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FIXING FRAUD

Flaws in the Economic Crime and Corporate Transparency Act and the current enforcement approach

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- Given the high economic costs of fraud, the Economic Crime and Corporate Transparency Act 2023 aims to address the well-known deficiencies of the common law's approach to corporate criminal liability with the introduction of a corporate failure-to-prevent fraud offence (s.199, not yet in force) and the statutory extension to the common law's identification principle that attributes the criminal liability of senior officers to the corporate body (s.196, in force).

- Although the new failure-to-prevent fraud is disappointing in its limited application to just large companies, the extension of the range of officers whose guilt can be attributed to the corporation, for fraud and other specified offences, has real potential to serve as a powerful corporate deterrent that will undoubtedly extend responsibility to significantly increased numbers of individual managers.

- However, economic analysis demonstrates that the success of substantive law reform depends upon a radical change in the policy on corporate criminal enforcement such that large corporations should no longer be effectively guaranteed a disposal by way of a deferred prosecution agreement (DPA).

- Although DPAs seek to address both the problem of detection and to mitigate collateral damage to otherwise innocent stakeholders, by offering leniency for self-disclosure bargains, this leads to a dramatic deficit in corporate deterrence and can incentivise unlawful corporate activity.

- For an effective anti-fraud law and therefore greater market efficiency, the currently flawed notion of collateral damage must be corrected; not least, it should include the costs of the demonstrably ineffective DPA enforcement regime and the consequent preservation of corporations that prosper through criminal activities.

- Economic analysis evidences the need for a credible threat of traditional prosecution of corporations and, to this end, for the use of a well-designed whistleblower reward scheme as the cornerstone to ensuring fair competition.

Introduction

Successful market economies are underpinned by legal institutions that establish and protect property rights, including an effective regulatory framework to minimise fraud. Fraud has high economic costs not only because it erodes public trust and thereby deters investment and economic activity, but also because it distorts competition, increases the cost of doing business, reduces tax revenue and results in the misallocation of resources. James Forder's IEA Discussion Paper 'Fraud Focus' provided a timely review of the Serious Fraud Office's (SFO) history of corporate investigations (Forder 2023). Forder rightly identified the weaknesses of the substantive law, and especially the identification principle of corporate liability, as one of the main contributors to its lack of success.

Since the publication of that paper, there have, of course, been some significant developments, which include a change of Directorship at the SFO, with Nick Ephgrave QPM now at the helm, and the enactment of substantive reforms of the criminal law. The Economic Crime and Corporate Transparency Act 2023 has introduced provisions aimed at improving the criminal accountability of corporations for fraud and other economic crimes. Specifically, it has enacted a bespoke corporate offence of 'failure-to-prevent fraud', and it has also sought to address the deficiency of the common law's identification principle with a new provision setting out that, for a number of specified economic offences, including fraud, the guilt of a broader range of senior officers can be attributed to the corporate entity.

This paper considers each of these legal measures and suggests that, while some are to be applauded as a matter of substance, they are unlikely to improve the success of our anti-fraud regime and thus the efficacy of the SFO unless they are accompanied by a radical overhaul of the policy surrounding corporate criminal enforcement. In reaching this conclusion, this paper will demonstrate that the basic assumptions underpinning corporate regulatory theory are fundamentally unsound and, accordingly, that the now pervasive use of deferred prosecution agreements (DPAs) may not deter corporate wrongdoing but rather positively promote it. While resorting to the DPA's settlement approach certainly alleviates the costly and practical problem of obtaining prosecution evidence of corporate wrongdoing, there is an economic case to be made for increased resort to the traditional trial process. This is necessary to address the current deterrence deficit, and it will be easier to bring about corporate prosecutions if the incentivisation of corporate whistleblowers, as envisaged by Nick Ephgrave, comes to fruition (SFO n.d.).

The first part of this paper considers the scope of the new corporate offence of failure-to-prevent fraud and its considerable limitations. In the second part, the statutory 'extension' of the identification principle of corporate liability is evaluated and thereby shown to have significant potential in the fight against corporate economic crime. The third part of the paper moves from the recent substantive law reforms to a consideration of their utility in the light of current enforcement policy, and, by reference to economic and regulatory theory in the fourth part, the deficiency of the now pervasive use of DPAs is examined. In the last part, this paper proposes that to serve as an effective deterrent to corporations, the threat of criminal conviction must be credible, and this requires a greater risk of exposure to the traditional trial process than is currently the case.

