NEW MODELS OF CORPORATE CRIMINALITY: THE DEVELOPMENT AND RELATIVE EFFECTIVENESS OF "FAILURE TO PREVENT" OFFENCES

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INTRODUCTION

Concerns over corporate behaviour in areas as seemingly disparate as homicide, manslaughter, bribery and tax evasion have led to experimentation with new models of corporate – as distinct from individual – criminality. The aim has been to avoid obstacles to prosecution posed by the common law's identification principle, where an individual can be said to the company's "directing mind and will", that effectively limits prosecution to small companies. Foremost amongst these new models has been the "failure to prevent" model introduced by the Bribery Act 2010. This has been perceived to have been successful in changing corporate behaviour, with widespread adoption of new corporate practices evidencing that compliance is taken seriously. As a consequence, it has been proposed that this model be extended to other areas of behaviour regarded as economic crimes. HMRC warmly endorsed the model and the Criminal Finances Act 2017, which came into force on 30 September 2017, contains new corporate tax offences relating to the failure to prevent UK and foreign tax evasion**.** In early 2017, the Ministry of Justice issued a "Call for Evidence on Corporate Liability for Economic Crime", with particular reference to its proposal to create "failure to prevent" fraud, false accounting and money-laundering offences.

The purpose of this series of two articles is to focus on whether the extension of the "failure to prevent" model, now employed in the Bribery Act 2010 and the Criminal Finances Act 2017, is likely to succeed in dealing with corporate fraud, especially in a financial services context. In this first article we analyse:

(a) The problem of "economic crime";
(b) The historical development of the "failure to prevent" model of organisational liability for bribery; and
(c) Its relative effectiveness in the context of the Bribery Act 2010 and extension in the Criminal Finances Act 2017.

This will exclude an examination of its applicability to other offences since these are distinct in substance and therefore merit separate investigation. In the second article, "New Models of Corporate Criminality: The Problem of Corporate Fraud: Prevention or Cure?" we will evaluate the relative ineffectiveness of the existing law in combating fraud in a financial services context, the appropriateness of the "failure to prevent" model to "economic crime", specifically fraud in a financial services context, and make proposals for reform.

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THE PROBLEM OF "ECONOMIC CRIME"

Growth in international and national scale

Criminal activity involving companies, whether in terms of money-laundering, fraud, bribery or tax evasion seems increasingly unresponsive to traditional legal strategies and has grown to a scale incurring significant economic consequences. In the aftermath of the global financial crisis, evidence of misconduct is emerging that has never before "occurred so systematically, in such a scale and across multiple jurisdictions." [2]

The estimates globally for money-laundering are truly eye-watering. According to a study of studies conducted by the UN Office on Drugs and Crime the amounts *available* for money-laundering in 2009 were equivalent to 3.6% of GDP or US$ 2.1 trillion[3] with *money flows* relating to transnational organised crime activities equivalent to 1.5% of global GDP or US$ 870 billion.[4] Furthermore, 70% of these money flows would have been *available* for laundering through the financial system, equivalent to 1% of global GDP or US$ 590 billion.[5] The UK's National Crime Agency believes that "many hundreds of billions of international criminal money is laundered through UK banks, including their subsidiaries, each year".[6] HM Treasury and the Home Office see money-laundering as a key enabler of serious and organised crime, involving more broadly based measures of social and economic costs, estimated at £24 billion each year as well as a threat to national security.[7] Reflecting perhaps the increasing priority attached to this issue, the Financial Conduct Authority (FCA) announced its largest penalty ever for a failure to maintain an adequate anti-money-laundering control framework against Deutsche Bank AG, being a fine of just over £163

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[2] M. Shafik, Bank of England Deputy Governor, Markets and Banking, "From 'ethical drift' to 'ethical lift': Reversing the tide of misconduct in global financial markets" speech given at the panel discussion Federal Reserve Bank of New York Conference on 'Reforming Culture and Behaviour in the Financial Services Industry' Oct. 20, 2016, at *www.bankofengland.co.uk/publications/Pages/speeches/default.aspx/Documents/speeches/2016/speech930.pdf* [Accessed May 29, 2017]. See also the comments made by the European Parliament, Directorate General for Internal Policies, Policy Dept A: Economic and Scientific Policy, Consumer Protection Aspects of Financial Services (2014), IP/A/IMCO/ST/2013-07 Feb. 2014 at *http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/507463/IPOL-IMCO_ET(2014)507463_EN.pdf* [Accessed May 29, 2017].

[3] "Estimating illicit financial flows resulting from drug trafficking and other transnational organised crime: Research Report" (UNODC, October 2011), at *http://www.unodc.org/documents/data-and-analysis/Studies/Illicit_financial_flows_2011_web.pdf* [Accessed May 21, 2017].

[4] "Estimating illicit financial flows resulting from drug trafficking and other transnational organised crime: Research Report" (UNODC, October 2011), at *http://www.unodc.org/documents/data-and-analysis/Studies/Illicit_financial_flows_2011_web.pdf* [Accessed May 21, 2017] pp.5-7.

[5] "Estimating illicit financial flows resulting from drug trafficking and other transnational organised crime: Research Report" (UNODC, October 2011), at *http://www.unodc.org/documents/data-and-analysis/Studies/Illicit_financial_flows_2011_web.pdf* [Accessed May 21, 2017] pp.5-7.

[6] *http://www.nationalcrimeagency.gov.uk/crime-threats/money-laundering* [Accessed May 5, 2017].

[7] HM Treasury & Home Office, "UK national risk assessment of money-laundering and terrorist financing" (Oct. 2015), p.3. This figure is dominated by the cost of drug-supply of £10.7 billion and fraud with a cost of £8.9 billion, see p.19. The report acknowledges that less is known of the costs of cyber-crime and modern slavery.

million in January 2017.[8]

The estimates for the amount of bribery and its costs, which may be very different, have become the subject of some controversy.[9] Estimates indicate that the scale of the problem internationally has grown from $1.1 trillion in 2005 to between $1.5 trillion to $2 trillion in 2015.[10] The proportion of companies that have to pay bribes to win or retain business varies enormously globally, 15% in industrialised countries, 30% in Asia and 60% in former Soviet Union countries.[11] The position in the UK is unclear; however, some idea of the potential scale of the problem may be shown by the record payment of £497.25 million plus interest and costs by Rolls-Royce plc under the terms of a Deferred Prosecution Agreement made with the Serious Fraud Office (SFO) in 2017, following a four-year investigation into bribery and corruption, with the total paid out by Rolls-Royce being approximately £671 million when payments to the US and Brazil were taken into account.[12] The costs of bribery are often indirect or concealed; as the Ministry of Justice has pointed out they may include: contracts not being specified or enforced properly, e.g. services not performed to the required standard or over-specified with unnecessary gold-plating; transaction costs may be higher; competition impaired; incentives to invest and innovate undermined; as well as serious reputational damage and strategic disruption if concerns arise.[13] However, in the case of bribery, it has been argued that the new approach to imposing criminal liability in the Bribery Act 2010 has had a significant impact in addressing and perhaps reducing bribery in the UK.

Equally eye-watering are the global estimates for fraud. PKF estimated that in 2013 the global loss from fraud might have cost an equivalent of £2.78 trillion, more than 50% greater than the UK's entire GDP for the period.[14] Examples of the sorts of areas where losses were found to have been measured were wide-ranging, whether in terms of sector, e.g. agriculture, construction, education and housing and in terms of activity e.g. compensation, payroll and procurement.[15] Using the terminology employed in the Annual Fraud Indicator, Crowe Clarke Whitehill, Experian and the Portsmouth University Centre for Counter Fraud Studies believe that fraud alone is estimated to have cost[16] the UK economy a staggering £190 billion

[8] Financial Conduct Authority Final Notice to Deutsche Bank AG dated 30th Jan. 2017, at *https://www.fca.org.uk/publication/final-notices/deutsche-bank-2017.pdf* [Accessed May 21, 2017].

[9] See, for example, M. Stephenson "The Amount of Bribery and the Cost of Bribery are not the same", The Global Anticorruption Blog (15.12.15).

[10] International Monetary Fund, Staff Discussion Note "Corruption: Costs and Mitigating Strategies" (May 2016), p.5, citing D. Kaufman "Myths and Realities of Governance and Corruption" (Munich: MPRA Paper 8089) (2005) and an extrapolation by him in 2015 based on the earlier estimate.

[11] Transparency International UK, Corruption Data at *http://www.transparency.org.uk/corruption-data*, cited by Ministry of Justice "Impact Assessment of bill on reform of the law on bribery" (Implementation stage, version 2), p.7.

[12] "SFO completes £497.25 million Deferred Prosecution Agreement with Rolls-Royce PLC", SFO News Release 17 Jan. 2017.

[13] Ministry of Justice, "Impact Assessment of bill on reform of the law on bribery", (Implementation stage, version 2), p.7.

[14] J. Gee and M. Button, "The Financial Cost of Fraud 2015" (PKF and University of Portsmouth, 2015), p.10.

[15] J. Gee and M. Button, "The Financial Cost of Fraud 2015" (PKF and University of Portsmouth, 2015), p.7.

