application of criminal law to companies in the nineteenth century, which included cases involving public nuisance¹, criminal libel², of statutory offences of non-feasance³ and misfeasance⁴. The doctrine was extended by three Court of Appeal decisions in 1944⁵. The leading authority on the doctrine of criminal liability of companies is *Tesco Supermarkets v Natrass*⁶. This decision has become synonymous with the evolution of the identification doctrine, yet this had already been considered in *Lennard's Carrying Co Ltd v Asiatic Petroleum Ltd*⁷. In *Tesco*, the House of Lords concluded that a

¹ *Pharmaceutical Society v London and Provincial Supply Association Ltd* (1880) 5 App. Cas. 857, 870.

² *Ibid.*

³ *R v Birmingham and Gloucester Ry.* (1842) 3 Q.B. 223.

⁴ *R v Great North of England Ry.* (1846) 9 Q.B. 315.

⁵ See *DPP v Kent and Sussex Contractors Ltd* 1944] 1 K.B. 146; in *R v ICR Haulage Co Ltd* [1944] K.B. 551 and *Moore v Bresler Ltd* [1944] 2 E.R. 575.

⁶ [1972] AC 153.

⁷ [1915] A.C. 705 HL.

company is allowed to provide a defence to a prosecution under the Trade Descriptions Act 1968 (falsely advertising the price of washing powder) provided the company had established an effective procedure to avert the commission of a criminal offence. Whilst giving the leading opinion, Lord Diplock stated that when the court considers how it will identify who has the directing mind of the company it can refer to its memorandum and articles of association, thus also to the directors of the company and other senior company officers⁸. In order for a company to be guilty of a criminal offence, a person who has the directing mind of the company and the self-determination of the company must also have criminal intent. This decision resulted in the creation of the “identification doctrine”, which has become the principal reason that prosecutors are prevented from bringing successful criminal proceedings against companies. Indeed, Lisa Ososky, the current Director of the Serious Fraud Office (SFO), stated that the identification doctrine was a «standard of 1800s when mom and pop ran companies – that is not at all reflective of today’s world»⁹. The restrictive interpretation of the test and the nature of large companies have been highlighted by several subsequent cases including the Herald of Free Enterprise¹⁰, the Clapham rail disaster¹¹, the Transco gas explosion¹², the Hatfield Disaster¹³ and the sinking of the Marchioness¹⁴. In response, the Corporate Manslaughter and Corporate Homicide Act 2007 criminalised corporate harm that leads to a person’s death¹⁵. However, the impact of the 2007 Act is negligible as there have only been 19 corporate criminal charges brought under the 2007 Act between 2008 and 2016¹⁶.

Tesco has restricted the ability of law enforcement agencies and prosecutors to tackle corporate financial crime associated with the 2007/2008 financial crisis. For example, the attribution of criminal responsibility to non-natural persons, following the case of *SFO v Barclays*¹⁷, has been narrowed to a point that it is near impossible to achieve, especially where the criminal activity in question is fraud related. Within his judgment Davis LJ stated «T]hat the individuals had some

⁸ [1972] A.C. 153, at 198.

⁹ C. BINHAM-J. CROFT, *Barclays: the legal fight for a company’s controlling mind*, March 8, 2020, available from <https://www.ft.com/content/f666b592-5a4b-11ea-abe5-8e03987b7b20>, accessed August 6 2021.

¹⁰ *R. v P&O European Ferries (Dover) Ltd* (1991) 93 Cr. App. R. 72 (Central Crim Ct).

¹¹ See generally A. HIDDEN, *Investigation into the Clapham Railway Junction Railway Accident* (Department of Transport, London, 1989).

¹² See *Transco Plc v HM Advocate (No. 3)* 2005 1 J.C. 194; 2005 S.L.T. 211; 2005 S.C.C.R. 117; 2005 G.W.D. 4-40.

¹³ See *R v Balfour Beatty Rail Infrastructure Services Ltd* [2006] EWCA Crim 1586.

¹⁴ See generally House of Commons, *Thames safety inquiry: final report by Lord Justice Clarke*, Cm 4558, February 2000.

¹⁵ Corporate Manslaughter and Corporate Homicide Act 2007, s. 1.

¹⁶ See Crown Prosecution Service *Corporate manslaughter statistics: Freedom of Information Act 2000 Request* (Crown Prosecution Service: London, 2016) at 2-3.

¹⁷ *Serious Fraud Office v Barclays plc and another* [2018] EWHC 3055 (QB).

degree of autonomy is not enough. It had to be shown, if criminal culpability was capable of being attributed to Barclays, that they had entire autonomy to do the deal in question»¹⁸. Thus, the ruling set a very high threshold for prosecutors to meet, whilst allowing companies to evade corporate criminal liability by simply evidencing that the Board retains ultimate control¹⁹. It is important that the attribution of criminal liability begins to mirror modern-day decision making, which within multi-national companies is decentralised, so that companies and senior individuals/top level management are prevented from distancing themselves from the reach of prosecutors and culpability. For this to be achieved, the law needs to change to reflect the complex structures of larger companies. This can be achieved by amending the common law identification doctrine to allow prosecutors the ability to attribute criminal liability to a company based on a wider pool of individuals, or through the creation of a strict liability offence extending the “failure to prevent” model to specific elements of economic crime²⁰.

The then Attorney General Jeremy Wright identified the manipulation of the London Inter-bank Offered Rate (LIBOR) as one of the recent cases where the prosecutors were unable to obtain convictions due to the decision in *Tesco*, noting that other jurisdictions have been able to hold UK companies to account. He describes the effect of the identification doctrine as incentivising «a company’s board to distance itself from the company’s operations», which has «clear implications for the reputation of our justice system»²¹. The SFO did not instigate criminal proceedings against any companies involved in the LIBOR crisis, despite several convictions of low-level traders who argued that their actions were known about and even encouraged by their employers²². For example, Tom Hayes, a former trader for UBS and Citigroup was sentenced to fourteen years (reduced on appeal to 11 years) for his role in the manipulation of LIBOR²³. During his trial, Hayes asserted that managers in the bank were aware of his actions and even condoned them. The SFO has stated that the identification doctrine hindered prosecution of the companies involved: «Tom Hayes was prosecuted in this country for his role in LIBOR manipulation. The operation of the identification doctrine meant that we could not touch the bank for which he worked whilst manipulating LIBOR.

¹⁸ *Ibid.* [122].

¹⁹ H. SPECTOR, *SFO v Barclays: Elusive corporate criminal liability in the UK* (Red Lion Chambers, 3 December 2020), <https://redlionchambers.co.uk/sfo-v-barclays-elusive-corporate-criminal-liability-in-the-uk/>, accessed 22 August 2021.

²⁰ P. RAPPO, *Barclays SFO trial: Is corporate criminal liability dead?* (DLA Piper, 24 March 2020) <https://www.dlapiper.com/en/belgium/insights/publications/2020/03/barclays-sfo-trial/> accessed 22 August 2021.

²¹ J. WRIGHT, *Speech to the Cambridge Symposium on Economic Crime 2016* (GOV.UK, 5 September 2016) <https://www.gov.uk/government/speeches/attorney-general-jeremy-wright-speech-to-the-cambridge-symposium-on-economic-crime>, accessed 30 May 2020.

²² Transparency International UK, *Corporate Liability for Economic Crime: submission from Transparency International UK* (Responses to Call for Evidence, 2017).

²³ See *R v Hayes* [2015] EWCA Crim 1944; [2018] 1 Cr. App. R. 10.

That bank was held to account for Hayes ‘conduct in a New York courtroom, where vicarious liability made the prosecution a much simpler matter’²⁴.

3. Failure to Prevent.

Given this background, it is unsurprising that the government eventually issued a “call for evidence” on corporate criminal liability for financial crime. A total of 62 responses were received between January and March 2017, with the discussion focusing on five potential options for reform:

- extending the scope of the Senior Managers and Certification Regime;
- changing the law so that there are alternatives to proving directing mind complicity in corporate criminal conduct;
- a US style vicarious liability offence, making companies guilty through the actions of their staff, without the need to prove complicity;
- a strict liability failure to prevent model, whereby a company is liable unless it shows it has taken steps to prevent offending; and
- a variant of the failure to prevent model, whereby the prosecution would have to prove criminal intent²⁵.

The MoJ finally published its response to the Call for Evidence in November 2020, concluding that «the evidence submitted was inconclusive. Further work is required before considering any change to the law and the Government has commissioned an expert review by the Law Commission»²⁶. The reason for the three-and-a-half-year delay and general inactivity on the issue is unclear. Perhaps it was due to Brexit or the recent Covid-19 pandemic, or maybe the government was simply «reticent about taking any action that could add to the current burden already being borne by companies and their employees, and the political ramifications of the same»²⁷. Either way, the government’s solution seems to have been to shift responsibility to the Law Commission. Thus, in June 2021, the Law Commission published a discussion paper that solicited respondents’ views on the potential impact of the proposed changes²⁸. At the time of writing, it was widely

²⁴ Serious Fraud Office, *Report to the Cambridge Symposium on Economic Crime 2016* (Serious Fraud Office, 5 September 2016), <https://www.sfo.gov.uk/2016/09/05/cambridge-symposium-2016/>, accessed 30 May 2020.