Corporate failure-to-prevent fraud offence

The Economic Crime and Corporate Transparency Act 2023 introduces a new offence, at s.199, whereby an organisation can be convicted of failure to prevent fraud if an associate or employee commits a specified fraud offence[1]. Although this offence is only applicable to large companies as defined in the Companies Act 2006[2], it is nonetheless modelled on the existing corporate failure-to-prevent offences, comprising bribery[3] and tax evasion[4], which are, in contrast, of general application. Accordingly, where an employee or associate of a large company has committed the predicate fraud offence, the 2023 Act creates strict corporate liability, which is tempered by the provision of a due diligence defence[5]. This means that the

1 The applicable fraud offences are listed in Schedule 13, and liability includes the aiding, abetting, counselling or procuring of one of the listed offences.

2 I.e., with at least two of the following criteria: a turnover of at least £36 million; a balance sheet total of at least £18 million; at least 250 employees.

3 Bribery Act 2010, s.7. Accessed: 31 July 2024 (https://www.legislation.gov.uk/ukpga/2010/23/contents).

4 Criminal Finances Act 2017, ss.45 and 46. Accessed: 31 July 2024 (https://www.legislation.gov.uk/ukpga/2017/22/contents).

5 Economic Crime and Corporate Transparency Act 2023, s.199(4). Accessed: 31 July 2024 (https://www.legislation.gov.uk/ukpga/2023/56/contents).

organisation can avoid criminal liability if it can prove that it had in place reasonable prevention procedures at the time that the fraud offence was perpetrated or that, in all the circumstances, it was not reasonable to expect any such procedures. It is anticipated that the failure-to-prevent fraud offence will come into force this year, when the government has published guidance on what constitutes reasonable measures[6]. Since the corporation's criminal liability is premised on the (in) adequacy of its internal compliance system, there is no need to prove the culpability of individual high-ranking officials, as is the case with the common law identification principle, or to establish a causative link between the deficiency of the internal system and the commission of the predicate offence by the company's employee or associate. All that is required of the prosecution is evidence that the base offence has been committed by an employee or associate of the company, although this person need not be prosecuted as an individual. The failure-to-prevent model of corporate criminality thus combines the truly criminal offence with what is traditionally a regulatory-style defence. Inevitably, this construction blurs the line between quasi-criminality and real criminality, such that the outcome is perceived as 'hybrid' (Copp and Cronin 2018; Garrett 2019) or 'quasi-regulatory' (Ministry of Justice 2018) in nature.

As an approach to corporate criminal liability, the failure-to-prevent model is highly efficient. By affording a central role to the internal compliance system, corporations are delegated responsibility for policing the behaviour of individuals within their sphere of

6 Ibid., s.219(8).

influence, and criminal law enforcement is, in effect, privatised (Sieber and Engelhart 2014). Furthermore, as a form of self-regulation, this model recognises that corporations are better placed than regulators to comprehend risks specific to them (Braithwaite 2003), while the due diligence style defence places the evidential burden on the party best placed to access it: the corporation itself. In theory, the failure-to-prevent model therefore addresses the problem of information asymmetries between business and the state (Baldwin et al. 1999: 126) while providing the criminally backed external force necessary to incentivise corporate self-regulation (Harding and Cronin 2022: ch. 6). Since failure-to-prevent offences are employed as an accessory to existing civil and public law obligations, they harness the criminal law's superior deterrent effect but do so without the creation of additional obligations (Engelhart 2018). With that in mind, it is disappointing that the new failure-to-prevent fraud offence, unlike those relating to bribery and tax evasion, only applies to companies with at least two of the following criteria: a turnover of at least £36 million; a balance sheet total of at least £18 million; a total of at least 250 employees[7], although the resources of a parent company and its subsidiaries can be considered cumulatively. While the size restriction was justified as necessary to avoid a regulatory overburden on smaller businesses, the due diligence defence already performs that function and arguably does so with a much greater sophistication, since the requirements of the compliance system are proportionately tailored to what can be reasonably expected in the company's individual circumstances, if required at all.

7 Ibid., ss. 119, 201 and 202.

Given the extraordinary prevalence of fraud[8] and the likelihood that a substantial proportion of companies may be enjoying significant benefits from the frauds of their employees or associates, the arbitrary exemption of potentially vast swathes of business from the reach of the criminal law is both unprecedented and undesirable. Laying the criminal law open to criticism that it is being employed as an unpalatably selective tool, such an approach is a questionable affront to the rule of law. As Lord Garnier KC so aptly pointed out in his speech on the matter in the House of Lords, this law is equivalent to saying that only burglars over six foot six are liable to prosecution, and that every other burglar can get off scot-free[9]. In fact, the disparity is worse than that, given that sizeable corporations, unlike people, are considered too large to prosecute in any event (Garrett 2014)[10]. The selective approach to criminal liability also flies in the face of economic theory, which suggests that a generic anti-fraud law can provide the scope for dramatic reductions in the volume and complexity of corporate regulation and thereby offer substantial potential savings in corporate transaction costs (Copp and Cronin 2015). What can be said with certainty is that the criminal law's deterrent effect can have no influence whatsoever on the behaviour of those companies arbitrarily excluded from its reach.