[16] This may be better expressed as a misallocation of resources.

in 2017,[17] rising from £52 billion in 2013.[18] This figure is more than the UK Government spends on health and defence combined and equates to circa £10,000 per family in the UK.[19] While the exponential leap in the amount estimated over that period may be explained more by other factors than by a particularly sharp increase in fraudulent activity itself,[20] it is quite clear that fraud remains a widespread problem despite considerable legislative attention in the Fraud Act 2006. Beyond the quantifiable financial cost, there is also the documented social cost of economic crime: small businesses forced into bankruptcy, livelihoods ruined, jobs destroyed and opportunities lost, the inestimable impact on society and people's health and well-being.[21]

It may even be that the global estimates for fraudulent behaviour cited above grossly underestimate the full extent of fraudulent behaviour, acknowledging as they do frauds perpetrated against organisations but not necessarily those arguably committed by them. This is not a matter of criticism but simply reflects the different methodologies that may be employed in the selection and calculation of activities considered criminally fraudulent. The authors have addressed this issue elsewhere in terms of how addressing off-balance sheet finance as a matter of accounting regulation means that its potential categorisation as criminal fraud may be overlooked[22]. The impact of addressing other forms of misconduct as matters of financial services regulation may have similar effect. Accordingly, the 2017 Annual Fraud Indicator provides a comprehensive account of a number of types of fraud but does not refer to the various mis-selling cases that have pervaded the financial services industry.[23] If put to the test in the criminal courts, many of the numerous mis-selling scandals that have hit the headlines over recent years, might perhaps be found to constitute fraud.[24] On this basis, in

[17] Crowe Clarke Whitehill, Experian and Portsmouth University Centre for Counter Fraud Studies, "Annual Fraud Indicator 2017" at *https://www.croweclarkwhitehill.co.uk/wp-content/uploads/sites/2/2017/11/Annual-fraud-indicator-2017.pdf* [Accessed Jan 18, 2018].

[18] National Fraud Authority, 6 June 2013 at *http://www.gov.uk/government/publications/annual-fraud-indicator--2* [Accessed May 21, 2017].

[19] Crowe Clarke Whitehill, Experian and Portsmouth University Centre for Counter Fraud Studies, "Annual Fraud Indicator 2017" at *https://www.croweclarkwhitehill.co.uk/wp-content/uploads/sites/2/2017/11/Annual-fraud-indicator-2017.pdf* [Accessed Jan 18, 2018] p.5.

[20] For example, different methodologies for the reports and, in particular, the fact that there is no accepted definition of "fraud" which leaves the scope of the activities included in the reports open to variation.

[21] New City Agenda and Cass Business School, "Cultural Change in the FCA, PRA and Bank of England, Practising What They Preach?", 25 October 2016 at *http://newcityagenda.co.uk/wp-content/uploads/2016/10/NCA-Cultural-change-in-regulators-report_embargoed.pdf* [Accessed May 21, 2017] p.13.

[22] S. Copp and A. Cronin, "The failure of criminal law to control the use of off balance sheet finance during the banking crisis" (2015) 36 *Company Lawyer* (4) 99.

[23] Crowe Clarke Whitehill, Experian and Portsmouth University Centre for Counter Fraud Studies, "Annual Fraud Indicator 2017" at *https://www.croweclarkwhitehill.co.uk/wp-content/uploads/sites/2/2017/11/Annual-fraud-indicator-2017.pdf* [Accessed Jan 18, 2018] which specifically includes tax fraud, NHS fraud, benefits fraud, vehicle excise fraud, TV licence fee fraud, blue badge fraud, retail and telecommunications fraud, council tax fraud, rail transport fraud, ID fraud against consumers, payroll fraud, procurement fraud, grants fraud, mortgage fraud, credit/debit card fraud, housing tenancy fraud, motor finance fraud, insurance fraud.

[24] The generic offence is contained in the Fraud Act 2006 and can be made out either through the making of a false or misleading representation, Fraud Act 2006, s.1(1)(2)(a) and s.2; or failing to disclose information that a person is legally obliged to disclose, Fraud Act 2006, s.1(1)(2)(b) and s.3; or by abusing a position occupied in relation to the financial interests of another, Fraud Act 2006, s.1(1)(2)(c) and s.4. If done dishonestly, Fraud Act 2006, s.2(1)(a), s.3(a), s.4(1)(b), and with an intention to make a gain for himself or another, or to cause a loss

excess of £54 billion might be added to the estimated overall costs for the period since 2000, this figure representing the total in compensation paid out by the major retail banks and building societies in the UK in the 15 years since the turn of the millenium for mis-selling activities.[25] In addition, further claims, estimated to amount to £33 billion, may result from the Supreme Court decision in *Plevin v Paragon [2014]* relating to the non-disclosure of sales commissions paid on these policies.[26] Numerous other mis-selling complaints include interest rate hedging schemes, packaged accounts, interest only mortgages, investments and other insurance products.[27] More recently, it has been suggested that liability for mis-selling pension annuities may prove to be as extensive as the personal protection insurance scandal.[28]

Legal problems of attribution hinder criminal prosecution

The common law's approach to attributing criminal liability to companies, employing the so-called "identification principle", has posed serious difficulties. The common law foundation of criminal liability is traditionally expressed in the Latin maxim *"actus non facit reum nisi mens sit rea"*[29] which essentially means that "whatever the deed a man may have done, it cannot make him criminally punishable unless his doing of it was actuated by a legally blameworthy attitude of mind".[30] Further, in accordance with the criminal law's individualist ideal, the state of mind in question is determined subjectively rather than by reference to an objective standard of behaviour.[31] A review of the means by which criminal culpability can be attracted in the context of corporate activity reveals various possibilities. In the first instance, an individual employee may commit the substantive offence in question and attract individual liability, for example under s. 1 Fraud Act[32] for fraudulent activity of a proscribed type[33] or s. 1, 2 or 6 of the Bribery Act 2010 for an offence of bribery, being bribed or bribing a foreign public official. The liability is contained at the individual level, whether or not the misconduct was intended to benefit the company, unless the individual actor involved

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to another or to expose another to a risk of loss, Fraud Act 2006, s.2(1)(b)(i) and (ii), s.3(b)(i) and (ii), s.4(1)(c)(i) and (ii). A conviction can follow with a term of up to 10 years' imprisonment.

[25] New City Agenda and Cass Business School, "Cultural Change in the FCA, PRA and Bank of England, Practising What They Preach?", 25 October 2016 at *http://newcityagenda.co.uk/wp-content/uploads/2016/10/NCA-Cultural-change-in-regulators-report_embargoed.pdf* [Accessed May 21, 2017].

[26] *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61. The Supreme Court held that the Consumer Credit Act 1974, ss.140A to 140D applied and the non-disclosure of the amount of commissions and the identity of the recipients did make the debtor-creditor relationship unfair under s.140A(1)(c) and the creditor may not have taken out the personal protection insurance had she known the amount of the commission charged.

[27] *www.financial-ombudsman.org.uk/news/speech/2013/CW-BILA-conference.pdf* [Accessed May 21, 2017].

[28] *http://www.telegraph.co.uk/finance/personalfinance/pensions/11286965/Annuity-mis-selling-scandal-could-it-be-as-big-as-PPI.html* [Accessed May 21, 2017].

[29] See, for example, Lord Kenyon CJ in *Fowler v Padget* (1798) 7 T.R. 509; Lord Goddard CJ in *Harding v Price* [1948] 1 K.B. 695.

[30] J.W. Cecil Turner, *Russell on Crime* (Stevens & Sons, 1964) Vol. 1.

[31] A recent example of the subjectivist tendency can be found in the criminal damage case of *R. v G.* [2004] 1 A.C. 1034 (HL) in which the objective test of recklessness was replaced in favour of a subjective test.

[32] Fraud Act 2006, s.1 and referring to ss.2, 3 and 4.

[33] In addition, if a business is carried out for a fraudulent purpose, statutory provisions impose liability under Companies Act 2006, s.993 and Fraud Act 2006, s.9 where an individual participates in a fraudulent business carried on by a sole trader.

is so senior in the organisation that he is deemed to be its controlling mind.[34] In such a case, the company itself may also be criminally liable for the substantive offence under the "identification doctrine". Application of this doctrine means that a corporation can be found guilty of a substantive offence, for example fraud contrary to s. 1 Fraud Act or one of the bribery offences set out at ss. 1, 2 and 6 Bribery Act, the *mens rea*, namely the dishonesty and/or relevant intent, of the senior individual being attributable to the corporate entity itself. Further, if liability is attributed to the company under this doctrine, other company officers may attract culpability for the offence if they have consented to or connived in its commission.[35] As far as corporate liability is concerned, criminal culpability is restricted to cases in which the individual who is deemed to be the "directing mind and will" of the corporation, acting and speaking for it, is himself guilty of the offence.[36]

The construction of corporate liability on this basis is now dated in that it is premised in a notion of corporations comprising relatively simple, pyramidal managerial frameworks. This means that large companies with typically complex organisational structures and decentralised responsibility are likely to evade prosecution whereas smaller companies, with directors more likely to be involved in the day to day activities of the business, are convicted much more readily.[37] As a basis of fault, it can be said that the "identification principle" underestimates the complexity and subtlety of corporate action, imposing an already simplified biological model on an equally simplified appreciation of corporate management and behaviour.[38] In practice, corporate policy and decision-making is often decentralised or the product of other corporate policies and procedures rather than the result of individual decisions.[39] Indeed, the "identification principle" of liability attribution serves as a real incentive to senior managers to "turn a blind eye" to questionable or dubious practices and it acts as a disincentive for the internal reporting of suspected illegality.[40] Therefore, as a method of attributing criminal liability, "it fails to reflect the reality of the modern day large multinational corporation (...) [and] it produces what many regard as an unsatisfactory narrow scope for criminal liability".[41] Furthermore, the need to identify the criminality of an individual of sufficient seniority, as a precursor to corporate prosecution, incurs evidential

