CORRUPT CORPORATIONS AND THE FACILITATION OF TAX CRIMES: A REVIEW OF THE UNITED KINGDOM'S ENFORCEMENT MECHANISMS

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I

INTRODUCTION

Financial crime is synonymous with the seminal work of Edwin H. Sutherland, which used the term "white-collar crime" in 1940.[1] Sutherland defined the term as "a crime committed by a person of respectability and high social status in the course of his occupation."[2] He added that financial crime was committed by "merchant princes and captains of finance and industry" whilst working for a wide range of corporations.[3] This interpretation has generated much debate in both the United States and the United Kingdom.[4] Although these commentaries have focused on crimes committed by individuals, very few have considered financial crime committed by corporations. The common law provides that corporations are capable of committing certain offenses,[5] and the rules have evolved to limit abuse of power by corporations, including breaches of criminal law.[6] This article provides an original contribution by comparing and contrasting the United Kingdom's approach to attributing criminal liability to corporations for bribery and for tax evasion.

Corporate financial crime is a "complex subject on many levels and efforts at strict definitional exactitude rapidly become self-defeating."[7] Since Sutherland's definition, financial crime has attracted a great deal of commentary, and research

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1. Edwin H. Sutherland, *White-Collar Criminality,* 5 AM. SOCIO. REV. 1 (1940).

2. EDWIN H. SUTHERLAND, WHITE COLLAR CRIME 9 (1949).

3. Sutherland, *supra* note 1, at 2.

4. *See, e.g.,* MICHAEL L. BENSON & SALLY S. SIMPSON, WHITE-COLLAR CRIME: AN OPPORTUNITY PERSPECTIVE *(*2009) (providing an introduction to white-collar crime and an overview of discussion within the subject).

5. MINISTRY OF JUST., CORPORATE LIABILITY FOR ECONOMIC CRIME CALL FOR EVIDENCE 10 (2017).

6. *See generally* R. v. P&O Eur. Ferries (Dover) Ltd. [1991] 93 Cr App R 72, 83 (applying criminal law to actions of a corporation).

7. TIMOTHY EDMONDS, HOUSE OF COMMONS LIBRARY BRIEFING PAPER NUMBER 7359 – CORPORATE ECONOMIC CRIME: BRIBERY AND CORRUPTION 3 (2017).

has been published on money laundering,[8] terrorist financing,[9] fraud,[10] market manipulation,[11] and bribery.[12] However, there is a dearth of literature on corporate financial crime, particularly corporate tax crime,[13] and little work that compares and contrasts the enforcement mechanisms for bribery and tax evasion. Most of the literature has concentrated on a few topics: the doctrine of corporate criminal responsibility,[14] the liability of corporations for breaching the Corporate Manslaughter and Corporate Homicide Act 2007,[15] and the "failure to prevent" bribery offenses under the Bribery Act 2010.[16] The new bribery offenses have also inspired commentary on the use of Deferred Prosecution Agreements (DPAs)—specifically, court approved agreements between the Serious Fraud Office (SFO) and a company, partnership or unincorporated association.[17] However, the international profile of corporate financial crime has dramatically increased during the past three decades. This rise is partly due to corporate financial crime in the United States, including examples such as the Savings and Loans Crisis,[18] the collapse of several large corporations,[19] the Bernard Madoff Ponzi fraud scheme,[20] and the "Great Wall Street Rip-Off."[21] The United Kingdom also

8. *See generally* PETER ALLDRIDGE, MONEY LAUNDERING LAW: FORFEITURE, CONFISCATION, CIVIL RECOVERY, CRIMINAL LAUNDERING THE TAXATION OF THE PROCEEDS OF CRIME (2003) (exploring the evolution of the law of money laundering).

9. *See generally* JIMMY GURULE, UNFUNDING TERROR: THE LEGAL RESPONSE TO THE FINANCING OF GLOBAL TERRORISM (2010) (investigating post-September 11, 2001 changes in legal strategy combatting financing of terrorism).

10. *See generally* MICHAEL LEVI, REGULATING FRAUD: WHITE-COLLAR CRIME AND THE CRIMINAL PROCESS (1987) (exploring the law of fraud and the forces that impact its policing).

11. *See generally* JANET AUSTIN, INSIDER TRADING AND MARKET MANIPULATION: INVESTIGATING AND PROSECUTING ACROSS BORDERS (2017) (discussing the impact of globalization of security markets on market manipulation).

12. *See generally* AXEL PALMER, COUNTERING ECONOMIC CRIME: A COMPARATIVE ANALYSIS (2017) (comparing approaches to economic crimes, including a focus on bribery).

13. *See generally* Malte Wilke & Alisdair Macpherson, *Liability of Banks for Aiding Tax Evasion: A Comparative Analysis of German and UK Tax Law*, 10 EUR. J. RISK REGUL. 148 (2019) (discussing recent increases in attention given to tax evasion).

14. *See generally* CELIA K. WELLS, CORPORATIONS AND CRIMINAL RESPONSIBILITY (2d ed. 2001) (discussing methods of addressing corporate power, with a focus on criminal responsibility).

15. *See generally* James Gobert, *The Corporate Manslaughter and Corporate Homicide Act 2007 – Thirteen Years in the Making but was it Worth the Wait?* 7 MOD. L. REV. 413 (2008) (discussing the impact of the Corporate Manslaughter and Corporate Homicide Act).

16. *See generally* Celia K. Wells, *Who's Afraid of the Bribery Act 2010?* 5 J. BUS. L. 420 (2012) (analysing the failure to prevent bribery offence, among other aspects of the Bribery Act 2010).

17. *See generally* Costantino Grasso, *Peaks and Troughs of the English Deferred Prosecution Agreement: The Lesson Learned from the DPA between the SFO and ICBC SB Plc*, 5 J. BUS. L. 388 (2016) (discussing DPAs, with focus on the relationship between the SFO and ICBC SB Plc).

18. The Savings and Loans crisis resulted in the collapse of over 1,000 savings institutions due to fraud.

19. The collapse of Enron and WorldCom are associated with wide scale fraud.

20. *See generally* United States v. Madoff, 626 F.Supp. 2d 420 (S.D.N.Y. 2009) (prosecuting the Bernard Madoff Ponzi scheme).

21. This refers to the illegal conduct of many financial institutions before and during the 2007/2008 financial crisis. For a detailed examination, see NICHOLAS RYDER, THE FINANCIAL CRISIS AND WHITE COLLAR CRIME – THE PERFECT STORM? (2015).

has experienced widescale corporate financial crime at institutions such as Barlow Clowes International,[22] the Bank of Credit and Commerce International,[23] and Barings Bank,[24] along with the manipulation of the London Interbank Offered Rate and the Foreign Exchange market,[25] and fraud associated with the global pandemic.[26] Against that backdrop, this article addresses the lack of existing literature on corporate tax crime and provides a novel comparison of U.K. enforcement approaches towards corrupt corporations that facilitate bribery and tax evasion.

Building on research carried out within the project VIRTEU,[27] this article begins by providing an overview of several tax scandals to illustrate the role of professional intermediaries, including corporations, in tax evasion. This discussion contributes to a greater conceptual understanding of corruption by characterizing the professional facilitation of tax crimes as a corrupt practice and by calling for effective actions to curtail its detrimental social consequences. The next part focuses on the influence and application of the Organization for Economic Co-operation and Development's (OECD) Ten Global Principles in Fighting Tax Crime, which require the attribution of liability to corporations that commit tax crimes. The fourth part reviews the negative impact of the common law rules used to attribute criminal liability to corporations in the United Kingdom. The fifth part examines the problems caused by the identification doctrine in asset recovery, both generally and as applied to tax crimes, with part six exploring the ability of the United Kingdom's city regulator to impose civil financial penalties on corporations for financial crime rule breaches. The final parts of the article critically review the "failure to prevent" bribery and tax evasion offenses under the Bribery Act 2010 and the Criminal Finances Act 2017, which improve the United Kingdom's ability to attribute liability to corporations by circumventing the application of the identification doctrine. The results are then contrasted with enforcement actions taken against corporate facilitators of tax crimes in the United States. The article argues the United Kingdom's attempts to combat tax evasion by corrupt corporations have proven lackluster, despite the introduction of "failure to prevent" tax evasion offenses and particularly when compared to

22. Barlow Clowes went into liquidation in 1988 after amassing £190m after misleading 20,000 investors.

23. BCCI went into liquidation in 1991 following allegations of fraud and money laundering.

24. The collapse of Barings Bank is associated with the frauds committed by Nick Leeson.

25. HM TREASURY SELECT COMM., FIXING LIBOR: SOME PRELIMINARY FINDINGS (2012).

26. *See* NAT'L AUDIT OFF., IMPLEMENTING EMPLOYMENT SUPPORT SCHEMES IN RESPONSE TO THE COVID-19 PANDEMIC 42–58 (2020) (exploring changes in fraudulent behavior alongside the COVID-19 pandemic).

27. VIRTEU (Vat Fraud: Interdisciplinary Research on Tax Crimes in the European Union) was a two-year international research project funded by the European Anti-Fraud Office (OLAF) of the European Commission (Grant Agreement no: 878619) aimed at exploring the interconnections between tax crimes and corruption. All the documents produced as well as all video recordings of the events organized over the course of the project are available online on THE CORPORATE CRIME OBSERVATORY: www.corporatecrime.co.uk/virtue [https://perma.cc/K8ZE-SZ7G].

enforcement actions taken by non-tax agents in the United Kingdom and by U.S. authorities.

II

CORRUPT CORPORATIONS AND THE FACILITATION OF TAX CRIMES

Over the past few decades, whistleblowers and investigative journalists have documented the extent of tax due globally that has been evaded by strategic use of foreign jurisdictions.[28] Fitzgibbon notes investigative journalists have played an instrumental role in increasing awareness of and changing attitudes towards tax crimes.[29] Additionally, Middleton asserts that whistleblowers, with their unique insight into individual organizations and their structures and tax practices, remain critical in exposing tax-related criminality.[30] A particularly striking feature of these revelations is the involvement of professionals. In 2007, whistleblower Bradley Birkenfeld revealed that the Swiss bank, UBS, had assisted its U.S. clients in forming foreign shell companies to hold their accounts at UBS, thereby avoiding reporting and withholding requirements.[31] Additionally, Birkenfeld divulged that UBS bankers would travel to the United States to attract wealthy clients, with the bank providing guidance on how to avoid detection by authorities.[32] Birkenfeld recounted that these attempts to avoid detection even encompassed purchasing diamonds using a client's funds, followed by smuggling "the diamonds into the United States in a toothpaste tube."[33]

Similarly, HSBC—also known as HSBC Private Bank (Suisse)—enabled clients in several jurisdictions to benefit from undisclosed advice and services, leading to tax avoidance and evasion.[34] HSBC was more than a passive recipient of funds. Whistleblower Hervé Falciani reported that in addition to setting up offshore accounts, HSBC reassured its international clients that account details would not be disclosed to national authorities, regardless of indications of undeclared assets.[35] In fact, HSBC told its customers how to circumvent the application of the European Savings Tax Directive and provided one wealthy family with

28. *See generally* Shu-Yi Oei & Diane Ring, *Leak-Driven Law*, 65 UCLA L. REV. 532 (2018) (discussing leaks that led U.S. authorities to investigate tax evasion and design new tax laws).

29. Will Fitzgibbon, *VIRTEU International Final Conference - Panel 4*, CORP. CRIME OBSERVATORY, at 32:30 (June 23, 2022), www.corporatecrime.co.uk/virteu-final-conference-day1-panel4 [https://perma.cc/DK39-TXN2].

30. Charles Middleton, *VIRTEU Roundtable - Whistleblowing, Reporting, and Auditing in the Area of Taxation*, CORP. CRIME OBSERVATORY, at 09:55 (February 26, 2021), www.corporatecrime.co.uk/virteu-whistleblowing [https://perma.cc/2BF4-AZKT].

31. STAFF OF PERMANENT SUBCOMM. ON INVESTIGATIONS, 88TH CONG., TAX HAVEN BANKS AND U.S. TAX COMPLIANCE 83 (2008).

32. *Id*. at 99.

33. *Id.* at 100.

34. *See* Diane Ring, *International Tax Relations: Theory and Implications*, 60 TAX L. REV. 83, 83 (2007) (exploring tensions between the fact that the vast majority of tax rules are "domestic," yet tax practice is inherently international).

35. Gerard Ryle et al., *Banking Giant HSBC Sheltered Murky Cash Linked to Dictators and Arms*

an anonymous credit card to withdraw funds.[36] Investigations revealed that of the leaked HSBC accounts in 203 countries, approximately 7,000 belonged to clients based in the United Kingdom, 1,100 of whom had not paid the correct amount of tax.[37] During the VIRTEU project itself, another whistleblower, John Christensen, revealed details of a scheme he encountered during his time working offshore for one of the Big Four accounting firms.[38] He explained that an oil company was routinely invoiced by a shell company—around half a million to one and a half million dollars each month—for "engineering services."[39] The amount billed was then paid by a large bank to the account of a trust company in Bermuda and directed on to a number of shell companies in the British Virgin Islands. Crucially, Christensen reported that the engineering services never existed, and the transaction was "almost certainly a fraud."[40] Central to the issue of criminal facilitation by financial and tax professionals, he observed that a "large number of different professionals" all failed to question the nature and propriety of the transaction.[41]

These scandals illustrate the nature and extent of professional and corporate involvement in tax crimes. The facilitation of tax crimes has been particularly acute in Switzerland, where over eighty banks admitted to their involvement in tax-related criminal offenses in connection with undeclared U.S. accounts under the U.S.–Swiss Bank Program. However, other exposés highlight the involvement of U.K. professionals and corporations. The Offshore Leaks in 2012 revealed the identities of those who owned over 120,000 companies and trusts established in offshore jurisdictions, such as the British Virgin Islands and the Cook Islands, many of which were used to evade taxation.[43] A BBC investigation found that a number of U.K. corporate service providers were "willing to facilitate tax evasion and turn a blind eye to criminal activity,"[44] and His Majesty's Revenue & Customs (HMRC) found that "more than 200 U.K. accountants, lawyers and

Dealers, INT'L CONSORTIUM OF INVESTIGATIVE JOURNALISTS (Feb. 8, 2015), www.icij.org/investigations/swiss-leaks/banking-giant-hsbc-sheltered-murky-cash-linked-dictators-and-arms-dealers/ [https://perma.cc/F6X9-CLML].