8 Fraud accounts for 41% of all offences committed in England and Wales (see https://www.gov.uk/government/publications/fraud-strategy/fraud-strategy-stopping-scams-and-protecting-the-public#fn:1 [Accessed: 3 April 2024]).

9 Lord Garnier, House of Lords, 27 June 2023.

10 See the discussion that follows regarding the pervasive use of deferred prosecution agreements for large corporations.

Extending the scope of corporate liability for the economic offences of senior officers

Given the extremely limited application of the corporate failure-to-prevent fraud offence, it remains to be seen whether the Economic Crime and Corporate Transparency Act 2023 can succeed in counter-balancing the likely deterrence deficit through its extension of the range of officers whose guilt can be attributed to a corporation. In this regard, s.196 applies to a range of economic offences, including fraud[11], and, unlike the new failure-to-prevent fraud offence, this provision applies to all companies, irrespective of size. As is the case with the common law identification principle, where, for instance, fraud is committed by a senior officer, the corporate conviction is also for the substantive offence of fraud, and not for the qualitatively different failure to prevent it.

From the deterrence perspective, liability attributed to the corporation by reference to a senior officer's guilt reflects a more personalised form of corporate wrongdoing and is therefore likely to attract a relatively

11 Economic Crime and Corporate Transparency Act 2023, s.196(2) and Schedule 12. Accessed: 31 July 2024 (https://www.legislation.gov.uk/ukpga/2023/56/contents).

greater degree of moral opprobrium and market censure. Furthermore, the statutory extension to the identification doctrine does not provide a form of corporate due diligence defence, and, in the event that a senior officer commits a relevant economic offence, the corporation can be convicted irrespective of any compliance measures it had in place. The company will be culpable even if it was not aware of the misconduct and, in contrast to the failure-to-prevent offence, even if it was not the intended beneficiary of the gain. Although it is highly likely that the meaning of 'senior manager' will be the subject of future litigation, this reform nonetheless offers significant potential as a powerful corporate deterrent. For economic crimes that cannot be charged as an offence of corporate failure-to-prevent, and this of course will include many frauds, due to the exclusion discussed above, prosecutors will no doubt be astute to focus their investigations at the level of senior management in the corporate hierarchy. It is to be anticipated that, by effectively extending responsibility to a significantly increased number of individual managers holding positions below the previously determinative 'directing mind and will' level, s.196 will serve as a powerful deterrent to senior managers' direct involvement in serious misconduct. Furthermore, and this requires emphasis, guilt can be attributed to the corporation not only when individual senior officers perpetrate one of the listed offences but also in cases where senior officers attract personal criminal liability through encouraging or assisting another in the commission of the offence[12]. The encouraging and assisting offences are set out in Part 2 of the Serious Crime Act 2007, and ss. 45 and 46

12 Ibid., s.196(2)(i).

are especially broad in construction, creating criminal liability when an individual does an act or an omission[13], capable of encouraging the commission of an offence or offences, believing that the offence(s) will be committed and that his/her act or omission will encourage its commission. Under the Act, belief is defined as a state of awareness short of knowledge where the defendant believes or is reckless as to whether the other person will perform the act with the *mens rea* necessary for the offence in question[14].

The provisions of the Serious Crime Act thus offer a departure from the common law's approach to accessorial liability that involves the more stringent element of an intention to encourage or to assist[15], and they have therefore provided a considerable expansion to the reach of the criminal law. In effect, this means that a corporation may be convicted of an economic offence not just in situations where a senior officer is directly involved in the criminal conduct but also where a senior officer foresees a risk of a lower-level employee committing an economic offence, at least within an area of activity for which that officer has managerial responsibility, and that his/her failure to intervene may be taken as tacit approval by the employee. Since criminal liability arising through the failure to act can be imposed on both the senior officer and the corporation, it is to be anticipated that the traditional principles of omission-based liability will come under increasing scrutiny as a consequence. As

13 Serious Crime Act 2007, s.47(8)(a). Accessed: 31 July 2024 (https://www.legislation.gov.uk/ukpga/2007/27/contents).

14 Ibid., s. 47(5)(a).

15 Jogee [2016] UKSC 8.

criminal liability for an omission arises where there is a corresponding duty of care or a duty to act, the likely result will be to focus attention on the duties incumbent upon senior corporate officers in their individual roles. Ultimately, this should incentivise responsible management, the clear delineation of individuals' duties and accompanying reporting structures, and serve overall to encourage the effective oversight of, and by, senior corporate officers (Cronin 2024). Although not formally constructed as a 'failure-to-prevent' offence, it appears that, in contrast to the s.199 provision, s.196 has excellent potential to serve as a sobering and powerful incentive to corporations of whatever magnitude, directors and senior managers, to ensure that reasonable and effective compliance procedures are in place.