[34] *Tesco v Nattrass* [1972] A.C. 153 (HL).
[35] For example, directors, managers, secretaries or similar or persons purporting to act in any such capacity will be equally culpable if the offence is proved to have been committed with their consent or connivance, see Fraud Act 2006, s.12(2)(a) and (b) and Bribery Act 2010, s.14.
[36] This terminology is attributed to Viscount Haldane, *Lennard's Carrying Co Ltd v Asiatic Petroleum Ltd* [1915] A.C. 705 (HL).
[37] See, for example, the prosecution of the small company in *R. v Kite & OLL Ltd.*, 8 Dec 1994. T. Woolf, "The Criminal Code Act 1995 (Cth) - Towards a Realist Vision of Corporate Criminal Liability" (1997) *Criminal Law Journal* 257. See too, HMRC "Tackling offshore tax evasion: a new corporate criminal offence of failure to prevent the facilitation of evasion" (Consultation document, 16 July 2015).
[38] C. Harding, *Criminal Enterprise, Individuals, Organisations and Criminal Responsibility* (Willan, 2007) Ch 9.
[39] C.M.V. Clarkson, 'Kicking Corporate Bodies and Damning Their Souls' [1996] *Modern Law Review* 557, 561.
[40] HMRC "Tackling offshore tax evasion: a new corporate criminal offence of failure to prevent the facilitation of evasion", (Consultation document, 16 July 2015).
[41] D. Ormerod*, Smith & Hogan's Criminal Law* (Oxford: Oxford University Press, 2008) p. 249, a view shared by Gobert, see J. Gobert, "Corporate Criminality: four models of fault" (1994) 14(3) *Legal Studies* 393, 395.

problems which inevitably increase as the size of the company increases.[42] In the absence of the involvement of an actor whose mind is deemed to be that of the organisation itself, corporations have not been liable for the crimes perpetrated by their employees or agents in the course of business, even where the offending activity is to the benefit of the organisation.[43] As a result of these limitations, bespoke statutory reforms have been enacted in relation to corporate manslaughter,[44] bribery[45] and tax evasion[46] and reform is now proposed more broadly in other areas of economic crime.

The first significant innovation, the Corporate Manslaughter and Corporate Homicide Act 2007, introduced a distinct statutory basis for corporate liability where death arises as a consequence of a gross breach of the duty of care owed to the deceased by the organisation.[47] Subsequently, the Bribery Act 2010 imposed corporate criminal culpability on the basis of a failure of the organisation to prevent its employees or associated persons bribing another to the advantage of the organisation where there have been inadequate procedures in place to prevent the conduct.[48] The Bribery Act therefore works in tandem to the common law "identification doctrine", the new statutory "failure to prevent" model adding to the type of corporate culpability that may be incurred by imposing corporate liability for ineffective control of "rogue" employees.

Government proposals for a new approach to "economic crime"

In December 2014, the government published its UK Anti-Corruption Plan.[49] Whilst this focused specifically on bribery, corruption,[50] money laundering, and a number of highly particularised settings in which these crimes are perpetrated,[51] Action 36 set out a

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[42] M. Hsaio, "Abandonment of the Doctrine of Attribution in favour of Gross Negligence Test in the Corporate Manslaughter and Corporate Homicide Act 2007" (2009) 30(4) *Company Lawyer* 110, 111.

[43] The need to find a "directing mind and will" with which to equate corporate blameworthiness is a relatively recent proposition emanating from the civil case of *H.L. Bolton (Engineering) Co Ltd v T.J. Graham & Sons Ltd.* [1957] 1 Q.B. 159 (CA) and followed in *Tesco Ltd v Nattrass* [1972] A.C. 153 (HL). Prior to this authority existed for the application of established agency principles to corporate liability, see A. Cronin, "Reforming Corporate Fraud Regulation in the UK: A Model of Manifest Liability", PhD thesis, Bournemouth University (Taylor Francis, 2017, forthcoming) *sub nom* "*Corporate Criminality and Liability for Fraud*" and the analysis of *Triplex Safety Glass Co Ltd. v Lancegaye Safety Glass (1934) Ltd.* [1939] 2 K.B. 395 (CA); *R v ICR Haulage Ltd* [1944] K.B. 551 (CCA); *Moore v Bresler Ltd.* [1944] 2 All E.R. 515.

[44] Corporate Manslaughter and Corporate Homicide Act 2007.

[45] Bribery Act 2010, s. 7.

[46] Criminal Finances Act 2017, Pt. 3, ss. 45 and 46.

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

[48] Bribery Act 2010, s.7.

[49] HM Government "UK Anti-Corruption Plan", (Dec. 2014).

[50] Although acknowledging there is no universally accepted definition of "corruption", the UK Anti-Corruption Plan seems to accept that corruption is the abuse of power for personal gain, HM Government "UK Anti-Corruption Plan", (Dec. 2014) p.9.

[51] For example, organised crime, corruption in government departments and agencies, corruption, jury nobbling, corruption at borders, corruption by MPs, local authorities, the MOD, sports and betting, financial services and in the context of financial markets. The Plan also looks at money laundering and terrorism and the proceeds of crime, and generally at whistle-blowing provisions, HM Government "UK Anti-Corruption Plan" (Dec. 2014).

commitment to examine not only the case for a new offence of a corporate failure to prevent economic crime but also the rules on establishing corporate criminal liability more widely.[52] However, within just a year, on 28th September 2015, the Justice Minister, Andrew Selous, revealed that the Ministry of Justice had abandoned its work on corporate criminal liability for failure to prevent economic crimes.[53] The reasons given for this decision were two-fold: first, there had been no corporate prosecutions to date for the Bribery Act offence of failing to prevent bribery and, second, there was little evidence of corporate economic wrongdoing going unpunished.[54] Despite this seeming lack of confidence in the new model, on 16 July 2015, HMRC proposed the introduction of a new corporate offence of failing to prevent the facilitation of offshore tax evasion by its agents.[55] Starting in 2016 for the Crown Dependencies and Overseas Territories and in 2017 for the remaining signatory countries, HMRC will receive detailed information about offshore accounts held by UK tax residents under the Common Reporting Standards.[56] The Finance Act 2016 introduced tougher sanctions with civil financial penalties and additional criminal offences for individual employees and/or associated persons who enable offshore tax evasion,[57] which is now built upon by the corporate "failure to prevent" offences in relation to both UK tax and foreign tax evasion in the Criminal Finances Act 2017.[58] The Organisation for Economic Cooperation and Development's (OECD) Global Forum for Transparency and Exchange of Information for Tax Purposes, currently with 140 members, provides the practical framework within which the offence will be constructed.[59] In the meantime, the failure to prevent economic crimes project has been resurrected by the Ministry of Justice, which on 12 May 2016 announced that it would be consulting later in the year with a view to extending the "failure to prevent" model to fraud, false accounting and money-laundering.[60] That call for evidence took place in early 2017, closing on the 24 March 2017.[61]

The use of the terminology of "economic crime" to encompass issues of money-laundering, false accounting and fraud, whilst bribery and tax evasion are addressed under distinct measures, is to be regretted. There is a lack of logic using general terminology to cover money-laundering, false accounting and fraud whilst keeping other "economic" crimes, such as bribery and tax evasion, separate. It is submitted that the better solution would be to retain the status quo and reform the underlying legislation, for example, the Proceeds of Crime Act 2002, Terrorism Act 2000, Money-Laundering Regulations 2007 and Fraud Act 2006.

[52] HM Government, "UK Anti-Corruption Plan" (Dec. 2014), p.14.
[53] https://www.lawgazette.co.uk/news/government-drops-plan-to-extend-corporate-criminal-liability/5051277.article [Accessed June 6, 2017].
[54] Ibid, the Bribery Act 2010, which set out the innovative offence in s. 7, had come force on July 1, 2011 and therefore more than 4 years had then elapsed.
[55] HMRC "Tackling offshore tax evasion: a new corporate criminal offence of failure to prevent the facilitation of evasion" (Consultation document, 16 July 2015).
[56] This includes the name and address of the account holder, account numbers, interest and balances.
[57] Finance Act 2016, s.162 and Sch.20, s.166 inserting ss.106B to 106H into the Taxes Management Act 1970.
[58] Criminal Finances Act 2017, Pt 3, ss.45 and 46.
[59] *http://www.oecd.org/tax/transparency/* [Accessed May 9, 2017].
[60] *https://www.gov.uk/government/news/new-plans-to-tackle-corporate-fraud* [Accessed June 26, 2016].
[61] Ministry of Justice, "Call for Evidence on Corporate Liability for Economic Crime" 13 Jan. to 24 Mar. 2017, the responses to which are not yet published.

Furthermore, the use of the term "economic" poses the risk that the very real human costs associated with these crimes may fail to be appreciated, they may be perceived as purely "economic" and victimless in nature. To take money-laundering as an example, the human costs associated with the practice may well include modern slavery, human trafficking and terrorist atrocities. The consequences of fraud may be less visible but, as has been identified above, may nonetheless include inestimable damage to people's health and well-being through bankruptcy and other factors. The use of the term "economic crime" may also pose the risk of policy creep over time; it conjures up unfortunate connotations in its application in the former Soviet Union.[62]

THE HISTORICAL DEVELOPMENT OF THE "FAILURE TO PREVENT" MODEL OF ORGANISATIONAL LIABILITY FOR BRIBERY

The need to reform bribery law

Given that bribery is a form of economic crime, it is of note that this particular offence was the subject of reform well in advance of the other forms now more generally identified. In this respect, the law of bribery is to be understood as the product of its genealogy, its origins and development wholly independent of the evolutionary paths of the law of fraud and other economic crimes. Bribery has also been treated in isolation at the international level and this distinction is reflected as much in the substance of the offence as in its enforcement[63] and the drivers for reform. Cases involving an offence called bribery first appeared in Star Chamber records circa 1550.[64] The common law offence of bribery of a public official sat alongside a number of other offences which prohibited conduct of this nature in highly particularised circumstances, for example misconduct in public office[65] and misconduct by executive and administrative officials of the crown.[66] Having evolved on a case by case basis, the common law offence of bribery of a public official encompassed the "receiving or offering [of] any undue reward by or to any person whatsoever, in a public office, in order to influence his behaviour in office, and incline him to act contrary the known rules of honesty and integrity."[67] As regards its scope, precedent existed for the bribing of privy councillors, officers of justice and jurymen[68] and the elections of overseers of parishes, officers of companies and members of parliament.[69] However, with the growth of commercial activity in