36. *HSBC Bank 'Helped Clients Dodge Millions in Tax',* BBC NEWS (Feb. 10, 2015), www.bbc.co.uk/news/business-31248913 [https://perma.cc/6UG4-5XN3].

37. *Id.*

38. John Christensen, *VIRTEU International Symposium - The Professionals: Dealing with the Enablers of Economic Crime, Session 1 (The Phenomenon)*, CORP. CRIME OBSERVATORY, at 23:40 (July 21, 2021), www.corporatecrime.co.uk/virteu-symposium-the-professionals [https://perma.cc/BU84-WC4C].

39. *Id.*

40. *Id.*

41. *Id.*

42. *Swiss Bank Program*, U.S. DEP'T OF JUST. (last updated Oct. 28, 2020), www.justice.gov/tax/swiss-bank-program [https://perma.cc/PH9B-F37E].

43. Gerard Ryle et al., *Secret Files Expose Offshore's Global Impact*, INT'L CONSORTIUM OF INVESTIGATIVE JOURNALISTS (Apr. 2, 2013), www.icij.org/investigations/offshore/secret-files-expose-offshores-global-impact [https://perma.cc/CBJ7-XSPY].

44. *Tax Evasion Flourishing with Help from UK Firms*, BBC NEWS (Nov 25, 2012), www.bbc.co.uk/news/uk-20451176 [https://perma.cc/HV5A-Z3V8].

other professional advisors" provided advice on setting up the structures.[45] Revelations in the Panama Papers illustrated how the Panamanian firm at issue provided incorporation services and set up complex structures for clients from more than 200 countries and territories, including organized crime groups and tax evaders.[46] The United Kingdom had one of the highest numbers of intermediaries involved in the Panama Papers,[47] with HMRC identifying at least nine "potential professional enablers."[48] Moreover, the Pandora Papers in 2021 showed the use of offshore companies and trusts to engage in tax avoidance and evasion,[49] while the FinCEN Files in 2020 disclosed the complicity of banks in processing illicit transactions for unidentified individuals.[50]

Professional facilitators play a pivotal role in providing services to enable tax evasion. These scandals lay bare the complicity of corporations in facilitating criminal tax evasion through their organizational culture and their direct provision of assistance. Through the VIRTEU Project, a widespread consensus emerged that the facilitation of tax crimes was a systemic issue—a bad orchard as opposed to bad apples.[51] The tax crime exposés evidence that many corporations tend to overlook or ignore the activities of their clients and employees involved in tax evasion. Tenbrunsel demonstrates that violations of law are likely to be more common within organizational structures that exploit the grey area between avoidance and evasion because such structures create a slippery slope where behavior unnoticeably slides from simply unethical to wholly illegal, owing to ethical fading in the decision-making process.[52]

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45. Gerard Ryle & Marina Walker Guevara, *Tax Authorities Move on Leaked Offshore Documents*, INT'L CONSORTIUM OF INVESTIGATIVE JOURNALISTS (May 9, 2013), www.icij.org/investigations/offshore/tax-authorities-move-leaked-offshore-documents [https://perma.cc/H3VE-37K8].

46. Martha M. Hamilton, *Panamanian Law Firm Is Gatekeeper to Vast Flow of Murky Offshore Secrets*, INT'L CONSORTIUM OF INVESTIGATIVE JOURNALISTS (Apr. 3, 2016), https://panamapapers.icij.org/20160403-mossack-fonseca-offshore-secrets.html [https://perma.cc/8T4E-VALS].

47. *See Report on the Inquiry into Money Laundering, Tax Avoidance and Tax Evasion 2017/2013 (INI)*, EUR. PARLIAMENT (Nov. 8, 2017) at 27, www.europarl.europa.eu/cmsdata/131460/2017-11-08%20PANA%20Final%20Report.pdf [https://perma.cc/6GVC-BTCK] (citing the International Consortium of Investigative Journalists) (stating that the U.K. ranks among the top ten countries with the most active intermediaries listed in the Panama Papers).

48. *Taskforce Launches Criminal and Civil Investigations into Panama Papers*, HM REVENUE & CUSTOMS, (Nov. 8, 2016), www.gov.uk/government/news/taskforce-launches-criminal-and-civil-investigations-into-panama-papers [https://perma.cc/NLJ5-GZE8].

49. *Offshore Havens and Hidden Riches of World Leaders and Billionaires Exposed in Unprecedented Leak*, INT'L CONSORTIUM OF INVESTIGATIVE JOURNALISTS (Oct. 3, 2021), www.icij.org/investigations/pandora-papers/global-investigation-tax-havens-offshore/ [https://perma.cc/F42R-WA2L].

50. *FinCEN Files: All You Need to Know about the Documents Leak*, BBC NEWS (Sep. 21, 2020), www.bbc.co.uk/news/uk-54226107 [https://perma.cc/6H5H-Z5GN].

51. Diane Ring et al., *Professionals as Enablers: Bad Apples or Bad Orchards?*, *VIRTEU International Symposium: "The Professionals: Dealing with the Enablers of Economic Crime," Session 1 (The Phenomenon)*, CORP. CRIME OBSERVATORY, at 01:15:42 (July 21, 2021), www.corporatecrime.co.uk/virteu-symposium-the-professionals [https://perma.cc/L5LD-4KNB].

52. Ann Tenbrunsel, *VIRTEU Roundtable - CSR, Business Ethics, and Human Rights in the Area of Taxation*, CORP. CRIME OBSERVATORY, at 14:16 (Feb. 12, 2021), https://www.corporatecrime.co.uk/virteu-csr-business-ethics [https://perma.cc/Z89Y-E7FA].

Defining corruption is problematic,[53] particularly given differing cultural perceptions and norms.[54] Yet the activities of professionals and corporations in assisting tax evasion must be labelled as corruption.[55] Research demonstrates that corrupt societies and public institutions breed both tax evasion and tax avoidance.[56] However, academic discourse largely fails to recognize the *facilitation* of tax evasion itself as a form of corruption.[57] Nicholas Lord, Karin van Wingerde, and Liz Campbell note that corporations may be involved in tax evasion in three different ways, such as "(a) a primary offender, (b) an agent, weapon, conduit, tool, or location for offending, and (c) a facilitator of third-party criminality."[58] HMRC observes that large multinational corporations are more likely to legally avoid rather than illegally evade taxation.[59] Collectively, these tax scandals demonstrate that large intermediaries also provide services as facilitators of third-party criminality and are directly involved in "the supply-side facilitation of corruption through concealment."[60] The failure of legal discourse to recognize these activities as corruption likely reflects the success of influential stakeholders in restricting the scope of corruption to the public sector. The World Bank and Transparency International define corruption as the "abuse of public office for private gain" and the "abuse of entrusted power for private gain," respectively.[61] International legal instruments pertaining to corruption "concentrate solely on

53. *See* Costantino Grasso, *The Dark Side of Power: Corruption and Bribery within the Energy Industry*, *in* RESEARCH HANDBOOK ON EU ENERGY LAW AND POLICY 237, 238 (Rafael Leal-Arcas & Jan Wouters eds., 2017) (illustrating challenges in adopting a legal definition of corruption).

54. *See* Vito Tanzi, *Corruption, Complexity and Tax Evasion*, 15 EJOURNAL TAX RSCH. 144, 145 (2017) (explaining that the definition of corruption may differ depending on cultural norms).

55. This paper adopts a notion of corruption which is broader than simply bribery. *See* Diane Ring & Costantino Grasso, *Beyond Bribery: Exploring the Intimate Interconnections between Corruption and Tax Crimes*, 85 LAW & CONTEMP. PROBS., no. 4, 2022, at 3–4, 7–8 (discussing why adoption of a broader notion of corruption is necessary to effectively counter tax abuses and corrupt practices).

56. *See e.g.*, Anastasia Litina & Theodore Palivos, *Corruption, Tax Evasion and Social Values,* 124 J. ECON. BEHAV. & ORG. 164 (2016) (explaining that corruption and tax evasion are often highly persistent and correlated).

57. On the facilitation of tax avoidance as corruption, see Prem Sikka, *Why Combatting Tax Avoidance Means Curbing Corporate Power*, 94 CRIM. JUST. MATTERS 16 (2013) (using three examples to show how tax avoidance has facilitated the capture of U.K. policymaking).

58. Nicholas Lord, Karin V. Wingerde, & Liz Campbell, *Organising the Monies of Corporate Financial Crimes via Organisational Structures: Ostensible Legitimacy, Effective Anonymity, and Third-Party Facilitation,* 8 ADMIN. SCIS. 1, 3 (2018). Although not explicitly defined by the authors, category (b) appears to refer to companies, often shell companies, being used to carry out or disguise illicit activities, whereas category (c) appears to refer to otherwise legitimate companies that wittingly or unwittingly assist the illegal activities of others.

59. *See* PUB. ACCTS. COMM., FURTHER WRITTEN EVIDENCE FROM OSITA MBA, 2010–12, HC 1531, AT 2.46 (UK), https://publications.parliament.uk/pa/cm201012/cmselect/cmpubacc/1531/1531we07.htm [https://perma.cc/8Q72-AWNB] (recording an exchange where an HMRC Commissioner stated that big businesses mostly avoid, rather than evade, taxes).

60. Arianna Palma Skipper, *The Attorney's Facilitation of Transnational Corruption: Shortcomings of the United States Anti-Money Laundering Framework*, 33 GEO. J. LEGAL ETHICS 825, 826 (2020).

61. *Anticorruption Fact Sheet*, WORLD BANK (Feb 9, 2020), www.worldbank.org/en/news/factsheet/2020/02/19/anticorruption-fact-sheet [https://perma.cc/438L-VF69]; *What is Corruption?*, TRANSPARENCY INT'L, www.transparency.org/en/what-is-corruption [https://perma.cc/SR6P-Z9CV].

corruption of public officials," or encompass only bribery within the private sector.[62] However, contemporary conceptualizations of corruption tend to recognize that, in both the public and private sector, "wherever an individual is in a position of power and has opportunities to exercise discretion, be it directly or indirectly, in the decision-making process [then] opportunities for engaging in corrupt behavior present themselves."[63]

Sandgren contends that definitions of corruption focus on the public sector because corrupt civil servants harm public trust in national institutions and "public property is regarded as more worthy of protection than private property."[64] However, the facilitation of tax crimes by the private sector causes similar harms. At least a proportion of the funds at the center of tax crimes can be regarded as public property and the prolonged operation of professional facilitators of tax crimes damages public trust in the tax system, increasing tax evasion. Tanzi defines corruption "as the act of breaking an accepted social *or* legal norm,"[65] whereas others emphasize the necessarily unlawful nature of corrupt activities.[66] Assisting tax evasion or abusive tax avoidance is a violation of legal norms. However, as Underkuffler notes, the illegality of the action does not itself lead to this characterization.[67] Instead, Underkuffler classifies corruption as "capture-by-evil," encapsulating the "deep, systemic dangers that actual or suspected" corruption "present for the *very idea* of the rule of law and its ability to control conduct."[68] The act of providing secretive, specialist services to select clients seeking to evade taxation is not only unlawful, but also endangers the rule of law and its ability to control revenue collection for the provision of public infrastructure and services. Tax crime facilitation services are not available to all;[69] they engender inequality and may compel states to introduce regressive taxes.[70]

Characterizing as corruption these actions undertaken by professionals and corporations to facilitate tax evasion is to recognize the especially serious nature of these crimes and the systemic harm caused.[71] The corrupt facilitation of tax

62. Indira Carr, *Corruption, Legal Solutions and Limits of Law*, 3 INT'L J. L. CONTEXT 227, 232–236 (2007).

63. *Id.*

64. Claes Sandgren, *Combating Corruption: The Misunderstood Role of Law*, 39 INT'L L. 717, 723 (2005).

65. Tanzi, *supra* note 54, at 145 (emphasis added).

66. Mathieu Deflem, *Corruption, Law, and Justice: A Conceptual Clarification*, 23 J. CRIM. JUST. 243, 250 (1995).

67. LAURA UNDERKUFFLER, CAPTURED BY EVIL: THE IDEA OF CORRUPTION IN LAW 3 (2013).

68. *Id.* at 4.

69. *See generally* Ring & Grasso, *supra* note 55 (discussing how both corrupt practices and tax abuses represent crimes of the powerful).

70. Gillian Brock & Hamish Russell, *Abusive Tax Avoidance and Institutional Corruption: The Responsibilities of Tax Professionals* 4–5, (Harv. Univ. Edmond J. Safra Ctr. for Ethics, Working Paper No. 56, 2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2566281 [https://perma.cc/HAV4-YGK6].