Enforcement and the use of deferred prosecution agreements

While s.196 can undoubtedly operate as a strong deterrent to corporate economic crime, the inclusion of the offences to which it applies, as matters that can be dealt with by way of a DPA warrants further consideration. DPAs involve a diversion of the criminal matter from the traditional adversarial (trial) process to what amounts to a form of negotiated settlement. By agreeing to engage with the DPA approach, corporations do not need to make any formal admission of guilt[16] and, crucially, they thereby avoid the risk of extensive reputational damage that would attend a criminal trial and potential conviction. The corporate reputation is a valuable intangible asset, and, following the collapse of the US auditing firm Arthur Andersen in the wake of its conviction in 2002, it was thought that a criminal conviction was tantamount to the imposition of a corporate death penalty.

In view of the detrimental impact on innocent stakeholders, such as the employees and shareholders of the firm, the Department of Justice responded by repurposing DPAs, previously given only to individuals for low-level crimes, for use as a less censorious

16 Crime and Courts Act 2013, Sch. 17, s.5(1). Accessed: 31 July 2024 (https://www.legislation.gov.uk/ukpga/2013/22/schedule/17).

alternative to corporate prosecution. However, while the apparent link between conviction and corporate failure has long been debunked (Markoff 2013) or is, at most, strictly confined to businesses especially dependent upon reputation, the desire to preserve the financial viability of large businesses and thereby avoid collateral damage to otherwise innocent third parties continues to justify this enforcement approach. Accordingly, most instances of serious corporate offending are dealt with by way of a DPA, and this is especially the case where large corporations, with the potential for relatively greater collateral damage, are involved (Garret 2014).

While the prevention of collateral damage rationale still dominates the supporting narrative[17], it is to be acknowledged that DPAs provide considerable efficiencies in other respects. Bearing in mind the context of typically under-resourced enforcement agencies, the requirement that corporations cooperate with the investigative process as a condition of exchange for the more lenient, less damaging form of disposal shifts much of the task of gathering evidence to the party that can perform it most effectively at the lowest cost. In addition, the settlement approach avoids the high costs of prosecuting that are otherwise incurred in the pursuit of characteristically long and complex corporate trials. Offering a quick and easy means of disposal, under which conditions can also be imposed aimed at improving future self-regulation, the DPA enforcement mechanism is likewise

17 See for example, the SFO guidance. Accessed: 16 April 2024 (https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/guidance-for-corporates/deferred-prosecution-agreements/).

supported by a rhetoric that emphasises the benefits of rehabilitative justice.

However, while DPAs are employed as a form of criminal enforcement, it is self-evident that they are, in substance, far more closely aligned to the dominant regulatory model of responsive regulation (Ayres and Braithwaite 1992). The regulatory style is emphasised from the very outset of the DPA process, premised as it is on consensual cooperation from the discovery of the wrongdoing, ideally with the corporation self-reporting its wrongdoing, through to entrusting the corporation to comply with any internal reforms or other conditions required by the consequent DPA. The threat that the prosecution will be resumed if, within the specified time frame, the corporation fails to do so, equally conforms to the pyramidal model of regulatory enforcement.

Regulatory and economic theory – flawed assumptions

The problem with using a regulatory approach to criminal enforcement can be explained by reference to the assumptions that underlie regulatory theory (Harding and Cronin 2022: chs 6 and 7). The first of these supposes that commercial entities are rational actors par excellence and that they therefore act in an ethically neutral way. This is an issue in that while economic theory is premised on the aim of increasing net social wealth, shareholder value prevails, and the optimal level of violations of the law is not zero (Parkinson 1993; Fischel 1982). To serve as a successful deterrent, the price of the offence, calculated as the penalty multiplied by the probability of its imposition, must significantly outweigh the financial benefit of the criminal activity, while the optimal price will be just high enough to pay for the harm inflicted on the rest of us (Becker 1968; Easterbrook 1983). Indeed, responsive regulation works on the basis that companies will self-regulate if they are under threat of credible punitive enforcement (Lord 2023). Thus, in aiming to preserve the financial viability of defendant corporations, however grave or harmful their criminal behaviour[18], DPAs ignore the implications of rational actor theory

