Corporate Agency and White Collar Crime—An Experience-led Case for Causation-based Corporate Liability for Criminal Harms

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Abstract

Criticism of the rules by which English law holds companies criminally liable for serious economic and financial misconduct is longstanding. Recently, a series of cases and decisions has given new impetus to criticism of the classic common law identification principle, deriving corporate criminal liability from the guilt of a "directing mind" of the company. These are instances where large and multinational companies have admitted liability or been convicted, followed either by the lack of prosecution or, indeed, the outright acquittal of the individuals from whose culpability the company's liability was stated to derive. Using these cases as a starting point, this article critically assesses the state of corporate criminal liability for serious economic misconduct from the points of view of systemic coherence and collateral fairness. It argues that there is a case for reform of corporate criminal liability to achieve two objectives: First, to separate corporate criminal liability conceptually from individual criminal liability in order to hold companies responsible for the unique, criminally proscribed harms that only they can cause. Second, this reform should ensure fairness to those who suffer the material and reputational consequences of a company's conviction.

Introduction—the elusive corporate conviction

The identification principle remains, despite sustained criticism,[1] the basic rule by which criminal liability for economic and financial misconduct[2] is attributed to legal persons in English law.[3] According to the well-known House of Lords decision

[*] The views expressed are personal to the author.

[1] See, e.g. D. Ormerod and K. Laird, *Smith, Hogan, and Ormerod's Criminal Law*, 15th edn (Oxford: Oxford University Press, 2018), p.250; J. Gobert, "Corporate Criminality: New Crimes for the Times" [1994] Crim. L.R. 722.

[2] This article is not concerned with the Corporate Manslaughter Act 2007, or regulatory offences based on vicarious liability.

[3] The Privy Council decision in *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 A.C. 500; [1995] 3 W.L.R. 413 is noted. However, given it has not had any practical impact on the application of the identification principle for serious economic and financial misconduct, it will be disregarded for present purposes.

in *Tesco Supermarkets Ltd v Nattrass*,[4] a company will be criminally liable if a person who can be qualified as its "directing mind and will" (DMW) commits an offence with the requisite mens rea.[5]

Much of the academic criticism of the identification principle focuses on its artificiality faced with the decentralised and fragmented decision-making processes of modern large and multinational companies.[6] From a more cynical perspective, the previous director of the Serious Fraud Office (SFO), Sir David Green QC was fond of observing that "the e-mail trail has a strange habit of drying up at middle management level".[7] As a general matter, however, and as those working with large companies will know, such cynicism is misplaced. For perfectly sensible organisational reasons the Board and senior management are as a rule not in possession of the granular information required in any way to participate in, let alone acquire mens rea with respect to, individual, allegedly criminal transactions. Be that as it may, what is beyond doubt is that English law makes it difficult to convict companies for serious economic and financial crime even when plainly committed on their behalf or for their benefit.[8]

Although a replacement for the identification principle has long been under consideration, no legislative proposals have been published. Rather, two specific corporate offences have been introduced on the "failure to prevent" (FTP) model. First, s.7 of the Bribery Act 2010 (in summary) makes companies liable for failing to prevent offences of bribery committed on their behalf. There is a defence for the company to show that the bribery occurred despite the existence of a compliance programme dedicated to preventing bribery within its organisation (the "adequate procedures defence"). Second, inspired by the Bribery Act, Pt 3 of the Criminal Finances Act 2017 created two corporate offences of failing to prevent anyone working for or providing services to a company from criminally facilitating tax evasion in, respectively, the UK or abroad, by a third party.[9] Again, it is a defence for the company to show that the facilitation occurred despite a dedicated compliance programme (in this context known as the "reasonable procedures defence").

The advent of the FTP offences has, if anything, intensified the calls for reform of the common law regime.[10] In that context, enforcement activity against large companies and related to their operations, principally by the SFO, has led to results which raise a number of questions relevant to the discussion of what a future corporate criminal liability regime for economic and financial offences should look like. This article will focus on two issues highlighted by these cases and

[4] *Tesco Supermarkets Ltd v Nattrass* [1972] A.C. 153; [1971] 2 W.L.R. 1166.

[5] This was recently confirmed by the Court of Appeal, presided over by the then President of the Queen's Bench Division, Sir Brian Leveson, in *A Ltd* [2016] EWCA Crim 1469; [2016] 4 W.L.R. 176 at [26]–[27], citing also *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] A.C. 705, and *St Regis Paper Co Ltd* [2011] EWCA Crim 2527; [2012] 1 Cr. App. R. 14.

[6] See, e.g. S.F. Copp and A. Cronin, "New models of corporate criminality: the development and relative effectiveness of 'failure to prevent' offences" (2018) 39(4) Comp. Law 104 (and references).

[7] Several remarks in 2013, e.g. to the Cambridge Symposium on Economic Crime on 2 September 2013 (available at *https://www.sfo.gov.uk/2013/09/02/cambridge-symposium-2013/* [Accessed 17 January 2020]).

[8] See Law Commission, Criminal Liability in Regulatory Contexts – A Consultation paper (TSO, 2010) Consultation Paper No.195, paras 5.84 et seq.

[9] See, e.g. K. Laird, The Criminal Finances Act 2017—an introduction [2017] Crim. L.R. 915.

[10] David Green QC reiterated his call for the failure to prevent the regime to be extended to all economic crime in his 2 September 2013 speech to the Cambridge Symposium on Economic Crime (available at *https://www.sfo.gov.uk /2013/09/02/cambridge-symposium-2013/* [Accessed 17 January 2020]).

which, it will be argued, should be central to this exercise: systemic coherence and collateral fairness.