71. *See* UNDERKUFFLER, *supra* note 67, at 3 ("The reason why this idea of corruption colors all settings, including legal settings, is obvious. It reflects, in an essential way, our deep, cultural notions of what corruption in fact involves.").

crimes warrants a meaningful law enforcement response, especially when committed through corporate entities. The corporate organizational structure provides additional opportunities and incentives for misconduct[72] and amplifies the harms caused.[73] Although some observers may have doubted the suitability of criminal liability for corporations, it is widely recognized that criminal enforcement actions have at least a symbolic impact on both offenders and society, in that they signify a degree of culpability and condemnation incomparable to other enforcement actions, galvanizing remedial action.[74] The consequences of corporate punishment appear to be particularly relevant in the area of tax crime, where "[f]airness matters" and lenient enforcement efforts against elites generally decrease tax morale and tax compliance.[75] Accordingly, the next part examines the international standards on corporate liability for tax crimes and the United Kingdom's compliance.

III

INTERNATIONAL STANDARDS ON CORPORATE LIABILITY FOR TAX CRIMES

The Financial Action Task Force (FATF) is regarded as an international standards-setter and "the global money laundering and terrorist financing watchdog,"[76] while the OECD plays a similar role in coordinating and improving multinational efforts to combat bribery and tax evasion. The FATF formulates and promotes Recommendations, which provide countries with a framework of legal measures to combat money laundering and terrorist financing.[77] Although the Recommendations do not have any legally binding force, many countries have made a political commitment to combat money laundering by implementing them. Moreover, FATF monitors countries' progress in implementing the Recommendations and includes jurisdictions showing strategic deficiencies in the so-called "grey list"—that is a list of jurisdictions under increased monitoring—exerting a form of political pressure aimed at achieving national legislative and regulatory reforms.[78] In particular, the Recommendations require countries to criminalize money laundering and terrorist financing and to apply the crime of money

72. Lord, Wingerde, & Campbell, *supra* note 58, at 3.

73. Robin Lööf, *Corporate Agency and White Collar Crime – An Experience-Led Case for Causation-Based Corporate Liability for Criminal Harms,* 4 CRIM. L. REV. 275, 285–86 (2020).

74. *See, e.g.*, Samuel W. Buell, *Retiring Corporate Retribution*, 83 LAW & CONTEMP. PROBS., no. 4, 2020, at 25, 44–45 (2020) (noting that criminal enforcement action "treats corporate crime with the sort of condemnation that seems deserved" despite the fact that "the criminal process cannot impose sanctions on corporations that are different in kind, or even theoretically in degree, than civil lawsuits and regulatory enforcement actions").

75. Michael Levi, *Serious Tax Fraud and Noncompliance: A Review of Evidence on the Differential Impact of Criminal and Noncriminal Proceedings*, 9 CRIMINOLOGY & PUB. POL'Y 493, 505 (2010).

76. *About: Who We Are*, FIN. ACTION TASK FORCE, www.fatf-gafi.org/about [https://perma.cc/Y3L4-URVN].

77. FIN. ACTION TASK FORCE, THE FATF RECOMMENDATIONS: INTERNATIONAL STANDARDS ON COMBATING MONEY LAUNDERING AND THE FINANCING OF TERRORISM & PROLIFERATION 7 (updated Mar. 2022).

78. *Jurisdictions under Increased Monitoring – March 2022*, FIN. ACTION TASK FORCE, www.fatf-

laundering to the widest range of predicate offenses,[79] including tax offenses.[80] They also require the attribution of criminal liability to legal persons for money laundering offenses and for failure to abide by the Recommendations, assuming this does not conflict with fundamental principles of domestic law.[81] The FATF has criticized the United Kingdom's archaic identification doctrine which can frustrate corporate prosecutions.[82] The FATF also praised the country's efforts to address corporate liability for certain financial crimes through the "failure to prevent" offenses.[83] At a European level, the sixth Anti-Money Laundering Directive requires Member States to provide for the liability of legal persons when money laundering offenses are committed for their benefit by leaders of the company.[84] Tax evasion is designated as a predicate offense.[85]

Paralleling FATF efforts, the OECD has long promoted the attribution of criminal liability to legal persons for bribery offenses[86] and played a pivotal role in the introduction of Section 7 of the Bribery Act 2010. Indeed, the OECD Working Group previously "sharply criticized the United Kingdom's failure to bring its anti-bribery laws into compliance with the Convention," noting that the country's then current "laws on foreign bribery and corporate liability are insufficient."[87] Section 7 was introduced to remedy these deficiencies and has been regarded as successful in enabling prosecutions and improving corporate culture.[88] More recently, the OECD released its Ten Global Principles (TGPs) in Fighting Tax Crime, which provide Principles "covering the legal, institutional, administrative, and operational aspects necessary for developing an efficient and effective system for identifying, investigating and prosecuting tax crimes."[89] The TGPs require countries to ensure that criminal liability can be attributed to companies that commit or facilitate tax crimes.[90] Like the failure to prevent bribery

gafi.org/publications/high-risk-and-other-monitored-jurisdictions/documents/increased-monitoring-march-2022.html [https://perma.cc/3V8U-WZQX].

79. FIN. ACTION TASK FORCE, *supra* note 77, at 12 (Recommendations 3 and 35).

80. *Id.* at 39, 121–22 (Interpretative Note to Recommendation 3).

81. *Id*. at 38.

82. FIN. ACTION TASK FORCE, ANTI-MONEY LAUNDERING AND COUNTER-TERRORIST FINANCING MEASURES: UNITED KINGDOM MUTUAL EVALUATION REPORT 71 (Dec. 2018).

83. *See id*. at 79 (discussing the U.K.'s success in its civil recovery orders recognised and enforced outside the U.K., giving the example of failure to prevent bribery).

84. Directive (EU) No. 2018/1673, of the European Parliament and of the Council of 23 October 2018 on Combating Money Laundering by Criminal Law, art. 7(1), 2018 O.J. (L 284) 22, 28.

85. *Id*. at art. 2(1)(q), 27.

86. ORG. FOR ECON. CO-OPERATION & DEV., Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, arts. 2, 3(1), Dec. 17, 1997, 37 I.L.M. 1 (1998) (entered into force Feb. 15, 1999).

87. ORG. FOR ECON. CO-OPERATION & DEV. WORKING GRP. ON BRIBERY, 2008 ANNUAL REPORT 13 (2009).

88. ORG. FOR ECON. CO-OPERATION & DEV., IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION PHASE FOUR REPORT: UNITED KINGDOM 75 (2017).

89. ORG. FOR ECON. CO-OPERATION & DEV., FIGHTING TAX CRIME – THE TEN GLOBAL PRINCIPLES 76 (2d ed. 2021).

90. *Id*. at 17.

offense, the OECD has promoted the United Kingdom's "failure to prevent" the facilitation of tax evasion offenses as examples of best practice in addressing misconduct by professional enablers.[91] Accordingly, there is international recognition of the value of attributing criminal liability to corporations for financial crimes, including tax evasion. In addition, the U.K. is often identified as providing a model of best practice for the attribution of criminal liability, owing to its limited adoption of "failure to prevent offenses." The next part of this article will illustrate the reasons behind the introduction of such a regime of offenses by providing a detailed account of the way in which it has allowed the United Kingdom to overcome the limits of the pre-existing legal framework, which proved to be a major barrier to the successful prosecution of corporate criminals.

IV

THE IDENTIFICATION DOCTRINE

The late nineteenth and early twentieth centuries marked the origins of the United Kingdom's efforts to tackle corporate financial crime.[92] In *Lennard's Carrying Company Ltd. v. Asiatic Petroleum Co.*, the court examined the ways in which a company could be held to be liable for the loss of cargo due to the negligent navigation of one of its vessels and relied on the emerging identification doctrine to ask who is the directing mind of the company.[93] The doctrine was further extended by three Court of Appeal decisions in 1944, which concluded that a corporation could be held directly accountable for the actions of its employees. In *Director of Public Prosecutions v. Kent and Sussex Contractors Ltd.*, the court concluded that a company could be held criminally liable where it had produced false documents.[94] Similarly in *Rex v. I.C.R. Haulage Co.*, the court ruled that a company could be held criminally accountable for conspiracy to defraud by the acts of one of its directors,[95] and in *Moore v. Bresler Ltd.*, the court held that a company could be liable for its secretary making a false return for revenue purposes with an intent to deceive.[96]

91. ORG. FOR ECON. CO-OPERATION & DEV., ENDING THE SHELL GAME: CRACKING DOWN ON THE PROFESSIONALS WHO ENABLE TAX AND WHITE COLLAR CRIMES 37 (2021).

92. *See* MINISTRY OF JUST., *supra* note 5, at 11 (discussing the first cases at the "turn of the twentieth century [when] the courts started to consider corporate liability for offences, such as economic crimes, that require the prosecution to prove criminal intent"). *See also* Pharm. Soc'y v. London & Provincial Supply Ass'n (1880) 5 App. Cas. 857, 870 (discussing corporate criminal liability); R v. Birmingham & Gloucester Ry. (1842) 3 QB 223, 223 ("A corporation aggregate may be indicted by their corporate name for disobedience to an order of justices requiring such corporation to execute works pursuant to a statute."); *see* R v. Great North of Eng. Ry. (1846) 9 QB 315, 315 ("A corporation aggregate may be indicted for a misfeasance.").

93. [1915] AC 705, 709.

94. (1944) 1 KB 146, 147.

95. [1944] KB 551, 551.

96. (1944) 2 All ER 515, 517.

The leading United Kingdom case, *Tesco Supermarkets Ltd. v. Nattrass*,[97] considered whether employees remained liable when they had followed instructions from their managers. The court was asked to consider how to identify the directing mind and will of a company. Lord Reid stated, "Where a limited company is the employer difficult questions do arise in a wide variety of circumstances in deciding which of its officers or servants is to be identified with the company so that his guilt is the guilt of the company."[98] He further stated that if the officer or employee "is the mind of the company" and "[i]f it is a guilty mind then that guilt is the guilt of the company."[99] To establish the identification principle, the court must identify who has the directing mind and will of the company and whether that individual has the requisite criminal intent. In making this determination, courts have to ascertain who are those natural persons who by the memorandum and articles of association, or by the company in general meeting pursuant to the articles, are entrusted with the exercise of the powers of the company.[100] The courts have also to determine if there are other individuals that can act as the company as a result of action taken by the directors, for instance when the "directors . . . delegate some part of their functions of management giving to their delegate full discretion to act independently of instructions from them."[101]

This identification doctrine test is the reason that prosecutors have been unsuccessful in bringing criminal proceedings against corporations.[102] This is because, while the identification and attribution of criminal intent may be straightforward in cases concerning small companies, prosecutors are often unable to perform this task when dealing with large, complex organizations, which may deliberately or inadvertently obscure the involvement of those identified as the directing mind from participation in criminal activities.[103] The doctrine "does not reflect modern corporate practice" and "ignores the reality of modern corporate decision-making."[104] Accordingly, it is far easier to prosecute smaller companies under the doctrine than larger ones.[105] This tension has been highlighted in a number of cases where the prosecutorial efforts relying on the identification doctrine failed to produce conviction, including the Herald of Free Enterprise,[106] the

97. [1972] AC 153, 153.

98. *Id*. at 170.

99. *Id*.

100. *Id.* at 199–200.

101. *Id.* at 171.

102. MINISTRY OF JUST., *supra* note 5, at 7.

103. *Id.* at 13.

104. C.M.V. Clarkson, *Kicking Corporate Bodies and Damning Their Souls*, 59 MOD. L. REV. 557, 561 (1996).

105. Mukul Chawla KC et al., *Corporate Criminal Liability in the UK: A New Era is Coming . . . Isn't It?*, BRYAN CAVE LEIGHTON PARTNERS (Nov. 18, 2020), www.bclplaw.com/en-GB/insights/corporate-criminal-liability-in-the-uk-a-new-era-is-coming-isnt-it.html [https://perma.cc/2QG5-4FCD].

106. R v. P&O Eur. Ferries (Dover) Ltd. (1991) 93 Cr. App. R(S) 72, 74.

Clapham rail disaster,[107] the Transco gas explosion,[108] the Hatfield disaster,[109] and the sinking of the Marchioness.[110] In response, the Corporate Manslaughter and Corporate Homicide Act 2007 was adopted.[111] The Act provides that an organization commits an offence if "the way in which its activities are managed or organised (a) causes a person's death, and (b) amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased."[112] Moreover, the manner in which the organization's activities "are managed or organised by its senior management" must be a "substantial element in the breach".[113] The offense was designed to be wider in application than the identification doctrine, applying to a wider class of management and management in the aggregate, as opposed to requiring the identification of an individual representing the directing mind and will.[114] However, the impact of this 2007 legislation has been negligible, with only twenty-seven criminal charges brought between 2008 and 2018.[115] In a financial context, a recent unsuccessful prosecution by the Serious Fraud Office (SFO) involved Barclays Bank PLC, with the court holding that "the alleged conduct and dishonest state of mind of the individual conspirators cannot properly be attributed to Barclays so as to make Barclays itself criminally culpable."[116] These four individuals were not seen as the directing minds of the company and no corporate liability was found despite their seniority.

In response, the government issued a Call for Evidence,[117] with the discussion focused on several reform options.[118] However, the Ministry of Justice concluded

107. The British Rail Board admitted vicarious liability but there was no corporate prosecution. *See* Mark Rowe, *When Tragedy Strikes, Who is to Blame?*, INDEPENDENT (July 3, 1999), https://www.independent.co.uk/news/when-tragedy-strikes-who-is-to-blame-1104143.html [https://perma.cc/XZ3Q-N5PJ].

108. *See* Transco Pub. Ltd. v. HM Advocate (No. 3) (2005) 1 JC 194, [22]–[24] (confirming the application of the identification doctrine in Scots Law, but rejecting the charge of 'culpable homicide' as the Crown could not identify a person regarded as the directing mind and will of the company).