18 The judiciary is rationalising the use of DPAs in even the most egregious conduct (see Lord 2023).

and operate as a stop-loss to cap the price of the offences committed. Accordingly, the profits to be made from corporate criminality typically far outstrip the costs. Indeed, serving as a perverse incentive to serious criminality, it follows that the larger the scale of the economic offence, and thus the ensuing harm, the greater the possible gain to the rationally acting corporation. The second assumption, which is clearly at odds with the first, supposes that corporations are like most individuals in that they are essentially well-meaning and responsible political citizens (Tombs 2016; Bittle and Frauley 2018). Indeed, it is this second assumption that justifies the trust implicit in all regulatory relationships (Snider 2009).

Given that the effectiveness of DPAs depends on the genuine commitment of corporations to effective compliance and, thus, on a preference for ethical over profit-maximising conduct, it is surely this assumption that underlies the DPA enforcement approach. Yet, while the ethical depiction may be true of some businesses (Kaal and Lacine 2014; Koehler 2015), for firms that prioritise profit, ethically neutral corporate rationality expects, if not positively encourages, criminal conduct (Harding and Cronin 2022: ch. 7). Since DPAs and the penalties imposed under them are generally perceived as an ethically neutral cost of doing business (Harding 2019), akin to the costs of regulatory infringement, they lack the punitive gravitas necessary to deter corporate criminality (Ryder 2018; Coffee 2020). This deterrence deficit is clearly borne out by studies consistently demonstrating the occurrence of serial corporate offending in the wake of earlier prosecution agreements (Clinard and Yeager 2006; Koehler 2015; Garrett 2016).

As to the economic perspective, the collateral damage argument, employed as the primary justification for using DPAs as an alternative to prosecution, is equally unsatisfactory. Firstly, and as mentioned above, it has long since been recognised that corporate conviction only rarely invokes sufficient reputational damage to strike a fatal blow to market confidence. Secondly, the tendency to prioritise shareholders' interests lacks logic. There is no fundamental difference between the effect of criminal sanctions and civil damages, for which no controversy arises. Furthermore, shareholders who benefit from the (unlimited) profits of corporate criminality should likewise bear the losses that flow from it. These losses are, in any event, limited to the shareholders' equity in the corporation, such that shareholders' personal assets are protected (Beale 2009). Thirdly, the concept of collateral damage, as it is currently construed, is blind to the real financial nature of corporations. In the context of enforcement, collateral damage is the notion of the undesirable costs of corporate conviction that are borne by otherwise innocent stakeholders. The notion is widely construed in that it includes the direct costs borne by shareholders, those passed on to customers and employees through higher prices, job losses and reduced opportunities, as well as the cost to the public at large due to decreased regional prosperity, less available investment for research and development, lower tax revenues, capital reserves, lending potential and damage to national and even global economic well-being[19]. However, while at first blush it appears to be far-reaching in its scope, the collateral damage concept is both myopic and highly misleading in that while it focuses on the costs likely to flow from corporate prosecution, it singularly fails to identify, and to counterbalance, the costs that flow from the now pervasive use of DPAs as an alternative.

Crucially, a more realistic conception of collateral damage would need to encompass the economic implications of an enforcement regime that, due to the reduced price of the offence and heavily diluted accompanying stigma, lacks the better deterrent bite of the criminal law. It should thus take account of the indirect costs of corporate criminal activity, from the damage caused to consumer trust and to the operation of the market generally, to undermining the social institutions necessary for people to trust the government in a democracy. It should also recognise that corporate criminality results in the misallocation of resources and that this incurs a myriad of other social costs, not least putting smaller firms out of business, destroying livelihoods and opportunities, and impacting people's health and well-being. Furthermore, given the perverse incentive to commit serious criminality, it follows that relatively more corporations are more likely to commit more crimes, of a more

19 In 2012, the US Department of Justice and the HSBC made a Deferred Prosecution Agreement where the HSBC had failed to implement US anti-money laundering laws and had facilitated the laundering of at least $881 million of proceeds from crime. Of note, the then Attorney General, Eric Holder, referred to the collateral damage that a prosecution would cause in terms of a negative impact on the national and perhaps the world economy (see https://www.americanbanker.com/transcript-attorney-general-eric-holder-on-too-big-to-jail-1057295-1.html [Accessed: 25 April 2024]).

serious nature, whether deliberately or recklessly, than would otherwise be the case. The concept of collateral damage should then also encompass the levels of penalties that will continue to spiral in accordance with basic principles of responsive regulation, as well as the burgeoning costs of an ever-growing regulatory burden to which *all* businesses are subject, criminal or not (Beales et al. 2017).