²⁵ Ministry of Justice, *Corporate Liability for Economic Crime Call for Evidence* (Ministry of Justice: London, 2017) at 11.

²⁶ Ministry of Justice, *Corporate Liability for Economic Crime: Call for Evidence: Government Response* (2020).

²⁷ Bryan Cave Leighton Partners, *Corporate Criminal Liability in the UK: A New Era is Coming ... Isn't It?*, www.bclplaw.com/en-GB/insights/corporate-criminal-liability-in-the-uk-a-new-era-is-coming-isnt-it.html, accessed 6 July 2021.

²⁸ Law Commission, *Corporate Criminal Liability A Discussion Paper* (Law Commission: London, 2021).

believed that the government's favoured option would be failure to prevent corporate financial crime due to the attempted insertion of a failure to prevent economic crime offence into the Financial Services Bill 2021. The government withdrew the clause as they await the recommendations from the Law Commission following the publication of its discussion paper.

4. *Corporate Criminal Liability for Bribery.*

With respect to bribery, the Bribery Act 2010 introduced a new form of corporate criminal liability. Section 7 of the Act provides that a commercial organisation can be found guilty of an offence if a person associated with that organisation bribes another with the intention of obtaining or retaining business or a business advantage for the organisation²⁹. In essence, this creates an additional direct – rather than alternative vicarious – liability when the commission of a section 1 or section 6 bribery offence has taken place on behalf of an organisation. For there to be any liability, however, the organisation in question must be stipulated as a “relevant commercial organisation”³⁰. For the purposes of this section, an “associated person” is any individual who «performs services for or on behalf of» the organisation³¹, such as the organisation's agent, subsidiary or employee³². This has been stated to be a «matter of substance rather than form»³³, with it being necessary for all surrounding circumstances to be taken into account, although a presumption will exist if the associated person is an employee of the organisation. The scope of section 7 is intentionally broad, to encompass the whole range of individuals who may be committing bribery on behalf of a third-party organisation. However, to be held as an “associated person”, «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»³⁴.

Due to this introduction of corporate criminal liability, section 7 of the Bribery Act 2010 was described in that year as a significant move «away from the current approach»³⁵. In 2011, the Ministry of Justice (MoJ) provided that, under section 7, «A commercial organisation will be liable to prosecution if a person associated with it bribes another person intending to obtain or retain business or an

²⁹ Bribery Act 2010, s. 7.

³⁰ Bribery Act 2010, s. 7(5).

³¹ Bribery Act 2010, s. 8(1).

³² Bribery Act 2010, s. 8(3).

³³ Ministry of Justice, *Bribery Act 2010*, Circular 2011/05 (Ministry of Justice: 2011), para 23.

³⁴ *Ibid.*

³⁵ T. POPE-T. WEBB, *Legislative comment: the Bribery Act 2010*, in *Journal of International Banking Law and Regulation*, 25(10), 2010, pp. 480-483, at 482.

advantage in the conduct of business for that organisation»³⁶. It is also worth noting that, for the offence to be made out, there is no requirement to prove that the activity was committed in the UK or elsewhere. Indeed, there is not even a need to show a close connection to the UK, as is necessary for the other bribery offences under the Act³⁷. Moreover, the existence of section 7 does not affect the common law principle that governs the liability of corporate bodies for criminal offences; The identification principle should still be used instead of section 7 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»³⁸.

Applicable only to section 7 offences, it is a defence if the relevant commercial organisation can prove that it had in place “adequate procedures” that were designed to prevent persons associated with the organisation from bribing another person. The MoJ stated, «in accordance with established case law, the standard of proof which the commercial organisation would need to discharge in order to prove the defence, in the event it was prosecuted, is the balance of probabilities»³⁹. The phrase “adequate procedures” has generated much debate. As required by the Act, the MoJ published guidance to commercial organisations to enable the Act to take effect from July 2011. This guidance sets out the six general principles of adequate procedures, namely:

- Proportionality;
- Top-level commitment to anti-bribery measures;
- Risk assessment;
- Due Diligence regarding business partners;
- Communication; and
- Monitoring and review⁴⁰.

The Serious Fraud Office (SFO) has thus been keen to emphasise that section 7 does not provide an offence of strict liability, due to the availability of the defence of adequate procedures. That is, if there are adequate procedures in place, then no offence has been committed. This is a complete defence, not merely mitigation⁴¹.

Breach of section 7 may result in a DPA, which is a court-approved agreement made between the SFO and a company, partnership or unincorporated association that is used when it is decided that it would not be in the public interest to

³⁶ Ministry of Justice, *The Bribery Act 2010: Guidance*, Ministry of Justice, 2011, 15.

³⁷ Ministry of Justice above, n 33 at para 22.

³⁸ *Ibid.*, at para 18.

³⁹ Ministry of Justice above, n 36 at 15.

⁴⁰ *Ibid.*

⁴¹ Serious Fraud Office, *Richard Alderman speech: the Bribery Act 2010 – the SFO’s approach and international compliance* (9 February 2011), www.sfo.gov.uk/about-us/our-views/director's-speeches/speeches-2011/the-bribery-act-2010---the-sfo's-approach-and-international-compliance.aspx, accessed 13 November 2011.

prosecute⁴². They can be used in cases of bribery and corruption, conspiracy to defraud, fraud, tax evasion and money laundering, but they apply only to corporations, not individuals. Concluded under the supervision of the judiciary, in the UK they are usually utilised to avoid expensive and time-consuming trials⁴³. The SFO describes the process of entering into a DPA as follows:

Once a DPA has been agreed in principle, a preliminary application will be made to the Crown Court in private. Depending on the size and the complexity of the DPA, it can also be heard in the Royal Courts of Justice, albeit sitting as the Crown Court. In the application, the prosecutor asks the Court for a declaration that (1) entering into a DPA with the Company is likely to be in the interests of justice, and (2) the proposed terms of the DPA are fair, reasonable and proportionate⁴⁴.

If the DPA is breached, the matter can be brought before the court again, and if «the Court considers that, on the balance of probabilities, a breach has occurred, the Company could then be prosecuted for the same conduct»⁴⁵. A DPA was used for the first time in the UK in *Serious Fraud Office v Standard Bank PLC*. Here, Standard Bank was accused of breaching section 7 of the Bribery Act 2010, but the proceedings were halted as soon as the DPA was approved by the court. Because of this agreement, Standard Bank agreed to pay financial orders totalling US\$25.2m, an additional US\$7m to the Tanzanian government, and the SFO's costs (£330,000)⁴⁶.

The second case, *SFO v Sarclad Limited* (initially anonymised as XYZ Limited), was settled with a DPA the following year⁴⁷. The judge commented on «the problems generated when a modestly resourced small to medium sized enterprise is demonstrably guilty of serious breaches of the criminal law»⁴⁸. The court had to grapple with raising a penalty that would inevitably make Sarclad insolvent whilst mitigating that penalty to allow the company to continue to trade. As a result of the DPA, Sarclad agreed to «pay financial orders of £6.5m, comprised of a £6.2m disgorgement of gross profits and a £352,000 financial penalty»⁴⁹. On this occasion, the SFO decided not to pursue its costs due to the company's precarious

⁴² Serious Fraud Office, *Deferred Prosecution Agreements*, www.sfo.gov.uk/publications/guidance-policy-and-protocols/guidance-for-corporates/deferred-prosecution-agreements-2/, accessed 25 June 2021.

⁴³ *Ibid.*

⁴⁴ See Serious Fraud Office above, n 42.

⁴⁵ *Ibid.*

⁴⁶ Serious Fraud Office, *SFO agrees first UK DPA with Standard Bank* (30 November 2015), www.sfo.gov.uk/2015/11/30/sfo-agrees-first-uk-dpa-with-standard-bank/, accessed 26 February 2016.

⁴⁷ *Serious Fraud Office v Sarclad Limited*, Southwark Crown Court U20150856.

⁴⁸ Conspiracy to bribe contrary to section 1 of the Criminal Law Act 1977 and failure to prevent bribery contrary to section 7 of the Bribery Act 2010.