109. *See* R v. Balfour Beatty Rail Infrastructure Servs. Ltd. [2006] EWCA Crim 1586, [34] (finding that prosecution did not secure convictions through the identification doctrine because of insufficient evidence and its notoriously high bar).

110. The Director of Public Prosecutions ruled out prosecuting the company due to insufficient evidence, but a private prosecution was later brought in Bow Street Stipendiary Magistrate, ex p South Coast Shipping Co Ltd [1993] QB 645.

111. Corporate Manslaughter and Corporate Homicide Act 2007, c. 19, § 1 (UK).

112. *Id.*

113. *Id.* § 1(3).

114. Victoria Roper, *The Corporate Manslaughter and Corporate Homicide Act 2007—A 10-Year Review,* 82 J. OF CRIM. L. 48, 56 (2018).

115. CROWN PROSECUTION SERV. INFO. MGMT. UNIT, CORPORATE MANSLAUGHTER STATISTICS: FREEDOM OF INFORMATION ACT 2000 REQUEST 2 (Feb. 4, 2019).

116. Serious Fraud Off. v. Barclays Pub. Ltd. & ANR [2018] EWHC 3055, [129] (QB).

117. *See, e.g.*, *Have Your Say: Select Committee Inquiries*, UK PARLIAMENT, www.parliament.uk/get-involved/committees [https://perma.cc/3SSU-XX74] (providing an opportunity to individuals to lend expertise).

118. *See* MINISTRY OF JUST., *supra* note 5, at 16–18 (defining a "call for evidence" as an information-gathering exercise through which the U.K. government or legislature seek expertise from people, organizations and stakeholders with knowledge of a particular issue).

that the information gathered through "the Call for Evidence was . . . inconclusive . . . as it had produced no new significant examples that clearly illustrated the extent of the reported problems with economic crime law and the identification doctrine."[119] The reason for this delay and inactivity is unclear. However, it can be suggested that the United Kingdom government has attempted to kick tackling corporate financial crime to the future and is still basking in the glory of the findings of the 2018 FATF Mutual Evaluation Report (MER). Perhaps it is because the government is "likely [to] be reticent about taking any action that could add to the current burden already being borne by companies."[120] Regardless, the government commissioned the Law Commission—a statutory independent body created to keep the law of England and Wales under review and to recommend reform where needed[121] —to undertake a detailed review of the identification doctrine with a particular focus on economic crime. The Law Commission published its Discussion Paper seeking views on proposed changes[122] and, consequently, identified possible solutions to the problems presented by the identification doctrine.[123] The Law Commission favored the introduction of a general "failure to prevent" economic crime offense. In particular, the Law Commission affirmed that "if the identification doctrine is retained as at present, the case for new failure to prevent offences, is inevitably more compelling."[124] It is important that the government responds promptly to the Law Commission's proposals. As the next part demonstrates, a further reform of corporate liability for economic crime in the United Kingdom, which goes beyond the first steps that have already been taken in relation to bribery in 2010 and tax evasion in 2017, is essential not only to secure convictions of criminal corporations for all economic crimes, but also to ensure the recovery of the proceeds of crime.

V

ASSET RECOVERY

The initial policy position relating to asset recovery in the United Kingdom was outlined in *R v. Cuthbertson*.[125] Although the defendants were convicted of conspiracy to manufacture and distribute drugs, the court concluded that the forfeiture powers under the Misuse of Drugs Act 1971 were limited to "the tools, instruments, or other physical means used to commit the crime."[126] In 1984, the Hodgson Committee, which was convened to examine the powers of the courts

119. MINISTRY OF JUST., CORPORATE LIABILITY FOR ECONOMIC CRIME CALL FOR EVIDENCE: GOVERNMENT RESPONSE 20 (2020).

120. Chawla et al., *supra* note 105.

121. *Welcome*, L. COMM'N, www.lawcom.gov.uk [https://perma.cc/3MXT-CDZG].

122. *See generally*, L. COMM'N, CORPORATE CRIMINAL LIABILITY: A DISCUSSION PAPER (2021) (discussing proposed changes to the identification doctrine for comment).

123. *See* L. COMM'N, CORPORATE CRIMINAL LIABILITY: AN OPTIONS PAPER (2022) (proposing solutions to the identification doctrine).

124. *Id.* at 119.

125. [1981] AC 470.

126. *Id.* at 486[B].

to strip criminals of their ill-gotten gains, produced its recommendations.[127] One of its key recommendations was to provide courts with a wider power to confiscate the proceeds of crime.[128] In 1998, the Prime Minister tasked the Performance & Innovation Unit of the Cabinet Office[129] with examining asset recovery arrangements with a view to improving the efficiency of the recovery process and increasing the amount of illegally obtained assets recovered, which resulted in the submission of a series of legislative and other proposals. Subsequently, the United Kingdom's policy towards individuals handling crime proceeds has undergone extensive reform. A broader confiscation regime consisting of three asset recovery mechanisms—criminal confiscation, civil confiscation and taxation of the proceeds of crime—was introduced by the Proceeds of Crime Act 2002. Over a decade later, the Criminal Finances Act 2017 introduced Unexplained Wealth Orders. Similar to what happens in other jurisdictions where forms of extended confiscation have been implemented,[130] this legal instrument allows law enforcement agencies in the United Kingdom to recover proceeds of crime by reversing the burden of proof for those parties who fall into specified categories of people,[131] who hold property[132] that appears disproportionate to their income, and are unable to explain how any purchasing costs were met.[133] This set of asset recovery rules has primarily been directed at natural persons and seek to eradicate the champagne life style of the kingpins of organized criminals. However, although some minor improvements have been recently made,[134] the most striking limitation of the confiscation regime can be seen in the restrained application to the proceeds of crime that are hidden in corporations.

127. M. MICHELLE GALLANT, MONEY LAUNDERING AND THE PROCEED OF CRIME: ECONOMIC CRIME AND CIVIL REMEDIES 70 (2005).

128. *Id*. at 27.

129. *See* U.K. PARLIAMENT, SELECT COMMITTEE ON PUBLIC ADMINISTRATION MINUTES OF EVIDENCE: MEMORANDUM BY THE STRATEGY UNIT (NC 04) (July 29, 2002), https://publications.parliament.uk/pa/cm200102/cmselect/cmpubadm/262/2071103.htm [https://perma.cc/A2XU-8UE5] (establishing the Performance and Innovation Unit in 1998 because senior officials and ministers, including the Prime Minister, believed that government needed to rebuild its capacity to do long-term thinking and strategic policy work).

130. *See, e.g.*, Pietro Sorbello & Stephen Holden, *Developing a Working Model to Fight Fiscal Corruption: The Nexus at Which Tax Crimes and Corruption Meet*, 85 LAW & CONTEMP. PROBS., no. 4, 2022, 207 (extending the discussion of confiscation in the Italian jurisdiction).

131. *See* Ali Shalchi, HOUSE OF COMMONS, UNEXPLAINED WEALTH ORDERS: RESEARCH BRIEFING 10 (2022), https://researchbriefings.files.parliament.uk/documents/CBP-9098/CBP-9098.pdf [https://perma.cc/Q55N-7EEM] (discussing provisions of the Criminal Finances Act 2017 only applying to Politically Exposed Persons or someone suspected of being involved in serious crime can be served with an unexplained wealth order).

132. *Id.* at 13. The order must relate to property which has a value of at least £50,000.

133. Peter Sproat, *Unexplained Wealth Orders: An Explanation, Assessment and Set of Predictions*, 82 J. CRIM. L. 232, 232 (2018).

134. *See* Ali Shalchi & Steve Browning, HOUSE OF COMMONS, ECONOMIC CRIME (TRANSPARENCY AND ENFORCEMENT) ACT 2022: RESEARCH BRIEFING 32 (2022) for a response to the Russian invasion of Ukraine, the Economic Crime (Transparency and Enforcement) Act 2022 created a new category of people who can receive an unexplained wealth order called "responsible officers." To counter the use of complex structures to hide the true owner of property, if the named respondent of an unexplained wealth order is a legal entity, the order can also name the responsible officer (e.g., a director, manager or partner

Application of the Proceeds of Crime Act and Criminal Finances Act to companies reflect the challenges of corporate convictions more generally. The asset recovery provisions are unlikely to apply to U.K. company assets, as "recoverable property" within the meaning of the Proceeds of Crime Act, because they have their own legal personality distinct from individual offenders.[135] Consequently, criminal liability for the offense must be attributed to the company itself, which is problematic owing to the identification doctrine. In practice, the application of the asset recovery provisions to corporations has been inconsistent. In *In re H Restraint Order: Realisable Property*, the Court of Appeal ruled that where the defendant has used the corporate structure to conceal the proceeds of crime, the corporate veil could be lifted and the tainted assets could be recoverable property.[136] Interestingly, the corporate veil can be lifted in circumstances where the company has engaged in unlawful commercial trading.[137] However, in *Crown Prosecution Service v. Aquila Advisory Ltd.*, the asset recovery provisions did not apply where the defendants, who had been convicted of cheating HMRC, had hidden the proceeds of crime in a company in which they were directors.[138] The defendants had used their position at the company to dishonestly facilitate and induce clients to submit false tax relief claims. But because the company itself was not convicted; it was allowed to keep the proceeds of crime. This presents an unsatisfactory position that allows criminals to exploit the identification doctrine and the corporate veil. As outlined above, the identification doctrine has limited the application of criminal law to corporations, and *Aquila Advisory Limited* enables criminal professional and criminal corporate intermediaries to use corporations or corporate shells to generate or hide the proceeds of crime. In 2020, the Law Commission outlined several potential reforms and discussed how criminals abuse the corporate structure and how the courts have considered the "concealment principle" in determining the remit of the confiscation mechanisms.[139] However, the Commission did not consider the merits of the corporate confiscation regime. Such a stance is unsatisfactory given the history of corporate vehicles creating and disguising the proceeds of crime.

VI

THE USE OF FINANCIAL PENALTIES

In part owing to the difficulties associated with the identification doctrine, which has limited the application of criminal law to companies and made it very

of a partnership, in or outside the U.K.) who must provide the necessary information.

135. MARK SUTHERLAND WILLIAMS, MICHAEL HOPMEIER, & RUPERT JONES, MILLINGTON AND SUTHERLAND WILLIAMS ON THE PROCEEDS OF CRIME 27 (5th ed. 2018).

136. *In re* H Restraint Order: Realisable Property (1996) 2 All ER 391, 402[A]–[G].

137. R v. K [2005] EWCA Crim 619, [17]–[26].

138. Crown Prosecution Serv. v. Aquila Advisory Ltd. [2021] UKSC 49, [81].

139. L. COMM'N, CONSULTATION PAPER 249: CONFISCATION OF THE PROCEEDS OF CRIME AFTER CONVICTION 351 (2020). *See also* R v. Powell [2016] EWCA (Crim) 1043, [2016] Crim LR 852, [20] (ruling that the concealment principle does not involve piercing the corporate veil).

difficult to recover corporate criminal assets, the most common enforcement tools used against corporations are civil financial penalties. These have been used for breaches of the Financial Conduct Authority's (FCA)[140] anti-economic crime rules and obligations under the Senior Managers and Certification Regime (SM&CR). The SM&CR, which was adopted in 2016 in response to the financial crisis of 2008, aims at reducing harm to consumers and strengthening market integrity. The regime does so by making individuals more accountable for their conduct and competence by easing the process of identifying responsible persons within complex organizations.[141] Originally applicable only to banking firms, the SM&CR was extended in 2018 to all FCA-solo-regulated firms. As a result, the SM&CR presents an opportunity to overcome the problems associated with the identification doctrine, as it may hold corporate senior management responsible for corporate financial crime policies, systems, and controls. The FCA stated, "the extension of the SM&CR is key to driving forward culture change in firms" and "the regime will also ensure that senior managers are accountable both for their own actions, and for the actions of staff in business areas they lead."[142]

The SM&CR has two objectives: to encourage all staff within the financial services sector to take responsibility for their actions and to enable authorized firms and employees to clearly determine where the responsibility lies.[143] The introduction of the SM&CR was heavily influenced by the recommendations of the Parliamentary Commission for Banking Standards, which was asked to investigate how standards could be improved following the 2007–08 market manipulation scandals.[144] The SM&CR provides that a corporation's senior management is responsible for the policies, systems and controls that are designed to reduce the threat posed by financial crime. Therefore, the SM&CR places the obligation of the regulated corporations to limit the risk posed by financial crime on its senior management.

The FCA's efforts are to be welcomed, yet the extension to make senior managers accountable for a firm's financial crime obligations are far from innovative; this new initiative duplicates existing obligations under the FCA.[145] Nonetheless, financial crime-related breaches of the SM&CR by senior managers will enable

140. *See About the FCA*, FIN. CONDUCT AUTH., www.fca.org.uk/about/what-we-do/the-fca [https://perma.cc/2U84-65SP] (establishing the Financial Conduct Authority as the independent regulatory body in the United Kingdom).

141. *Senior Managers and Certification Regime*, FIN. CONDUCT AUTH., www.fca.org.uk/firms/senior-managers-certification-regime [https://perma.cc/P9LY-TVU2].

142. FIN. CONDUCT AUTH., *Press Release: FCA Outlines Proposals to Extend the Senior Managers and Certification Regime to All Financial Services Firms* (July 26, 2017), www.fca.org.uk/news/press-releases/fca-outlines-proposals-extend-senior-managers-certification-regime-all-firms [https://perma.cc/7WDB-88FB].