Employed as a means to safeguard the financial viability of criminal corporations, the argument for DPAs diminishes yet further with the recognition that fraud does not increase the economic pie but merely redistributes it in a non-efficient way (Posner 1985). Businesses that survive through economic crime, whether the harm they cause is sustained directly by individuals or indirectly by the market mechanism, do so at the expense of lawful actors, and, in the, albeit highly unlikely, event that market forces were to operate fatally as a response to conviction, they would serve simply to extinguish an essentially parasitic corporate entity. Indeed, where DPAs are used to prop up such businesses, they might be considered a cause of market failure in themselves, and the idea that the social value of otherwise legitimate commercial enterprises always outweighs the costs of corporate criminality needs to be re-evaluated. In appropriate cases, for example, where there is serious, deliberate and/or repeated misconduct, the stigma of a traditional criminal conviction would serve to elicit an appropriate, and potentially more enduring, market response and, in the event that it should occur as a consequence, corporate failure should be understood in terms of the efficient operation of markets. Projected in terms of legal responsibility and legal causation, criminal conviction is not an intervening act, and it must be accepted that collateral damage is purely the result of the corporation's engagement in criminal activity, perpetrated through either the criminal digressions of its senior managers or want of a reasonable approach to compliance.

The fact that the direct and indirect costs of using DPAs are not fully acknowledged as collateral damage in the same way that the costs associated with corporate prosecution is a major oversight that needs to be urgently addressed. Properly construed, at least as much collateral damage, if not considerably more, flows from the use of DPAs than from corporate conviction, and their justification on this premise is entirely spurious (De Franco et al. 2019)[20]. To this end, an informed debate on the 'unseen' social cost of the predominant use of DPAs is much needed. Above all, account needs to be taken of their relative deficiency as a deterrent, and what the consequent increase in corporate crime inevitably entails. Ultimately, this includes higher prices, fewer available products, a reduction in services and opportunities, lower wages and decreasing job opportunities. These ramifications are particularly important given evidence that those who can least afford the dispersed financial impact of corporate criminality are those bearing the most (Stigler 1971; Peltzman 1976; Thomas 2018), with low-income consumers and low-wage earners primarily affected (McKenzie and Macaulay 1980; Anderson and Werner-Robertson 2016).

20 A recent survey based on buy-and-hold returns analysis reveals that firms subject to DPAs experience significantly lower returns in the 1-to-3-year period following the agreement than firms that were prosecuted, and they suffer a greater reduction in sales and the number of employees (see De Franco et al. 2019).

A more comprehensive understanding of collateral damage might well inform enforcement decisions in favour of traditional prosecution in some cases. It is only the traditional trial process, with the attendant threat of criminal conviction, that can harness the criminal law's full deterrent potential and thereby reduce the burgeoning social costs associated with regulatory failure. This is not to suggest that there is no place for DPAs in the fight against corporate crime; simply, they should not play the exclusive role that has come to be expected for corporations considered 'too large to fail' (Sorkin 2009)[21]. To best incentivise corporate self-regulation, the threat of criminal prosecution, with the attendant risk of reputational damage (Garrett 2019) and detrimental market response (Berghoff and Speikermann 2018), must be credible. Credibility is gained through example. It does not require a sustained programme of mass corporate prosecutions, but the timely demonstration of the full force of the criminal law, exercised in the public interest, in appropriate cases (Posner 1985).

21 The current enforcement approach has led to criticism that large corporations are immune to prosecution because they are too large to fail.