[62] See, for example, "Economic Crimes under Soviet Law" (1951) University of Melbourne *Res Judicata*, 45.
[63] Dealt with below.
[64] J. Lindgren, "The Theory, History, and Practice of the Bribery-Extortion Distinction" (1993) *University of Pennsylvania Law Review*, Vol. 141: 1695 and referring to J.T Noonan Jr's comprehensive work, *Bribes: The Intellectual History of A Moral Idea* (Diane Publishing Co, 1984).
[65] The Law Commission is currently analysing responses to its second public consultation process with a view to proposed reform of this offence*, http://www.lawcom.gov.uk/project/misconduct-in-public-office/* [Accessed May 15, 2017].
[66] See Law Commission, "Misconduct in Public Office, Issues Paper 1", App. A, Jan 20, 2016, providing a detailed account of the historical developments of this offence and related offences.
[67] J.W.C. Turner, *Russell on Crime* (Stevens, 1964) p.381.
[68] The now defunct offence was referred to as embracery.
[69] W.F. Craies and H.D. Roome, *Archbold's Pleading, Evidence and Practice in Criminal* Cases (24th ed., Sweet & Maxwell, 1910) p.1195.

the late nineteenth and early twentieth century, there was a corresponding increase in corrupt behaviour and the reach of the law was extended with the introduction of various statutory offences.[70] The first, the Public Bodies Corrupt Practices Act 1889, was enacted largely in response to the revelation of widespread misconduct of local government and other public employees within London's governing body, the Metropolitan Board of Works.[71] However, this statute did not address the growing problem of corruption in the private sector which was undermining confidence in trade and Parliament responded by passing the Prevention of Corruption Act 1906.[72] Criminalizing corruption between private individuals, the Act also extended the range of public officials who were caught by the law[73] but was itself limited by the requirement that the recipient of the corrupt payment was the "agent" of a "principal". The definition of "agent" was construed within the ordinary meaning of the term, applicable to those who acted on behalf of others, and therefore could include employees, directors and trustees.[74] Within a decade, s. 4(3) of the Prevention of Corruption Act 1916 extended the definition of "agent" in the public sector context such that a person serving under any public body, whether or not an agent within the accepted meaning, was deemed to be an agent for the purposes of the 1906 Act.[75] Neither the 1889 Act[76] nor the 1906 Act[77] provided a definition of "corruptly", an element that was central to the offending behaviour. In this respect, the courts relied upon the circular statement provided in *Cooper v Slade (1858)*[78] to the effect that it meant purposefully doing an act which the law forbids as tending to corrupt. Unsurprisingly, this proved problematic in practice and the 1916 Act also created a rebuttable presumption of corruption where gifts were made to public officials by those seeking a contract from the public body.[79]

Proposals for reform were put forward in the 1970's following the Poulson scandal,[80] the Radcliffe-Maud Committee recommending that the presumption of corruption should extend

[70] R. Chada et al, *Bribery: A Compliance Handbook* (Bloomsbury Professional, 2014).
[71] R. Chada et al, *Bribery: A Compliance Handbook* (Bloomsbury Professional, 2014).
[72] The Prevention of Corruption Act 1906 came into force the following year.
[73] R. Chada et al, *Bribery: A Compliance Handbook* (Bloomsbury Professional, 2014).
[74] P. Murphy (ed.), *Blackstone's Criminal Practice* (Oxford University Press, 2003) B15.13.
[75] P. Murphy (ed.), *Blackstone's Criminal Practice* (Oxford University Press, 2003) B15.13. See also *Barrett* [1976] 1 W.L.R. 946.
[76] Public Bodies Corrupt Practices Act 1889, s.1(1) "Every person who shall by himself or by or in conjunction with any other person, corruptly solicit or receive, or agree to receive..." and s.1(2) "Every person who shall by himself or by or in conjunction with any other person corruptly give, promise or offer...".
[77] Protection of Corruption Act 1906, s.1(1) "if any agent corruptly accepts or obtains..., or any person corruptly gives or agrees to give or offer...".
[78] *Cooper v Slade* (1858) VI House of Lords Court (Clark's) 746, 10 E.R. 1488 at 1499.
[79] Further to the enactment of Human Rights Act 1998, s.3 enshrining European Convention of Human Rights Art. 6(2), this shifts the evidential burden onto the defendant to raise the issue as to whether the gift was corruptly made, the burden of proof remaining with the prosecution.
[80] J. Poulson, architect, was convicted of conspiracy to make or receive corrupt gifts in a web of corruption extending to 23 local authorities and around 300 individuals including MPs, police officers, health authorities and civil servants, see *http://news.bbc.co.uk/onthisday/hi/dates/stories/march/15/newsid_4223000/4223045.stm* [Accessed May 22, 2017].

to cover elected officials who exercised discretion in areas such as housing and planning[81] and the Salmon Commission focusing on public sector issues.[82] These were not acted upon and a further scandal, the infamous "cash for questions" affair involving Mohamed Al-Fayed, the then owner of Harrods department store, sparked John Major's instigation of Lord Nolan's Commission of Inquiry in 1994.[83] It was at the suggestion of the Nolan Committee Report on Standards in Public Life[84] that the Law Commission made proposals for reform of the bribery offence in 1998.[85] However, the initial proposals were not adopted, largely due to the rejection of the proposed retention of the "agent" and "principal" basis for the offence[86] and reservations as to the alternatives that were subsequently mooted.[87] Referring the matter back for further review, the Law Commission published another report in 2008[88] and it was this that led to the enactment of the Bribery Act 2010.

A number of international initiatives were also emanating from various sources over this period and the domestic response to the problem of corruption and bribery must be viewed in this broader context. For example, as a member of the EU, the UK was subject to the First and Second Protocols to the Convention on the Protection of the European Communities' Financial Interests[89] and the Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the EU Framework Decision of 22 July 2003.[90] Similarly, the UK ratified the Council of Europe's Criminal Law Convention on Corruption[91] in December 2003 and this necessitated the criminalisation of both domestic and public foreign officials when it came into force in April 2004.[92] In December 2005, the United Nations Convention against Corruption came into force following a series of resolutions, declarations and conventions and the launch of the Global Programme against Corruption.[93] This was ratified by the UK in 2006, having signed up at an earlier high level conference in 2003.[94] Further, the Organisation for Economic Cooperation and Development (OECD), to which the UK acceded in 1961, enacted the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions in

[81] Radcliffe-Maud Committee on Local Government Rules of Conduct 1974.
[82] Royal Commission (*The Salmon Commission*) on Standards in Public Life 1976, Cmnd. 6524.
[83] R. Chada et al, *Bribery: A Compliance Handbook* (Bloomsbury Professional, 2014).
[84] Nolan Committee, *Report on Standards in Public Life 1995* (Cm 28501).
[85] Law Commission, *Legislating the Criminal Code: Corruption* (Report No. 248), 3 March 1998.
[86] *http://www.legislation.gov.uk/ukpga/2010/23/notes* [Accessed 16.10.16], see Summary, para.4.
[87] See the Government's White Paper "Raising Standards and Upholding Integrity: the Prevention of Corruption" (Cm. 4759); Joint Committee on the Draft Corruption Bill Session 2002-03, Report and Evidence HL 157, HC 705 Dec 2003; The Government Reply to the Report from the Joint Committee on the Draft Corruption Bill Session 2002-03 HL 157, HC 705, Cm. 6068 and the Government consultation "Bribery: Reform of the Prevention of Corruption Acts and SFO powers in cases of bribery of foreign officials" (2005).
[88] Law Commission, *Reforming Bribery* (Report No. 313), 20 Nov 2008.
[89] *http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3Al33019* [Accessed May 22, 2017], the first protocol came into force on the 17 October 2002, the second on the 19 May 2009.
[90] R. Chada et al, *Bribery: A Compliance Handbook* (Bloomsbury Professional, 2014).
[91] Council of Europe, Treaty No. 173.
[92] *http://www.coe.int/t/DGHL/cooperation/economiccrime/corruption/Default_en.asp* [Accessed May 22, 2017].
[93] See the details provided at *https://www.unodc.org/unodc/en/treaties/CAC/* [Accessed May 22, 2017].
[94] *https://www.unodc.org/unodc/en/treaties/CAC/signatories.html* [Accessed May 22, 2017].

1999.[95] In this respect, the OECD'S Working Group review of our national law found that the criminal law's response to corporate liability was wanting[96] and that although there were exceptions, our anti-corruption legislation was deficient in that it did not extend the jurisdiction of the UK courts to try cases abroad.