143. *Senior Managers and Certification Regime,* FIN. CONDUCT AUTH. (July 7, 2015), https://www.fca.org.uk/firms/senior-managers-certification-regime [https://perma.cc/VZ5D-WFQX].

144. PARLIAMENTARY COMM'N FOR BANKING STANDARDS, CHANGING BANKING FOR GOOD, 2013–14, HC 174-II (UK).

145. *Handbook*, FIN. CONDUCT AUTH., SYSC 6.3.8 (2016).

the identification of who constitutes corporate senior management, a determination which could allow them to satisfy the identification doctrine. This form of combined financial regulatory and criminal law response to financial crime breaches by corporations could be classified as a hybrid approach and it could go some way to resolving the problems associated with the identification doctrine.[146] This would be a novel step in the United Kingdom's efforts to tackle corporate financial crime, for the FCA has thus far acted in isolation and needs to adopt a much more cooperative approach with other agencies. The introduction of the SM&CR by the FCA is the most significant mechanism that could be used to overcome the restrictive interpretation of the doctrine of corporate criminal liability.

Notable fines have been issued. Deutsche Bank was fined £163 million for failing to maintain an adequate Anti-Money Laundering (AML) system.[147] The FCA fined Barclays £72 million because the bank's "senior management . . . had failed to oversee adequately Barclays' handling of the financial crime risks."[148] The FCA has also imposed large financial penalties for breaches of its money laundering rules. Examples include Turkish Bank (UK) Ltd.,[149] Habib Bank AG Zurich,[150] and Coutts & Company.[151] Nonetheless, the FCA did not pursue additional criminal prosecutions for breaches of the Proceeds of Crime Act 2002 against the employees, and the FCA has only one successful corporate money laundering conviction.[152] Thus, FCA has collected for HM Treasury but has failed to pursue any action against individuals, an unsatisfactory outcome considering the conclusions of the FATF 2018 MER.

Financial penalties have also been issued for bribery and corruption. For example, the then regulator, the Financial Services Authority (FSA), fined Willis

146. LAW COMM'N, *supra* note 123.

147. *FCA Fines Deutsche Bank £163 Million for Serious Anti-Money Laundering Controls Failings*, FIN. CONDUCT AUTH. (Jan. 31, 2017), www.fca.org.uk/news/press-releases/fca-fines-deutsche-bank-163-million-anti-money-laundering-controls-failure [https://perma.cc/2XTH-2CGT].

148. *FCA Fines Barclays £72 Million for Poor Handling of Financial Crime Risks,* FIN. CONDUCT AUTH. (Nov. 26, 2015), www.fca.org.uk/news/press-releases/fca-fines-barclays-%C2%A372-million-poor-handling-financial-crime-risks [https://perma.cc/2U37-2JP9].

149. *Turkish Bank (UK) Ltd: Decision Notice*, FIN. SERVICES AUTH. (July 26, 2012), webarchive.nationalarchives.gov.uk/20130202000754/http://www.fsa.gov.uk/static/pubs/final/turkish-bank.pdf [https://perma.cc/3EXC-PA67].

150. F*SA Fines Habib Bank AG Zurich £525,000 and Money Laundering Reporting Officer £17,500 for Anti-Money Laundering Control Failings*, NAT'L ARCHIVES (May 15, 2012), https://webarchive.nationalarchives.gov.uk/ukgwa/20120818011720/http://www.fsa.gov.uk/library/communication/pr/2012/055.shtml [https://perma.cc/L784-EJWW].

151. *Coutts Fined £8.75 Million for Anti-Money Laundering Control Failings*, NAT'L ARCHIVES (Mar. 26, 2012), https://webarchive.nationalarchives.gov.uk/ukgwa/20120405132900/http://www.fsa.gov.uk/library/communication/pr/2012/032.shtml [https://perma.cc/K4AS-Z8LV].

152. *NatWest Fined £264.8 Million for Anti-Money Laundering Failures*, FIN. CONDUCT AUTH. (Dec. 13, 2021), www.fca.org.uk/news/press-releases/natwest-fined-264.8million-anti-money-laundering-failures#:~:text=NatWest%20failed%20to%20comply%20with,money%20laundering%20and%20terrorist%20financing [https://perma.cc/844J-28XM] (noting that NatWest is the first, and presently only, company to be convicted of an offence under the Money Laundering Regulations).

Limited £6.895 million for weaknesses in its anti-bribery and corruption systems.[153] Aon Limited was fined £5.25 million for "failing to take reasonable care to establish and maintain effective" bribery and corruption systems.[154] In 2013, JLT Specialty Limited was fined £1.8 million for an "unacceptable approach to bribery and corruption risks."[155] Furthermore, Besso Limited was fined £315,000 for failing "to take reasonable care to establish and maintain effective systems and controls."[156] In contrast, Credit Suisse received a much larger fine of £147 million for breaches of its financial crime rules relating to the proceeds of corruption and for illegal conduct.[157] The FCA has favored imposing financial penalties on companies for breaches of its bribery related rules.

This is disappointing, for the criminal law has an important function in communicating the impropriety of certain corporate conduct, which cannot be replicated through further regulation.[158] In addition, despite the limited range of penalties imposed following corporate convictions, other consequences that follow a finding of guilt may act as a powerful deterrent to corporate misconduct.[159] This is particularly important considering the magnification of harm caused by an offence when it is carried out by a company, rather than an individual.[160] Moreover, the impact of these fines is negligible due to the high annual turnover of these companies compared to the size of the fines imposed. Civil investigation and settlement procedures are insufficient when it comes to dealing with corrupt corporate crimes because they are "the cost of doing business."[161] Grasso noted the

153. *FSA Fines Willis Limited 6.895m for Anti-Bribery and Corruption Systems and Controls Failings*, NAT'L ARCHIVES (July 21, 2011), https://webarchive.nationalarchives.gov.uk/ukgwa/20180306192301/https://www.fca.org.uk/print/news/press-releases/fsa-fines-willis-limited-£6895-million-anti-bribery-and-corruption-systems-and [https://perma.cc/VM7G-5AF3].

154. *Id*.

155. *Firm Fined £1.8million for 'Unacceptable' Approach to Bribery & Corruption Risks from Overseas Payments*, FIN. CONDUCT AUTH. (Dec. 19, 2013), www.fca.org.uk/news/firm-fined-18million-for-unacceptable-approach-to-bribery-corruption-risks-from-overseas-payments [https://perma.cc/M6VM-LVEU].

156. *Besso Limited Fined for Anti-Bribery and Corruption Systems Failings*, FIN. CONDUCT AUTH. (Mar. 19, 2014), www.fca.org.uk/news/besso-limited-fined-for-antibribery-and-corruption-systems-failings [https://perma.cc/RTZ9-8DNC].

157. *Credit Suisse Fined £147,190,276 (US$200,664,504) and Undertakes to the FCA to Forgive US$200 Million of Mozambican Debt*, FIN. CONDUCT AUTH. (Oct 19, 2021), www.fca.org.uk/news/press-releases/credit-suisse-fined-ps147190276-us200664504-and-undertakes-fca-forgive-us200-million-mozambican-debt [https://perma.cc/4KJW-ZMTF].

158. *See* Mark Dsouza, *The Corporate Agent in Criminal Law – An Argument for Comprehensive Identification,* 79 CAMBRIDGE L.J. 91, 93 (2020) ("Only a criminal conviction communicates to the public the law's judgment that the corporation's conduct was so bad that the layperson would recognise it as 'criminal'."). *See also* Mihailis E Diamantis, *Corporate Criminal Minds*, 91 NOTRE DAME L. REV. 2049, 2062–64 (2016).

159. Tim Corfield, Julia Schaefer, *The Taxman Cometh: The Criminal Offences of Failure to Prevent Tax Evasion,* 23 TRUSTS & TRUSTEES 1030, 1032 (2017) (noting that consequences include regulatory action taken by supervisory authorities, as well as reputational harm).

160. *See* Lööf, *supra* note 73, at 285–86 (also noting that, "corporate structures place individuals in positions to cause certain harms which they could not cause without them").

161. *See* Harry Stratton, *Guilt by Lottery: Criminal Failure to Prevent Facilitation of Tax Evasion Under the Criminal Finances Act 2017*, 86 J. CRIM. L. 29, 33 (2022) (discussing the negligible impact of civil

current AML regime allows companies to negotiate their way out of the criminal process and fosters a "pay to perpetrate crimes culture."[162] The United Kingdom is not the only country in which corporations resolve potential corporate criminal conduct through the payment of fines. Following U.S. investigations into PricewaterhouseCoopers, Ernst & Young, and KPMG for devising and selling "potentially abusive and illegal tax shelters,"[163] KPMG reached a DPA with the Department of Justice (DOJ) where it admitted criminal wrongdoing and paid a penalty of $456 million.[164] The superseding indictment alleged that KPMG's failure to register shelters with the IRS was a business decision whereby the profit to be gained in fees from the shelters were perceived to vastly outweigh any penalties that could be imposed.[165] Therefore, it is important to address corporate economic crime with criminal, rather than solely civil, sanctions and to ensure that any fines imposed are substantial. The next part of this article examines the introduction of the "failure to prevent" bribery offense, which was designed to facilitate corporate criminal liability for bribery and inspired "failure to prevent" tax evasion offenses in the United Kingdom.

VII

FAILURE OF COMMERCIAL ORGANIZATIONS TO PREVENT BRIBERY: BRIBERY ACT 2010

Owing to difficulties associated with the identification doctrine, the Bribery Act 2010 introduced a new form of corporate criminal liability for bribery only: a commercial organization can be found guilty of an offense if a person associated with the organization bribes another, intending to obtain or retain business or a business advantage for that organization.[166] This regime creates an additional direct—rather than alternative vicarious—liability if the commission of a Section 1 or Section 6 bribery offense has taken place on behalf of an organization.[167] An "associated person" is an individual who "performs services for or on behalf of

investigation and settlement procedures on corporate crime).

162. Costantino Grasso, UK PARLIAMENT, CONCERNS REGARDING OR IMPROVEMENT TO THE UK ANTI-MONEY LAUNDERING REGIME (written evidence submitted to the House of Commons Treasury Committee) (2020), https://committees.parliament.uk/writtenevidence/17591/pdf [https://perma.cc/P7YC-HVTB].

163. PERMANENT SUBCOMM. ON INVESTIGATIONS OF THE COMM. ON HOMELAND SEC. AND GOVERNMENTAL AFF. U.S. CONG., THE ROLE OF PROFESSIONAL FIRMS IN THE US TAX SHELTER INDUSTRY, S. REP. NO. 10–54 (2005).

164. *KPMG to Pay $456 Million for Criminal Violations in Relation to Largest-Ever Tax Shelter Fraud Case*, DEP'T OF JUST. (Aug. 29, 2005), www.justice.gov/archive/opa/pr/2005/August/05_ag_433.html [https://perma.cc/7L6A-7CKU].

165. Claudia Hill, *United States of America v. [the KPMG Defendants]*, 7 J. TAX PRAC. & PROC. 15, 27 (2005).

166. Bribery Act 2010, c.23, § 7 (UK).

167. *Id*. § 7(5).

the [organization],"[168] for example, the organization's agent, subsidiary or employee.[169] The scope of this definition has been characterized as a "matter of substance rather than form,"[170] although a presumption will exist if the associated person is an employee. By referring generically to any "person associated with" the legal entity, Section 7 adopts a broad approach, encompassing the whole range of individuals who may be committing bribery on behalf of an organization.[171] To be held as an associated person, however, "the perpetrator . . . must be performing services for the organization in question and must also intend to obtain or retain business or an advantage in the conduct of business for that organization."[172] There is no requirement to prove that the activity was committed in the United Kingdom or even show a close connection to the country, as is needed for other bribery offenses.[173] Section 7 has not replaced the identification doctrine. The decision to use one or the other criterion of attribution of criminal liability—Section 7 or identification doctrine—is left to the discretion of prosecutors.[174] It is a defense to Section 7 if the relevant commercial organization implemented "adequate procedures" to prevent persons associated with the commercial organization from bribing another person.[175] The Ministry of Justice has published guidance to commercial organizations, which is based on six general principles of adequate procedures.[176] If a commercial organization breaches Section 7, the adoption of a Deferred Prosecution Agreement (DPA) has become the favored option, not only for the corporations but also for the prosecution.[177] In the United Kingdom, DPAs apply only to corporations and not individuals; they are concluded under the supervision of the judiciary and seek to avoid expensive and time-consuming trials.[178] The first DPA appeared in *Serious Fraud Office v Standard Bank Plc*.[179] Standard Bank Plc had been accused of breaching Section 7 of the Bribery Act 2010. Under the DPA, Standard Bank agreed to pay

168. *Id*. § 8(1).

169. *Id*. § 8(3).

170. CRIM. L. POL'Y UNIT, MINISTRY OF JUST., *Bribery Act 2010 Circular 2011/05* ¶ 23 (June 27, 2011), www.justice.gov.uk/downloads/legislation/bills-acts/circulars/bribery-act-2010-circular-2011-5.pdf [https://perma.cc/4HXD-JG9N].

171. A person associated with a commercial organisation is defined at section 8 as a natural or legal person who "performs services" for or on behalf of the organisation. *Id.*

172. *Id*.

173. *Id*. ¶ 22.

174. *Id*. ¶ 18.

