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THE CHANGING FACE OF CORPORATE CRIMINAL LIABILITY IN ENGLAND AND WALES

par

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This article will trace the confluence of various influences on the law of England +and Wales relating to the criminal liability of corporations, and precipitating its move toward a different model of corporate criminal liability. It need not have followed from the introduction of legal personality to joint stock companies that they should face criminal liability, but that was the resolution that was reached quite early, by a series of exercises in statutory interpretation under which 'person' was held to include bodies holding corporate personality.[1] It left for resolution what exactly would be enough in individual cases to establish criminal liability. Others organisations – partnerships and unincorporated associations have been held to be the subject of liability.

THE 'IDENTIFICATION DOCTRINE'

The traditional approach of English criminal law to corporate criminal liability was that, in theory, a corporation could be held liable for a criminal offence, and that liability is frequently imposed for offences for which the basis for liability is strict (no mental state need be shown at all by the prosecution) or negligence (where the corporations failed to exercise the standard of care which might be expected of a reasonable person in the position of the corporation). Where the offence is one that requires the demonstration of a more culpable mental state, the corporation may only be convicted if it can be shown to have been held at the highest level of the corporation. The metaphor that has been deployed is that of the 'controlling mind'. The idea is usually dated to the early twentieth century[2] authority most frequently raised is the decision of the House of Lords in *Tesco v Nattrass.*[3] On a charge under the Trade Descriptions Act 1968 S 11(2), which states:

> *If any person offering to supply any goods gives, by whatever means, any indication likely to be taken as an indication that the goods are being*

[1] And *see R v Birmingham and Gloucester Railway Co* (1842) 3 QB 223, 114 ER 492; *Evans & Co Ltd v London County Council* [1914] 3 KB 315; Celia Wells, *Corporations and Criminal Liability* (Oxford, OUP, 2nd Edn) 86.

[2] *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705.

[3] *Tesco v Nattrass* [1971] UKHL 1; [1972] AC 153.

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> *offered at a price less than that at which they are in fact being offered he shall, subject to the provisions of this Act, be guilty of an offence,*

the company was held not to be liable because no decision by the 'controlling mind' of the company to commit the offence.

ADVANTAGES AND DISADVANTAGES OF THE IDENTIFICATION DOCTRINE

The underpinning metaphor of the 'controlling mind' is of explicatory value. It is clear and comes closest to treating organisation as being a natural person. The disadvantages are that it is very difficult to obtain convictions, especially in offences that have a strong mental state requirement – typically intention, knowledge, recklessness or dishonesty, and that the cases in which it possible to achieve convictions are not necessarily those in which they are most to be desired.

The financial incentives created by the identification doctrine run counter to any sensible enforcement strategy, because a large corporation disposed to avoid criminal lability can do so by fragmenting its management structure so that guilty mental states are held at lower levels in its corporate hierarchy than the board. Typically, anti-competitive agreements (cartels and monopoly agreements) might be entered into, informally, at regional level, with no information about them made known to the board.

There had been two major attempts to deal with the adverse consequences of the 'identification doctrine' – that it makes it very difficult to secure convictions at all, and that the corporations whose convictions it does allow may well not the ones whose conviction is most desirable. The first was the 'aggregation' doctrine, which operates thus: if a crime has mental elements a, b, c, &c, and No individual employee of company held all of a, b, c & at relevant time, but employee A had mental state a, B had mental state b, and so on. that would suffice. The courts of England and Wales have never been persuaded to adopt this course. It has a certain intellectual appeal but little practical value, because where the corporation is disposed to avoid liability, the impediment will be the status

The second consists in attempting to broaden the scope comprised by the identification doctrine by extending the notion of the 'controlling mind'. This has been achieved with some success in cases of inadvertence. In the case of manslaughter. The Corporate Manslaughter and Corporate Homicide Act 2007 facilitated prosecutions in the area. In the years since the enactment of the Act there have been some prosecutions,[4] but the effect has been some way short of what was hoped.