Common law precedents for a "failure to prevent" model generally unsuccessful

The failure to *prevent* the criminal activities of other persons has not generally been regarded as a criminal offence.[97] There was a common law misdemeanour "misprision of felony", involving a failure to *reveal* a felony to the authorities which in effect created a duty to reveal the commission of a crime. To attract liability it was not necessary to have done anything active in the commission of the offence,[98] however, it was also a misprision to fail to reveal another's *intention* to commit a future felony,[99] which comes very close to an offence of failing to prevent a felony. Perhaps understandably, this offence was regarded as unreasonably wide for a considerable period of time[100] such that it came to be regarded as "practically obsolete" in the nineteenth century.[101] That being said, four prosecutions for the failure to report the felony of another were successful in the twentieth century, the last being in 1961.[102] Although it had been suggested that the charge of misprision should only succeed on proof that the non-disclosure was for the benefit of the party charged,[103] this was rejected in *Wilde* [1960].[104] In *Sykes* [1961] Lord Denning accepted a number of limitations to prosecution for misprision, some of which were based on the nature of the relationship between the parties involved which could give rise to a claim of right in good faith, for example that between lawyer and client, doctor and patient and clergyman and parishioner.[105] In addition, the institutional writers identified it as a misdemeanour to *forbear from preventing* a felony, however, this was regarded as narrower in scope than misprision and

[95] *http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf* [Accessed May 22, 2017]. Art.1 criminalises the bribing of a foreign public official, Art.9 deals with mutual legal assistance and Art.10 with extradition.
[96] *http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/34599062.pdf* [Accessed May 22, 2017], pp.63 – 66.
[97] It is still a common law offence to refuse to assist a constable who calls for assistance in dealing with a breach of the peace, *Brown* (1841) Car & M 314; *Waugh* (1976) *Times*, 1 Oct. 1976.
[98] *Sykes v DPP* [1961] 3 W.L.R. 371 (TAC), a person committed an offence if he knew of another's guilt, and could give information that might lead to his arrest for a felony, but omitted to communicate that information to some justice of the peace, see JW Cecil Turner, *Kenny's Outlines of Criminal Law* (Cambridge University Press, 1966).
[99] G. Williams, *Criminal Law, General Part (*Stevens & Sons, 1961) p.423.
[100] G. Williams, *Criminal Law, General Part (*Stevens & Sons, 1961) p.423, citing the Criminal Law Commissioners 5th Rep (184) *Parl. Pap.* xx 36.
[101] G. Williams, *Criminal Law, General Part (*Stevens & Sons, 1961) p.424, citing Stephen, HCL ii 238.
[102] *Casserley, Times*, May 28, 1938; *Aberg* [1948] 1 All E.R. 601, 32 CAR 144 (CCA); *Wilde* [1960] *Criminal Law Review* 116; *Sykes v DPP* [1961] 3 W.L.R. 371 (TAC).
[103] *Aberg* [1948] 1 All ER 601 and Lord Goddard's reference to Lord Westbury in *Williams v Bayley* (1866) L.R. 1 HL 220.
[104] *Wilde* [1960] *Criminal Law Review* 116.
[105] *Sykes v DPP* [1961] 3 W.L.R. 371 (TAC).

was long regarded as obsolete.[106] The offence of misprision of felony, but not misprision of treason,[107] was finally abolished by the Criminal Law Act 1967 which also brought to an end the distinction between felonies and misdemeanours, a distinction that had played a fundamental part in determining the scope of criminal liability for the misprision offence. The Criminal Law Revision Committee report of 1965, upon which the statute was based, had rehearsed a number of concerns with the misprision offence.[108] The Committee noted that the offence had no clearly defined limitations and, in particular, dishonesty was not a prerequisite to a conviction for the omission to report a felony. In addition, it was suggested that public opinion was unlikely to support an offence of refusing to answer police questions about the commission of offences and it then rejected the imposition of a general duty to disclose "for obvious reasons".[109] Although not clarifying what those obvious reasons were, it has been suggested that this approach was based on the criminal law's general dislike of liability based on omissions, a principle that had been cogently argued in the context of rescuers and the failure to save or attempt to save those in peril.[110] This argument was founded primarily on the incursion into the individual's autonomy and liberty that such a duty would pose, noting that liability of this nature could arise by chance rather than choice. While supporters of social responsibility might have reasoned that a duty to disclose information is a minimal interference in comparison, the framers of the Criminal Law Act 1967 nonetheless followed the Law Committee's recommendations.

In other contexts, there have been limited instances in which the common law, in effect, imposed criminal liability on individuals for a failure to prevent another's offending but, where it has done so, the construction of the liability incurred is as an *accessory* to the substantive offence.[111] For example, a jury could infer that a mother intended to encourage or assist the sexual assault on her 12 year old son when she failed to prevent him from having sexual intercourse with an adult woman. The mother's liability was based on her present knowledge of her son's age and that he was unable to consent to the act.[112] Similarly, in *Carter v Richardson* [1974] the supervisor of a learner-driver who was above the blood-alcohol limit was found to have aided and abetted the drink-driving offence because he was aware that the driver had consumed excessive alcohol or was reckless as to whether he had done so.[113] However, the application of this construction to establish a corporate accessorial liability, under the Accessories and Abettors Act 1861 or the Serious Crime Act 2007, is problematic in that proof of some blameworthy mental state, intention, knowledge or

[106] G. Williams, *Criminal Law, General Part (*Stevens & Sons, 1961) p.422 citing *Coney* (1882) 8 Q.B.D. 557-558 (CCR).
[107] D. Ormerod, *Blackstone's Criminal Practice* (Oxford University Press, 2017) A1.16.
[108] Criminal Law Revision Committee, *Seventh Report on Felonies and Misdemeanours* (1965) (Cmnd. 2659) para.39.
[109] S. Wallerstein, "Imposing Obligations to Disclose Information on Non-Suspects" in G.R. Sullivan and I. Dennis (eds.) *Seeking Security: Pre-Empting the Commission of Criminal Harms* (Hart, 2012).
[110] S. Wallerstein, "Imposing Obligations to Disclose Information on Non-Suspects" in G.R. Sullivan and I. Dennis (eds.) *Seeking Security: Pre-Empting the Commission of Criminal Harms* (Hart, 2012).
[111] See for example the discussion by D.J. Baker in *G. William's Textbook of Criminal Law* (Sweet & Maxwell, 2015) p.610-12.
[112] *State v Ainsworth* (1993) 426 S.E. 2d 410.
[113] *Carter v Richardson* [1974] R.T.R. 314.

recklessness, is required. Aside from the statutory exceptions found in relation to corporate manslaughter,[114] the failure to prevent bribery[115] and tax evasion[116] the common law will only impose corporate culpability if the substantive offence in question has been committed by a sufficiently senior controlling officer within the organisation.[117] Therefore, in order to attribute secondary liability to a corporation in this way, it would be necessary to find that an individual senior manager/director had been criminally complicit through aiding, abetting, counselling or procuring another to commit the crime or in the assisting or encouraging of it.[118]

Statutory intervention to impose organisational liability based on failure to act

Modern legislation has imposed a criminal liability for failure to *disclose information* in two key areas. The first relates to acts of terrorism or its funding, for example, under sections 19 and 21A Terrorism Act 2000, and the second relates to knowledge or suspicion of money laundering under sections 330, 331 and 332 Proceeds of Crime Act 2002.[119] Application of the latter is confined specifically to persons working in the regulated sector where the defendant knows, suspects or has reasonable grounds for knowing or suspecting that another is engaged in money laundering.[120] In essence, this imposes a duty to report and the "reasonable grounds for knowing or suspecting" limb means that a conviction can be based on a finding that although the defendant did not suspect laundering activity, he should have done. This duty was underpinned by the higher standard of diligence imposed by the Money Laundering Regulations 2007, now superseded and subtly amended by the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017,[121] which required comprehensive preventative systems within the regulated sector. The offences contained in the Money Laundering Regulations 2007[122] began to get closer to a "failure to prevent" model by requiring that "relevant persons"[123] who are acting in the course of business conducted by them in the UK take appropriate steps to *detect and prevent* money laundering and the financing of terrorism.[124] In terms of the duty this imposed, there is a specific requirement to put in place and apply "customer due diligence" measures with an accompanying duty to effect internal controls, training and monitoring systems that are appropriate to the business in question, determined on a risk-based approach,

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[114] Corporate Manslaughter and Corporate Homicide Act 2007, s.1.
[115] Bribery Act 2010, s.7.
[116] Criminal Finances Act 2017, Pt.3, ss.45 and 46
[117] *Tesco v Natrass* [1972] A.C. 153 (HL).
[118] See the Accessories and Abettors Act 1861, s.8 and the Serious Crime Act 2007, ss.44-46.
[119] The 2002 Act came into force on February 24, 2003 and money laundering activity taking place prior to its commencement is subject to prosecution under the Criminal Justice Act 1988 for non-drugs offences or the Drug Trafficking Act 1994 for property derived from drugs offences.
[120] Proceeds of Crime Act 2002, ss.330, 331, 332.
[121] S.I. 2017, No 692, in effect from 26 June 2017.
[122] S.I. 2007, No 2157, in accordance with the EU 3rd Money Laundering Directive 2005, to be superseded by the 4th Anti-Money Laundering Directive (EU) 2015/849 which took effect on 26 June 2015, supplemented by the Reg. (EU) 2016/675 of 14 July 2016, which was transposed into national law on 26 June 2017.
[123] Money Laundering Regulations 2007, reg.3.
[124] D. Ormerod, *Blackstone's Criminal Practice* (OUP 2015), B21.32 emphasis added.

and to report suspicious activities. Non-compliance gave rise to a civil penalty[125] and the offence is committed if the relevant person and/or regulated business fails to comply with one of the specified duties[126] although there was a defence that the accused took all reasonable steps and exercised all due diligence to avoid committing the regulatory offence.[127] The corporate criminal behaviour is therefore the failure to comply with the detailed administrative requirements stipulated in the Regulations, this being the substantive offence. Accordingly, to describe the offence in terms of the failure to prevent money laundering affords considerable artistic licence as regards the specific underlying basis for the attribution of fault. Indeed, veering to the other extreme, the Financial Conduct Authority's ("FCA") recent report of Barclays' failure to comply with the enhanced due diligence requirements,[128] in a £1.88bn transaction undertaken for a number of politically exposed persons, described the conduct as a failure to "minimise a risk that it might be used to facilitate financial crime"[129] while the popular press described a record fine "for secret deals with mega-rich", omitting any express reference to money-laundering or the Regulations themselves.[130] The 2007 Money Laundering Regulations continue to apply where the conduct constituting an offence under one of those regulations began before the date on which the new Regulations came into force, that being the 26 June 2017. While the new approach includes a general obligation to establish adequate and appropriate policies, controls and procedures to prevent money laundering and terrorist financing, there is no direct reference to a duty to take steps to *detect* this behaviour.[131] Although this would appear to be implicit in the due diligence requirements, it is not clear whether the draftsmen intended to omit this specific obligation.