Deterrence, credibility and the problem of obtaining evidence

The largest problem in fighting corporate crime is detection. While it is true that a primary motivation for using DPAs is that they overcome the major problem of obtaining evidence of corporate crime, through the 'information for leniency' bargain, the extent of genuine corporate self-disclosure is uncertain. Arguably, the most economic means for corporations to exclude enforcement may be to employ expertise to navigate the intervention to be avoided, to cover up and evade discovery of either all or part of the criminal conduct (Haugh 2017). However, if it is assumed that DPAs address the problem of information asymmetry, this advantage is necessarily forfeited by resorting to prosecution under the traditional adversarial process. This does not mean that the problem of collating evidence is insurmountable and therefore that threats of prosecution will forever lack credibility; it simply means that an alternative solution must be found. From the perspective of efficiency, the best way to achieve this is to purchase the relevant information from those with the easiest access to it. Yet, while the practice of buying cooperation from parties involved in criminal conduct is relatively uncontroversial, through the mechanisms of plea bargaining and sentencing discounts (and indeed DPA agreements[22]), the incentivisation of informants through whistleblower inducements is met with considerable resistance. However, it must be recognised that it is the DPA's 'information for leniency' bargain that sits at the root of the deterrence deficit. Furthermore, while the DPA approach has been accepted on efficiency grounds, there is nonetheless an intrinsic link between corporate and individual liability since corporations can only act through human agents. Accordingly, when corporations self-disclose in pursuance of a DPA, this necessarily involves informing the enforcement agency about the suspected criminal conduct of individual employees. Inexplicably, this aspect of the DPA process does not attract the criticism evoked by the reverse prospect of innocent individuals informing on the suspected crimes of corporations. Within the confines of suspected corporate offending, and in view of the magnitude of damage that corporations can wreak, there is surely a case for a differential approach to whistleblowing than is taken in the context of mainstream, non-corporate crime.

An efficient alternative to the evidential problem, one that does not purchase information at the price of deterrent value, is undoubtedly required. In this respect, there are lessons that can be learned from experiments in whistleblower incentivisation across the Atlantic, and there are other efficiencies to be gained, not least in reducing the size of financial penalties consequently needed to deter corporate crime by increasing the probability of detection. As mentioned above, to act as a deterrent, the price of the offence, calculated as the

22 It should be noted here that companies entering into DPAs do not formally admit guilt.

penalty multiplied by the probability of its imposition, must considerably outweigh the financial benefit of the criminal activity. This has led to the observation that if the probability of conviction falls too low, 'even white-collar criminals could not pay enough' (Easterbrook 1983: 293). It is undeniably the case that the probability of conviction is extremely low for corporations involved in criminality; this is precisely the reason for the DPA's 'information for leniency' bargain.

Furthermore, unlike individuals, corporations cannot suffer the 'price' of imprisonment, and they also possess the capacity to offend, and thus to profit from crime, on a monumental scale. Indeed, in that the current enforcement regime actively sets out to safeguard the financial viability of corporate offenders, it implicitly acknowledges the fact that corporations typically cannot pay enough. Therefore, by increasing the probability of corporate conviction through creating a market for whistleblowing, the proportionate size of the corporate penalty can be 'reduced'. In contrast to the discount currently afforded via the information for leniency bargain, this is achieved with no reduction in deterrent value. Furthermore, by increasing the affordability of the corporate penalty, the fines imposed will conform more closely to the principle of proportionality in sentencing. The incentivisation of information would also mitigate other problems stemming from the low-conviction/high-penalty context, including its potential chilling effect on the entrepreneurial activities of some risk-averse actors.

Indeed, enforcement agency reports, as well as independent and peer-reviewed studies, demonstrate the remarkable success of incentivising whistleblowing in the US, where there has been much recent experimentation with this form of outsourcing. Not only do financial rewards in well-designed programmes substantially increase the incidence of reports of wrongdoing (Butler et al. 2017; Dyck et al. 2010; Coffee 2020: ch. 7; Nyreröd and Spagnolo 2021), but findings also indicate that well-publicised whistleblower reward programmes serve as a deterrent, due to the perceived increased risk of detection (Johannesen and Stolper 2017; Amir et al. 2018; Nyreröd and Spagnolo 2021). While the number of successful whistleblower claims is extremely low in proportion to the number of tip-offs made, the value of successful sanctions resulting from whistleblower incentivisation is so high that it dramatically exceeds the cost of processing the tip-offs (Filler and Markham 2018), with research estimating that benefits outweigh the costs by a multiple of between 14 to 1 and 52 to 1 (Carson et al. 2008). For example, the statistics published by the US Department of Justice Civil Fraud Division show that under the False Claims Act, between 1989 and 2023, awards totalling just short of $9 billion were paid to whistleblowers in relation to sanctions imposed of over $75 billion and approximately 70% of civil fraud recoveries obtained were the direct result of whistleblower information[23]. Similarly, the Securities and Exchange Commission's enforcement actions based on incentivised tip-offs have resulted in total monetary sanctions of $6.3 billion, including over $4 billion in disgorgement of criminal proceeds and interest, of which over $1.5 billion has been, or will be, returned to investors (Kohn 2024). Notwithstanding the growing body of empirical

23 https://www.justice.gov/opa/media/1339306/dl?inline [Accessed: 22 July 2024].

support for incentivisation, which is entirely funded by sanctions obtained, and scant evidence to substantiate the concerns expressed about possible malicious or fraudulent exploitation of such schemes (Buccirossi et al. 2017; Kohn 2024)[24], there remains little appetite for the more general introduction of financial reward schemes on this side of the Atlantic, although the HMRC currently offers small rewards for tip-offs and last year the UK's Competition and Markets Authority increased its informant reward, up to £250,000[25].