⁴⁹ Serious Fraud Office, *SFO secures second DPA* (8 July 2016), www.sfo.gov.uk/2016/07/08/sfo-secures-second-dpa/, accessed 5 August 2017.

financial position⁵⁰. Under the terms of the third DPA negotiated by the SFO, in January 2017, Rolls-Royce agreed to pay a total of £671m, including US\$170m to the US Department of Justice and US\$25 million to the Brazilian Ministério Público Federal, for «12 counts of conspiracy to corrupt, false accounting and failure to prevent bribery»⁵¹. A key element of this DPA was the fact that the misconduct, which related to the sale of aero engines, energy systems and associated services, spanned three decades. Moreover, the SFO stated that «the conduct covered by the UK DPA took place across seven jurisdictions: Indonesia, Thailand, India, Russia, Nigeria, China and Malaysia»⁵². Three months later, the SFO announced that it had entered into a fourth DPA, this time with Tesco, which required the company to pay a fine of £129 million for overstating its profits⁵³.

Largely due to these agreements, the MoJ asserted that the section 7 offence provides a «powerful incentive for the inclusion of bribery prevention procedures as a component of corporate good governance. Its utility as an enforcement tool has been recently demonstrated»⁵⁴. Interestingly, in each of the four DPA cases outlined above, no criminal convictions were secured against any of the offending corporation's employees or agents. This is not surprising, given the general lack of enthusiasm shown by the SFO and the Crown Prosecution Service towards prosecuting individuals under the Bribery Act 2010, even though such prosecutions may well have served as an additional form of deterrence for the individuals involved. Initially, irrespective of the fact that the SFO retained the ability to prosecute individuals too, corporations hailed DPAs as the preferred option for tackling illicit conduct. Nevertheless, they were utilised on only 12 occasions between their introduction in 2013 and the time of writing (March 2022). It is possible to draw two firm conclusions on the basis of these 12 DPAs: the SFO will use them against a range of businesses, from small firms to very large, multinational enterprises; and they are usually agreed to address conspiracy to corrupt, conspiracy to bribe and failure of a commercial organisation to prevent bribery offences, the one exception being Tesco and G4S.

5. Corporate criminal liability for tax evasion.

Many tax evasion offences are capable of capturing both those who perpetrate,

⁵⁰ *Ibid.*

⁵¹ Serious Fraud Office, *SFO completes £497.25m Deferred Prosecution Agreement with Rolls-Royce PLC* (17 January 2017), www.sfo.gov.uk/2017/01/17/sfo-completes-497-25m-deferred-prosecution-agreement-rolls-royce-plc/, accessed 26 November 2020.

⁵² *Ibid.*

⁵³ Serious Fraud Office, *SFO agrees Deferred Prosecution Agreement with Tesco* (10 April 2017), www.sfo.gov.uk/2017/04/10/sfo-agrees-deferred-prosecution-agreement-with-tesco/, accessed 18 January 2018.

⁵⁴ See Ministry of Justice above, n 25 at 6.

and those who facilitate, tax offences⁵⁵. Additionally, traditional doctrines of secondary and inchoate liability apply to tax evasion offences, criminalising the aiding and abetting, counselling or procuring⁵⁶, as well as the encouraging or assisting⁵⁷, of such an offence. However, owing to the difficulties in attributing criminal liability to companies identified above, as well as lacklustre enforcement efforts, the UK has persistently failed to address the facilitation of tax evasion offences by professional facilitators and their corporate employers. For instance, despite the UK having one of the highest numbers of intermediaries involved in the Panama Papers⁵⁸, and identifying nine «potential professional enablers of economic crime»⁵⁹, there has yet to be a single prosecution arising from the Panama Papers, irrespective of the multitude of civil and criminal investigations carried out into the tax affairs of more than 190 individuals⁶⁰. Moreover, the Financial Conduct Authority (FCA) failed to take action against any intermediary named in the Panama Papers⁶¹. Similarly, following the revelations contained in the HSBC (Suisse) scandal, no civil or criminal action was taken against the bank, notwithstanding evidence that the bank assisted its UK clients to evade taxation⁶². In this respect, the bank was accused of «actively helping its clients» to break the law, by enabling them to access funds that had been concealed from tax authorities, as well as providing advice on the avoidance of preventative measures⁶³.

Aside from statutory imposition of strict or vicarious liability, the attribution of criminal liability to companies in the UK, and thus, for the substantive and inchoate offences pertaining to tax evasion, is governed by the common law identification

⁵⁵ See for instance, the common law offence of cheating the public revenue, which was expressly preserved in the Theft Act 1968, s. 32(1)(a).

⁵⁶ Accessories and Abettors Act 1861, s. 8, *R v Jogee and Ruddock v Queen* [2016] UKSC 8; [2017] AC 387.

⁵⁷ Serious Crime Act 2007, ss. 44-46.

⁵⁸ EUROPEAN PARLIAMENT, *Report on the Inquiry into Money Laundering, Tax Avoidance and Tax Evasion (2017/2013(INI))* (8th November 2017), <https://www.europarl.europa.eu/cmsdata/131460/2017-11-08%20PANA%20Final%20Report.pdf>, accessed 9th November 2020, p. 27.

⁵⁹ HM REVENUE & CUSTOMS, *News Story: Taskforce Launches Criminal and Civil Investigations into Panama Papers* (8 November 2016) <https://www.gov.uk/government/news/taskforce-launches-criminal-and-civil-investigations-into-panama-papers>, accessed 24th August 2021.

⁶⁰ These investigations were predicted to generate £190 million, HM REVENUE & CUSTOMS, *Annual Report and Accounts 2018-19 (For the year ended 31 March 2019)* (HC 2018-19, 2394) p. 30.

⁶¹ Soon after the revelations were published, the Financial Conduct Authority wrote to financial institutions to ask them to identify and explain their involvement in the Panama Papers. Yet, little action has been taken as a result, see D. O'CONNOR, *Panama Papers – No Banks to Blame, Say Top European Regulators* (KYC 360, 28 June 2018), <https://www.riskscreen.com/kyc360/article/panama-papers-no-one-blame/>, accessed 24th August 2021. However, other regulatory authorities took action against their members, see M. WALTERS, *Panama Papers Solicitor Fined £45,000* (The Law Society Gazette, 15 January 2019), <https://www.law-gazette.co.uk/law/panama-papers-solicitor-fined-45000-/5068873.article>, accessed 24th August 2021.

⁶² BBC News, *HSBC Bank «Helped Clients Dodge Millions in Tax»* (10 February 2015), <https://www.bbc.co.uk/news/business-31248913>, accessed 24th August 2021.

⁶³ *Ibid.*

doctrine. As discussed above, there is an overwhelming consensus that the identification doctrine frustrates the prosecution of companies for economic crimes. This is because, while the identification and attribution of criminal intent may be straightforward in cases concerning small companies, prosecutors are often unable to perform this task when dealing with large, complex organisations, which may deliberately or inadvertently obscure the involvement of those identified as the directing mind from participation in criminal activities⁶⁴. The identification doctrine has hindered the UK's ability to combat the facilitation of tax offences by large companies, as demonstrated by the UK's tepid response to the organisations at the heart of recent tax evasion scandals. Accordingly, the "failure to prevent" offences were introduced to remedy the UK's inability to combat the facilitation of tax evasion offences by companies.

The corporate offences of failing to prevent the facilitation of UK and foreign tax evasion were introduced in the Criminal Finances Act 2017⁶⁵. Modelled on the corporate offence contained in the Bribery Act 2010, the offences extend liability to companies beyond the commission or facilitation of tax evasion offences, to encompass the failure to prevent the facilitation of this financial crime. As such, the offences increase the scope of responsibility for facilitation offences, as opposed to altering the nature of the substantive offence⁶⁶. The s.45 offence provides that relevant bodies will commit an offence if an associated person commits a UK tax evasion facilitation offence⁶⁷, while acting in an associated capacity⁶⁸. Similarly, the s. 46 offence provides that "relevant bodies", will commit an offence if an associated person carries out a foreign tax evasion facilitation offence⁶⁹, while acting in an associated capacity⁷⁰. For the latter offence to apply, there must be dual criminality⁷¹, as well as a sufficient connection between the organisation or the offence and the UK⁷². For both offences, it is a defence for the organisation to prove that it had reasonable prevention procedures in place, or that it «was not reasonable in all the circumstances» to require the body to adopt such procedures⁷³. Upon conviction for the offence, a company could face an unlimited fine⁷⁴. Alternatively, the offences are capable of being addressed via a DPA⁷⁵.

⁶⁴ See Ministry of Justice above, n 25 at 13.

⁶⁵ Criminal Finances Act 2017, ss. 45-46.

⁶⁶ T. CORFIELD-J. SCHAEFER, *The Taxman Cometh: The Criminal Offences of Failure to Prevent Tax Evasion* (2017) 23(10) T&T 1030, 1031.

⁶⁷ As defined in Criminal Finances Act 2017, s. 45(5).

⁶⁸ Criminal Finances Act 2017, s. 45(1).

⁶⁹ Criminal Finances Act 2017, s. 46(6).

⁷⁰ Criminal Finances Act 2017, s. 46(1)(a).

⁷¹ Criminal Finances Act 2017, s. 46(6).

⁷² Criminal Finances Act 2017, s. 46(1)(b).