[4] They are set out, in response to a Freedom of Information request, at https://www.cps.gov.uk/publications/docs/foi_disclosures/2016/disclosure_4.pdf.

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RESPONDEAT SUPERIOR

England and Wales never adopted the *respondeat superior* doctrine, imposing vicarious liability in criminal law. The doctrine has been common in the federal law of the United States since the decision in *NY Central and Hudson River Railroad v US*.[5] Its effect is that wherever there is wrongdoing, even at the lowest level of a corporation, then, according to the exigencies of the statute concerned, criminal liability may be imposed on the directors, or the company or both. It is a rough-and-ready doctrine, which has been a powerful weapon in the hands of prosecutors in the US. The fundamental objection is that it involves the visiting of punishment upon subjects who could not choose to do otherwise, and that is inconsistent with the classical liberal doctrine that choice should provide the basis upon which criminal liability is imposed.

Broadly speaking, until around 2000, the verdict on the English law of corporate criminal liability might have been that it was deficient, but, largely, inconsequentially so, and that its reform was not a priority. Three major, linked stimuli caused the shift. They are the international obligations of the UK, the growth in cross border investigations, and increased pressure for deal-making in cases of financial crime.

INTERNATIONAL OBLIGATIONS

One of the obligations the UK undertook under the Paris Convention of the OECD[6] was to have in place appropriate levels of corporate liability for bribery of overseas officials. It was signed in 1997. The Convention states:

> *Article 2*
> *Responsibility of Legal Persons Each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official.*
> *Article 3 Sanctions 1*
> *The bribery of a foreign public official shall be punishable by effective, proportionate and dissuasive criminal penalties. The range of penalties shall be comparable to that applicable to the bribery of the Party's own public officials and shall, in the case of natural persons, include deprivation of liberty sufficient to enable effective mutual legal assistance and extradition.*
> …
> *Article 5*
> *Enforcement Investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party. They shall not be influenced by considerations of national economic*

[5] *NY Central and Hudson River Railroad v US* 212 US 481 (1909).
[6] *Convention on Combatting Bribery of Foreign Officials in International Business Transactions* (1997).

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> *interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved.*

What was unusual at the time that the Convention was signed was the enforcement mechanism. There are no formal sanctions, but the Convention is enforced by the conducting of mutual evaluations, the results of which are published. In the assessments of UK law prior to the enactment of the Bribery Act 2010,[7] the OECD made clear that the application to the existing law of bribery of the existing rules on corporate criminal liability in the context of whatever revised offences were to be put in place would, without more, not bring the UK into compliance with Articles 2 and 3. At that time, there had never been a conviction of a corporation for bribery.[8]

The *Corner House* litigation arose from the decision by the Director of the Serious Fraud Office to halt in investigation into the alleged use of bribery to secure a very large arms contract with Saudi Arabia. The allegations included ones that the reason for ending the investigation – after the intervention of politicians Lord Goldsmith and Tony Blair – fell clearly within the terms of Article 5.[9] The House of Lords, then the highest court, apparently reluctantly, held that the decision by the Director − itself reluctant – was lawful. In consequence, the UK received considerable criticism[10] for its failings relative to the Convention, and the message was received at the highest level of government that something needed to be done about corporate criminal liability, at least so far as it dealt with overseas bribery. It would have been possible to deal only with overseas bribery, but a broader path was taken.

DEALS

All criminal justice systems have ways of striking deals on charge or procedure or penalty to elicit confessions or guilty pleas with defendants to expedite or facilitate or render more certain the conclusion of cases. The more a criminal justice system forbids overt bargaining, the more the bargaining will be covert.

The system in England and Wales has in general been opposed to overt deal-making, but there does appear to have been something recognisable as a plea bargain even in the eighteenth century,[11] yet for many years the courts roundly denied its existence.[12] In one of the ground-breaking socio-legal studies in

[7] And see Alldridge, 'The U.K. Bribery Act: "The Caffeinated Younger Sibling of the FCPA"' (2012) 73 Ohio State Law Journal 1181.

[8] See now *R v Smith and Ouzman* (2015).