175. Bribery Act 2010, c.23, § 7 (UK).

176. MINISTRY OF JUST., THE BRIBERY ACT 2010 – GUIDANCE 1, 15 (2011).

177. *Deferred Prosecution Agreements*, SERIOUS FRAUD OFF. (2020), www.sfo.gov.uk/publications/guidance-policy-and-protocols/guidance-for-corporates/deferred-prosecution-agreements-2/ [https://perma.cc/L4DH-Z6SB]. *See also* INST. OF ADVANCED LEGAL STUD., *Deferred Prosecution Agreements*, YOUTUBE, at 1:00:08 (Jan. 6, 2021), www.youtube.com/watch?v=bt_yxqT09Zs&t=3608s [https://perma.cc/BK3G-SE24] (illustrating U.K. judicial and prosecuting authorities' turnaround in the approach to DPAs and notions of justice).

178. *Id*.

179. For a critical analysis of the first DPA in England and Wales, see generally Grasso, *supra* note 17.

financial orders totaling $25.2 million.[180] The second case resolved through a DPA, *SFO v. Sarclad Limited*, spotlighted the dilemma created when penalties greatly exceed corporate resources.[181] The judge commented on "the problems generated when a modestly resourced small to medium sized enterprise is demonstrably guilty of serious breaches of the criminal law."[182] The court had to grapple with the imposition of a penalty, which could make Sarclad insolvent. Ultimately, Sarclad agreed to "pay financial orders of £6,553,085, comprised of a £6,201,085 disgorgement of gross profits and a £352,000 financial penalty."[183] In the third DPA in 2017, *SFO v Rolls-Royce plc*, the company had to pay £671 million, including $170 million to the DOJ and $25 million to Brazilian Ministério Público Federal for false accounting and failure to prevent bribery.[184] In 2017, the SFO announced that it had entered into a DPA with *Tesco*, which was required to pay a fine of £129 million for overstating its profits.[185] Interestingly, in each of the four DPAs, no criminal convictions were secured against any of the offending corporations' employees or agents.

Since 2013, DPAs have been used on only thirteen occasions, including G4S Care and Justice Services (UK) Limited,[186] Airline Services Limited,[187] Amec Foster Wheeler Energy Limited [188] and Unknown Company A and B.[189] Therefore, DPAs have been used in cases ranging from small to very large, multi-country enterprises. The offenses generally comprise conspiracy to corrupt, conspiracy to bribe, and failure to prevent bribery. The next part demonstrates the comparatively lackluster enforcement efforts that have accompanied the introduction of the failure to prevent tax evasion offenses in the United Kingdom. Such a discrepancy between the approach in the anti-corruption and anti-tax crime areas appears to be globally widespread and affecting the relevant international legal framework.[190]

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180. *SFO Agrees First UK DPA with Standard Bank*, SERIOUS FRAUD OFF. (Nov. 30, 2015), www.sfo.gov.uk/2015/11/30/sfo-agrees-first-uk-dpa-with-standard-bank [https://perma.cc/Q7PT-LMWE].

181. *See generally* Serious Fraud Off. v. Sarclad Ltd. [2016] EWHC (QB).

182. Serious Fraud Off. v. Sarclad Ltd (Initially anonymised as XYZ Ltd.) (Southwark Crown Court, Jul. 11, 2016, U20150856), [4].

183. *SFO Secures Second DPA*, SERIOUS FRAUD OFF. (July 8, 2016), www.sfo.gov.uk/2016/07/08/sfo-secures-second-dpa [https://perma.cc/6JD2-6SDV].

184. *SFO Completes £497.25m Deferred Prosecution Agreement with Rolls-Royce PLC*, SERIOUS FRAUD OFF. (Jan. 17, 2017), www.sfo.gov.uk/2017/01/17/sfo-completes-497-25m-deferred-prosecution-agreement-rolls-royce-plc/ [https://perma.cc/6QXT-565F].

185. *SFO Agrees Deferred Prosecution Agreement with Tesco*, SERIOUS FRAUD OFF. (Apr. 10, 2017), www.sfo.gov.uk/2017/04/10/sfo-agrees-deferred-prosecution-agreement-with-tesco/ [https://perma.cc/XKY9-BUWE].

186. Serious Fraud Off. v. G4S Care & Just. Serv. (UK) Ltd. [2020] Crim LR 138.

187. Serious Fraud Off. v. Airline Serv. Ltd. [2021] Lloyd's Rep. FC 42.

188. Serious Fraud Off. v. Amec Foster Wheeler Energy Ltd. [2021] Lloyd's Rep. FC 353.

189. *SFO Secures Two DPAs with Companies for Bribery Act Offences*, SERIOUS FRAUD OFF. (July 20, 2021), www.sfo.gov.uk/2021/07/20/sfo-secures-two-dpas-with-companies-for-bribery-act-offences/ [https://perma.cc/5XE4-BLEK].

190. *See* Lorena Bachmaier Winter & Donato Vozza, *Corruption, Tax Evasion, and the Distortion of*

VIII

CORPORATE LIABILITY FOR TAX CRIMES – THE CRIMINAL FINANCES ACT 2017

The important tax evasion exposés published over the past two decades have demonstrated the need for tough enforcement action against the corrupt corporate facilitators of tax offenses. Indeed, the expressive or communicative function of criminal liability[191] is particularly important for tax evasion, where strong enforcement action—particularly criminal prosecutions—can have a positive impact on compliance by other taxpayers.[192] However, widespread doubts on the effectiveness of anti-tax crime enforcement persist. As it emerged from the Expert Survey conducted during the project VIRTEU, although the criminal sanctions provided for by legislation were commonly considered adequate, the adequacy of criminal sanctions as imposed by the courts and actually served by natural persons was considered falling into the very lower end of the area labelled as average, borderline with inadequate.[193] Such a situation has appeared particularly critical in the United Kingdom, where HMRC's criminal investigation policy has historically led to very low numbers of prosecutions for tax evasion. From 1998–2002, only 263 defendants were prosecuted by the Inland Revenue for serious tax fraud.[194] By 2007, only two in one thousand cases of detected tax evasion were prosecuted in the United Kingdom.[195] After 2007, the number of prosecutions declined by forty-one percent.[196] This is because, prior to 2010, tax evasion was increasingly treated as an administrative or practical concern—rather than an issue for the criminal justice system—with priority afforded to the collection of revenue through civil penalties.[197] The financial crisis and several high-profile tax evasion scandals revealed the distortion of justice created by this revenue-centric approach. Increased public awareness led not only to an enhanced demand to combat tax evasion and its facilitation by both natural and legal persons, but also a desire to address these crimes using criminal penalties. Consequently, in 2010, HMRC was tasked with increasing the number of prosecutions for tax evasion from 165 individuals in 2010–11, to 1165 individuals in 2014–15 by making

Justice: Global Challenges and International Responses, 85 LAW & CONTEMP. PROBS., no. 4, 2022, at 96–100 (discussing different approaches in international responses to counter corruption and tax crimes).

191. Diamantis, *supra* note 158.

192. Levi, *supra* note 75, at 493.

193. Costantino Grasso & Stephen Holden, *VIRTEU Expert Survey Report: The Interconnections between Tax Crime and Corruption*, CORP. CRIME OBSERVATORY, at 20:21 (Sept. 2, 2022), www.corporatecrime.co.uk/virteu-expert-survey [https://perma.cc/DP2U-WDYV].

194. NAT'L AUDIT OFF., TACKLING FRAUD AGAINST THE INLAND REVENUE, 2003–04, HC 429, AT 39 (UK).

195. COMM. OF PUB. ACCTS., HMRC: TACKLING THE HIDDEN ECONOMY, 2007–08, HC 712, AT 6 (UK).

196. TREASURY COMM., CLOSING THE TAX GAP: HMRC'S RECORD AT ENSURING COMPLIANCE, 2010-12, HC 1371, at 11 (UK).

197. Jaap Roording, *The Punishment of Tax Fraud*, CRIM. L. REV. 240, 241 (1996).

sufficient referrals to the Crown Prosecution Service.[198] Consequently, the number of prosecutions for tax evasion offenses increased from 420 in 2010–11, 545 in 2011–12, 770 in 2012–13, 915 in 2013–14 and 1288 in 2014–15.[199]

During this period, the quality of tax evasion prosecutions decreased. The introduction of prosecutorial targets in 2010 led HMRC to "focus on less complex cases" particularly "lower-value cases," with prosecutions being undertaken for losses as small as £250.[200] Following these revelations, HMRC aimed at increasing the number of prosecutions for "serious and complex tax crime" by "wealthy individuals and corporates" to over 100 a year by the end of the Parliament.[201] But, since 2016, these targets have been quietly abandoned and the number of prosecutions has dramatically declined. Indeed, 2014–15 was the only year that HMRC met the target of 1,000 prosecutions;[202] 880 individuals were prosecuted in 2015–16,[203] followed by 886 in 2016–17,[204] 917 in 2017–18,[205] and 548 in 2019–20.[206] Of these, only forty-two concerned wealthy individuals or businesses in 2018–19 and thirty-two in 2019–20.[207] Further, from 2012–21, only forty individuals have been prosecuted for offshore tax evasion.[208] and twenty individuals have been convicted for facilitating fraudulent tax avoidance schemes.[209] From 2019–2020, zero prosecutions were brought against corporations for any tax evasion offense, whether facilitation or perpetration of tax evasion.[210]

198. NAT'L AUDIT OFF., TACKLING TAX FRAUD: HOW HMRC RESPONDS TO TAX EVASION, THE HIDDEN ECONOMY AND CRIMINAL ATTACKS, 2015–16, HC 610, at 32 [hereinafter TACKLING TAX FRAUD] (UK).

199. *See id.* at 33; HM REVENUE AND CUSTOMS, ANNUAL REPORT AND ACCOUNTS 2014–15, 2015, HC 18, at 16 (UK).

200. TACKLING TAX FRAUD, *supra* note 198, at 33.

201. HM TREASURY, SUMMER BUDGET 2015, 2015, HC 264, at 43 (UK); *see also*, HM REVENUE & CUSTOMS, NO SAFE HAVENS: OUR OFFSHORE EVASION STRATEGY 2013 AND BEYOND, 2013, at 17 (UK) (noting HMRC's intention to prioritise investigations into offshore tax evasion).

202. TACKLING TAX FRAUD, *supra* note 198, at 32.

203. HM REVENUE & CUSTOMS, ANNUAL REPORT AND ACCOUNTS 2015–16, 2016, HC 338, at 22 (UK).

204. HM REVENUE & CUSTOMS, ANNUAL REPORT AND ACCOUNTS 2016–17, 2017, HC 18, AT 24 (UK).

205. HM REVENUE & CUSTOMS, ANNUAL REPORT AND ACCOUNTS 2017–18, 2018, HC 1222, at 25 (UK).

206. *HMRC Fails to Deliver on Pledge to Increase Criminal Prosecutions by End of 2020, FOI Request Reveals*, KINGSLEY NAPLEY, (Dec. 21, 2020), www.kingsleynapley.co.uk/insights/blogs/criminal-law-blog/hmrc-fails-to-deliver-on-pledge-to-increase-criminal-prosecutions-by-end-of-2020-foi-request-reveals [https://perma.cc/G73D-V877] [hereinafter *HMRC Fails*]. HMRC states that 691 prosecutions were brought in 2019–2020. HMRC statistics include offenses other than tax evasion. *See HMRC Quarterly Performance Report: October to December 2020,* HM REVENUE & CUSTOMS (Feb. 4, 2021), www.gov.uk/government/publications/hmrc-quarterly-performance-report-october-to-december-2020 [https://perma.cc/U4K3-UQPU].

207. *Id*.

208. HM REVENUE & CUSTOMS, ANNUAL REPORT AND ACCOUNTS 2020–21, 2021, HC 696, AT 52 (UK).

209. HM REVENUE & CUSTOMS, ANNUAL REPORT AND ACCOUNTS 2018–19, 2019, HC 2394, at 32 (UK).

210. Emma Agyemang, *UK Tax Evasion Prosecutions Fall by Half in 5 Years*, FIN. TIMES (Dec. 20,

While some assign responsibility to corruption itself for the inertia surrounding corporate tax crimes,[211] other factors are likely influential, including the revenue-centric focus of HMRC and its lack of resources.[212] Regardless, perceptions matter, and HMRC's focus on low-value prosecutions at the expense of sophisticated corporate tax crimes is likely to have a detrimental impact on taxpayer morale and tax compliance. Indeed, the United Kingdom's chronic inability to impose criminal sanctions on powerful professionals and corporations that act as enablers of tax abuse results in a distortion of justice which may have a long-lasting impact. Failure to prosecute corporate facilitators of tax crimes is also a function of the identification doctrine governing attribution of criminal liability to corporations for tax evasion offenses. Although United Kingdom corporations can be criminally charged for evading their own taxes or assisting others in evading taxation, a successful prosecution turns on meeting the archaic identification doctrine.[213] The identification doctrine thus continues to distort justice in addressing tax crimes; companies can evade taxation and facilitate tax fraud with near impunity.

The impact of this legal barrier is demonstrated by the United Kingdom's tepid response to organizations at the heart of recent tax evasion scandals. Despite the United Kingdom having among the highest numbers of intermediaries involved in the Panama Papers,[214] and identifying nine "potential professional enablers of economic crime,"[215] there has yet to be a single prosecution of a corporate facilitator.[216] Moreover, the FCA took little action against any intermediary named in the Panama Papers.[217] Similarly, following the revelations contained in the HSBC (Suisse) Scandal, no civil or criminal action was taken against the bank, notwithstanding evidence that the bank assisted its U.K. clients in evading taxation.[218] The United Kingdom's inability to pursue individuals and corporations that facilitate financial crimes contrasts sharply with other countries, which

2020), https://www.ft.com/content/f9ace16a-4508-4bb8-a291-ad0d9b3deac2 [https://perma.cc/2GLJ-CEGY].