As regards the duty to disclose, it is suggested that this is legitimated by the fact that those who are under the duty, i.e. who work in the regulated sector, actively help, even if unknowingly, to launder money and they are in a special relationship which gives rise to concerns of conflicts of interests.[132] Accordingly, legislation and regulation in this area seek to strike a balance between the duties owed to the client and those owed to the state[133] while giving effect to EU law.[134] However, it must be remembered that liability for failure to disclose the offence of another and liability for the failure to prevent the commission of an offence by another are ontologically distinct. While the former imposes a responsive and

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[125] Money Laundering Regulations 2007, reg.42.
[126] Money Laundering Regulations 2007, regs.45 and 47.
[127] Money Laundering Regulations 2007, regs.45(4) and 47.
[128] Money Laundering Regulations 2007, reg.14(1).
[129] *http://www.fca.org.uk/news/fca-fines-barclays-72-million-for-poor-handling-of-financial-crime-risks* [Accessed May 22, 2017].
[130] *Daily Mail*, 27 Nov., 2015.
[131] See the commentary provided by David Ormerod and David Perry, *Blackstone's Criminal Practice* (OUP 2018), B21.34.
[132] S. Wallerstein, "Imposing Obligations to Disclose Information on Non-Suspects" in G.R. Sullivan and I. Dennis (eds.) *Seeking Security: Pre-Empting the Commission of Criminal Harms* (Hart, 2012).
[133] S. Wallerstein, "Imposing Obligations to Disclose Information on Non-Suspects" in G.R. Sullivan and I. Dennis (eds.) *Seeking Security: Pre-Empting the Commission of Criminal Harms* (Hart, 2012).
[134] S.I. 2007, No 2157, in accordance with the EU 3rd Money Laundering Directive 2005, to be superseded by the 4th Anti-Money Laundering Directive (EU) 2015/849 which took effect on 26 June 2015, supplemented by the Reg. (EU) 2016/675 of 14 July 2016, which must be transposed into national law by 26 June 2017.

arguably minimal obligation on the duty holder to report to the relevant authority, by comparison the latter imposes a potentially onerous duty to actively construct such prophylactic measures as may be considered reasonable in the circumstances.

The development of the "failure to prevent" model for bribery

The Law Commission's 2008 Report on *Reforming Bribery* naturally acknowledged both national and international obligations and influences.[135] It recognised that the creation of a new criminal offence incurred a heavy burden of justification, which it sought to meet in the following way.[136] It concluded that the criminal law needed strengthening in preference to modifying the civil law because an actionable damage may not be suffered when bribery is committed[137]. This finding directly reflected the OECD's requirement that criminal liability be imposed where there is no effective "tort" of bribery or special administrative sanction aimed at its prevention.[138] Of course, there are considerable limitations to bringing any civil action for this type of activity in English law which are primarily consequent on the construction of the wrongdoing itself and context in which it takes place, typically within the tight confines of an agency or fiduciary relationship. Accordingly, the civil law recognises that a principal may suffer an actionable loss as a result of his agent's breach of fiduciary duty or his unjust enrichment. Of note, the giving or the receiving of a bribe is not a distinct "tort" in itself, but is one of any number of different activities that could compromise the fiduciary duty or give rise to an unjust enrichment.[139] Although the fiduciary duties themselves are prophylactic in nature, there must be an identifiable and quantifiable loss for a claim of this nature to be actionable and, while the value of the secret commission itself may be readily established, quantifying the extent of the loss caused by the fraud is inevitably fraught with difficulty. Similarly, although liability for conduct of this type may be extended to third parties, this would need to be established on the basis of an unlawful means conspiracy involving proof of an agreement to some active or passive concerted action to cause damage[140] to another by unlawful means.[141] Accordingly, persons with *locus standi* to bring a civil action for bribery are strictly limited to those who have suffered a demonstrable direct financial loss, identified targets of an unlawful means conspiracy and/or those to whom injury was reasonably foreseeable in the course of the agreed activity. With the latter constraint in mind, the Law Commission concluded that a corporation, and those acting on its behalf, are better placed to ensure that the damage done by tolerating bribery is reduced or eliminated worldwide – especially in relation to overseas trade.[142]

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[135] Law Commission, *Reforming Bribery* (2008).
[136] Law Commission, *Reforming Bribery* (2008), para.6.13.
[137] Law Commission, *Reforming Bribery* (2008), para.6.13.
[138] Law Commission, *Reforming Bribery* (2008), para.6.68.
[139] *Petrotrade Inc v Smith* [2000] 1 Lloyd's Rep. 486, [2000] C.L.C. 916.
[140] This can be an intention to cause damage to the target or where it is reasonably foreseeable that injury will be caused.
[141] *Prudential Assurance Co Ltd v Newman Industries (No. 2)* [1982] Ch. 204 (CA). Of note, a corporate body can also be a party to such a conspiracy and this liability can be imposed on the basis of Nelsonian knowledge / wilful blindness, *Commissioners for HM Revenue and Customs v Sunico A/S* [2013] E.W.H.C. 941 (Ch).
[142] Law Commission, *Reforming Bribery* (2008), para.6.14.

Militating further towards the invocation of a criminal liability, the Law Commission also observed that the ambition of the EU Conventions was not adequately reflected in the civil jurisdiction, where the aim of the law of tort is primarily to restore parties to the financial position they were in before the loss.[143] The Law Commission also rejected the possibility that minority shareholders could bring an action against the corporate tolerance of unethical practice, referring to potential obstacles and the lack of evidence that actions of this nature are, or could be, used effectively to hold company Boards to account.[144] Thus, to accord with the spirit of our international obligations, the UK needed to adopt a more preventative approach by providing an enhanced means of deterrence and punishment to companies indifferent to the commission of bribery.[145] Further, the preference for criminalization over regulation was underlined by reference to the character of the misconduct in question, contrasting "parking offences, many environmental or licensing offences, and offences connected with, for example, failures to file accounts in a particular form" as examples of regulatory offences.[146] Providing further elucidation, the Law Commission opined that regulatory offences often target conduct that involves no harm in itself but which is conducive to harmful, risky or wrongful outcomes, for example parking on a double yellow line.[147] In support, three of the four consultees who responded did not believe that regulation enforced by non-criminal sanctions was the best way to address lack of corporate supervision.[148]

THE RELATIVE EFFECTIVENESS OF THE FAILURE TO PREVENT MODEL IN THE CONTEXT OF THE BRIBERY ACT 2010 AND ITS EXTENSION IN THE CRIMINAL FINANCES ACT 2017

Structure of legislation

The common law bribery offence and the patchwork of statutory provisions were repealed when the Bribery Act 2010 came into force on 1 July 2011. Although the Act retains the distinctions between active and passive bribery,[149] liability is not limited by reference to the particular status of the individuals involved and is determined by nature of the consequent act or that intended. Accordingly, the offer and/or acceptance of the advantage, financial or other, are deemed criminal bribery if done with an intention that the recipient will perform a

[143] Law Commission, *Reforming Bribery* (2008), para.6.67.
[144] Law Commission, *Reforming Bribery* (2008), para.6.68.
[145] Law Commission, *Reforming Bribery* (2008). There are 4 European Conventions requiring liability for bribery and an inadequate failure to supervise an employee (or other person) who has committed bribery: Art.3(2) Second Protocol of the Convention on the Protection of the European Community's Financial Interests; Art.18(2) Council of Europe's Criminal Law Convention on Corruption; Art.5(2) European Council's Framework Decision 2003/568/JHA; OECD Antibribery Convention.
[146] Law Commission, *Reforming Bribery* (2008), para.6.17.
[147] Law Commission, *Reforming Bribery* (2008), para.6.18.
[148] Law Commission, *Reforming Bribery* (2008), para.6.70.
[149] Criminalized at Bribery Act 2010, ss.1 and 2 respectively.

relevant function or activity improperly.[150] The territorial limitation is addressed by s. 6 which specifically criminalises the bribery of a foreign public official and corporate responsibility is set out at s. 7 with the failure to prevent bribery offence. The Bribery Act "failure to prevent" offence,[151] with the accompanying adequate procedures/due diligence defence,[152] is, however, very different to previous common law attempts to develop liability based on a failure to prevent criminal acts and can instead be seen quite simply as the application of a well-established model of *regulatory* liability that developed in parallel. It is also very different to the failure-based offences in the Money Laundering Regulations in that it does not turn on a failure to comply with a detailed framework of administrative measures but is framed specifically on the failure to prevent an employee or associate committing the substantive bribery offence.[153] Further, in relation to the corporate bribery offence, the company itself must determine what internal procedures need to be invoked in order meet the adequacy test for prevention encompassed in the statutory "due diligence" defence, there are no explicitly prescribed measures.[154] The novelty of the Act therefore lies in the creation of a serious corporate offence combined with a defence that is effectively the demonstration of regulatory-type compliance, this construction now blurring the criminal and the regulatory categories in a penal statute.[155]

Evaluation of the Bribery Act 2010

Five years on, there are mixed messages as to whether the Bribery Act is proving a success. For example, some commentators have described a "step change in anti-bribery compliance standards"[156] and note that, in spite of predictions that UK companies would be seriously disadvantaged on the global stage, the UK economy is the strongest in Europe.[157] Similarly, in terms of awareness and impact of the new provisions, a survey conducted in January 2014 found that 66% of SMEs had either heard of the Bribery Act 2010 or were aware of its corporate liability for failure to prevent bribery, with that awareness increasing slightly among those exporting to less developed regions, including the Middle East, Asia, Africa and South and Central America.[158] Of the 66% aware of the Act, 81% knew that the Act has