[9] *R (on the application of Corner House Research and others) v Director of the Serious Fraud Office* [2008] UKHL 60,

[10] OECD, Phase 2bis Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation On Combating Bribery In International Business Transactions United Kingdom (2008).

[11] BP SMITH, 'Plea Bargaining and the Eclipse of the Jury' (2005) 1 *Annual Review of Law and Social Science*, 131-149.

[12] Eg *R v Wise* [1979] RTR 57. 'If a judge enters into a blatant plea-bargain, his fitness to sit as a judge on the criminal law Bench is called into question.' (Lord Widgery CJ at 59C–D); *R* v *Grice*

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England,[13] Baldwin and McConville showed that events around crown court trials were only explicable by the inference that covert deals were being struck. While this study had a tremendous effect upon the legal academy, the effect upon the courts was less striking. *R* v. *Turner*,[14] as underlined and applied in subsequent cases, save in the most exceptional circumstances, effectively prohibited the judge from giving any indication of sentence in advance of a guilty plea by the defendant. The Royal Commission on Criminal Justice noted wistfully that:

> *A significant number of those who now plead guilty at the last minute would be more ready to declare their hand at an earlier stage if they were given a reliable early indication of the maximum sentence that they would face if found guilty.*[15]

Sir Robin Auld's review of the criminal courts discussed advance indications of sentence. It concluded that subject to a number of specified safeguards, a defendant, through his advocate, should be able to request to be informed of and the judge should be entitled formally to indicate the maximum sentence in the event of a plea of guilty at that stage and the possible sentence on conviction following a trial.[16] Auld believed that the ability of the judge to give an indication to a defendant who wished to know the maximum sentence s/he faced would 'enable the guilty defendant and those advising him to evaluate the judge's indication and assess the advantage or otherwise of proceeding with a plea.'[17] It would clearly be in the interests of all that s/he be able to undertake a comparison between the sentence on a plea of guilty and a possible sentence on conviction:

> *He knows and will in any event, be advised by his lawyer that a plea of guilty can attract a lesser sentence and broadly what the possible outcomes are, depending on his plea. So what possible additional pressure, unacceptable or otherwise, can there be in the judge, whom he has requested to tell him where he stands, indicating more precisely the alternatives?*[18]

(1978) 66 *CAR* 167. 'We find it quite astonishing that any recorder should characterise what he is doing as 'plea bargaining.' But even more so when it clearly was 'plea bargaining.' (Roskill LJ at 308).

[13] BALDWIN and MCCONVILLE, *Negotiated Justice* (Martin Robertson, London, 1977). See PA Thomas, 'Plea Bargaining in England and Wales', (1978) 69 *Journal of Criminal Law and Criminology* 170-178, for a contemporary reaction and M McConville, J Hodgson, L Bridges and A Pavlovic, *Standing Accused* (Oxford: OUP, 1994) 189-98.

[14] *R v Turner* [1970] 2 QB 321.

[15] W. RUNCIMAN (chair), Royal Commission on Criminal Justice, Cm. 2263 (1993), paragraphs 41-58. And see M. MCCONVILLE, 'Plea Bargaining: Ethics and Politics' (1998) 25 *JLS* 562-587.

[16] R. AULD, *Review of the Criminal Courts of England and Wales* (London: The Stationery Office, 2001), (Auld Report) 434-444.

[17] At 367.

[18] And see A ASHWORTH, *Sentencing and Criminal Justice* (CUP, 5th Edn 2012) 172. Sentencing Advisory Panel (Now Council), *Reduction in Sentence for a Guilty Plea: Definitive Guideline* (London, Sentencing Advisory Council, 2007).