⁷³ Criminal Finances Act 2017, s. 45(2), s. 46(3).

⁷⁴ Criminal Finances Act 2017, s. 45(8), s. 46(7).

⁷⁵ Crime and Courts Act 2013, s. 45, Schedule 17.

The strict liability nature of the offences renders the identification doctrine inapplicable. Instead, the offences comprise three stages, namely, the criminal tax evasion by a taxpayer, the facilitation of this crime by an “associated person” acting in such capacity, as well as a failure to prevent the facilitation⁷⁶. The offences improve the law pertaining to tax evasion in the UK by providing a mechanism to address tax-related offending on the part of companies, such as the facilitation of tax evasion seemingly demonstrated by HSBC (Suisse) amongst others. The offences will also provide a mechanism to address the facilitation of tax offences through the provision of advice and services to avoid the application of anti-tax evasion measures, such as the Common Reporting Standard⁷⁷. However, thus far, the offences have had a negligible impact; not a single organisation has been charged with an offence⁷⁸. Further, a HMRC commissioned survey found that only around a quarter of businesses surveyed were aware of the Criminal Finances Act and its offences⁷⁹. Therefore, the second key aim of the offences is also not presently being realised, specifically, prompting changes in governance and behaviour by companies who wish to aver themselves of the reasonable procedures defence⁸⁰. Nevertheless, investigations into corporate economic crimes committed by large organisations are notoriously complex and take a long time to come to fruition⁸¹. There are signs that prosecutions or DPAs might soon be forthcoming, with HMRC currently conducting 14 investigations into suspected offences, with

⁷⁶ HM REVENUE & CUSTOMS, *Tackling Tax Evasion: Government Guidance for the Corporate Offences of Failure to Prevent the Criminal Facilitation of Tax Evasion* (1st September 2017), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/672231/Tackling-tax-evasion-corporate-offences.pdf, accessed 24th August 2021, p. 6.

⁷⁷ HM REVENUE & CUSTOMS, *Tackling Offshore Tax Evasion: A New Corporate Offence of Failure to Prevent the Facilitation of Tax Evasion* (Consultation Document, 16 July 2015), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/445534/Tackling-offshore-tax-evasion_-_a_new_corporate_criminal_offence_of_failure_to_prevent_facilitation_of_tax_evasion.pdf, accessed 24th August 2021, at p. 10.

⁷⁸ HM REVENUE & CUSTOMS, *FOI Release: Number of Live Corporate Criminal Offences Investigations* (Updated 26 May 2021), <https://www.gov.uk/government/publications/number-of-live-corporate-criminal-offences-investigations/number-of-live-corporate-criminal-offences-investigations>, accessed 19th August 2021.

⁷⁹ IPSOS MORI SOCIAL RESEARCH INSTITUTE, *Evaluation of Corporate Behaviour Change in Response to the Corporate Criminal Offences Research Report 529* (December 2018, published March 2019), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/781334/Evaluation_of_corporate_behaviour_change_in_response_to_the_corporate_criminal_offences_HMRC_research_report_529.pdf, accessed 24th August 2021, p. 4.

⁸⁰ HM REVENUE & CUSTOMS, *Tackling Offshore Tax Evasion: A New Corporate Offence of Failure to Prevent the Facilitation of Tax Evasion* (Consultation Document, 16 July 2015), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/445534/Tackling-offshore-tax-evasion_-_a_new_corporate_criminal_offence_of_failure_to_prevent_facilitation_of_tax_evasion.pdf, accessed 24th August 2021, p. 10.

⁸¹ K. LAIRD, *Deferred Prosecution Agreements and the Interests of Justice: A Consistency of Approach?* (2019) 6 Crim LR 486, 499.

another 14 “opportunities” under review⁸². If enforcement of the tax evasion offence replicates the enforcement of the comparable bribery offence, it is likely that the offence will lead to the conclusion of DPAs, as opposed to convictions of offending companies.

The multitude of tax evasion exposés that have taken place over the past two decades demonstrate the need for tough enforcement action on the corporate facilitators of tax offences. Indeed, the “expressive” or “communicative” function of criminal liability⁸³ is particularly important in a tax evasion context, where strong enforcement action, particularly criminal prosecutions, can have a positive impact on compliance by others⁸⁴. In this respect, the “failure to prevent” offences constitute an improvement to the law pertaining to tax evasion in the UK by providing a method to attribute liability to companies for their involvement in the facilitation of tax crimes, a formerly near-impossible task. However, these scandals also demonstrate that it is often disingenuous to label such corporate offending as “failing to prevent” tax evasion. In fact, the revelations often depict large divisions of these organisations as actively facilitating tax offences. In such cases, attributing liability to the corporation for the facilitation offence, rather than its omission in preventing it, would provide a clearer message to the public as to the severity of the corporation’s conduct. Accordingly, it is important to enable liability to be attributed to the most egregious corporate offenders for the facilitation of the primary offence, rather than simply a failure to prevent it, which can only be achieved through repeal or reform of the identification doctrine.

The need to reform the doctrine of corporate criminal liability, alternatively or in addition to, the introduction of further failure to prevent offences is also supported by comparing UK efforts to combat corporate tax crimes with those employed by other countries⁸⁵. In particular, the UK position contrasts sharply with that of the US, which has persistently taken criminal and civil actions against banks and other organisations that facilitate tax evasion. Under US federal law, corporate criminal liability is imposed under the *respondeat superior* doctrine, which attributes criminal liability to a corporation based on the acts of its employees. The *respondeat superior* doctrine provides for a much wider basis of

⁸² HM REVENUE & CUSTOMS, *FOI Release: Number of Live Corporate Criminal Offences Investigations* (Updated 26 May 2021), <https://www.gov.uk/government/publications/number-of-live-corporate-criminal-offences-investigations/number-of-live-corporate-criminal-offences-investigations>, accessed 19th August 2021.

⁸³ M. DSOUZA, *The Corporate Agent in Criminal Law – An Argument for Comprehensive Identification* (2020) 79(1) CLJ 91, 93.

⁸⁴ See M. LEVI, *Serious Tax Fraud and Noncompliance* (2010) 9(3) *Criminology and Public Policy* 493, 493.

⁸⁵ See, W. FITZGIBBON, *Germany Seeks Arrest of Panama Papers Lawyers* (ICIJ, 21 October 2020), <https://www.icij.org/investigations/panama-papers/germany-seeks-arrest-of-panama-papers-lawyers/>, accessed 24th August 2021. In 2017, HSBC agreed to pay £300 million following action by the French authorities, see BBC News, *HSBC to Pay €300m to Settle Tax Investigation* (15 November 2017), <https://www.bbc.co.uk/news/business-41992985>, accessed 24th August 2021.

corporate criminal liability than the identification doctrine in the UK⁸⁶. In fact, the effect is similar to the imposition of the failure to prevent offence in the UK, without the concomitant defences⁸⁷. The expansive scope of corporate criminal liability in the US has enabled the conclusion of DPAs/Non-Prosecution Agreements (NPAs) with high-profile law and accounting firms for their facilitation of fraudulent tax shelters⁸⁸. A significant number of DPAs/ NPAs have been concluded with foreign banks for their facilitation of tax evasion by US citizens through offshore accounts⁸⁹. For instance, the US reached a DPA with UBS in 2009 for conspiring to defraud the IRS, which resulted in the imposition of a \$780million penalty⁹⁰. The US also indicted Switzerland's oldest bank, Wegelin, which admitted guilt and paid a penalty of \$74million leading to the collapse of the bank⁹¹. In direct contrast to the UK, the US also concluded a DPA with HSBC Private Bank (Suisse) in 2019, including an accompanying penalty of \$192.35million, for its facilitation of tax evasion by US citizens⁹². Accordingly, it is clear that the US approach to attributing criminal liability to corporations, as well as its approach to enforcement, is far more effective in redressing tax-related corporate misconduct than its UK counterpart.

⁸⁶ R. LUSKIN, *Caring about Corporate «Due Care»: Why Criminal Respondeat Superior Liability Out-reaches its Justification* (2020) 57(2) *American Criminal Law Review* 303, 313.

⁸⁷ In *Dollar SS Co*, the court held that regardless of the company's prevention policies and procedures, liability would be imposed for the company «failed to prevent the commission of the forbidden act», *Dollar SS Co v United States*, 101 F2d 638 (9th Cir 1939).

⁸⁸ See for instance, US Department of Justice, *KPMG to Pay \$456 Million for Criminal Violations in Relation to Largest-Ever Tax Shelter Fraud Case* (29 August 2005), https://www.justice.gov/archive/opa/pr/2005/August/05_ag_433.html, accessed 24th August 2021.

⁸⁹ See the DPA concluded with one of Israel's largest banks Department of Justice, *Mizrahi-Tefahot Bank Ltd Admits its Employees Helped US Taxpayers Conceal Income and Assets* (12 March 2019), <https://www.justice.gov/opa/pr/mizrahi-tefahot-bank-ltd-admits-its-employees-helped-ustaxpayers-conceal-income-and-assets>, accessed 24th August 2021.

