



**Law  
Commission**  
Reforming the law

# **Corporate criminal liability – Lessons from across the Irish Sea**

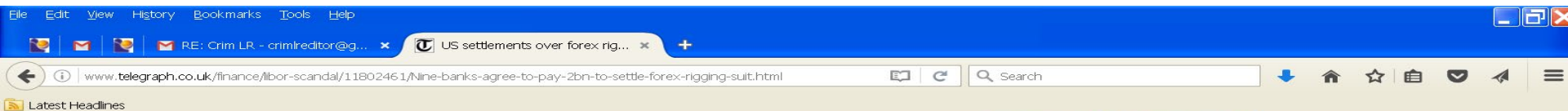
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Professor David Ormerod QC

# Corporate Liability- a continuing public concern?

- Does identification doctrine hold corporate wrongdoing to account?
- 1990s
  - Pressure for reform from corporate failings leading to transport and other disasters.
    - Corporate Manslaughter and Corporate Homicide Act 2007 – senior management failure
- 2000s
  - Public pressure re corporate failings leading to financial crisis
    - Bribery Act model – failure to safeguard

# The pressure remains



Nine banks have paid a total of \$9bn to investors in the US over claims they rigged foreign exchange markets, and their lawyers hope to launch similar lawsuits in London

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Banks accused of foreign exchange rate rigging have agreed to pay major penalties to investors Photo: REX



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Tim Wallace and agencies

7:43AM BST 14 Aug 2015

British and European investors could now get a chance to open lawsuits



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“I would very much like the test for corporate criminal liability to be looked at again. As you know, in this country, it is extremely difficult to convict a company of an offence because the prosecution has to show that the controlling minds of the company — somebody at the board level — were complicit in the criminality you are trying to prove.

I think that bar is too high, and is a very unrealistic test — not least because I think anyone will agree that if you’re looking into allegations of corporate misconduct spookily the e-mail trail tends to dry up at a fairly junior level.”

David Green CB, Director of the SFO

<http://www.acfe.com/article.aspx?id=4294980221>

# SFO suggestion for Law Comm 13<sup>th</sup> Programme

- “whole structure and framework of law on corporate liability needs thorough review with a view to wholesale reform.”
- “the current law makes the successful prosecution of a large multinational corporation for economic wrongdoing very difficult”

big chunk of the SFO's caseload. Green appears a little envious of the powers his counterparts at the FBI and Securities Exchange Commission exercise, particularly in relation to corporate liability.



Green says he would like to investigate FIFA but has no jurisdiction CREDIT: AFP

To prosecute a company, the SFO must be able to prove that the “controlling mind” of the company knew about wrongdoing. For the American courts the fact of fraud or corruption occurring means corporates can be held criminally liable. Green has campaigned for similar

# Overview

- To what extent is the identification doctrine failing?
- What models of corporate criminal liability are available?
  - The identification doctrine.
  - The organisational model
    - Senior management failures
    - Corporate failure to safeguard.
  - Combined approaches.
  - Vicarious liability.
- What are the merits of each?
- Can one model meet all forms of corporate wrongdoing?

# Problems with Identification Doctrine

- The model is a fiction – fails to criminalise corporate culture of wrongdoing
- Fails to recognise that corporation has structure, systems and processes that are distinct
- No aggregation of *mens rea* for officers
- Complex corporate structures render doctrine difficult to apply to large but (too) easy to small company
  - Impacts on small business and therefore potentially on disproportionately on some sectors
- Encourages company to decentralise activity
- Disincentive for reporting wrongdoing to more senior members
- Low risk of conviction means no deterrence value



# Impact of doctrine in practice...

- SFO reported to Law Commission
  - “unable to prosecute any of the banks in LIBOR investigation because corporate structures are too large and complex to be able to apply the identification doctrine with confidence”
- CPS reported in 2015
  - unable to prosecute Newsgroup for any involvement in the phone hacking actions of its staff



# Operation Elveden corruption probe ends

🕒 26 February 2016 | [UK](#)

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The Metropolitan Police investigation into allegations of inappropriate payments to police and public officials by journalists has officially ended after nearly five years.

Nine police officers were among 34 people convicted as part of Operation Elveden, which cost almost £15m.