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As noted by Auld, one aspect of the criminal justice system in England and Wales that has always been inconsistent with the idea that pleas should be uninfluenced by considerations as to what their outcome might be is the sentencing discount. Judicial precedent created the one-third discount for guilty-pleas, which was incorporated into criminal law later.[19]

Some departure from the 'no bargains' rule is now permitted by statute. Under the 'plea before venue system', the accused is entitled to request an indication of sentence, in particular whether 'a custodial sentence or non-custodial sentence would be more likely to be imposed if he were to be tried summarily … and to plead guilty. The court is entitled, but not obliged, to respond to such a request.'[20] That is, there is no longer any absolute prohibition against an advance indication of sentence.[21] In cartel offences in which the enforcement authority is the Office of Fair Trading (OFT) bargains of some sorts have been permitted.[22] The question is not whether an absolute bar should be maintained but whether and how deal-making might properly be extended to bribery offences.

Following the guidance published by the Sentencing Guidelines Council in December 2004 on the Reduction in Sentence for Guilty Plea,[23] in *Goodyear*,[24] adopting the procedure in *Attorney General's Reference (No. 1 of 2004)* and *Simpson*,[25] a five-judge Court of Appeal, presided over by the Lord Chief Justice, was convened to consider whether the *Turner* rule of practice should be modified, and if so, to what extent. It laid down new guidelines[26] which state that normally speaking an indication of sentence should not be given until the basis of the plea has been agreed or the judge has concluded that he or she can properly deal with the case without the need for a trial of the issue. The plea and case management hearing in the Crown Court now specifically requires the judge to seek and be given information first, on whether the defendant has in fact been advised about the credit to be obtained for a guilty plea, and second, what steps had been taken to see whether the case might be resolved without a trial.[27]

There are several techniques of 'negotiated diversion'. The idea is to avoid costly and time-consuming opportunity for adversarial conflict. This recommendation and subsequent legislation[28] placed it on a more formal footing. Subject to those

[19] Criminal Justice and Public Order Act 1994 s 48, Criminal Justice Act 2003 s 144.
[20] Criminal Procedure and Investigations Act 1996 - Venue being significant because of the differing sentencing powers of the Magistrates' and Crown Court.
[21] In Schedule 3 of the Criminal Justice Act 2003, dealing with the allocation of cases triable either way, and sending cases to the Crown Court, paragraph 6, substituting s. 20 of the Magistrates Court Act 1980, addresses the procedure where summary trial appears more suitable.
[22] J. LAWRENCE, M. O'KANE, S RAB and J. NAKHWAL, 'Hardcore Bargains: What Could Plea Bargaining Offer in UK Criminal Cartel Cases?', (2008) 7 *Company Lawyer* 17-42. OFT, *The Cartel Offence: Guidance on the issue of no-action letters by individuals, OFT 513* (April 2003), available at: www.oft.gov.uk/shared_oft/business_leaflets/enterprise_act/oft513.pdf.
[23] Sentencing Guidelines Council in December 2004 on the Reduction in Sentence for Guilty Plea.
[24] *R v Goodyear* [2005] EWCA Crim 888.
[25] *Attorney General's Reference (No. 1 of 2004)* 1 WLR 2111, *R v Simpson* [2004] QB 118.
[26] Auld Report, paras. 55-80.
[27] *Goodyear*, para. 46.
[28] Criminal Justice and Public Order Act 1994 s 48.

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imposed by the judges, the main constraints upon the prosecutor in making deals with defendants are set out in the *Attorney-General's Guidelines on the acceptance of pleas.*[29] This requires, amongst other things, attention to transparency, the basis of plea, attention to the interests of victims and to mitigating factors.

There are obvious reasons why deal-making might not be appropriate in the case of bribery. There is no clearer case of bribery, whatever the age of the laws and whatever the jurisdiction, than that of paying someone not to prosecute the briber for an offence he or she is alleged to have committed. If a person is able to pay to avoid criminal liability, then he or she is not really subject to the criminal law at all. Generality is one of the characteristics of criminal law. One of the clearest indicators of a corrupt society is that it is possible to flex economic muscle so as to avoid the consequences of breaking the law. The fundamental principle is clear and does not admit of shades of grey. Allowing people to pay to avoid criminal proceedings very clearly undermines the Rule of Law, which requires impartial application of clear rules to everybody. A rule whose effects can be avoided by bribing the appropriate person is a rule whose generality is compromised

Conversely, why might deals be particularly appropriate in bribery cases?[30] There is nothing particularly to differentiate it from others types of financial crime, but financial crime in general is an area in which successful prosecutions are difficult and the length of the trial involves substantial risk of an acquittal (with its attendant bad publicity) and expense, and where financial losses to defendants, however described, might be supposed to have a deterrent effect.[31] The complicating features, which are not unique to bribery prosecutions, but which are typical to them as to some other forms of financial crime are the corporate element and the international aspect. In any corporate case the possibility of a deal is attractive where the management has changed since the offence was committed, or can in some other way distance itself from the offence.