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[150] Bribery Act 2010, s.3.
[151] Bribery Act 2010, s.7(1).
[152] Bribery Act 2010, s.7(2).
[153] Bribery Act 2010, s.1 or s.6.
[154] Bribery Act 2010, s.7(2). As regards guidance in relation to this matter see *https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf* [Accessed May 22, 2017].
[155] S. Gentle, "The Bribery Act 2010" [2011] *Criminal Law Review* 101.
[156] http://www.out-law.com/en/articles/2015/april/five-years-ofn-the-bribery-act-has-led-to--a-step-change-in-anti-bribery-compliance-standards-says-expert/ [Accessed May 22, 2017], by B. Vitou, an anti-bribery expert at Pinsent Masons, LLP.
[157] *https://www.icsa.org.uk/ireland/knowledge-and-guidance/governance-and-directors/report-on-awareness-and-impact-of-the-uk-bribery-act-2010-among-small-and-medium-sized-enterprises-published* [Accessed May 22, 2017].
[158] Department for Business, Innovation and Skills (BIS, which became the Department for Business, Energy and Industrial Strategy in July 2016) and the Ministry of Justice, "Report on awareness and impact of the UK Bribery Act 2010 among small and medium sized enterprises", 25 Sept. 2015, at *https://www.gov.uk/government/publications/impact-of-the-bribery-act-2010-on-smes* [Accessed May 22, 2017].

extra-territorial reach and 72% thought that their company had sufficient understanding to be able to implement adequate anti-bribery procedures.[159] Impressive as this may sound, put another way it meant that less than half of the SMEs surveyed had enough knowledge to take sufficient steps some two and half years after the Act came into force. Of some concern is the report published in October 2016 by Professor Kakabadse, Henley Business School, which suggests that bribery is a "way of life" for British companies working in emerging markets, with an estimated 85% of managers forced to resort to it in order to do business, often with the tacit permission of their chief executives.[160] While acknowledging that the robust penalties contained in the UK Bribery Act and the US Foreign Corrupt Practices Act "bring fear to boards", he suggested that they are also creating a new class of "fall guys". These findings, based on a 12-year inquiry comprising of "intimate discussions" with over 900 executives,[161] are in contrast to other recent reports which indicate an increased awareness of bribery which may be attributable to the numerous high-profile corruption cases involving major US and European corporations[162] or the recent corporate investigations which are being undertaken by the Serious Fraud Office in the UK. According to the report published by PWC as a part of its Global Crime Survey 2016,[163] UK respondents reported that the overall level of bribery and corruption has fallen since 2014 with 98% stating that their company's management were clear in their condemnation of the practice, and 94% believing that their company would rather have a business transaction fail than resort to bribery to secure it.[164] On a global perspective, the outlook is less optimistic with Ernst & Young's report showing no improvement since 2014 and 39% of those surveyed perceiving that bribery is widespread in their countries. In the emerging markets this equated to 51% of respondents thinking that bribery occurs widely and in the developed markets 21% reported that such behaviour is widespread.

Notwithstanding, the perception of a high incidence of corrupt behaviour in both developed and emerging markets, there has been just one conviction for the corporate offence of failure

[159] Department for Business, Innovation and Skills (BIS, which became the Department for Business, Energy and Industrial Strategy in July 2016) and the Ministry of Justice, "Report on awareness and impact of the UK Bribery Act 2010 among small and medium sized enterprises", 25 Sept. 2015, at *https://www.gov.uk/government/publications/impact-of-the-bribery-act-2010-on-smes* [Accessed May 22, 2017].

[160] See the media reports at *http://www.telegraph.co.uk/business/2016/10/26/bribery-a-way-of-life-for-companies-operating-in-emerging-market/* [Accessed May 22, 2017]; *http://www.lexology.com/library/detail.aspx?g=d44e6b4f-df0f-409f-ab82-b73654b1fdc7* [Accessed May22, 2017].

[161] *http://www.telegraph.co.uk/business/2016/10/26/bribery-a-way-of-life-for-companies-operating-in-emerging-market/* [Accessed May 22, 2017]; *http://www.lexology.com/library/detail.aspx?g=d44e6b4f-df0f-409f-ab82-b73654b1fdc7* [Accessed May22, 2017].

[162] For example in the Ernst & Young Global Fraud Survey 2016 and commenting in particular on the worsening view in developed markets, at *http://www.ey.com/gl/en/services/assurance/fraud-investigation---dispute-services/ey-global-fraud-survey-2016* [Accessed May 22, 2017].

[163] *http://www.pwc.com/gx/en/services/advisory/consulting/forensics/economic-crime-survey.html* [Accessed May 22, 2017].

[164] *http://www.pwc.com/gx/en/services/advisory/consulting/forensics/economic-crime-survey.html* [Accessed May 22, 2017].

to prevent bribery[165] to date and three Deferred Prosecution Agreements.[166] Deferred Prosecution Agreements (DPA) became part of the Serious Fraud Office's (SFO) enforcement armoury in February 2014 and can be invoked, with judicial approval, once criminal proceedings have been instituted against a corporation. In essence, the effect is that the prosecution is deferred on terms, such as the payment of a financial penalty, compensation and the implementation of a compliance programme. If the terms of the agreement are met within the specified time, the proceedings are discontinued.[167] Further, in October 2014 sentencing guidelines on financial penalties for companies convicted of economic crimes came into force and these will also inform the level of any financial penalty that forms part of a DPA.[168] Thus, for example, in February 2016, Sweett Group PLC was fined £1.4m on conviction[169] and, in November 2015, Standard Bank was given a US Dollar 16.8m fine as a term of its DPA.[170]

The lack of prosecutions for the s. 7 corporate failure to prevent bribery to date is not necessarily indicative of particularly low incidents of economic crime of this nature. It must be remembered that the Bribery Act 2010 came into force just over 5 years ago, does not have retrospective effect and the corporate model of criminal liability it employs is an innovation lacking any equivalent in the earlier anti-bribery regime. The provisions can only be invoked for failures occurring since July 2011. Accordingly, in January 2016, in the case referred to as "chickengate", Smith & Ouzman Ltd. was convicted of 3 counts of corruption but, because the bribes had taken place between November 2006 and December 2010, this was prosecuted under s. 1(1) of the Prevention of Corruption Act 1906.[171] This corporate

[165] Sweett Group PLC pleaded guilty to the corporate offence on 18 Dec. 2015, contrary to Bribery Act 2010, s.7.

[166] On 30 Nov. 2015, Sir B. Leveson approved the first DPA between the Serious Fraud Office and ICBC Standard Bank Plc for acting with its sister company, Stanbic Bank Tanzania Ltd. to bribe Tanzanian government officials, see for example the report by Ashurst LLP on Global ABC and investigations, 18 Jan. 2016 at *https://www.ashurst.com/doc.aspx?id_Content=12763 [Accessed* May 22, 2017]. The second DPA was approved on July 8, 2016, also by Leveson LJ, the counterparty is a UK SME that cannot be named because of ongoing related legal proceedings and is therefore referred to as XYZ Ltd, see *https://www.sfo.gov.uk/2016/07/08/sfo-secures-second-dpa/* [Accessed May 22, 2017]. The third DPA was agreed on Jan. 17, 2017 with Rolls Royce, *https://www.sfo.gov.uk/2017/01/17/sfo-completes-497-25m-deferred-prosecution-agreement-rolls-royce-plc/* [Accessed May 16, 2017]. A fourth DPA was agreed on Apr. 10, 2017 between the SFO and Tesco Stores Ltd but the details of the criminal activity to which this relates are currently the subject of reporting restrictions, *https://www.sfo.gov.uk/2017/04/10/sfo-agrees-deferred-prosecution-agreement-with-tesco/* [Accessed May 16, 2017].

[167] Crime and Courts Act 2013, Sch.17 and The Criminal Procedure Rules 2015, Pt.11.

[168] *https://www.sentencingcouncil.org.uk/wp-content/uploads/Fraud_bribery_and_money_laundering_offences_-_Definitive_guideline.pdf* [Accessed May 22, 2017].

[169] With an additional £851, 152.23 confiscated and £95,031.97 ordered in costs, *https://www.sfo.gov.uk/2016/02/19/sweett-group-plc-sentenced-and-ordered-to-pay-2-3-million-after-bribery-act-conviction/* [Accessed May 22, 2017].

[170] It also had to pay back the bribe of US $6million plus interest, disgorge the profit of $8.4million and pay the SFO's legal costs. See *https://www.sfo.gov.uk/2015/11/30/sfo-agrees-first-uk-dpa-with-standard-bank/ [Accessed* May 22, 2017].

[171] *http://www.printweek.com/print-week/news/1148334/smith-ouzman-denies-paying-gbp400k-bribes-chickengate* [Accessed May 22, 2017]. The case became known as "chickengate" because of the frequency

conviction, the first for offences involving bribery of foreign public officials, would have been established through the longstanding common law identification principle, with both the Chairman and the Sales and Marketing Director having been found guilty of the offences.[172] Similarly, investigations of this nature are inevitably long-running. The Smith & Ouzman case, for example, was concluded in January 2016 having been opened in October 2010, the first hearing not taking place until some 3 years later, in October 2013. The same can be said even in cases where the defendant organisation self-reports to the SFO. Thus, for example, where Sweett Group Plc had self-reported in July 2014, it was not until some 17 months later, on the 18 December 2015, that a guilty plea was finally entered.[173] Although the company had invited the involvement of the SFO, it appears that the company ceased to be considered co-operative on the basis that, following legal advice, it had continued to undertake its own independent investigation.[174] However, in the Standard Bank case, where the defendant company was seen to co-operate sufficiently to be granted a DPA on 30 November 2015, the self-referral had been made after suspicions were raised in March 2013, some 2 years and 8 months earlier.