While this article will use English law and its potential reform as its starting point, any consideration of what corporate criminal liability for economic and financial offences ought to look like almost necessarily involves making universal, jurisdictionally neutral normative statements. Such an approach has been criticised for not being sensitive to local contexts.[11] However, this seems misplaced from the point of view of the corporate suspects or defendants most affected. For these companies, divergence between systems of corporate attribution in the jurisdictions in which they operate causes real-life difficulties. In addition, from an internal perspective, modern companies, in particular multinationals, are in many ways jurisdictionally agnostic: a degree of centralised governance is required across operations which manifests itself in employees being taught a corporate ethos detached from any particular jurisdictional or cultural context. This (often) leads to a "highest common denominator" approach to compliance (whether it is high enough being a different matter).[12] Finally, shareholders come from a wide variety of jurisdictional backgrounds and are (or at least should be) well aware of the corporate, as opposed to any country- or culture-specific ethos or approach of the company in which they have invested. For all these reasons, from the point of view of the companies most affected, it seems entirely justified to approach the issue of corporate criminal liability in terms which could be applied across jurisdictions.

The identification principle and systemic coherence

The expression "systemic coherence" in the criminal justice context is best described with reference to its opposite: systemic *in*coherence occurs when a behaviour, and thereby the person responsible for that behaviour, is held at the same time criminal and innocent within the same system or normative framework.

In the corporate liability context, issues of systemic coherence arise in the interaction between findings on corporate derivative liability and separate and arguably inconsistent findings on individual direct liability. A number of recent UK enforcement actions have created situations which arguably constitute instances of systemic incoherence.

Recent examples of systemic incoherence

On 17 January 2017 Sir Brian Leveson, President of the Queen's Bench Division, approved a deferred prosecution agreement[13] (DPA) between the SFO and the iconic engineering company Rolls-Royce Plc.[14] The DPA involved Rolls-Royce accepting that numerous instances of corrupt conduct occurred abroad on its behalf

[11] J.G. Stewart, "A Pragmatic Critique of Corporate Criminal Theory: Lessons from the Extremity" (2013) 16 *New Criminal Law Review* 268.

[12] The fact that the leadership teams of multinational corporations are often drawn from a wide variety of backgrounds further reinforces the point.

[13] Provided for by s.45 of and Sch.17 to the Crime and Courts Act 2013, the DPA process enables a suspect organisation to agree with the SFO (or the Crown Prosecution Service) that criminal proceedings should, subject to double court approval, be suspended on the condition that the organisation admits to the underlying facts, and complies with undertakings set out in the DPA (most notably, a financial penalty). If the organisation has complied with all the terms of the DPA at the end of its term, the proceedings are discontinued.

[14] The author's firm acted for Rolls-Royce in the matter.

between 1989 and 2013. Rolls-Royce agreed to pay financial penalties totalling nearly £500 million in the UK, in addition to approximately £155 million to US and Brazilian authorities, in coordinated settlements.[15]

The relevant conduct occurred both before and after the entry into force of the Bribery Act 2010. The DPA is therefore predicated on Rolls-Royce's acceptance that individuals who at the time represented its DMW committed corrupt acts and, for the charges brought under the Bribery Act 2010, that individuals acting on its behalf, committed corrupt acts. On 22 February 2019, the SFO announced that "there will be no prosecution of individuals associated with the company."[16]

On 10 April 2018, a UK subsidiary of the French transport group Alstom (Alstom Network UK Ltd) was found guilty by a jury in respect of pre-Bribery Act 2010 corruption in Tunisia. The conviction was predicated on findings of corrupt conduct by two individuals who represented the company's DMW. However, one of these individuals could not be extradited and had declined to attend, and the other had not been charged "for case management reasons." The company's appeal based on various difficulties associated with the absence of either of these two individuals from proceedings was dismissed.[17]

In both the *Rolls-Royce* and *Alstom* cases, it can be argued that the systemic incoherence is not manifest. Indeed, a failure to proceed against the individuals whose conduct led to the, respectively, acceptance of responsibility and guilt of these companies, does not amount to a finding that they were innocent. That argument cannot however be made in relation to the *Sarclad* and *Tesco* cases.

Sarclad Ltd entered into a DPA with the SFO approved on 11 July 2016 in respect of foreign corrupt conduct between 2004 and 2012, carried out by one individual who had been a DMW, and two other senior employees.[18] The DPA included the payment by Sarclad of £6,201,085 in disgorgement of gross profits and £352,000 by way of financial penalty. The three individuals whose conduct underpinned the DPA were prosecuted and, on 16 July 2019, a jury acquitted them.

Tesco concerned accounting irregularities for which the giant grocery chain reported itself to the SFO and subsequently agreed to enter into a DPA involving a financial penalty of £129 million. Tesco Stores Ltd accepted criminal liability for false accounting on the basis of the actions of three named individuals deemed to be DMW.[19] However, the proceedings against them came to a juddering halt when on 5 December 2018 the trial judge directed the acquittal of two of them at the close of the prosecution case.[20] The SFO then offered no evidence against the third whose case had been severed for health reasons.

It is worth analysing these various outcomes from both a factual and a legal perspective.

[15] See *Serious Fraud Office v Rolls-Royce Plc and Rolls-Royce Energy Systems Inc* [2017] Lloyd's Rep. F.C. 249.

[16] SFO press release available at: *https://www.sfo.gov.uk/2019/02/22/sfo-closes-glaxosmithkline-investigation-and-investigation-into-rolls-royce-individuals/* [Accessed 17 January 2020].

[17] *Alstom Network UK Ltd* [2019] EWCA Crim 1318; [2019] 2 Cr. App. R. 34.

[18] See *Serious Fraud Office v Sarclad Ltd [aka "XYZ"]* [2016] Lloyd's Rep. F.C. 517 (preliminary judgment), and *Serious Fraud Office v Sarclad Ltd* [2016] Lloyd's Rep. F.C. 509 (final judgment).

[19] See *Serious Fraud Office v Tesco Stores Ltd* [2019] Lloyd's Rep. F.C. 283.

[20] A ruling upheld by the Court of Appeal, see *Bush and Scouler* [2019] EWCA Crim 29.