INVESTIGATIONS AND PROSECUTIONS ACROSS BOUNDARIES

Greater ability to move property between jurisdictions and to organise corporations across jurisdictions, and also to commit crimes across jurisdictions, has given rise to a greater need to co-ordinate prosecutions between jurisdictions. The question which has arisen with increasing frequency in recent years, and can

[29] www.attorneygeneral.gov.uk/Publications/Pages/AttorneyGeneral'sguidelinesontheacceptanceofpleas(revised2009).aspx.

[30] R. TYLER, 'Lord Goldsmith urges plea bargaining in bribery cases', Daily Telegraph, 13 September 2011.

[31] Roskill Report (Report from the Fraud Trials Committee [1986 HL 471]) gave us the SFO with its special investigative powers and the Criminal Justice Act 2003 s 43 gave a power to operate without a jury, but these provisions were never brought into force, and a subsequent attempt to bring them in failed. See Rosalind Wright, 'Why (Some) Fraud Prosecutions Fail', (2006) 13 Journal of Financial Crime 177-182.

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only arise more, is this: where investigations are conducted by the authorities of more than one jurisdiction, what happens when one jurisdiction is happier to deal than another?

If there are to be a financial payment, whether by way of fine, disgorgement of profits, forfeiture or civil recovery, then, in the first instance it will divided between the jurisdictions in question. If one jurisdiction is happy to settle, but another is not, then the less willing must face the prospect that the 'partner' will settle without them, and that the jurisdiction in question will face a consequential loss.

The conflicts first came to a head in the case of *Innospec*.[32] there was Investigation into bribery by Innospec of State officials in Indonesia and Iraq, in order to secure contracts from their governments fuel additives produced by Innospec, including tetraethyl lead. Fuel containing tetraethyl lead was banned in the UK in 2000 due to links between the compound and severe neurological damage. Innospec was a company incorporated in England & Wales, but was a wholly owned subsidiary of a company incorporated in Delaware.

The (UK) Serious Fraud Office (SFO) and the US authorities agreed that, in the light of X and Y's full admission and full co-operation, they should not seek to impose a penalty which would drive Innospec out of business. Innospec and its parent company offered to pay $40.2 million. The investigating authorities accepted the offer, subject to the approval of the UK and US courts. The SFO and the US authorities agreed that the UK and US shares should be $12.7 million and $27.5 million, respectively. The US court would be asked to approve $14.1 million as a fine, with the remaining $13.4 million going to the US investigating authorities. The Office and X agreed that $6.7m of the $12.7 million should be allocated to a fine or confiscation to be imposed in the Crown Court with the balance being the subject of a civil settlement. The US court duly approved the fine as requested, the Director of the Serious Fraud Office agreed, and the 'global settlement' was presented to the English courts for 'approval' – without a judge having been asked first.

Thomas LJ (as he then was) was unhappy to be presented with this arrangement as a *fait accompli*.

> *'However there is a more important general principle. Those who commit such serious crimes as corruption of senior foreign government officials must not be viewed or treated in any different way to other criminals. It will therefore rarely be appropriate for criminal conduct by a company to be dealt with by means of a civil recovery order; the criminal courts can take account of co-operation and the provision of evidence against others by reducing the fine otherwise payable. It is of the greatest public interest that the serious criminality of any, including companies, who engage in the corruption of foreign governments, is made patent for all to see by the imposition of criminal and not civil sanctions. It would be inconsistent with basic principles of justice for the criminality of corporations to be glossed*

[32] *R v Innospec* [2010] EWCA Misc 7.