⁹⁰ United States District Court Southern District of Florida, *Case No.09-60033-CR-COHN United States of America vs. UBS AG: Deferred Prosecution Agreement* (19 February 2009), https://www.justice.gov/sites/default/files/tax/legacy/2009/02/19/UBS_Signed_Deferred_Prosecution_Agreement.pdf, accessed 24th August 2021.

⁹¹ Department of Justice, *Swiss Bank Pleads Guilty in Manhattan Federal Court to Conspiracy to Evade Taxes* (3 January 2013), <https://www.justice.gov/usao-sdny/pr/swiss-bank-pleads-guilty-manhattan-federal-court-conspiracy-evade-taxes>, accessed 24th August 2021. Emmenegger notes that this indictment was of «high symbolic importance» and was likely to result in comparatively minimal collateral consequences (at least for the US). See P. EMMENEGGER, *The Long Arm of Justice: US Structural Power and International Banking* (2015) 17(3) *Bus Polit* 473, 486.

⁹² United States Department of Justice, *Justice Department Announces Deferred Prosecution Agreement with HSBC Private Bank (Suisse) SA* (10 December 2019), <https://www.justice.gov/opa/pr/justice-department-announces-deferred-prosecution-agreement-hsbc-private-bank-suisse-sa>, accessed 24th August 2021.

6. A civil or criminal approach to corporate criminal liability?

Civil penalties, normally in the form of fines, play a key role in regulation as they have the potential to act as a deterrent if imposed at a high enough level, however they do not carry the public and reputational stigma of a criminal conviction⁹³. Commentators have argued that financial penalties, when imposed on companies, have a negligible impact as the fines are frequently viewed by the offending company as little more than the cost of doing business⁹⁴. Civil penalties alone will not deter the company repeating the offending behaviour. Regulators in the UK should be given the power to impose either civil or criminal corporate penalties, depending on the seriousness of the offence committed. Criminal penalties are imposed for offences and breaches that negatively affect society as a whole, rather than just one person. For offences that negatively affect the whole of the UK, such as the benchmark rate manipulation carried out in relation to the LIBOR and Forex benchmarks, a criminal penalty is more appropriate than a civil one. Imposing a corporate criminal penalty may not result in a higher fine for a company than fine imposed pursuant to a civil penalty but being in breach of a criminal law carries more weight in society, with the potential to create more reputational damage, than being in breach of a civil law⁹⁵. The Crown Prosecution Service stated, «a thorough enforcement of the criminal law against corporate offenders, where appropriate, will have a deterrent effect, protect the public and support ethical business practices. Prosecuting companies, where appropriate, will capture the full range of criminality involved and thus lead to increased public confidence in the criminal justice system»⁹⁶. There is a significant difference in the perception of society between criminal and civil penalties. Criminal penalties are viewed as the more serious of the two types of penalty. It is argued that for serious breaches of economic crime, in particular for breaches where actual harm has been committed by the company⁹⁷, it is more appropriate for UK regulators to impose corporate criminal liability on those companies whose employees have committed the illegal acts rather than civil, administrative penalties, which are seen as less serious.

⁹³ N. WERLE, *Prosecuting Corporate Crime When Firms Are Too Big to Jail: Investigation, Deterrence, and Judicial Review* (2019) 128 *Yale L. J.* 1366.

⁹⁴ R. JONES, *Unfit for Duty: The Officer and Director Bar as a Remedy for Fraud* (2014) 82 *University of Cincinnati Law Review* 444.

⁹⁵ G. MARKOFF, *Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century* [2013] 15(3) *University of Pennsylvania Journal of Business Law* 797-842.

⁹⁶ Crown Prosecution Services, *Corporate Prosecutions (CPS, 2017)*, <https://www.cps.gov.uk/legal-guidance/corporate-prosecutions>, accessed 5 August 2021.

⁹⁷ R. LÖÖF, *Corporate Agency and White Collar Crime—An Experience-led Case for Causation-based Corporate Liability for Criminal Harms* [2020] 1(4) *Criminal Law Review* 275-290.

7. Civil and criminal penalties imposed following the LIBOR and Forex crisis.

Corporate criminal liability has not yet been used in the UK against large global companies involved in market manipulation in the way that has been seen in the US. Following the LIBOR crisis, the Financial Services Authority (FSA), then the UK's financial regulator at that time, was criticized by the HM Treasury Select Committee for its decision not to initiate criminal proceedings in relation to LIBOR⁹⁸. The Committee said, «the FSA took a narrow view of its power to initiate criminal proceedings for fraudulent conduct in this case» and recommended that the Government should clarify the FSA and its successors' power to initiate criminal proceedings where there is serious fraudulent conduct in the context of the financial markets⁹⁹. Subsequently, two new criminal offences have been created which criminalise individuals for making false or misleading statements, or giving false or misleading impressions in relation to a benchmark or investment¹⁰⁰. However, no new corporate criminal offence for this economic crime has been introduced.

8. Libor – US and UK approach to enforcement.

Following the LIBOR crisis in the US, the Commodity Futures Trading Commission (CFTC) imposed civil monetary penalties on thirteen banks and brokers of over \$4bn for infringements of the Commodity Exchange Act 2006 in connection with the LIBOR and Forex benchmark abuses.¹⁰¹ The Anti-Trust Division of the Department of Justice (DoJ) charged banks and traders involved in the LIBOR scandal, using the criminal charge of conspiracy to commit wire fraud and bank fraud.¹⁰² Following the corporate criminal charges against banks, the DoJ entered into DPAs to settle criminal charges made against five banks, the Royal Bank of

⁹⁸ HM TREASURY SELECT COMMITTEE, *Fixing LIBOR: Some Preliminary Findings* (HM Treasury Select Committee: 2012) at 103.

⁹⁹ *Ibid.*

¹⁰⁰ Financial Services Act 2012, s. 91.

¹⁰¹ COMMODITY FUTURES TRADING COMMISSION, *Deutsche Bank to Pay \$800 Million Penalty to Settle CFTC Charges of Manipulation, Attempted Manipulation, and False Reporting of LIBOR and Euribor* (Commodity Futures Trading Commission, 23 April 2015), <https://www.cftc.gov/PressRoom/PressReleases/7159-15#:~:text=With%20Today's%20Action%2C%20the%20CFTC,LIBOR%20and%20FX%20Benchmark%20Abuses>, accessed 4 December 2020.

¹⁰² DEPARTMENT OF JUSTICE, *UBS Securities Japan Co Ltd to Plead Guilty to Felony Wire Fraud for Long-running Manipulation of LIBOR Benchmark Interest Rates* (The United States Department of Justice, 19 December 2012), <https://www.justice.gov/opa/pr/ubs-securities-japan-co-ltd-plead-guilty-felony-wire-fraud-long-running-manipulation-libor>, accessed 20 August 2021.

Scotland¹⁰³, Deutsche Bank¹⁰⁴, UBS¹⁰⁵, Barclays¹⁰⁶ and Rabobank¹⁰⁷. These DPAs were used to impose significant fines on these banks as well as behavioural commitments given by the banks to the DOJ for the term of each DPA. Unlike the US, the SFO has not charged any of the banks involved in the LIBOR crisis with a corporate criminal offence, despite individuals involved in the LIBOR benchmark rate fixing cartel being employees at the time and acting to increase the profits of their employers. In total, six banks, Barclays¹⁰⁸, UBS¹⁰⁹, Royal Bank of Scotland¹¹⁰, Deutsche Bank¹¹¹, Rabobank¹¹², Lloyds Banking Group¹¹³ and two brokers, ICAP

¹⁰³ DEPARTMENT OF JUSTICE, *RBS Securities Japan Limited Agrees to Plead Guilty in Connection with Long-Running Manipulation of Libor Benchmark Interest Rates* (The United States Department of Justice, 6 February 2013), <https://www.justice.gov/opa/pr/rbs-securities-japan-limited-agrees-plead-guilty-connection-long-running-manipulation-libor>, accessed 5 August 2021.

¹⁰⁴ DEPARTMENT OF JUSTICE, *Deutsche Bank's London Subsidiary Agrees to Plead Guilty in Connection with Long-Running Manipulation of LIBOR* (The United States Department of Justice, 23 April 2015), <https://www.justice.gov/opa/pr/deutsche-banks-london-subsidiary-agrees-plead-guilty-connection-long-running-manipulation>, accessed 5 August 2021.

¹⁰⁵ DEPARTMENT OF JUSTICE, *UBS Securities Japan Co Ltd to Plead Guilty to Felony Wire Fraud for Long-running Manipulation of LIBOR Benchmark Interest Rates* (The United States Department of Justice, 19 December 2012), <https://www.justice.gov/opa/pr/ubs-securities-japan-co-ltd-plead-guilty-felony-wire-fraud-long-running-manipulation-libor>, accessed 5 August 2021.