Systemic incoherence in context

From a factual perspective, it is legitimate to wonder why large, well-resourced and advised companies come to conclusions adverse to themselves on evidence which repeatedly fail to convince trial courts. One aspect of this is the dynamics of the modern corporate criminal process and sound corporate management. Particularly following the introduction of the DPA process, there are powerful incentives for a company to co-operate with a criminal investigation and to enter into a negotiated resolution. A company thereby avoids what is likely to be a much more disruptive investigation and the vagaries of the trial process. The company also retains a measure of control and predictability which is beneficial from business and investor-relations perspectives. Finally, a DPA avoids the potentially catastrophic consequences of a conviction on any pipeline of government work.[21]

Another aspect is how a company arrives at the decision to enter into a DPA. This will typically be based on an internal investigation, led by external lawyers specialising in corporate investigations and supported by an array of experts (accounting, IT, market analysis, etc.). The analysis of the evidence is forensic, and at the same time more and less rigorous than a trial. On the one hand, those collecting and assessing the evidence are expert professionals working with material and human resources that are simply unavailable to either the prosecuting authorities or the courts.[22] They, on behalf of the company, are therefore able to perform a rigorous and dispassionate analysis that a jury could not be expected to replicate. This is not least because the English trial process requires juries to be passive audiences to (in these cases) long presentations of less than scintillating documentary evidence. On the other hand, there are no rules on admissibility in an internal investigation; every single piece of information can be taken into account, notwithstanding likely inadmissibility in a trial.[23]

From a legal perspective, to the extent that English criminal law has dealt with systemic incoherence it is in the context of appeals on the grounds of "inconsistent verdicts." These are appeals against conviction where it is argued, in essence, that the jury's conviction was logically irreconcilable with its own, or another jury's, verdict on a separate count.[24]

There is no direct guidance on how the case law on inconsistent verdicts interacts with the scenario where a company is convicted (on a plea or following trial) and the identified DMW is subsequently acquitted. What is clear is that the Court of Appeal is relatively unconcerned with theoretical consistency, and traditionally adopts a highly pragmatic approach:

> "As long as it is possible for persons concerned in a single offence to be tried separately, it is inevitable that the verdicts returned by the two juries will on occasion appear to be inconsistent with one another. … We do not … accept

[21] See the debarment provisions in Directive 2014/24 on public procurement and repealing Directive 2004/18/EC [2014] OJ L94/65, transposed in the UK by the Public Contracts Regulations 2015/102.

[22] Of course, prosecuting authorities have procedural tools and sources of intelligence unavailable to private actors. However, in this author's experience and knowledge, such material features little in this type of case and is in any event always outweighed by the company's superior material capacity to gather evidence.

[23] This is not to say that admissibility is not relevant to the analysis of the company's position following an internal investigation.

[24] See generally M. Lucroft (ed.), *Archbold on Criminal Pleading Evidence and Practice*, 2019 edn (London: Sweet & Maxwell, 2018), para.7-70.

> [the] submission that inconsistent verdicts from different juries ipso facto render the Guilty verdict unsafe."[25]

So, for instance, the House of Lords held in the landmark 1975 case of *Shannon*[26] that if one alleged party to a closed conspiracy of two pleads guilty but the other is subsequently acquitted, the previous conviction can stand. In more recent times, the Court of Appeal has refused to quash the conviction of the money launderer despite the subsequent acquittal of the alleged predicate offender,[27] or that of the person convicted (having pleaded guilty) of assisting an offender, following the acquittal of the alleged offender himself.[28]

The inconsistent verdict cases posit that an individual accused of an offence that presupposes predicate offending could be convicted despite the acquittal of anyone accused of the latter. Rather than focusing on the theoretical contradiction of the verdicts taken together, the Court of Appeal requires anyone seeking to challenge a conviction on the basis of inconsistency with another verdict to demonstrate how the latter verdict makes her/his conviction "unsafe." The fundamental justification for this was formulated by the Court of Appeal in *Andrews-Weatherfoil Ltd*: "The verdict 'not guilty' includes 'not proven'."[29] This was echoed by Lord Simon of Glaisdale in *Shannon*: "'guilty/not guilty' are not synonymous with 'guilty/innocent': they are no more than the mundane, forensic counterparts of those ethical absolutes".[30] The Court of Appeal applied this distinction to a concrete situation in *Zaman*:

> "As a matter of obvious inference, his time with [the acquitted offender] in the aftermath of the alleged principal offence would inevitably have equipped him with knowledge over and above what the prosecution were able to adduce at [the acquitted offender]'s trial."[31]

When assessing how English law would approach systemic incoherence in relation to corporate criminal liability, the question is whether it is defensible to adopt the approach of looking only at the verdict being appealed and assessing any forensic factors which may distinguish it from, and therefore justify an apparent but theoretical conflict with, the second verdict. This approach certainly has the advantage of avoiding conceptual ruminations. However, in circumstances where there is no objective or subjective distinction between the bases for the liability of the individual and the company for which she/he is the DMW, could the company lawfully be or remain convicted following the acquittal of the former?

Practically speaking, it could easily be the case that, for reasons of availability and/or admissibility, the evidence taken into account in relation to the company is "better" or more extensive than that which can be taken account in relation to its DMW. Equally, further evidence, inculpatory or exculpatory, may have come to light by the time a court considers the liability of the DMW. On that basis, it would be possible to apply the above reasoning and conclude that the conviction

[25] *Andrews-Weatherfoil Ltd, Sporle, and Day* [1972] 1 W.L.R. 118 at 125H and 126C; [1972] 1 All E.R. 65.
[26] *DPP v Shannon* [1975] A.C. 717; [1975] Crim. L.R. 703.
[27] *Burke* [2006] EWCA Crim 3122.
[28] *Zaman* [2010] EWCA Crim 209; [2010] 1 W.L.R. 1304; [2010] Crim. L.R. 574.
[29] *Andrews-Weatherfoil Ltd, Sporle, and Day* [1972] 1 W.L.R. 118 at 126C; [1972] 1 All E.R. 65.
[30] *DPP v Shannon* [1975] A.C. 717 at 764E; [1975] Crim. L.R. 703.
[31] *Zaman* [2010] EWCA Crim 209; [2010] 1 W.L.R. 1304 at 1308D; [2010] Crim. L.R. 574.

of the company is explicable on the evidence, despite the apparent inconsistency with the acquittal of its DMW.