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> *over by a civil as opposed to a criminal sanction. There may, of course, be a place for a civil order, for example, as a means of compensation in addition to a fine. It is therefore plainly desirable that the Lord Chief Justice should consider directions that ensure any civil penalties are heard in conjunction with criminal proceedings.'*

He thought the prosecutor had overstepped his proper role. It seemed then that the deal-making that characterises much of US corporate criminal law would not be welcome in the law of England and Wales. This left open some remaining questions, when (as will with increasing frequency be the case) there is an investigation conducted jointly by the enforcement agencies of two or more jurisdictions. Should there be communication or co-operation between judges or would that interfere with judicial independence? How is allocation of money between jurisdictions to be done? An approach that simply pretended that answers to these questions were unnecessary would fly in the face of reality.

Innospec also raised the possibility that there might be different systems of criminal justice according to the investigatory capacities of the respective jurisdictions, and their International muscle. There are many issues that need to be resolved if multilateral investigations are to be conducted. The evidential rules need to be aligned at least to the point where the involvement of the authorities from one jurisdiction does not provide an obstacle to a fair trial in another. It has been suggested [33] that the move towards making deals more central to the criminal justice enterprise is one associated with the (over) Americanisation of criminal justice throughout the world, and that the enforcement of FCPA operates disproportionately against non-American companies,, to the benefit of the American fisc.

DEALS TO DEFERRED PROSECUTION AGREEMENTS

One of the historical peculiarities of the system of prosecution in England and Wales is that prosecution was an action by a private citizen, even if that citizen happened to be a police officer or otherwise involved in law enforcement. Even when the Crown Prosecution Service was introduced,[34] it was not given a monopoly on prosecution. Any private citizen could still bring a prosecution.[35] This structure went some way towards imposing of limits on the deals that could be struck. Only if the State has a monopoly on prosecution (or at least can make enforceable promises to prevent the bringing of prosecutions otherwise than by the State) can it plausibly enter into agreements not to prosecute. In addition, only the State is ever in a position to negotiate sentences.

[33] Hubert DE VAUPLANE, 'Une Nouvelle Geopolitique de la Norme' in Antoine GARAPON et Pierre SERVAN-SCHREIBER (dir.), *Deals de Justice* (PUF, 2013) 23 *et seq.*
[34] Prosecution of Offences Act 1985.
[35] And see *R v Rollins* [2010] UKSC 39.

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In 2013 the UK government put in place a system of Deferred Prosecution Agreements,[36] encouraging corporations to provide evidence against themselves in exchange for an agreement not to profit. The idea is that then the corporation will endure some adverse publicity, and pay monies under various heads, and will not be prosecuted. It was put in place in imitation of the DPA system which operates, apparently successfully, in the Federal US jurisdiction, where (unlike England and Wales) the State does have a monopoly on prosecutions. There is a two stage procedure directed towards the encouragement of provision of full and accurate information. The right to prosecute privately was removed for these agreements.

My initial reaction to these innovations was that this was a case of mistaken borrowing – a 'legal transplant' from the United States to England and Wales that would not work very well in the UK, because of the 'identification doctrine'. This doctrine makes it very difficult for a large company, particularly one with a diffuse management structure, to be convicted, and so, taken with the very serious consequences of a DPA that it will usually be preferable for the company to take the risk of conviction, and contest the allegations in the hope of securing an acquittal.

By the time of writing (May 2017) the only DPAs that have been entered into were three in relation to allegations under section 7 of the Bribery Act 2010 (that is, the offences of failing to prevent bribery by an employee), and a fourth, as yet unpublished, entered into with Tesco Stores Ltd, that will deal with fraud. The first two are not of great moment, although they did allow the courts to set forth the way in which DPAs should be treated.[37]

The turning point may be the DPA that was reached with Rolls Royce early in 2017.[38] Leveson LJ was clearly shocked that a flagship British company was involved in anything of this nature.