¹⁰⁶ DEPARTMENT OF JUSTICE, *Barclays Bank PLC Admits Misconduct Related to Submissions for the London Interbank Offered Rate and the Euro Interbank Offered Rate and Agrees to Pay \$160 Million Penalty* (The United States Department of Justice, 27 June 2012), <https://www.justice.gov/opa/pr/barclays-bank-plc-admits-misconduct-related-submissions-london-interbank-offered-rate-and>, accessed 5 August 2021.

¹⁰⁷ DEPARTMENT OF JUSTICE, *Rabobank Admits Wrongdoing in Libor Investigation, Agrees to Pay \$325 Million Criminal Penalty* (The United States Department of Justice, 29 October 2013), <https://www.justice.gov/opa/pr/rabobank-admits-wrongdoing-libor-investigation-agrees-pay-325-million-criminal-penalty>, accessed 5 August 2021.

¹⁰⁸ FINANCIAL SERVICES AUTHORITY, *Final Notice To Barclays Bank Plc* (27 June 2012), <https://www.fca.org.uk/publication/final-notices/barclays-jun12.pdf> accessed 5 August 2021.

¹⁰⁹ FINANCIAL SERVICES AUTHORITY, *Final Notice To UBS AG* (19 December 2012), <https://www.fca.org.uk/publication/final-notices/ubs.pdf>, accessed 5 August 2021.

¹¹⁰ FINANCIAL CONDUCT AUTHORITY, *The Financial Conduct Authority (FCA) has fined Lloyds Bank plc (Lloyds) and Bank of Scotland plc (BoS), both part of Lloyds Banking Group (LBG) £105 million for serious misconduct relating to the Special Liquidity Scheme (SLS), the Repo Rate benchmark and the London Interbank Offered Rate (LIBOR)* (28 July 2014), <https://www.fca.org.uk/news/press-releases/lloyds-banking-group-fined-%C2%A3105m-serious-libor-and-other-benchmark-failings>, accessed 5 August 2021.

¹¹¹ FINANCIAL CONDUCT AUTHORITY, *Final Notice to Deutsche Bank AG* (23 April 2015), <https://www.fca.org.uk/publication/final-notices/deutsche-bank-2017.pdf>, accessed 5 August 2021.

¹¹² FINANCIAL CONDUCT AUTHORITY, *The FCA fines Rabobank £105 million for serious LIBOR-related misconduct*, <https://www.fca.org.uk/news/press-releases/fca-fines-rabobank-%C2%A3105-million-serious-libor-related-misconduct>, accessed 5 August 2021.

¹¹³ FINANCIAL CONDUCT AUTHORITY, *The Financial Conduct Authority (FCA) has fined Lloyds Bank plc (Lloyds) and Bank of Scotland plc (BoS), both part of Lloyds Banking Group (LBG) £105 million for serious misconduct relating to the Special Liquidity Scheme (SLS), the Repo Rate benchmark and the London Interbank Offered Rate (LIBOR)* (28 July 2014), <https://www.fca.org.uk/news/press-releases/lloyds>

Brokers¹¹⁴ and Martin Brokers (UK)¹¹⁵, were fined by the FCA's predecessor, the Financial Services Authority (FSA) and by the FCA between 2012 and 2015 for breaches to the FSA and FCA's "Principles for Businesses" in relation to LIBOR benchmark manipulation. Fines ranged from £59 million for Barclays¹¹⁶ to £227 million for Deutsche Bank¹¹⁷, totalling £976m for the six banks and two brokers¹¹⁸. However, these fines were significantly smaller than those imposed for the same misconduct in the US, where fines totalling \$2.519 billion were made¹¹⁹ and because the FCA fines were civil penalties they did not carry the reputational damage that a criminal penalty would have carried.

9. *Forex – US and UK approach to enforcement.*

Following the Forex crisis in the US, banks and their employees were prosecuted under the anti-trust/competition law provisions of section 1 of the Sherman Act¹²⁰, for engaging in a conspiracy to fix the price and rig bids for the euro/US dollar currency pair in the Forex spot market by agreeing to eliminate competition in violation of the Sherman Antitrust Act¹²¹. This is an interesting difference in approach to that taken by the DOJ in the enforcement of the LIBOR manipulation. In that case, the Antitrust Division of the DOJ did not use the Sherman Act to charge the traders from competitor banks, who had colluded and conspired together to raise or lower the LIBOR benchmark rate, in much the same way that traders manipulated the Forex benchmark rate. In the LIBOR enforcement, the Department of Justice used the Wire Fraud statute as opposed to the anti-trust provisions of the Sherman Antitrust Act. Both are criminal charges, which can be used against

banking-group-fined-%C2%A3105m-serious-libor-and-other-benchmark-failings, accessed 5 August 2021.

¹¹⁴ Financial Conduct Authority, *ICAP Europe Limited fined £14 million for significant failings in relation to LIBOR* (25 September 2013), <https://www.fca.org.uk/news/press-releases/icap-europe-limited-fined-%C2%A314-million-significant-failings-relation-libor>, accessed 5 August 2021.

¹¹⁵ Financial Conduct Authority, *Martin Brokers (UK) Limited fined £630,000 for significant failings in relation to LIBOR* (15 May 2014), <https://www.fca.org.uk/news/press-releases/martin-brokers-uk-limited-fined-%C2%A3630000-significant-failings-relation-libor>, accessed 5 August 2021.

¹¹⁶ *Ibid.*, 111.

¹¹⁷ *Ibid.*, 114.

¹¹⁸ A. JORDANOSKA-N. LORD, *Scripting the mechanics of the benchmark manipulation corporate scandals: The "guardian" paradox*. (2020, *European Journal of Criminology*, Vol. 17(1), 9-30).

¹¹⁹ US DEPARTMENT OF JUSTICE, *Deutsche Bank's London Subsidiary Sentenced for Manipulation of LIBOR* (28 March 2017), <https://www.justice.gov/opa/pr/deutsche-bank-s-london-subsidiary-sentenced-manipulation-libor>, accessed 5 August 2021.

¹²⁰ Sherman Antitrust Act, 15 U.S.C. §1.

¹²¹ UNITED STATES DISTRICT COURT DISTRICT OF CONNECTICUT, *United States of America v Barclays PLC Plea Agreement* (United States District Court District of Connecticut, 20 May 2015), <https://www.justice.gov/file/440481/download>, accessed 29 January 2021.

corporate bodies¹²². In the Forex crisis, the DOJ used the Sherman Act to impose criminal financial penalties on banks¹²³ for manipulating foreign exchange rates. The highest criminal financial penalty under the Sherman Act was \$925m, which was imposed on Citicorp in 2015 for its participation in the Forex benchmark manipulation cartel¹²⁴. The charges brought by the DOJ against the banks for conspiring to manipulate the Forex market were the first time in decades that the parent of a major American financial institution pleaded guilty to criminal charges¹²⁵. In 2015 Citicorp, JPMorgan Chase & Co, Barclays PLC, The Royal Bank of Scotland plc, and UBS AG all pleaded guilty and agreed to pay collectively more than \$2.5bn in criminal fines for their participation in the manipulation of the US Dollar and euro in the Forex market, which breached criminal antitrust laws¹²⁶. It is clear that the US authorities value being able to bring criminal charges against companies such as banks for their manipulation of the Forex. The then US Attorney General Loretta Lynch stated, «the penalty these banks will now pay is fitting considering the long-running and egregious nature of their anticompetitive conduct. It is commensurate with the pervasive harm done. And it should deter competitors in the future from chasing profits without regard to fairness, to the law, or to the public welfare»¹²⁷.

In the UK no criminal penalties were imposed on companies involved with the Forex benchmark rate manipulation, only regulatory fines were imposed. The SFO did open a criminal investigation into the Forex benchmark manipulation carried out in the UK, however the investigation was closed after almost two years of investigation, due to insufficient evidence for a reasonable prospect of conviction¹²⁸. Commentators at the time attributed the closure of the investigation to the difficulty in making a corporate prosecution pursuant to the identification doctrine and called for a change in the law on corporate criminal responsibility, to

¹²² DEPARTMENT OF JUSTICE, *Sanctions in Antitrust Cases* (Global Forum on Competition, 10 November 2016), <https://www.justice.gov/atr/case-document/file/979201/download>, accessed 5 August 2021.

¹²³ BANKS INCLUDE: CITIGROUP INC, *Citigroup Announces Foreign Exchange Settlements with the US Department of Justice and the Federal Reserve* (Citi, 20 May 2015), <https://www.citigroup.com/citi/news/2015/150520a.htm>, accessed 29 January 2021.

¹²⁴ DEPARTMENT OF JUSTICE, *Sherman Act Violations Resulting in criminal fines & penalties of \$10 Million or more* (US Department of Justice, 24 July 2020), <https://www.justice.gov/atr/sherman-act-violations-yielding-corporate-fine-10-million-or-more>, accessed 5 January 2021.