As we await the outcome of the UK government's review of the whistleblower framework[26], under which only limited protection under employment rights is currently provided, it is of note that the incoming director of the SFO, Nick Ephgrave, in addition to the leniency measures for offenders[27], has already expressed his support for a whistleblowing incentivisation regime. To this end, it is heartening to see that the Economic Crime and Corporate Transparency Act 2023 includes provisions aimed at resolving the urgent problem of strategic lawsuits against public participation

24 See for example, the unsubstantiated concerns expressed by the UK's Financial Conduct Authority and Prudential Regulation Authority, FCA and PRA Financial Incentives for Whistleblowers. Accessed: 19 July 2024 (https://www.fca.org.uk/publication/financial-incentives-for-whistleblowers.pdf).

25 https://www.gov.uk/government/news/blowing-the-whistle-on-cartels [Accessed: 19 July 2024].

26 https://www.gov.uk/government/publications/review-of-the-whistleblowing-framework/review-of-the-whistleblowing-framework-terms-of-reference [Accessed: 11 April 2024].

27 Serious Organised Crime and Police Act 2005, Chapter 2. Accessed: 31 July 2024 (https://www.legislation.gov.uk/ukpga/2005/15/contents).

(SLAPPs), at least in relation to matters of economic crime, since this will be essential to the success of any future whistleblowing scheme. The SLAPPs claims, involving litigation in areas such as defamation, invasion of privacy and breach of confidence, constitute an abuse of process whereby the powerful silence those seeking to hold them to account[28], essentially by threat of financial ruin. These claims inhibit whistleblowers and others, such as campaigners, academic researchers and investigative journalists, from publishing on matters of public importance. However, although the Act effects an early dismissal mechanism for claims falling within the definition of a SLAPP, by amending the Civil Procedure Rules, crucially this does not address the chilling effect of pre-action letters, since these are sent prior to judicial determination of the nature of the claim regarding whether or not it constitutes a SLAPP. The provisions of the subsequently proposed Strategic Litigation Against Public Participation Private Members' Bill[29] that would extend the dismissal of SLAPPs to all types of litigation also fail to address this concern (Coe 2023). While it is suggested that far more extensive reforms to the general law of defamation will be necessary to address the mischief, it is at least a matter now under the spotlight and ripe, one would hope, for further reforms.

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28 Economic Crime and Corporate Transparency Act 2023, ss. 194 and 195. Accessed: 31 July 2024 (https://www.legislation.gov.uk/ukpga/2023/56/contents).

29 Put forward by Wayne David MP on 23 February 2024. Accessed: 31 July 2024 (https://bills.parliament.uk/bills/3544).

Conclusion

For now, it is possible to be optimistic about the 2023 Act's extension of corporate criminal liability for economic offences by reference to that of individual senior officers. In its operation, the extended identification principle may well make up for the lamentably limited scope of the new corporate failure-to-prevent fraud offence and, by extending responsibility to a swathe of managers at a senior level, induce the genuine commitment to compliance that is sought. However, if it is to be effective as a deterrent to corporate crime, improvements to substantive criminal law must be accompanied by the credible threat of a punitive response. For the rational corporate actor, for whom maximising profit and maintaining a good corporate reputation are primary concerns, engagement in criminal conduct must therefore involve a real risk of conviction, accompanying stigma and an unconstrained market response. To this end, the cost of potential corporate failure, albeit a highly unlikely consequence of conviction, needs to be weighed against the respective costs of 'artificially' preserving criminogenic behemoths. This requires the recognition of a more expansive notion of collateral damage. The calibration exercise should not only include the purchase of evidence from corporations at the cost of deterrence, symptomatic of the use of DPAs, but also consider, in the alternative, the efficiencies that can be gained by buying information from witnesses with ready access to it. Whistleblowing is the cornerstone of ensuring fair competition. A well-designed reward scheme (Kohn 2024)[30], together with a reconceptualisation of the collateral damage concept, and an acceptance of Darwinian principles operating in the market, would address the current deterrence deficit and lead to greater market efficiency (Harding and Cronin 2022: chs 6 and 7).

30 The US experience shows that three elements are essential: an effective law enforcement agency to report to, anonymity and mandatory payments to all qualified whistleblowers linked to the quality of the evidence provided.

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