211. *See, e.g.*, Prem Sikka, *Accounting for Corruption in the 'Big Four' Accountancy Firms, in* HOW CORRUPT IS BRITAIN? 157, 162–63 (David Whyte ed., 2015) (noting the "revolving door" between those in accounting firms and senior policymaking positions).

212. *State of Tax Administration 2022*, TAX WATCH, (Feb. 2022), www.tax-watchuk.org/state_of_tax_administration/ [https://perma.cc/CCE2-U6VV].

213. *See* Theft Act 1968, c. 60, § 32(1)(a) (UK), https://www.legislation.gov.uk/ukpga/1968/60/section/32 [https://perma.cc/36HS-LF7N] (explaining the common law offence of Cheating the Public Revenue).

214. *Report on the Inquiry into Money Laundering, Tax Avoidance and Tax Evasion 2017/2013(INI)*, *supra* note 47, at 27.

215. *Taskforce Launches Criminal and Civil Investigations into Panama Papers, supra* note 48.

216. ANNUAL REPORT AND ACCOUNTS 2018–19, *supra* note 209, at 30.

217. Denis O'Connor, *Panama Papers – No Banks to Blame, Say Top European Regulators*, KYC360 (June 28, 2018), www.riskscreen.com/kyc360/article/panama-papers-no-one-blame/ [https://perma.cc/3VDB-NJH2].

218. *HSBC Bank 'Helped Clients Dodge Millions in Tax', supra* note 36. *See also*, Jill Treanor, *HSBC Escapes Action by City Regulator Following Swiss Tax Scandal,* GUARDIAN (Jan. 4, 2016), www.theguardian.com/business/2016/jan/04/hsbc-escapes-regulatory-action-swiss-tax-scandal

took enforcement action in response to these scandals.[219] The United States not only secured convictions of individual facilitators identified through the Panama Papers,[220] but also reached a DPA with HSBC Private Bank (Suisse), including a penalty of $192.35 million, for its facilitation of tax evasion by U.S. citizens.[221] As seen below, the United States has persistently taken criminal and civil actions against organizations that facilitate tax evasion.

To remedy the host of deficiencies associated with the identification doctrine, in 2017 the United Kingdom introduced two corporate criminal offenses of "failing to prevent" the criminal facilitation of tax evasion. The offenses cover cheating the public revenue and fraudulent tax evasion.[222] Under Section 45 of the Criminal Finances Act 2017, any relevant body can be prosecuted if a person commits a tax evasion facilitation offense when acting in the capacity of a person associated with it.[223] Section 44 explains that a relevant body could be any body corporate or partnership—wherever incorporated or formed[224]—and that an associated person could be an employee, an agent, or any other person who performs services for or on behalf of the legal entity.[225] The second offense under the Act is similar in nature but differs in that it relates to the evasion of foreign tax. Relevant conduct for both offenses can take place either in the United Kingdom or elsewhere.[226]

For both offenses there are three stages. First, it must be proven that an individual or a legal entity has committed tax evasion; second, that an associated person of the relevant body facilitated this evasion; and finally, that the relevant body failed to prevent the person associated with it from committing this facilitation act. Certain defenses are available for both offenses: Either the relevant body needs to prove that it adopted reasonable prevention procedures, or that it "was not reasonable in all the circumstances to expect [the relevant body] to have any prevention procedures in place."[227] To help identify reasonable prevention procedures, the Act instructs the government to prepare and publish guidance

[https://perma.cc/5CJ8-2527].

219. *See* Will Fitzgibbon, *Germany Seeks Arrest of Panama Papers Lawyers*, INT'L CONSORTIUM OF INVESTIGATIVE JOURNALISTS (Oct. 21, 2020), www.icij.org/investigations/panama-papers/germany-seeks-arrest-of-panama-papers-lawyers [https://perma.cc/66D5-8XY9] (demonstrating that prosecutors in Germany and the U.S. have taken enforcement action).

220. Will Fitzgibbon, *US Accountant, Guilty in Panama Papers Case, Sentenced to More Than 3 Years*, INT'L CONSORTIUM OF INVESTIGATIVE JOURNALISTS (Sep. 25, 2020), www.icij.org/investigations/panama-papers/us-accountant-guilty-in-panama-papers-case-sentenced-to-more-than-3-years/ [https://perma.cc/JC2N-LFX6].

221. *Justice Department Announces Deferred Prosecution Agreement with HSBC Private Bank (Suisse) SA*, U.S. DEP'T OF JUST. (Dec. 10, 2019), www.justice.gov/opa/pr/justice-department-announces-deferred-prosecution-agreement-hsbc-private-bank-suisse-sa [https://perma.cc/6ZE6-SCR7].

222. Criminal Finances Act 2017, c. 22 § 45(4) (UK), https://www.legislation.gov.uk/ukpga/2017/22/section/45/enacted [https://perma.cc/55TV-CBBZ].

223. *Id*. at § 45(1).

224. *Id*. at § 44(2).

225. *Id*. at § 44(4).

226. *Id*. at § 48.

227. *Id*. at § 45(2).

for corporations and partnerships—a similar provision in the bribery act requires publication of guidance. HMRC published guidance on reasonable prevention procedures based on six guiding principles.[228] Upon conviction for the offense, a corporation could face an unlimited fine,[229] calculated using the Sentencing Guideline for Corporate Offenders.[230] The Guidelines require an estimation of the harm caused, which is then multiplied by a percentage figure based on the culpability of the corporation (up to 400 percent).[231] Alternatively, the offenses may be addressed via a DPA.[232]

The strict liability nature of the offenses renders the identification doctrine inapplicable although, as the offenses incorporate a due diligence defense, the new offenses may be most appropriately described as offenses of strict criminal responsibility.[233] Instead, conviction for the offenses simply tracks the three stages outlined above.[234] The offenses improve the law pertaining to tax evasion in the United Kingdom by providing a means independent of the identification doctrine to address tax-related crimes of corrupt corporations. The offenses will also provide a mechanism to address the facilitation of tax offenses through the provision of advice and services intended to aid clients in avoiding the application of anti-tax evasion measures such as the Common Reporting Standard.[235] Thus far, however, enactment of the new offenses has had a negligible effect; not a single organization has been charged.[236] Investigations into corporate economic crimes committed by large organizations are notoriously complex and may take time,[237] which may explain the absence of charges even five years after introduction of the new offenses. There are signs that prosecutions or DPAs might soon

228. HM REVENUE AND CUSTOMS, TACKLING TAX EVASION: GOVERNMENT GUIDANCE FOR THE CORPORATE OFFENCES OF FAILURE TO PREVENT THE CRIMINAL FACILITATION OF TAX EVASION 15 (2017) [hereinafter Tackling Tax Evasion] (UK).

229. Criminal Finances Act 2017, *supra* note 222, at § 45(8), § 46(7).

230. *Corporate Offenders: Fraud, Bribery and Money Laundering,* SENT'G COUNCIL (Oct. 1, 2014), https://www.sentencingcouncil.org.uk/offences/crown-court/item/corporate-offenders-fraud-bribery-and-money-laundering/ [https://perma.cc/JR73-XHBN].

231. *Id.*

232. Crime and Courts Act 2013, c. 22, Schedule 17 (UK), https://www.legislation.gov.uk/ukpga/2013/22/schedule/17/enacted [https://perma.cc/TXU9-3XZN].

233. ANTONY DUFF, ANSWERING FOR CRIME: RESPONSIBILITY AND LIABILITY IN THE CRIMINAL LAW 233 (2007)*; See also* Andrew Ashworth*, The Diffusion of Criminal Responsibility: A Cause for Concern?*, QUEENSLAND LEGAL YEARBOOK 170, 180 (2017).

234. TACKLING TAX EVASION, *supra* note 228, at 6.

235. HM REVENUE & CUSTOMS, CONSULTATION DOCUMENT – TACKLING OFFSHORE TAX EVASION: A NEW CORPORATE OFFENCE OF FAILURE TO PREVENT THE FACILITATION OF TAX EVASION 10 (2015) [hereinafter CONSULTATION DOCUMENT] (UK).

236. *FOI Release: Number of Live Corporate Criminal Offences Investigations,* HM REVENUE & CUSTOMS (Jun. 30, 2022), www.gov.uk/government/publications/number-of-live-corporate-criminal-offences-investigations/number-of-live-corporate-criminal-offences-investigations [https://perma.cc/23X9-3LKH].

237. Karl Laird, *Deferred Prosecution Agreements and the Interests of Justice: A Consistency of Approach?*, 6 CRIM. L. REV. 486, 499 (2019).

be forthcoming with HMRC currently conducting seven investigations into suspected offenses and another twenty-one opportunities under review.[238] Separate from the impact of actual enforcement, the new crimes could potentially shape business behavior on the front end. However, research found that two years into the new legal regime, only around a quarter of businesses were aware of the offenses.[239] To the extent that full appreciation of the risk of these new criminal charges is slow to spread within the business community, the second key aim of the offenses prompting changes in governance and behavior by corporations who wish to avail themselves of the reasonable procedures defense will not be met.[240]

IX

UNITED STATES COMPARISON

This part argues that the United Kingdom's efforts to combat the corrupt corporate facilitators of tax crimes pale in comparison to their U.S. counterparts. A corporation is considered a person within the meaning of U.S. tax evasion offenses,[241] and may be held criminally liable for evading its own taxes,[242] or for facilitating the evasion of another.[243] A corporation may also conspire with its employees to violate the Internal Revenue Code (IRC) or otherwise defraud the Internal Revenue Service (IRS).[244] The United States recognizes that "vigorous enforcement of the criminal laws against corporate wrongdoers, where appropriate, results in great benefits for law enforcement and the public."[245] The United States has demonstrated its commitment by bringing criminal charges against many corporations who have perpetrated or facilitated white collar crimes, including tax evasion offenses. This is in sharp contrast to the United Kingdom, which, as detailed above, provides for corporate liability for tax crimes in theory but not in practice.

Some of the differences between U.S. and U.K. enforcement of corporate criminal tax violations are attributable to U.K. challenges with the identification doctrine, which still applies to companies that evade, rather than facilitate the evasion of taxation. But, following the introduction of the "failure to prevent" offenses, the limited U.K. enforcement must also be the product of other factors, likely including lack of resources or lack of commitment to bringing corporate prosecutions for tax crimes. In comparison, the U.S. respondeat superior doctrine

238. *FOI Release: Number of Live Corporate Criminal Offences Investigations*, *supra* note 236.

239. IPSOS MORI SOC. RSCH. INST., HM REVENUE AND CUSTOMS, RESEARCH REPORT 529: EVALUATION OF CORPORATE BEHAVIOUR CHANGE IN RESPONSE TO THE CORPORATE CRIMINAL OFFENCES, Mar. 2019, at 4 (UK).

240. CONSULTATION DOCUMENT, *supra* note 235, at 10.

241. 26 U.S.C. § 7701(a)(1); 26 U.S.C. § 7343.

242. *See* United States v. Beacon Brass Co., Inc., 344 U.S. 43, 44 (1952).

243. *See generally* United States v. Shortt Acct. Corp., 785 F.2d 1448, 1451 (9th Cir. 1986).

244. *See, e.g.*, United States v. Chon, 713 F.3d 812, 820 (5th Cir. 2013); United States v. Hartley, 679 F.2d 961, 972 (11th Cir. 1982).

245. U.S. DEP'T OF JUST., JUSTICE MANUAL § 9-28.200 (2015).

essentially provides for a form of vicarious liability, holding a corporation criminally responsible for the criminal acts of its agents, including low-level employees, carried out with intent to benefit the corporation.[246] While respondeat superior liability for civil torts and offenses of strict liability is longstanding in English Law, vicarious liability has not been extended to criminal offences requiring mens rea in the United Kingdom.[247] Moreover, the United States has also demonstrated a strong commitment to tackling corporate tax offenses through its criminal justice system.

Historically, U.S. common law also prevented the attribution of criminal liability to corporations, particularly for offenses that require criminal intent.[248] However, this position was overturned in *New York Central & Hudson River Railroad Company v. United States*,[249] which confirmed the application of criminal offenses to corporations.[250] Under U.S. federal law, corporate criminal liability is imposed under the respondeat superior doctrine, which attributes criminal liability to a corporation based on the acts of its employees. The doctrine merely requires proof that criminal activities were carried out by those acting for the corporation, within the remit of their employment and for the purposes of benefitting the corporation.[251]

The effect is similar to the imposition of the failure to prevent offense in the United Kingdom, without the concomitant defenses.[252] The criminal activity must have been committed within the employee's general line of work,[253] but need not have been sanctioned by senior management.[254] The key distinction between common law corporate liability in the United Kingdom and United States is that in the United States "a corporation may be held criminally responsible for conduct that it specifically prohibited and that its employee went to great lengths to conceal."[255] As such, the respondeat superior doctrine provides for a much wider basis of liability than the identification doctrine, and offers inspiration for the United Kingdom's ongoing efforts at reform of corporate criminal liability for economic crimes. The United States also demonstrates the advantages of reforming the identification doctrine rather than introducing further failure to prevent offenses. In the United States, liability is attributed to the corporation for the tax

246. Lowell H. Brown, *Vicarious Criminal Liability of Corporations for the Acts of Their Employees and Agents*, 41 LOY. L. REV. 279, 285–88 (1995).

247. Robert Luskin, *Caring About Corporate "Due Care": Why Criminal Respondeat Superior Liability Outreaches Its Justification*, 57 AM. CRIM. L. REV. 303, 306–07 (2020).