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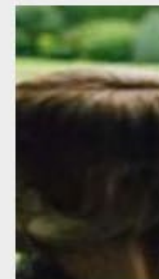
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# Alternatives

# (1) Senior Management Failure Model

- Direct corporate liability.
- No predicate offence required.
- “Senior management” failure in relation to corporate activities
  - Problems of identifying senior managers?
  - Adopts a form of aggregated model
  - Easier to prosecute small company
- Better suited to neglect/breach of duty offences
- Attitudes, policies, systems and accepted practices are to be taken into account by the jury
  - That tends towards a true organisational model

## (2) Failure to Prevent Model

- Examples
  - s. 7 Bribery Act 2010 - corruption
  - s. 21 Criminal Justice and Courts Act 2015 – care managers
  - Criminal Finances Bill 2016 - failing to prevent the facilitation of tax evasion.
- A form of assisting/facilitating
- Depends on a predicate offence by an individual
  - s. 7 Bribery Act 2010
    - a person “associated” with the company.
  - s. 21 Criminal Justice and Courts Act 2015
    - a person who is “part of a care provider’s arrangements”.
  - Cl 37 Criminal Finances Bill 2016
    - Evasion offence by taxpayer assisted by “associated” person
    - **No requirement for corporate to benefit**
    - Corporate has defence if reasonable prevention procedures in place

## Criminal Finances Bill

### *Failure of relevant bodies to prevent tax evasion facilitation offences by asso*

#### **37 Failure to prevent facilitation of UK tax evasion offences**

- (1) A relevant body (B) is guilty of an offence if a person commits a UK tax evasion facilitation offence when acting in the capacity of a person associated with B.
- (2) It is a defence for B to prove that, when the UK tax evasion facilitation offence was committed—
  - (a) B had in place such prevention procedures as it was reasonable in all the circumstances to expect B to have in place, or
  - (b) it was not reasonable in all the circumstances to expect B to have any prevention procedures in place.
- (3) In subsection (2) “prevention procedures” means procedures designed to prevent persons acting in the capacity of a person associated with B from committing UK tax evasion facilitation offences.
- (4) In this Part “UK tax evasion offence” means—
  - (a) an offence of cheating the public revenue, or
  - (b) an offence under the law of any part of the United Kingdom consisting of being knowingly concerned in, or in taking steps with a view to, the fraudulent evasion of a tax.
- (5) In this Part “UK tax evasion facilitation offence” means an offence under the law of any part of the United Kingdom consisting of—
  - (a) being knowingly concerned in, or in taking steps with a view to, the

# CI 37 The core ingredients

- D is “associated” with the company
- D need not have sought to benefit the corporation (cf s. 7 Bribery Act 2010)
- Co failed to have “reasonable procedures” in place to prevent the offence from happening
- No expectation that Co can put in place foolproof measures
- CI 39 requires guidance to be published
- Personal consent of DFSSO required

# **The benefits of the model**

- Guarantees procedures to encourage lawful corporate practices [provided penalties are effective]
- Promotes good governance
- Places responsibility for policing on the corporate
  - [NB also other examples such as the Modern Slavery Act 2015 requirement to prove slave free chain of supply]



# The limits of the model?

- Depends on predicate by a person. Does that make it too narrow?
- By requirement of failure to prevent also requires elements of corporate fault
- How remote is the Co from the predicate?
  - D is merely “associated”
  - Conduct of D need not be for Co’s benefit. What if it is directly contrary to the company’s purpose?
  - What control must Co have over D? Proximity is relevant to defence
- Is there the danger that the failure to prevent model could be stretched to breaking point?

# What link?

- It has been suggested that the failure to prevent model could be broadened to increase “any” corporate criminal offence.
- What would be the nexus between D committing fraud for his own self-enrichment, for example, and the company’s failure to prevent D from committing fraud?
- Does the existence of the company providing the “opportunity” for an associate to offend suffice to pass responsibility for policing to the Co on pain of criminal sanction?

# Compliance costs

- It is necessary to keep in mind the compliance costs associated with the organisational model when assessing its merits.
  - Burden on SME
  - Disproportionate burden on some sectors
  - SME unlikely to have as ready access to legal advice
- Costs incurred in ensuring compliance with s.7 Bribery Act 2010 have been extensive.
- There have been only a handful of prosecutions
- Does that demonstrate success?

# **(3) Vicarious Liability**

- Limited application in England and Wales
- Risks both under and over inclusiveness
  - Under: requires some personal individual criminality on which the corporate liability is predicated
  - Over: company liable despite its attempts to prohibit the conduct by its agents
- Is the failure to prevent model a fairer version by requiring some corporate fault?

# Other problems

- *Penalties*
  - What will encourage good corporate cultures?
- *Piercing the corporate veil*
  - *R v Boyle Transport (Northern Ireland) Ltd* [2016] EWCA Crim 19
  - Limited prospects for piercing the veil
- *Unincorporated associations.*
  - Risk of over-criminalisation of the entire membership