It is important to recall that it has been put beyond doubt that there is no legal obligation to prosecute either or both of the company or its DMW; it is a matter of prosecutorial discretion.[32] However, it does not necessarily follow that because the company's liability may be established without attempting to establish that of its DMW, its conviction could stand in the face of a positive ruling that the DMW's liability cannot be established.

Unlike in the inconsistent verdicts cases cited above, the DMW's culpability is not merely a factual predicate for the company's liability on which separate tribunals may differ. The inconsistent verdicts cases rely on the twin possibilities that the acquitting court got it "wrong" as a matter of historical fact, *and* that the convicted individual was aware of the true situation. As Lord Morris of Borth-y-Gest stated in *Shannon*:

> "No one could know better than A whether he did or did not agree with B to do something wrongful and … the law might seem to be artificial and contrariwise which required that because the charge against B failed A must be held to be not guilty when he himself knew and had admitted that he was guilty."[33]

In relation to a convicted company faced with the acquittal of its DMW, the possibility certainly exists that the acquittal was inaccurate as a matter of historical fact. However, the company has no "awareness" separate from its DMW; the essence of the identification principle is precisely that the company's liability is the legal attribution of the DMW's culpability. As the courts have made clear, in inconsistent verdicts cases the two verdicts result from two discrete factual questions: Is A guilty?, and Is B guilty? This is what made it possible for Lord Morris to state in *Shannon* that:

> "The reasons for the acquittal of B may have nothing to do with A. The circumstances that B's acquittal will result from the absence of proof of the case against him does not diminish the fact that he can fully assert that he has been cleared of the charge against him."[34]

That is not the case in relation to a company and its DMW. Even if their respective liabilities are considered on separate occasions by different tribunals, the factual question is one and the same, namely: Is the DMW guilty? As a matter of law, the acquittal of B has everything to do with A.

On this interpretation, the company's liability could not exist, as a matter of law, absent at least *the possibility* that the liability of the DMW could be established (even if it never is).[35] To put it another way, the relationship between the liability of the appellant and the predicate offending in the inconsistent verdicts cases is

[32] See, e.g. *A Ltd* [2016] EWCA Crim 1469 at [36]; [2016] 4 W.L.R. 176; *Alstom Network UK Ltd* [2019] EWCA Crim 1318 at [47]; [2019] 2 Cr. App. R. 34.

[33] *DPP v Shannon* [1975] A.C. 717 at 745F-G; [1975] Crim. L.R. 703.

[34] *DPP v Shannon* [1975] A.C. 717 at 754B; [1975] Crim. L.R. 703.

[35] For the avoidance of doubt, this discussion is not relevant to the situation where it is clear that one, but unclear which one, of several DMWs was responsible (see Ormerod and Laird, *Smith, Hogan, and Ormerod's Criminal Law*, 15th edn (2018), p.255). However, this was not the situation in either *Tesco* or *Sarclad*.

one of fact, whereas the relationship between the liability of the company and that of its DMW is one of law.

Based on the above reasoning, an acquittal of the DMW represents the crystallisation of the legal possibility of corporate liability in relation to the particular circumstances of the case in hand. A company could therefore argue that its conviction should not be scrutinised for logical-factual inconsistency with a subsequent acquittal of its DMW. Rather, it would argue that, simply, in light of the acquittal of its DMW it is clear that its conviction amounted to an error of law and therefore should be quashed as unsafe. As Lord Morris opined in *Shannon*:

> "If certain facts are admitted and if on the basis of them there is a plea of guilty and if the facts do not warrant such a plea it may be that the acceptance by the court of the plea could amount to a wrong decision of a question of law."[36]

In the context of the recent corporate resolutions cited above as possible examples of systemic incoherence, it may be countered that this discussion is moot: none of them concerned inconsistent *verdicts*, at worst there were DPAs with factual premises undermined by the acquittals of the DMWs. It is of course correct that the law does not provide a company that has entered into a DPA on the basis of the culpability of identified DMWs with the possibility of challenging the DPA in light of their acquittals.[37] However, this discussion is nevertheless highly relevant because it bears on the enforceability of the DPAs should the company fail to abide by its terms. The ultimate sanction for such a failure is the termination of the DPA and the lifting of the suspension of the indictment,[38] i.e. the commencement of a formal prosecution of the company. If such a prosecution were moribund because an ultimate conviction is legally precluded by virtue of the acquittal of the relevant DMWs, any remaining obligations under the DPAs in *Tesco* and *Sarclad* would (for the remainder of their duration) be unenforceable.

Consequently, it seems that the identification principle for attributing corporate criminal liability for economic offending could result (and arguably already has resulted) in instances of systemic incoherence. It is further arguable that English law would provide a remedy for a company that is the "victim" of systemic incoherence.

The second major issue with the identification principle is what will be termed "collateral fairness".

Derivative liability and collateral fairness

In the event of a corporate conviction, it is not only the whole corporate organisation, but also third parties such as shareholders and pension savers, who will bear the consequences, financial as well as reputational. Stewart has written that criticism of corporate criminal liability often notes

[36] *DPP v Shannon* [1975] A.C. 717 at 747E; [1975] Crim. L.R. 703. This dictum should remain sound despite the amendment removing "wrong decision of any question of law" as an express ground for quashing a conviction in s.2 of the Criminal Appeals Act 1968, see *Graham and Others* [1997] 1 Cr. App. R. 302; [1997] Crim. L.R. 340.

[37] See also *Serious Fraud Office v Tesco Stores Ltd* [2019] 1 WLUK 176 where an application to amend the DPA following the acquittal of the DMWs was rejected.