¹²⁵ *Ibid.*

¹²⁶ DEPARTMENT OF JUSTICE, *Individual Accountability in the Financial Services Industry* (27 March 2017), <https://www.justice.gov/atr/division-operations/division-update-spring-2017/individual-accountability-financial-services-industry>, accessed 17 February 2021.

¹²⁷ DEPARTMENT OF JUSTICE, *Five Major Banks Agree to Parent-Level Guilty Pleas* (US Department of Justice, 20 May 2015), <https://www.justice.gov/opa/pr/five-major-banks-agree-parent-level-guilty-pleas>, accessed 29 January 2021.

¹²⁸ Serious Fraud Office, *SFO closes Forex investigation* (15 March 2016), <https://www.sfo.gov.uk/2016/03/15/sfo-closes-forex-investigation/>, accessed 5 August 2021.

enable corporate criminal prosecutions to be brought, rather than the imposition of regulatory fines against firms¹²⁹.

If the UK regulators had been able to bring a successful corporate criminal offence against the banks involved in the LIBOR and/or FX cartels, it would have provided UK authorities with the option of entering into a DPA with those banks in lieu of prosecution. Entry into a DPA with the offending banks would have allowed the regulators to impose a significant fine in conjunction with behavioural remedies, which could have been used to ensure that future instances of market manipulation did not happen again in the near future due to the threat of a future criminal trial hanging over the banks. As it was, further market manipulation scandals followed the LIBOR scandal (including the FX crisis), which demonstrates the lack of a deterrent effect the FSA's fines had on the banks involved¹³⁰.

10. *Civil penalties – how to make these more effective.*

Civil corporate penalties could be a more effective deterrent to economic crime if regulators use the full range of powers given to them rather than relying on financial monetary penalties alone. Regulators in the UK who are able to address economic crime carried out by companies are the FCA, the Competition and Markets Authority (CMA) and the SFO. Between them, these regulators have the power to impose a wide assortment of civil penalties, including both behavioural and structural remedies such as commitments and directions, which are available to both the FCA and CMA¹³¹, pursuant to competition law¹³². These remedies are available for a breach of competition law, such as the Chapter 1 prohibition¹³³, which deals with anti-competitive agreements between businesses, including the cartels seen between banks in the LIBOR and Forex scandals. For cartels, the CMA uses civil penalties available under Chapter 1 Competition Act 1998¹³⁴. The

¹²⁹ JAMES QUINN, *SFO ends foreign exchange probe but admits wrongdoing occurred in City of London* (The Telegraph, 15 March 2016), <https://www.telegraph.co.uk/business/2016/03/15/serious-fraud-office-ends-foreign-exchange-probe-but-admits-wrong/>, accessed 5 August 2021.

¹³⁰ N. RYDER, *“Too Scared to Prosecute and Too Scared to Jail?” A Critical and Comparative Analysis of Enforcement of Financial Crime Legislation Against Corporations in the USA and the UK* (2018, *The Journal of Criminal Law*, Vol. 82(3), 245-263).

¹³¹ Competition and Markets Authority, *Guidance on concurrent application of competition law to regulated industries* (March 2014), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/892735/Guidance_on_concurrent_application_of_competition_law_to_regulated_industries.pdf, accessed 5 August 2021.

¹³² Competition Act 1998, ss. 31, 32.

¹³³ Competition Act 1998, Chapter 1, s. 2.

¹³⁴ COMPETITION AND MARKETS AUTHORITY, *Annual Report and Accounts 2020 to 2021* (15 July 2021), <https://www.gov.uk/government/publications/cma-annual-report-and-accounts-2020-to-2021/annual-report-and-accounts-2020-to-2021#case-study-4-pre-cast-concrete-drainage-cartel>, accessed 5 August 2021.

Chapter I prohibition in the Competition Act 1998 prohibits agreements and concerted practices between businesses which have as their object or effect the prevention, restriction, or distortion of competition within the UK. In addition to this prohibition, the Enterprise Act 2002 contains a criminal cartel offence, which can be used against individuals, but not companies, involved in a cartel¹³⁵. Other civil structural remedies exist in the Enterprise Act 2002, where the power to break up a dominant firm guilty of serial abusive behaviour is explicitly available pursuant to a market investigation reference¹³⁶. Therefore, more civil penalties exist than fines alone, so regulators should be encouraged to combine monetary penalties with other civil penalties such as commitments and directions to regulate future behaviour of companies who have infringed competition law in the financial services market.

11. *Strengthening Senior Management Certificate Regime (SM&CR).*

The final section of the chapter provides a critical review of the enforcement powers of the FCA towards companies who have breached financial crime legislation. This is important and necessary due to the regulator's statutory objective to reduce financial crime. As a result, of the Financial Services Act 2012, the FSA was replaced by the FCA, and its statutory objective to reduce financial crime now forms part of its integrity objective¹³⁷. This section of the chapter concentrates on the ability of the FCA to impose financial penalties for breaches of its financial crime rules and the obligations under the SM&CR. Edmonds suggested that the SM&CR «would allow greater identification of individuals with corporate failure»¹³⁸. The most frequently used power against companies for financial crime breaches by the FCA is financial penalties. For example, in January 2017, the FCA imposed a record financial penalty of £163m on Deutsche Bank for failing to maintain an adequate AML system¹³⁹. Specifically, the FCA determined that Deutsche Bank had performed inadequate customer due diligence, had deficient anti-money laundering (AML) policies and procedure, and it concluded that the «failings of Deutsche Bank are simply unacceptable»¹⁴⁰. The decision by the FCA to impose this record financial penalty can be contrasted with the stance of its predecessor,

¹³⁵ Enterprise Act 2002, s. 188.

¹³⁶ Enterprise Act 2002, s. 161 and Schedule 8.

¹³⁷ Financial Services Act 2012, s. 1D(2)(d).

¹³⁸ T. EDMONDS, *Corporate Economic Crime: bribery and corruption* (House of Commons Library: 2017) at 3.

¹³⁹ See FINANCIAL CONDUCT AUTHORITY, *FCA fines Deutsche Bank £163 million for serious anti-money laundering controls failings*, January 31 2017, available from <https://www.fca.org.uk/news/press-releases/fca-fines-deutsche-bank-163-million-anti-money-laundering-controls-failure>, accessed August 25, 2021.

¹⁴⁰ *Ibid.*

the FSA, towards HSBC when the regulator decided not to take any action. This must be questioned and criticized given the contrasting content of each case. For instance, HSBC flouted US AML laws and the UN sanctions regime, which resulted in no enforcement action by the FSA. Conversely, Deutsche Bank was fined £163.1m for not having adequate AML rules as proscribed by the FCA Handbook, even though there was no evidence of any money laundering. The FCA has imposed large financial penalties for breaches of its AML rules, even though there was no evidence of money laundering. For examples, such fines were imposed on Turkish Bank (UK) Ltd¹⁴¹, Habib Bank AG Zurich¹⁴² and Coutts & Company¹⁴³. It is also interesting to note, that in none of these cases did the FCA pursue any prosecutions for breaches of the Proceeds of Crime Act 2002 against any employee. In fact, the FCA has only instigated criminal proceedings for money laundering under the Proceeds of Crime Act 2002 on one occasion¹⁴⁴. Another example of the ineffectiveness of financial penalties was the £72m fine imposed on Barclays Bank in November 2015. Here, the FCA stated that the banks «senior management ... had failed to oversee adequately Barclays' handling of the financial crime risks ... and that it was unclear which senior managers were in charge of doing so»¹⁴⁵. The FCA concluded, «Barclays ignored its own process designed to safeguard against the risk of financial crime and overlooked obvious red flags to win new business and generate significant revenue»¹⁴⁶. Despite the imposition of financial sanctions by the FCA for breaches of its AML rules, the regulator decided against imposing any further sanctions such as a prosecution of the banks senior management or the money laundering reporting officer. The ability to impose financial penalties in the UK against companies can be contrasted with the US approach. It is our contention that the UK legislature should introduce legislation that is based on the provisions in the Financial Institutions Reform, Recovery and Enforcement Act 1989. This

¹⁴¹ FINANCIAL SERVICES AUTHORITY *Turkish Bank (UK) Ltd: Decision Notice*, July 26 2012, available from <http://webarchive.nationalarchives.gov.uk/20130202000754/http://www.fsa.gov.uk/static/pubs/final/turkish-bank.pdf>, accessed August 3 2017.

¹⁴² Financial Services Authority *FSA fines Habib Bank AG Zurich £525,000 and money laundering reporting officer £17,500 for anti-money laundering control failings*, May 15 2012, available from <http://webarchive.nationalarchives.gov.uk/20130201230641/http://www.fsa.gov.uk/library/communication/pr/2012/055.shtml>, accessed August 2017.

