Statute Law Review, 2024, **45**, 1–17
https://doi.org/10.1093/slr/hmae007
Advance access publication 25 February 2024
Article

OXFORD

The Corporate 'Failure to Prevent' Principle in the UK Bribery Act 2010: Philosophical Foundations of Economic Crime

Shabir Korotana*

ABSTRACT

This article discusses the new corporate offence of corporate 'failure to prevent' bribery found in section 7(1) of the UK Bribery Act 2010 and the nature of consequential corporate liability. It discusses the nature of corporate vicarious liability, strict liability, and the identification doctrine and identifies the philosophical foundations of the principle of corporate failure to prevent bribery. The philosophical foundation of corporate liability emanating from the principle of the corporate offence is not based on the principles of corporate vicarious liability, strict liability or the identification doctrine. Liability attaches directly to the corporation because the rationale behind the legislation is to eliminate the culture of corporate bribery both domestically and extra-territorially. Section 7(2) affords a corporation a legal defence against its failure to prevent bribery if it can demonstrate that it had implemented adequate procedures to prevent individuals associated with it from undertaking such behaviour.

INTRODUCTION

Corporate offending other than offences of corporate manslaughter usually relates to corporate vicarious liability, civil or criminal strict liability and the identification doctrine. However, this article analyses the new corporate offence of corporate 'failure to prevent' bribery codified in the UK's Bribery Act 2010.

There has been widespread criticism of the corporate 'failure to prevent' bribery principle in Anglo-American literature.[1] It has been labelled as too vague, too broad and lacking specificity[2] and the meaning of 'failure' is undetermined.[3] The reason for such criticism is the

* Senior Lecturer in Commercial Law, Brunel Law School, Brunel University London, Uxbridge, UK. E-mail: shabir.korotana@brunel.ac.uk

[1] Jonathan J Rusch, 'Section 7 of the United Kingdom Bribery Act 2010: A 'Fair Warning' Perlustration', 43(1) The Yale J Int L 1 (2017) *Online*; Jessica A Lordi, 'The UK Bribery Act: Endless Jurisdictional Liability on Corporate Violators', 44(3) Case W Res J Int 995 (2012); Bruce W Bean and Emma H MacGuidwin, 'Unscrewing the Inscrutable: The UK Bribery Act 2010', 23 Ind Int Comp L Rev 63, 64 (2013).

[2] Jonathan J Rusch, Ibid. 3.

[3] Ibid, p. 16.

misunderstanding of the philosophical foundations of this principle; the principle has been misconstrued, misunderstood, and misinterpreted as the principle of vicarious liability, as supporting corporate vicarious and strict liability.[4]

This study examines the philosophical foundation of the 'failure to prevent' principle in the Bribery Act 2010 as the Act does not define the principle itself. Interpretation has been left to the courts; however, under Article 9, the Department of Justice provides guidance.[5] Since 2010, the corporate 'failure to prevent' principle has expanded to other financial and economic crimes including tax evasion,[6] money laundering and fraud.[7] However, the focus of this article is the Bribery Act.

The article also expands the discussion to the analysis of whether the principle of corporate 'failure to prevent' bribery is vague and deals with the issue of how the principle should be construed. It suggests that the focus should be on two things: that the purposive nature of the principle is to discourage the institutional culture of bribery; and that the institutional culture of bribery is also a failure of corporate governance. This discussion will allow us to identify the philosophical foundation of the principle in the 2010 Act.

The article is structured as follows. Part I presents the background and briefly discusses the origins of the principle and its development in UK legislation. Part II discusses the nature of corporate liability and the attribution rules. Part III examines the philosophical basis of the principle in the 2010 Act 2010.

PART 1—BACKGROUND

(i) The Origins of the Principle of 'Failure to Prevent' Bribery and its Development in UK Legislation

The duty to prevent bribery stems from dangers that cause market failure; bribery is a wrong and hence criminalized because its engagement deviates from the professed market rules, thus causing markets to fail.[8] The commitment to eliminate corruption through criminal and civil sanctions is gaining momentum as was demonstrated by the US's Foreign Corrupt Practices Act (FCPA)[9] and by two prominent anti-bribery conventions: the Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the OECD Anti-Bribery Convention)[10] and the United Nations Convention Against Corruption (UNCAC).[11] Both advocate punishment against individuals and corporate organizations involved in bribery and corruption. These efforts are analogous in the sense that they seek to address the issue of bribery, both domestically and extra-territorially. The Bribery Act 2010 seeks to advance this agenda.

The original legislative model for eliminating bribery and corruption was the FCPA. It prohibits bribery and corruption of foreign public officials by individuals and corporate

[4] Ibid. pp. 6, 12–13; Sharifa G Hunter, 'A Comparative Analysis of the Foreign Corrupt Practices Act and the UK Bribery Act, and the Practical Implications of Both on International Business, 18(1) ILSA J Int Comp L 96 (2023).

[5] Ministry of Justice, *The Bribery Act 2010, Guidance* https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/832011/bribery-act-2010-guidance.pdf (accessed on 6 January 2023).