[38] Crime and Courts Act 2013 Sch.17 paras 2 and 19.

> "the 'reputational rub-off" effect of corporate criminal liability on senior managers, and more frequently, the fact that the costs of a corporate conviction tend to be borne by employees and shareholders who are presumptively innocent."[39]

By "collateral fairness", therefore, is intended the proposition that the law should seek to avoid imposing adverse consequences on third parties with no responsibility for the conviction of a company.

Collateral fairness has had an impact on how corporate criminality is managed. Famously, the massive increase in the preference for DPAs over prosecutions by the US Department of Justice can be traced back to the collapse of Arthur Anderson following its conviction in 2002.[40] Now, the DoJ's *Principles of Federal Prosecution of Business Organizations* state that prosecutors

> "may consider the collateral consequences of a corporate criminal conviction or indictment in determining whether to charge the corporation with a criminal offense and how to resolve corporate criminal cases."[41]

The English DPA Code of Practice names as a factor against prosecution (and in favour of resolution by DPA) that

> "[a] conviction is likely to have collateral effects on the public, [the company's] employees and shareholders or [the company's] and/or institutional pension holders."[42]

If a company is convicted, English sentencing courts are encouraged to consider the "[i]mpact of [the proposed] fine on employment of staff, service users, customers and local economy (but not shareholders)".[43]

However, managing the collateral consequences of a company's criminal liability does not engage with the more radical question of why a company should be held criminally liable at all because a single, albeit senior, representative "goes rogue"?

Certainly in the English context, there is no need for this out of a concern to ensure that a company does not benefit from the criminal conduct of senior representatives: anyone who has suffered a loss can sue, and any material benefit from criminality can be confiscated in civil proceedings brought under Pt V of the Proceeds of Crime Act 2002.

The question remains: under what circumstances it is fair that stakeholders who had no role in wrongdoing on behalf of a company should suffer the sometimes severe reputational and financial consequences of its criminal conviction. This question becomes more acute in relation to listed multinational companies where merely reducing their profit margin would impact on their ability to pay dividends to the likely detriment of public pension funds, in addition to any reduction in

[39] Stewart, "A Pragmatic Critique of Corporate Criminal Theory: Lessons from the Extremity" (2013) 16 *New Criminal Law Review* 280.

[40] See, e.g. N. Ryder, "'Too scared to prosecute and too scared to jail?' A critical and comparative analysis of enforcement of financial crime legislation against corporations in the USA and the UK" (2018) 82(3) J. Crim. L. 248.

[41] US Department of Justice, *Principles of Federal Prosecution of Business Organizations*, para.9-28.1100.

[42] Issued jointly by the SFO and the Crown Prosecution Service, *DPA Code of Practice* (TSO, 2014), para.2.8.2(vii); see also, e.g. *Serious Fraud Office v Rolls-Royce Plc and Rolls-Royce Energy Systems Inc* [2017] 1 WLUK 189 at [52] et seq.

[43] Sentencing Council, *Fraud, bribery and money laundering: corporate offenders – Definitive Guideline* (TSO, 2014), effective from 1 October 2014.

taxes paid. At the same time, it is in relation to these highly complex organisations that the inadequacy of the identification principle is most manifest, leading many commentators to call for reform to facilitate their convictions.[44]

However, it is the very organisational complexity of large multinational companies that raises serious concerns from a point of view of collateral fairness. A DMW is regarded as such precisely because she/he is deemed in some way to embody the company. However, in relation to large multinational companies, in many (or most) cases it is highly doubtful that the criminal, possibly occasional, acts by a single individual, however senior, can in any true sense be said to be representative of the multitude of stakeholders who will ultimately suffer the consequences of the company's conviction.

Alongside the issues associated with systemic coherence set out above, concern with collateral fairness not only bolsters the case for replacing the identification principle but should also inform what it is replaced with.

Recognising the distinctness of corporate agency

Reforming corporate criminal liability requires consideration of why we should have it at all.

Societas delinquere non potest?

Being relatively used to it in the common law world, there is a tendency to gloss over the conceptual stretch involved in applying the morally charged concepts inherent in the criminal law to the legal fiction that is the company. Comparative research shows that it is only relatively recently that civil law systems started introducing corporate criminal liability,[45] and there are still jurisdictions where the concept does not exist.[46]

Scepticism towards the very concept of corporate criminal liability has been particularly prominent in German scholarship, as is exemplified by Ransiek:

> "It is quite clear that there is a difference between humans and legal persons; and because there is a difference, imposing a criminal sanction should be restricted to humans, because only a human can act personally responsible, can be blamed, can be guilty."[47]

As Ransiek makes clear,[48] this analysis starts from the principle that criminal liability is intrinsically bound up with moral agency and culpability. It is indeed

[44] Copp and Cronin have proposed a solution based on a procedural amendment clarifying the application to the legal person directly of the evidential presumption in s.8 of the Criminal Justice Act 1967 ("New models of corporate criminality: the problem of corporate fraud - prevention or cure?" (2018) 39(5) *Company Lawyer* 139). Although elegant, it is highly doubtful that this is a solution. The s.8 presumption can of course be used to find the mental element satisfied as against the DMW and, thereby, the company. However, absent substantive reform, the law does not recognise a corporate mental state to which the s.8 presumption can apply and the proposed solution would appear to be contrary to the ratio in *Attorney-General's Reference (No.2 of 1999)* [2000] Q.B. 796; [2000] Crim. L.R. 475.

[45] E.g. G. Vermeulen, W. de Bondt and C. Ryckman, *Liability of legal persons for offences in the EU* (for the European Commission) (Antwerpen: Maklu, 2012); Allens Arthur Robinson, *'Corporate Culture' as a basis for the Criminal Liability of Corporations*, Report for the United Nations Special Representative of the Secretary General for Business and Human Rights (UNSRSG), February 2008.

[46] E.g. Germany, Italy, and Sweden.