¹⁴³ Financial Services Authority *Coutts fined £8.75 million for anti-money laundering control failings*, March 26 2012, available from <http://webarchive.nationalarchives.gov.uk/20130201230628/http://www.fsa.gov.uk/library/communication/pr/2012/032.shtml>, accessed August 3, 2018.

¹⁴⁴ See *R v Rollins* [2010] UKSC 39. At the time of writing this submission, the Financial Conduct Authority secured its first corporate money laundering conviction for NatWest Bank for alleged breaches of the 2007 Money Laundering Regulations. See *R v National Westminster Bank Plc*, Southwark Crown Court, 13 December 2012, available from <https://www.judiciary.uk/wp-content/uploads/2021/12/FCA-v-Natwest-Sentencing-remarks-131221.pdf>, accessed March 28, 2022.

¹⁴⁵ FINANCIAL CONDUCT AUTHORITY *FCA fines Barclays £72 million for poor handling of financial crime risks*, November 26 2015, available from <https://www.fca.org.uk/news/press-releases/fca-fines-barclays-%C2%A372-million-poor-handling-financial-crime-risks>, accessed August 2, 2017.

¹⁴⁶ *Ibid.*

legislation could provide the FCA and the SFO with another mechanism to target companies who have breached financial crime related legislation.

The introduction of the SM&CR by the FCA presents an opportunity to possibly overcome the problems associated with the identification doctrine, as highlighted above. The SM&CR has two objectives: to encourage all staff within the financial services sector to take responsibility for their actions and that authorised firms and employees can clearly illustrate where the responsibility lies¹⁴⁷. The introduction of the SM&CR was heavily influenced by the recommendations of the Parliamentary Commission for Banking Standards that had been asked to investigate how standards could be improved following the market manipulation scandals of LIBOR and FOREX¹⁴⁸. The SM&CR provides that a corporation's senior management is responsible for the policies, systems and controls that are designed to reduce the threat posed by financial crime. Therefore, the SM&CR places the obligation of the regulated companies to limit the risk posed by financial crime on its senior management. The FCA stated that «the extension of the SM&CR is key to driving forward culture change in firms ... this is about individuals not just institutions ... the regime will also ensure that senior managers are accountable both for their own actions, and for the actions of staff in business areas they lead»¹⁴⁹. The FCA is attempting to improve the culture within firms and is clearly placing the burden on senior managers to limit the risk posed by financial crime. Such efforts are to be welcomed, yet the extension to make senior managers accountable for a firm's financial crime obligations are from innovative and this "new" initiative duplicates the existing obligations under the FCA¹⁵⁰. Nonetheless, financial crime related breaches of the SM&CR by senior managers would enable the FCA, and potentially prosecutors, to identify a corporation's senior management who could meet requirements of the identification doctrine. This form of combined financial regulatory and criminal law response to financial crime breaches by companies can be classified as a "hybrid" approach and it would go some way to resolving the problems associated with the identification doctrine. This would be a novel step in the UK's efforts to tackle corporate financial crime, but it would require a more joined up approach between the FCA and prosecutorial agencies.

One way the SM&CR could be improved is to alter the burden of proof. At present there is a "duty of responsibility" requiring management to take appropriate

¹⁴⁷ FINANCIAL CONDUCT AUTHORITY, *Senior Managers and Certification Regime*, July 7 2015, available from <https://www.fca.org.uk/firms/senior-managers-certification-regime>, accessed November 29 2017.

¹⁴⁸ PARLIAMENTARY COMMISSION FOR BANKING STANDARDS, *Changing banking for good – Report of the Parliamentary Commission on Banking* (2013).

¹⁴⁹ FINANCIAL CONDUCT AUTHORITY, *FCA outlines proposals to extent the Senior Managers and Certification Regime to all financial services firms*, July 26 2017, available from <https://www.fca.org.uk/news/press-releases/fca-outlines-proposals-extend-senior-managers-certification-regime-all-firms>, accessed November 29 2017.

¹⁵⁰ FCA Handbook, SYSC 6.3.8.

steps to prevent a regulatory breach occurring¹⁵¹. Thus, the burden of proving misconduct falls to the regulator. In essence this has made little difference to what senior managers were already expected to do in practice and pinpointing who responsibility ultimately lies with is still difficult. However, before the regime came into effect the FCA proposed the introduction of a “presumption of responsibility”, which would result in a senior manager being held personally accountable and possibly facing personal sanction for an alleged failure taking place within the business unit they were responsible for. This reverse burden of proof means the senior manager responsible for the area of the corporation in which the regulatory breach has occurred would be guilty unless they could show regulators they had taken “reasonable steps” to stop or prevent those breaches occurring¹⁵². Whilst controversial, this reverse burden of proof could help to ensure a clear standard of expected behaviour within the financial services sector is set, ensuring an improved corporate culture is led from the top-down.

Furthermore, allowing the FCA to seek a Disqualification Order, where a senior manager/director cannot demonstrate they have taken “reasonable steps” to stop or prevent regulatory breaches occurring within the business unit they are responsible for would be beneficial. Such an approach would be similar to that of the CMA. Since 2016, the CMA have actively been taking actions against directors of companies who have breached competition law with Competition Disqualification Orders (CDO), which allow the disqualification of an individual from being a company director for a period up to 15 years¹⁵³. The CMA recognises individual liability as a powerful deterrent and over the last four years, they have disqualified 18 directors with the intention of continuing to make greater use of disqualification powers¹⁵⁴. At present, the FCA cannot seek the disqualification of a director itself. Instead, where the FCA considers the conduct of a director falls below the standard required, from information obtained through investigation, it may refer information to the Insolvency Service «to consider whether to seek the disqualification

¹⁵¹ L. HODGES, *Holding individuals to account in financial services – unexpected shift in burden of proof* (Kingsley Napley, 16 October 2015), <https://www.kingsleynapley.co.uk/insights/blogs/criminal-law-blog/holding-individuals-to-account-in-financial-services-unexpected-shift-in-burden-of-proof>, accessed 23 August 2021.

¹⁵² *Ibid.*

¹⁵³ The CMA can also accept a competition disqualification undertaking (CDU), which is voluntarily offered from a director who does not wish to go through the whole court proceedings. This has the same effect as a CDO. See Herbert Smith Freehills LLP, *CMA director disqualification cases signal greater focus on individual accountability for breach of competition rules* (22 May 2019), available from <https://www.lexology.com/library/detail.aspx?g=3ae97a92-794e-4fc1-949c-5bcacd58ac6e>, accessed 23 August 2021.

¹⁵⁴ ASHURST, *UK real estate director banned for seven years after court grants CMA order* (30 July 2020), available from <https://www.ashurst.com/en/news-and-insights/legal-updates/competition-law-newsletter---july-2020/cn10---uk-real-estate-director-banned-for-seven-years-after-court-grants-cma-order/>, accessed 23 August 2021.

of that person as a director»¹⁵⁵. Therefore, if a similar tool could be provided to the FCA like that of a CDO for the CMA, then it would provide the FCA with the necessary tool the agency needs to have significant impact in its enforcement measures. Additionally, it would send a message to senior management that individual accountability would be scrutinised with impactful consequences if it is not taken seriously. Together with the appropriate use of DPAs and significant financial penalties, it would provide a forceful deterrent for both companies and individuals.

12. Conclusion.

There are strong arguments for tough new enforcement measures to be implemented against corporate bodies in the UK. The current identification doctrine does not allow the FCA or the SFO to successfully prosecute international corporate bodies such as banks, due to their complex management structures that can span different geographical locations and make the identification principle all but impossible to prosecute. The problems encountered in the UK in prosecuting companies for economic crimes can be seen by the limited number of successful corporate criminal convictions. We recommend that the use of DPAs, as seen in many corporate criminal liability prosecutions by the SFO, is made more accessible to regulators in the UK alongside the modification or removal of the identification doctrine. DPAs strike a balance between the need to communicate the severity of a corporate defendant's conduct and the need to avoid unintended consequences of a criminal conviction, such as corporate death. This chapter also analysed the benefits and detriments of imposing civil penalties rather than criminal ones for economic crime. The wide range of civil penalties already available in law to the financial services regulator, using its Competition Act powers¹⁵⁶, has been analysed. Enforcement powers available to the FCA include significant fines of up to 10% of a company's worldwide turnover, but also measures such as commitments, directions and interim measures, all of which can be used in the financial services sector to tackle economic crime. Ultimately, this chapter argued that this wide range of civil measures, rather than fines alone, should be used in addition to reforming the method used for attributing criminal liability to corporations for economic crime.

¹⁵⁵ FINANCIAL CONDUCT AUTHORITY, *Memorandum of Understanding between Financial Conduct Authority and Insolvency Service* (25 January 2018), available from <https://www.fca.org.uk/publication/mou/mou-insolvency-service.pdf>, accessed 23 August 2021.

¹⁵⁶ The Financial Services (Banking Reform) Act 2013.