While only 2 corporate proceedings had been brought under the Bribery Act 2010 by the end of 2015, the SFO had opened 16 new investigations that year and there are currently a number of ongoing inquiries which relate to activity preceding and post-dating the coming into force of the Bribery Act 2010. These include ABB, Airbus Group, Amec Foster Wheeler, BAT, Chemring, ENRC, FH Bertling, KBR, Petrofac, Rio Tinto and Unaoil.[175] Perhaps indicative of the growing appetite for robust anti-bribery action, in May 2015 the International Corruption Unit was created as part of the UK Anti-Corruption Plan with a view to a significant increase in investigations and a higher likelihood of prosecution.[176] The UK Anti-Corruption Strategy 2017-2022 builds upon this.[177] It is reasonable to expect that the increasing publicity of investigative actions and enforcement measures being taken, in increasingly high-profile corporate cases, will continue to diminish the knowledge and awareness deficit that has been identified in relation to the anti-bribery offences. Publicity will also serve to illustrate, as it did in the Standard Bank proceedings, that a purely tick-box approach to corporate anti-bribery and corruption policy is not enough to demonstrate that due diligence has been exercised and to avoid penalty.

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with which "chicken" as a pseudonym for "bribe" was used in the correspondence relied upon in evidence at trial.

[172] *https://www.sfo.gov.uk/2014/12/22/uk-printing-company-two-men-found-guilty-corruption-trial/* [Accessed May 22, 2017].

[173] See the discussion in Ashurst LLP, "Bribery and corruption; what now for 2016?", 18 Jan. 2016 at *https://www.ashurst.com/doc.aspx?id_Content=12763* [Accessed May 22, 2017].

[174] *https://www.ashurst.com/doc.aspx?id_Content=12763* [Accessed May 22, 2017].

[175] *https://www.sfo.gov.uk/our-cases/* [Accessed Jan 18, 2018].

[176] *http://www.nationalcrimeagency.gov.uk/about-us/what-we-do/economic-crime/international-corruption-unit-icu* [Accessed May 22, 2017]. This combined the remits of the Metropolitan Police Proceeds of Corruption Unit, the City of London Police Overseas Anti-Corruption Unit and elements of the National Crime Agency Economic Crime Command.

[177] *https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/667221/6_3323_Anti-Corruption_Strategy_WEB.pdf/* [Accessed Jan 22, 2018].

The "failure to prevent" model not only side-steps the problematic attribution of corporate fault inherent in the identification doctrine, the placing of the evidential onus on the corporate defendant to show due diligence also goes a long way to overcome practical difficulties that are particularly exacerbated in the corporate context. The problem of evidence is further alleviated with the availability of the Deferred Prosecution Agreement, and accompanying opportunity for a reduction in penalty, which serves as a strong incentive to self-report when companies discover that their anti-bribery regime has been ineffective.

Further development of model in the Criminal Finances Act 2017

The corporate offence for failure to prevent offshore tax evasion introduced by the Criminal Finances Act 2017 goes further than the model in the Bribery Act in two important respects.[178] First, the substantive bribery offence is committed by the employee of, or person associated with, the commercial organisation itself and the imposition of corporate culpability for "failure to prevent" rests on a 2-step process. In contrast, corporate liability for failure to prevent the facilitation of tax evasion is premised on a substantive offence being committed by a client of the firm and requires a 3-step process. In the first step, it must be established that there is a substantive criminal offence committed at taxpayer level, for example the common law crime of cheating the public revenue, or conspiracy to do so, or one of the range of statutory fraudulent evasion offences.[179] The second step requires that a person associated with the company, acting in his professional capacity, has criminally facilitated the taxpayer's evasion of tax. This may be any offence pursuant to which a person is knowingly concerned, for example the fraudulent evasion of income[180] or other form of tax, or dishonestly taking "steps with a view" to tax evasion,[181] or through established "aiding, abetting, counselling or procuring" principles of secondary criminal liability.[182] The consequential corporate liability is predicated on the third step of proof of substantive criminal activity by both the taxpayer and the associated person providing services for or on behalf of the corporation, though neither the prosecution nor the conviction of either individual are prerequisites. In this respect, HMRC's stated policy is to deal with fraud by using Civil Investigation of Fraud procedures, preferring the encouragement of full and honest voluntary disclosure under Contractual Disclosure Facility arrangements and the subsequent imposition of civil penalties.[183] From 1 January 2017, the civil penalties were extended to enablers of the offshore tax evasion.[184]

[178] Compare Criminal Finances Act 2017, Pt 3, ss.45 and 46 with Bribery Act 2010, s.7.
[179] See, for example, Value Added Tax Act 1994, s.72; Taxes Management Act 1970, s.106A or ss.106B to 106H as inserted by Finance Act 2016, s.166.
[180] Finance Act 2000, s.144.
[181] See, for example, Value Added Tax Act 1994, s.72 and the Taxes Management Act 1970, s.106A, which make it an offence to dishonestly "take steps with a view to" or be "knowingly concerned in" the evasion.
[182] HMRC, "Tackling tax evasion: Government guidance for the corporate offence of failure to prevent the criminal facilitation of tax evasion", Draft Government Guidance, Oct. 2016; Criminal Finance Act 2017, ss.45(4) and 45(5).
[183] HMRC, "Code of Practice 9, HM Revenue and Customs investigations where we suspect tax fraud", June 2014.
[184] Finance Bill 2016, s.162 and Sch.20. Penalties can be incurred of up to 100% of the tax they helped to evade or £3,000, whichever is the highest.

In that a finding of corporate liability for "failure to prevent" does not rest on criminal action being taken in relation to the underlying substantive tax offences of the taxpayer and the enabler, this approach accords with that taken to criminal liability for a corporate failure to prevent bribery. However, given the shift from a 2-step to a 3-step approach in the latter context, it may be argued that corporate liability for tax evasion is even more remote than that established under the Bribery Act,[185] with one of the offenders being a party not once but twice removed from the organisation itself. Further, unlike the corporate failure to prevent bribery offence,[186] there is no requirement to show that the individual agent facilitating the evasion was acting for the benefit of the corporation. The rationale for the development of the "failure to prevent" model of corporate liability in both contexts is said to be that it incentivises organisations to take reasonable steps, and put in place adequate procedures, to promote corporate good governance.[187] Thus, mirroring the approach taken in the Bribery Act,[188] a due diligence defence is available to corporations who have taken reasonable steps to prevent the facilitation of tax evasion by their associates.[189] Whether or not the steps taken were reasonable will be a question of fact to be determined on a case-by-case basis.

CONCLUSION

The estimates for criminal activity by companies in areas considered to constitute economic crime were seen to be seriously eye-watering. However, it was apparent that even these figures could understate the true level of criminality depending on how certain types of activities, such as mis-selling or off-balance sheet finance might be recategorized. Against this backcloth, it was seen that the common law's reliance on the identification principle to impose criminal liability was not merely an obstacle, for example, evidentially, but could give rise to perverse incentives for senior managers not to address questionable or dubious practices in large companies. The government's desire to reform this area was, therefore, unsurprising, though its apparent lack of confidence in its chosen method – the "failure to prevent" model – and its use of the rather nebulous and history-laden terminology of economic crime were regrettable.

The adoption of the new "failure to prevent" model in the context of bribery was unsurprising. The law on bribery had developed in relative isolation both in a national and international context and its historical origins showed that it had been subject to reform over an extended period. The "failure to prevent" model was shown not to be as novel as perhaps thought but insofar as there were historical precedents for such an approach, they were generally unsuccessful and eventually repealed. A comparison was made with attempts to impose criminal liability for a failure to disclose but these were seen to be quite distinct with a "failure to prevent" model being potentially much more onerous in requiring the construction of appropriate prophylactic measures. Perhaps the closest example was found in

[185] Bribery Act 2010, s.7.
[186] Bribery Act 2007, ss. 7(1)(a) and (b).
[187] HMRC "Tackling offshore tax evasion: a new corporate criminal offence of failure to prevent the facilitation of evasion", (Consultation document, 16 July 2015), paras.2.17 and 2.18, p.10.
[188] Bribery Act 2010, s.7(2).
[189] Criminal Finance Act 2017, s.45(2).

the Money-Laundering Regulations 2007 but on closer examination it is little more than a regulatory offence to ensure detailed administrative compliance and has failed to survive in explicit form in the 2017 Regulations.

An important determining factor in the adoption of a failure to prevent model for bribery was that companies were best placed to address bribery and such a model takes advantage of this. The true novelty of the Bribery Act 2010 “failure to prevent” offence was indeed the creation of a serious corporate criminal offence that blurs the line with regulatory offences but allows a defence based on regulatory-type compliance, giving companies a large measure of discretion as to how to satisfy this. The offence has also been supported by the availability of DPA’s and new sentencing guidelines. Modest levels of prosecution offer different possible interpretations of the measure’s effectiveness – merely one conviction and three DPA’s to date - which may result from its non-retrospective nature and novelty, but nonetheless there appear grounds for cautious optimism. This is supported by the further development of the model in the Criminal Finances Act 2017.

The second article in this series, “New Models of Corporate Criminality: The Problem of Corporate Fraud: Prevention or Cure?” will explore why the law has, in contrast, appeared relatively ineffective in addressing fraud. It will look, for example, at the inadequacy of the civil law, the ad hoc and fragmented criminal law response, and the problems of the regulatory approach for financial services. It will argue that the “failure to prevent” model can be inappropriate where there is corporate rather than individual dishonesty and where the parties to criminal activity may include the company itself. It explores potential alternative approaches and makes proposals for reform.