[47] A. Ransiek, "Criminal sanctions against corporations?" (2015) 5(3) Eu. C.L.R. 342–343; see also the overview in Vermeulen, de Bondt and Ryckman, *Liability of legal persons for offences in the EU* (Antwerpen: Maklu, 2012).

[48] Ransiek, "Criminal sanctions against corporations?" (2015) 5(3) Eu. C.L.R. 337.

difficult to argue with the proposition that "shoehorning corporations into a criminal structure built for individuals"[49] is intellectually uncomfortable. However, while it is obviously a critical factor in attributing criminal liability to individuals, an exclusive focus on moral culpability (or mens rea) in considering corporate criminal liability misses out important aspects of the role and purpose of the criminal law as a whole.

First, it is not accurate that the criminal law is only concerned with moral culpability. As Gobert and Punch put it, it is also concerned with

> "the prevention of social harm and the deterrence of conduct likely to lead to such harm – regardless of whether the conduct in question can be characterised as immoral."[50]

And so, at least as a matter of English law, the fact that an individual is incapable of moral discernment does not remove from the ambit of the criminal law harms that it proscribes and that she/he causes. Lack of moral discernment usually prevents *punishment*, but not consequences under the criminal law.[51]

Second, and more important for present purposes, certain types of criminally proscribed harms can only be caused in a corporate context. This is not simply a reflection of Sutherland's classic differential association theory,[52] but of the fact that corporate structures place individuals in positions to cause certain harms which they could not cause without them.

Both of these aspects can be illustrated with the fictional but reality inspired example of hundreds of individual tele-salespeople employed by financial institutions causing millions of retail customers to buy expensive financial products as a result of grossly misleading statements. In many or most cases, the individual salespeople will not have sufficiently understood the products they were selling to know that the sales manual they were following contained statements that would be grossly misleading in many contexts. They would therefore not be guilty of fraud. However, the harm caused to the retail customers, individually as well as collectively, was clearly the result of misrepresentations the criminal law of fraud seeks to proscribe.

We can use one of the recent examples of corporate enforcement to illustrate this. The fact that the DMWs were acquitted in *Tesco* does not detract from the fact that the market was misled by massively inflated profit predictions based on deliberately (even if not dishonestly) applied figures, leading to a market correction to the tune of over £2 billion.

It seems unarguable that "the activities or defaults of corporations can produce enormous harm",[53] independently of any individual culpability. Whilst clearly lacking moral agency, companies have "rational and physical capacity"[54] and are therefore perfectly capable of lying, bribing, and profiteering, without it being apt

[49] Stewart, "A Pragmatic Critique of Corporate Criminal Theory: Lessons from the Extremity" (2013) 16 *New Criminal Law Review* 277.
[50] J. Gobert and M. Punch, *Rethinking Corporate Crime* (London: Butterworths, 2003), p.47.
[51] If the individual in question is found to have caused the harm, the criminal court will apply a range of mental health disposals (see s.5 of the Criminal Procedure (Insanity) Act 1964).
[52] E. Sutherland, "The White Collar Criminal" (1940) 5 *American Sociological Review* 1.
[53] A. Ashworth, "A New Generation of Omissions Offences" [2018] Crim. L.R. 359.
[54] Gobert and Punch, *Rethinking Corporate Crime* (2003), p.48.

to ascribe these epithets to the acts of particular individuals acting on their behalf.[55] If the criminal law as applied to individuals can provide protection and redress for society and victims from criminal harm caused absent culpability, it is not much of a leap to apply the same logic to companies. The recognition that the causation of criminally proscribed harm by companies is morally reprehensible[56] and should if possible be prevented strengthens this argument.

In the English context, reasoning along these lines has been met with criticism based on its alleged failure to address "equivalent culpability" for the corporate offender with that of the individual. Sullivan, for example, focused on whether companies are "'real' in the sense that they may be regarded as substantive moral agents".[57] He made the point that it is unfair to inflict the moral censure inherent in a conviction for a serious offence on a company, a legal person is therefore immune to it. However, it being accepted that there is no corporate conscience in a subjective sense, why is this even an issue? Once it has been established that companies are substantive agents *simpliciter* and able to cause criminally proscribed harms, it is a question of policy when it is appropriate to hold companies criminally liable; whether they are capable of subjective morality need not detain us. And if we accept Sullivan's point that companies lack moral "reality", it is difficult to see how they would suffer the stigma of incrimination.

What is more, corporate structures are capable of amplifying harm on a scale well beyond that which could be caused by any individuals operating within them acting for themselves. That being so, it seems logical and right to judge corporate acts causing criminal harm on their own terms. English law does not, which is yet another argument in favour of reform.

The case for causation-based corporate criminal liability for criminal harms

The merits of corporate criminal liability as such are not generally contested in the English reform debate which has focused on making it easier to convict companies. There is however a risk that this focus leads to reform which does not solve or, worse, amplifies the difficulties with systemic coherence and collateral fairness inherent in the current regime.

One option which has high-level backing[58] is to introduce a general corporate FTP offence for economic crime. The idea is that the same regime as currently applies to bribery would also apply to, principally, fraud and money laundering. Under this system, a company would be liable for failing to prevent the criminal activities of any person "associated" with it.

[55] A somewhat literal interpretation of multiple, independently non-culpable decisions and acts leading to a corporate causing criminally proscribed harm, has led to the argument that it should be possible to aggregate the various states of knowledge of all the individuals involved in the relevant decision-making process into a corporate mens rea satisfying the definition of the offence in question. This was firmly rejected by the Court of Appeal in *Attorney-General's Reference (No.2 of 1999)* [2000] Q.B. 796; [2000] Crim. L.R. 475; on which see Ormerod and Laird, *Smith, Hogan, and Ormerod's Criminal Law* (2018), pp.254–255.

[56] See Law Commission, Criminal Liability in Regulatory Contexts – A Consultation paper (2010) Consultation Paper No.195, paras 4.6 et seq.