248. Eds., *Criminal Responsibility of Corporations*, 27 DICK. L. REV., no. 4, 1923, at 89, 89–95.

249. New York Cent. & Hudson R.R. Co. v. United States, 212 U.S. 481, 495–96 (1909).

250. Dane C. Ball & Daniel E. Bolia, *Ending a Decade of Federal Prosecutorial Abuse in the Corporate Criminal Charging Decision*, 9 WYO. L. REV. 230, 233 (2009).

251. CONG. RSCH. SERV., R43293, CORPORATE CRIMINAL LIABILITY: AN OVERVIEW OF FEDERAL LAW 3 (2013).

252. In *Dollar SS Co.,* the company "failed to prevent the commission of the forbidden act." *Dollar SS Co. v. United States*, 101 F.2d 638, 640 (9th Cir. 1939).

253. United States v. Agosto-Vega, 617 F.3d 541, 552–53 (1st Cir. 2010).

254. United States v. Hilton Hotels Corp., 467 F.2d 1000, 1004 (9th Cir. 1972).

255. Luskin, *supra* note 247, at 303 (2020).

evasion facilitation offense, rather than its omission in preventing it, providing a clearer message to the public as to the severity of the corporation's conduct.

The United States frequently prosecuted corporations up through the latter half of the twentieth century.[256] However, its approach transformed following the prosecution of accounting firm Arthur Andersen, as the collapse of the firm revealed the dramatic collateral consequences that could accompany a corporate conviction. Since 2001, prosecutors have made frequent use of DPAs and Non-Prosecution Agreements (NPAs).[257] In deciding whether to prosecute or attempt to reach an NPA or DPA, prosecutors must consider eleven factors, including the nature and seriousness of the offense, the systemic and persistent nature of criminal activity within the corporation, the level of cooperation provided, and the collateral consequences of a criminal conviction.[258] In this respect, the use of DPAs may strike a balance between the need to communicate the severity of the defendant's conduct through criminal enforcement action, with the need to avoid unintended consequences.

In contrast to the United Kingdom, the expansive scope of corporate criminal liability in the United States has led to impressive results in combatting tax crimes. The United States has reached DPAs and NPAs with high-profile law firms, accounting firms, and insurance companies, for facilitating the use of fraudulent tax shelters.[259] A significant number of DPAs and NPAs have also been concluded with foreign banks for their facilitation of tax evasion by U.S. citizens.[260] In 2009, the United States reached a DPA with UBS for conspiring to defraud the IRS, which resulted in the imposition of a $780 million penalty, as well as unprecedented levels of information exchange between Switzerland and the United States.[261] The United States also indicted Switzerland's oldest bank, Wegelin, which admitted guilt and paid a penalty of $74 million leading to its

256. *See* Mike Koehler, *Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement*, 49 U.C. DAVIS L. REV. 497, 500 (2015) (discussing charging options prior to NPAs and DPAs).

257. David M. Uhlmann, *Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability*, 72 MD. L. REV. 1295, 1303 (2013) (citing Brandon L. Garrett & Jon Ashley, *Corporate Prosecution Registry*, https://corporate-prosecution-registry.com/browse [https://perma.cc/574T-LS3H]).

258. U.S. DEP'T OF JUST., JUSTICE MANUAL § 9-28.300 (2018).

259. *See e.g.*, U.S. DEP'T OF JUST., *supra* note 164; U.S. DEP'T OF JUST., *Zurich Life Insurance Company Ltd. and Zurich International Life Limited Enter Agreement with U.S. Regarding Insurance Products* (Apr. 25, 2019), www.justice.gov/opa/pr/zurich-life-insurance-company-ltd-and-zurich-international-life-limited-enter-agreement-us [https://perma.cc/2RLG-F6GS].

260. *See* U.S. DEP'T. OF JUST., *Mizrahi-Tefahot Bank Ltd. Admits Its Employees Helped U.S. Taxpayers Conceal Income and Assets* (Mar. 12, 2019), www.justice.gov/opa/pr/mizrahi-tefahot-bank-ltd-admits-its-employees-helped-ustaxpayers-conceal-income-and-assets [https://perma.cc/F7AM-MM6C] (discussing a DPA colluded with one of Israel's largest banks).

261. United States vs. UBS AG: Deferred Prosecution Agreement, Case No.09-60033-CR-COHN (S.D. FLA. 2009), www.justice.gov/sites/default/files/tax/legacy/2009/02/19/UBS_Signed_Deferred_Prosecution_Agreement.pdf [https://perma.cc/W48A-MY9Z].

collapse.[262] The United States also charged several banks with tax evasion offenses before establishing the Swiss Bank Program in 2013.[263] The Program required Swiss Banks to disclose criminal activities, provide information on U.S. taxpayers, close certain accounts, and pay significant penalties, in exchange for a NPA.[264] By the end of the Program in 2016, the United States had reached NPAs with eighty banks and imposed over $1.36 billion in penalties.[265] Therefore, not only has the United States been able to secure significant financial benefit in taking criminal action against corporations that facilitate tax evasion, but through its action against Swiss banks, the United States dramatically enhanced international cooperation in tax matters.[266]

Overall, the United States has reached a significant number of agreements with corporations in respect of tax crimes, with thirty-eight DPAs and NPAs relating to tax fraud agreed in the final twenty months of the Obama Administration alone.[267] Two DPAs and two NPAs relating to tax fraud were reached in 2019, accounting for over ten percent of all DPAs and NPAs reached by the U.S. Department of Justice in that year, with penalties exceeding $400 million.[268] Accordingly, it is clear that the U.S. approach to attributing criminal liability to corporations, as well as its approach to enforcement, are far more effective than its U.K. counterpart. Nonetheless, U.S. commentators have expressed concerns about the expansive scope of criminal liability, suggesting that it lacks proportionality[269] and may be counterproductive from a deterrence perspective.[270] Additionally, the United States has been criticized for its use of DPAs and NPAs, with many suggesting that they afford too much discretion to prosecutors,[271] lack

262. U.S. DEP'T. OF JUST., *Swiss Bank Pleads Guilty in Manhattan Federal Court to Conspiracy to Evade Taxes* (Jan. 3, 2013), www.justice.gov/usao-sdny/pr/swiss-bank-pleads-guilty-manhattan-federal-court-conspiracy-evade-taxes [https://perma.cc/8PGL-SZHW].

263. Yvan Lengwiler & Albana Saljihaj, *The U.S. Tax Program for Swiss Banks: What Determined the Penalties*?, 154 SWISS J. OF ECON. & STAT., Dec. 2018, at 1.

264. U.S. DEP'T. OF JUST., *supra* note 42.

265. U.S. DEP'T. OF JUST., *Justice Department Announces Final Swiss Bank Program Category 2 Resolution with HSZH Verwaltungs AG* (Jan. 27, 2016), www.justice.gov/opa/pr/justice-department-announces-final-swiss-bank-program-category-2-resolution-hszh-verwaltungs [https://perma.cc/2D6Q-YPD5].

266. Patrick Emmenegger, *Swiss Banking Secrecy and the Problem of International Cooperation in Tax Matters: A Nut Too Hard to Crack?*, 11 REGUL. & GOVERNANCE 24, 26 (2017).

267. Brandon L. Garrett, *Declining Corporate Prosecutions*, 57 AM. CRIM. L. REV. 109, 145–55 (2020).

268. GIBSON DUNN, 2019 YEAR-END UPDATE ON CORPORATE NON-PROSECUTION AGREEMENTS AND DEFERRED PROSECUTION AGREEMENTS, Appendix (Jan 8, 2020), www.gibsondunn.com/2019-year-end-npa-dpa-update [https://perma.cc/QB39-AU67]. *See also* Uhlmann, *supra* note 257.

269. Stacey N. Vu, *Corporate Criminal Liability: Patchwork Verdicts and the Problem of Locating a Guilty Agent*, 104 COLUM. L. REV. 459, 466 (2004).

270. Luskin, *supra* note 247, at 317 (2020).

271. Jennifer Arlen, *Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed Through Deferred Prosecution Agreements*, 8 J. LEGAL ANALYSIS 191, 231 (2016).

judicial oversight,[272] and do not have the same condemnatory effect as prosecution.[273] Several corporations also seem to be persistent offenders, suggesting that the deterrence and reform objectives of DPAs and NPAs are not being achieved.[274] In this respect, the United States' use of DPAs may be a case of pursuing "quantity over quality," or the presentation of a "façade of enforcement."[275] However, comparison to the U.K.'s non-existent corporation enforcement suggests that low quality enforcement actions may be better than no action at all, particularly considering the magnification of harm caused by corrupt criminal entities and the importance of taking visible enforcement actions. The United States' use of DPAs and NPAs has led to speedier, cost effective, resolutions to tax crimes that often would not otherwise be possible, given evidentiary or financial constraints.[276] Further, DPAs and NPAs can lead to improvements in corporate compliance procedures, including innovative solutions in addressing tax crimes, such as an agreement to curtail and review the provision of tax products and services.[277]

Although the U.S. model should not be adopted without modification, the U.S. approach convincingly illustrates why, notwithstanding the introduction of failure to prevent offenses, the identification doctrine should be modified or replaced with a more expansive form of corporate criminal liability in the United Kingdom. The U.S. attribution of liability to a corporation for the tax offense itself, rather than for the failure to prevent, provides a clearer public message regarding the severity of the corporation's conduct. Additionally, the expansive scope of U.S. corporate criminal liability has encouraged prosecutors to bring enforcement actions against the facilitators of U.S. tax offenses, prompting changes in behavior and funding further enforcement activities. Nevertheless, there are dangers inherent in applying such a wide basis of liability as the respondeat superior model.[278] A balance must be struck between facilitating law enforcement and criminalizing non-culpable violations of law. Several U.S. com-

272. Peter Reilly, *Sweetheart Deals, Deferred Prosecution, and Making a Mockery of the Criminal Justice System: U.S. Corporate DPAs Rejected on Many Fronts*, 50 ARIZ. STATE L.J. 1113, 1121 (2019).

273. Richard Mays, *Towards Corporate Fault as the Basis of Criminal Liability of Corporations*, 2 MOUNTBATTEN J. LEGAL STUD., NO. 2, 1998, at 31, 37.

274. *See, e.g.*, Nicholas 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*, 82 J. CRIM. L. 245, 253 (2018) (recognizing HSBC as a persistent offender).

275. Koehler, *supra* note 256, at 527.

276. Michael Yangming Xiao, Note, *Deferred/Non Prosecution Agreements: Effective Tools to Combat Corporate Crime*, 23 CORNELL J. L. & PUB. POL'Y 233, 242–43 (2013).

277. *See, e.g.*, U.S. DEP'T. OF JUST., *German Bank HVB Admits Criminal Wrongdoing and Agrees to Pay $29 Million as Part of Deferred Prosecution Agreement in Relation to Largest-Ever Tax Shelter Fraud* (Feb. 14, 2006), www.justice.gov/archive/usao/nys/pressreleases/February06/hvbdeferredprosecutionagreementpr.pdf [https://perma.cc/NK9B-LV7P].

278. Luskin, *supra* note 247, at 317.

mentators have suggested retaining respondeat superior but incorporating a defense of taking reasonable care to prevent the offense.[279] This would have a similar effect to the failure to prevent offense in the United Kingdom, yet the label attaching to such criminal activity would more accurately reflect the harm caused by the corporation—the commission of a substantive offense, rather than simply a failure to prevent one. Reform of the identification doctrine should be accompanied by enhanced enforcement actions in the United Kingdom.

X

CONCLUSION

This article has demonstrated that the act of providing services to facilitate client tax evasion must be classified as corruption. Enabling clients to evade taxation is not only unlawful but also harmful to the national fisc. Furthermore, where access to these facilitation services is limited to elites, inequality in the system grows and states may be forced to introduce more regressive taxes. By characterizing these professional and corporate activities that facilitate tax evasion as corrupt activities, a state is acknowledging the serious nature of the crimes and the systemic harm caused by the professionals and corporations involved. But acknowledgement is not enough. These facilitation crimes require an effective law enforcement response, especially when committed within organizational structures that provide additional opportunities and incentives for misconduct and can amplify the harms. The benefits of effective enforcement against tax evasion extend beyond recouping unpaid tax, securing penalties, and changing entity behavior going forward; meaningful enforcement also strengthens the overall tax system by increasing taxpayer morale and tax compliance.

Nevertheless, enforcement in the United Kingdom has been hampered by the restrictive common law identification doctrine. Faced with this barrier to criminal enforcement against corporations, the government has relied on civil sanctions not subject to the identification doctrine. In some cases, significant civil penalties have been imposed, but even then the government has not pursued criminal charges. In a more recent move to resolve this impediment to criminal enforcement against corporations, the United Kingdom enacted criminal statutory regimes—the "failure to prevent" offenses—applicable to corporations through strict responsibility and without reference to the identification doctrine. Unfortunately, these legislative moves have proved a disappointment in practice. In particular, the failure to prevent tax evasion offenses have had a negligible impact; not a single organization has been charged with an offense and organizations lack sufficient awareness of their new liability, thus curbing possible changes in behavior. In contrast, the expansive scope of U.S. corporate criminal liability, combined with its enforcement approach, have generated impressive results in combatting the corrupt facilitation of tax crimes and provide inspiration for the United Kingdom's ongoing reform efforts.

279. *Id*. at 330.

The Law Commission's Discussion and Options Papers demonstrate that the fight to hold corporations to account has lacked the political will to make a significant difference. It is worrying that successive governments have delayed tackling the problems associated with corporate financial crime. The Law Commission's decision to entertain reform proposals is welcome but must be quickly followed by meaningful action to avoid being another in a series of stalled efforts. The United Kingdom's limited action to date on corporate financial crime, especially corporate facilitation of tax crimes, has distorted justice and undermined the tax and financing system more generally.