> *4 … [I]t can properly be described as devastating and of the very greatest gravity that the conduct of this institution should fall to be examined within the context of a criminal investigation and that the investigation (in very large part conducted and voluntarily revealed to the SFO by Rolls-Royce itself) should reveal the most serious breaches of the criminal law in the areas of bribery and corruption (some of which implicated senior management and, on the face of it, controlling minds of the company).*

In consequence of these events Rolls Royce had to pay around £700 million, which is one of the largest settlements reached in a corporate crime case. This was after an investigation led by the US, and the fear must remain that even if DPAs operate successfully, this might only be where there is US input, and that there is a risk of having two systems of justice according as to whether or not the US is involved.

[36] Crime and Courts Act 2013 s 45 & Sched 17 Part 2 Para 4(1).
[37] *SFO v Standard Bank* (Nov 2015); *SFO v XYZ* (2016).
[38] *SFO v Rolls Royce* (2017).

FAILURE TO PREVENT OFFENCES

Necessity is the mother of invention. Because the pressures of the international obligations of the UK, particularly those of the Paris Convention of the OECD. and because an offence the record of prosecution of any offence imposing liability directly upon a corporation was insufficient to satisfy the OECD, and because it was at best unclear whether any offence drafted so as to place evidential burdens on the defendant would (a) satisfy the OECD Convention and (b) satisfy Article 6.2 of the European Convention on Human Rights; the UK put in place the 'failure to prevent' offence under section 7 of the Bribery Act 2010. This imposes liability upon corporations that fail to prevent their employees[39] from committing bribery offences. A defence is provided of putting in place 'adequate procedures' to ensure compliance by employees. Guidance is published,[40] and corporations in general took steps to ensure compliance by putting in place training progammes and other compliance mechanisms.

The introduction of failure to prevent offence under the Bribery Act 2010 was never likely to produce a large number of prosecutions. One of the objectives of the shifts in the way in which financial crimes are policed has been to move the costs of compliance from the public to the private sector, and this was achieved to some extent by the efforts corporations had to make to comply. After the introduction of DPAs, section 7 offences did, however, figure prominently.

There is no reason in principle why the 'failure to prevent' approach could not be adopted throughout the sphere of economic crime.[41] The more widely it is adopted, however, the less easy will it be to give clear concise and appropriate guidance as to how best to comply. The 'failure to prevent' idea was taken from the Bribery Act to provide the model for the offences in the Criminal Finances Act 2007,[42] which was a response to concerns about the participation of employees of large accountancy firms in the illegal use of offshore tax havens by their clients.

The advantages of the 'failure to prevent' approach are that it guarantees procedures to encourage lawful corporate practices (always provided the penalties are effective, it promotes improved corporate governance and places responsibility for policing on the corporation. The model does have limits. It does depend on the commission of the predicate offence by a (natural) person. This might make too narrow for some purposes. It also involves questions – sometimes difficult – of remoteness, and to do with the limits of the scope of which actors (employees and what order of looser association? What if the employee is not acting for the corporation's benefit, or even contrary to the company's purpose?) but none of these is insuperable.

[39] The statutory expression is 'person associated': Bribery Act 2010 s 8.
[40] https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf
[41] And see Celia WELLS, 'Corporate Failure to Prevent Economic Crime – A Proposal' [2017] Criminal LR 426.
[42] Criminal Finances Act 2007 Part 3 (ss. 43-48).

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CONCLUSION

The use of traditional methods (prosecution) has not been tremendously successful in England and Wales in cases of economic crime. Prosecutions of individuals are very unpredictable and very expensive compared to any monies that might be recovered from the criminal. Action against corporations can, in appropriate cases, yield financial settlements two orders of magnitude greater than any that might be obtained from individuals. Corporations can be given incentives to co-operate (which do not apply to individuals), and the structures around the 'failure to prevent' offence can provide reasons for corporations to govern themselves better, while shifting compliance costs from public to private sector. Nonetheless, the Installation of 'failure to prevent' as a typical or at least default mechanism for criminal law enforcement in corporate crime cases should be introduced, if at all, gradually.

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