[57] G.R. Sullivan, "The Attribution of Culpability to Limited Companies" (1996) 55 *Cambridge Law Journal* 532.

[58] E.g. letter from MPs Kevin Hollinrake and Norman Lamb, Co-Chairs of the All-Party Parliamentary Group on Fair Business Banking, to then Prime Minister Theresa May, 6 March 2019; report by the House of Lords Select Committee on the Bribery Act 2010, 14 March 2019; speech by former DSFO Sir David Green QC at the 37th International Symposium on Economic Crime in Cambridge, 2 September 2019.

However, and as has been pointed out,[59] liability under FTP is still derivative: the company's liability is predicated on the established criminality of an individual. This leaves unresolved the issue of systemic coherence. The assumption that it is always possible to prosecute lower-level employees, as compared to DMWs, will in many instances be wrong. First, the number of individuals found to be responsible for alleged criminal activity by a company is often relatively small, at any level. This is clearly illustrated by *Sarclad* where three individuals were deemed responsible in the DPA (and subsequently acquitted).[60] Second, a person lower in the hierachy of an organisation may be directly responsible for an act, but not have any knowledge of the circumstances critical to acquiring the necessary mens rea. This can be illustrated with reference to the example above involving the retail sale of financial products.

FTP expands—significantly—the range of individuals who can incriminate a company they act for. It is therefore fair to assume that, on balance, the generalised adoption of FTP would *in theory* lead to more companies being liable (although query how big a practical difference it would make in many circumstances). However, FTP fails to address systemic coherence and, further, by recasting the liability of the corporate as FTP rather than causing the harm, it arguably also fails to deal with corporate criminal harms on its own terms.

While FTP deals, at least to some extent, with collateral fairness by including a defence to corporate liability of proving the existence of a dedicated compliance programme, that cannot be said about another alternative which is frequently cited.[61] *Respondeat superior*, or vicarious liability, is the principle which has governed corporate criminal liability in US federal law since the early 20th century.[62] Like FTP, it expands the theoretical scope for corporate criminal liability but also fails to address systemic coherence and the unique nature of corporate criminal harms.[63] In addition, the absence of a compliance defence leads to potentially critical issues of collateral fairness[64] which could only be addressed by heavy reliance on prosecutorial discretion.

It is submitted that the recent cases discussed above have revealed fundamental problems inherent in the identification principle as applied to the modern enforcement of serious economic and financial misconduct. Moreover, the difficulties associated with the most commonly discussed solutions for reform of corporate criminal liability in English law demonstrate the need to consider more innovative approaches.

In this regard, it seems logical to start from the independence of corporate agency:

[59] See, e.g. C. Wells, "Corporate Failure to Prevent Economic Crime—A Proposal" [2017] Crim. L.R. 426.

[60] See also the DPA between the SFO and Standard Bank (*https://www.sfo.gov.uk/cases/standard-bank-plc/* [Accessed 17 January 2020]). For US examples, see the DPAs with SBM Offshore and Och-Ziff (both available at *https://www.justice.gov/criminal-fraud/related-enforcement-actions* [Accessed 17 January 2020]).

[61] E.g. remarks made by Lord Edward Garnier QC at the Fraud Lawyers Association's International Conference, 21 June 2019.

[62] See the US Supreme Court judgment in *N.Y. Cent. & Hudson River R.R. Co v United States*, 212 U.S. 481 (1909).

[63] See J. Child and D. Ormerod, *Smith, Hogan, and Ormerod's Essentials of Criminal Law*, 3rd edn (Oxford: Oxford University Press, 2019), p.30: "Where D (the organisation) has acted in a criminally blameworthy fashion then it should be targeted directly, and where it has not, the use of vicarious liability is surely unfair."

[64] See Sullivan, "The Attribution of Culpability to Limited Companies" (1996) 55 *Cambridge Law Journal* 543: "even an impeccably run company may find itself employing, from time to time, an employee who turns out to be dishonest."

> "A company has its own distinctive goals, its own distinctive culture, and its own distinctive personality. It is an independent organic entity, and, as such, should be responsible in its own right, directly and not derivatively, for the criminal consequences that arise out of the way that its business is conducted."[65]

On this basis, in the sphere of economic and financial crime, a system could be envisaged whereby a company would be liable on the basis of *causation* for the criminal harms arising as a result of its operations, regardless of whether any individual could be held criminal responsible for it. Business operations occasioning harm by means of the actus reus proscribed would thus suffice, subject to the possibility of the company showing that its operations were not a significant cause of the harm, or novus actus interveniens.[66] This defence can be envisaged as either implicit in the concept of "causation" and therefore evidential, or as a formal legal defence. This is a distinction carrying huge practical significance: an evidential defence would involve the company asserting why it should not be responsible, with the burden of disproving the defence remaining on the prosecution.[67] A legal defence, on the other hand, would impose on the company the burden of proving (on the balance of probabilities) that its operations did not cause the harm.[68]

It is submitted that a legal defence is to be preferred. As a matter of procedural convenience, the defendant company would be in a much better position to collect and marshal the evidence necessary to prove lack of causation, than the prosecution would be to disprove it.[69] From the perspective of the administration of justice, this would have the beneficial consequence of maximising the quality of the evidence before the court.

From a normative perspective, a legal defence would also enable legislative indications of when a company's operations should not be held causative of criminally proscribed harms. A non-exhaustive list of circumstances preventing causation would include, certainly, the existence of a dedicated compliance programme, but also unforeseeable individual agency, as well as accident. Using factual and legal concepts of causation already familiar to the criminal law, notably novus actus interveniens and "significant cause",[70] the company would need to prove that its operations did not cause the harm in question.

It should be clarified that this type of causation-based liability for economic and financial crime would be limited to instances where the relevant actus reus results in actual harm. It is of course the case that the substantive offences of, in particular, bribery and fraud, are complete regardless of whether the bribe is accepted, or the intended gain or loss arises. It is however submitted that the social purpose of criminalising companies is best served by limiting their liability to offending causing actual harm: Companies would not thereby be disincentivised from seeking to prevent offending within their operations as the success or otherwise of any

[65] Gobert and Punch, *Rethinking Corporate Crime* (2003), p.38.

[66] This would, of course, be in addition to the possibility for the company simply to argue that no harm was in fact caused, or that any harm was not criminal in nature.

[67] Cp. lack of causation in manslaughter, or self-defence.

[68] Cp. the "adequate procedures" defence to the corporate offence in the Bribery Act 2010.

[69] For a defence of reverse burdens on corporate defendants based on these considerations, see A. Ashworth, "A New Generation of Omissions Offences" [2018] Crim L.R. 361.

[70] Extensively discussed in case law related to unlawful act manslaughter, see, in particular, *Mellor* [1996] 2 Cr. App. R. 245; [1996] Crim. L.R. 743, and *Wallace* [2018] EWCA Crim 690; [2018] Crim. L.R. 918.

genuine attempt to cause a criminally proscribed harm is ultimately out of their hands. In addition, any individuals responsible will remain liable for the full range of offending, even when "unsuccessful."

Perhaps most importantly, however, limiting corporate criminal liability to offending causing actual harm is consistent with the objective of dealing with corporate offending on its own terms. These include the fact that, albeit it is an economic actor distinct from its constituent individuals, a company does not have a subjective conscience. The justification for criminalising "unsuccessful" offending is precisely that the behaviour in itself is considered morally reprehensible, even if it is ultimately victimless due to circumstances out of the offender's control. It would be pointless to hold companies liable, and a waste of government resources to enforce liability, on this basis.

An illustration of how a system of corporate criminal liability based on causation of criminally proscribed harms would work can be distilled from *Andrews-Weatherfoil Ltd*: A company successfully appealed against its conviction for bribery on the basis that the jury had not been invited to consider whether a DMW had made a corrupt offer of employment to a council official called Sporle. Sporle's appeal, in turn, was based on the asserted inconsistency between his conviction for agreeing to the offer and the acquittal of the company. The Court of Appeal rejected Sporle's appeal, holding that the company's acquittal "in no way affect[ed] the question whether or not Sporle corruptly agreed to accept employment."[71] This is plainly right, and under the system proposed, this finding of criminal harm caused would be sufficient to establish the company's liability, subject to its demonstrating lack of causation.

Conclusion

It its 2010 Consultation Paper, the Law Commission relied on the flexibility supposedly injected into the law by *Meridian* to opine that "there is no pressing need for statutory reform or replacement of the identification doctrine" because it

> "should only be applied as the basis for judging corporate conduct in the criminal law if the aims of the statute in question will be best fulfilled by applying it."[72]

Whether or not that approach would have been desirable from the point of view of legal certainty for companies, the past decade has shown not only the resilience of the identification principle in the field of serious economic and financial crime, but also the attendant problems highlighted in this article.

There are possible inspirations for reform which go at least some way towards addressing the concerns set out in this article. Section 12.3 of the Australian Criminal Code allows for the conviction of a company where it has authorised or permitted the commission of an offence, inter alia by its "corporate culture" (as defined). However, despite a statutory definition of "corporate culture", it remains

[71] *Andrews-Weatherfoil Ltd, Sporle, and Day* [1972] 1 W.L.R. 118, p.125F; [1972] 1 All E.R. 65.

[72] Law Commission, *Criminal Liability in Regulatory Contexts – A Consultation Paper* (2010) Consultation Paper No.195, para.5.103.

an elusive concept[73] and there appears to be some doubt whether it allows for the conviction of a company without identifying an individual responsible.[74] Perhaps as a consequence of these uncertainties, in its 20-plus years on the statute book, there has been no reported, let alone successful, enforcement action on the basis of attribution by "corporate culture."[75] Against this background, the Australian Law Reform Commission has recently recommended consolidating corporate criminal attribution based on criminal conduct by "associates" acting on behalf of a company, subject to a due diligence defence.[76] If implemented, this would again strengthen the derivative nature of corporate criminal liability in Australia.

Another example is provided by Ch.9 of the Finnish Penal Code which includes a residual basis for convicting a company even if no responsible senior officer or manager can be identified. While an interesting solution, there is an important distinction between not being able to identify an individual responsible and providing for the possibility that no individual is responsible. This article has sought to make the case that it ought to be possible for a company to be criminally liable also in the latter case.

The idea of decoupling corporate criminal liability from individual criminal liability is not new, but largely untested. The scheme to replace the identification principle[77] proposed in this article would address the twin concerns of systemic coherence and collateral fairness by focusing on the unique, criminally proscribed harms companies can cause. Along the way it would provide much-needed clarity and predictability currently lacking in the English law of corporate criminal liability.

[73] See, e.g. J.H.C. Colvin and J. Argent, "Corporate and personal liability for 'culture' in corporations?" (2016) 34 C. & S.L.J. 30; A. Clarke, "The Corporation and Corporate Culture: A New Paradigm?" (2019) 36 C. & S.L.J. 596.

[74] Allens Arthur Robinson, *'Corporate Culture' as a basis for the Criminal Liability of Corporations*, Report for the United Nations Special Representative of the Secretary General for Business and Human Rights (UNSRSG), February 2008, p.69.

[75] S. Bronitt, "Rethinking Corporate Prosecution: Reviving the Soul of the Modern Corporation" (2018) 42 Crim. L.J. 205. "Corporate culture" was however considered in a directed acquittal in *Potter & Mures Fishing Pty Ltd* Unreported 14 September 2015 (Supreme Court of Tasmania).

[76] ALRC, *Corporate Criminal Responsibility* (November 2019) DP 87, Ch.6.

[77] There is also a case for replacing FTP so as to provide a uniform basis for corporate liability for serious economic and financial misconduct. The ALRC addressed this point in the Australian context in ALRC, *Corporate Criminal Responsibility* (November 2019) DP 87, para.6.74.