[6] Criminal Finances Act 2017. See s 45 on the failure to prevent facilitation of UK tax evasion offences and s 46 failure to prevent facilitation of foreign tax evasion offences.

[7] UK Ministry of Justice, 'Corporate Liability for Economic Crime: Consultation outcomes', https://www.gov.uk/government/consultations/corporate-liability-for-economic-crime-call-for-evidence (accessed on 25 March 2023)

[8] Bruce Wardhaugh, 'A Normative Approach to the Criminalisation of Cartel Activity', 32(3) Legal Studies (2012); Raphael M, *Blackstone's Guide to the Bribery Act 2010* (OUP 2010) 71–76.

[9] 15 U.S.C. SS 78dd-1.

[10] OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, December 17, 1997 37 I.L.M.1 (entered into force15 February 1999).

[11] United Nations Convention against Corruption (adopted 31 October 2003, 2349 UNTS 41 and entered into force Dec. 14, 2005).

organizations[12] and creates offences relating to accounting violations by corporations.[13] Hence, it prohibits bribery, albeit in a broad and non-specific manner. Article 2 of the OECD Convention states that state parties "shall take measures as may be necessary, in accordance, with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official".[14] Article 26 of the UNCAC comparably states that each state "shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in the offences established under this Convention".[15] However, these Articles do not provide adequate direction regarding how states should establish the ambit of corporate criminal liability when prohibiting bribery and how corporate bribery is to be ascribed to a corporation. So, as is normal for international organizations, the issue of defining actions and conduct which are constituent elements of a crime is left to the individual states.

Before the Act, the UK had three acts on preventing corruption, which the Act replaced: the Public Bodies Corrupt Practices Act 1889, the Prevention of Corruption Act 1906 and the Prevention of Corruption Act 1916. The 2010 Act repealed all three. In 2005, the OECD Working Group on Bribery in International Business Transactions severely criticized the United Kingdom for its lack of effective legislation to prevent bribery[16] despite having ratified the Convention in 1998.[17] The FCPA, OECD, and UNCAC are the forerunners of the Bribery Act 2010 and were influential in developing the Act and proscribing bribery, but the Act goes beyond them in scope, crystalizing the bribery offence and its punishment.

The 2010 Act is distinctive in its approach to corporate criminal liability. While it created the offences of bribing another person (Section 1), being bribed (Section 2), and bribing foreign public officials (Section 6), Section 7 created a new offence of unparalleled scope: the failure of a commercial organization to prevent bribery. Subsection 7(1) defines the corporate 'failure to prevent' bribery offence as follows:

> (1) A relevant commercial organization ('C') is guilty of an offence under this Section if a person ('A') associated with C bribes another person intending—
>
> (a) to obtain or retain business for C, or
> (b) to obtain or retain an advantage in the conduct of business for C.

Subsection 7(5) defines 'relevant commercial organization' as:

> (a) a body which is incorporated under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere),
> (b) any other body corporate (wherever incorporated) which carries on a business, or part of a business, in any part of the United Kingdom,
> (c) a partnership that is formed under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere), or

[12] 15 U.S.C. ss 78dd-3.
[13] 15 U.S.C. s 78m(b)(2)(A)-(B) and s 78m(b)(5).
[14] OECD Anti-Bribery Convention Art. 2.
[15] United Nations Convention Against Corruption Art. 26.
[16] OECD, Directorate for financial and enterprise affairs. united kingdom: phase 2 report on the application of the convention on combating bribery of foreign public officials in international business transactions and the 1997 recommendation on combating bribery in international business transactions https://www.oecd.org/investment/anti-bribery/anti-briberyconvention/34599062.pdf (accessed on 02 April 2023).
[17] OECD Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions: Ratification Status as of 21 May, 2014 OECD https://www.bing.com/search?q=OECD+Convention+on+Combatting+Bribery+of+Foreign+Public+Officials+in+International+Business+Transactions%3A+Ratification+Status+as+of+21+May%2C+OECD&form=ANNTH1&refig=66ae24c91d134501a9ddda1ffde0500d, (accessed on 01 April 2023).

(d) any other partnership (wherever formed) which carries on a business, or part of a business, in any part of the United Kingdom.

To some, the concept of corporate failure to prevent bribery in the Bribery Act seems to be 'very widely defined'[18] although it may be argued that the statute law is defined purposively to make it comprehensive, meaningful, and effective in its application allowing the courts to set the boundaries of the concept objectively. For the satisfaction of the fair warning principle, the enforcement of the specific corporate duty to act to 'prevent bribery', Articles 7, 9, and 11 of the Bribery Act are read together.[19] Section 9 refers to providing guidance about business entities preventing bribery and section 11 relates to the penalties for bribery crimes.

(ii) Development of the Corporate 'Failure to Prevent' Bribery Principle in the UK Bribery Act

To enhance our understanding of the corporate failure to prevent principle in the Act we must first briefly look at the process of development of the principle i.e. the Law Commission's recommendations and the draft bill. The Law Commission made four proposals[20] for the development of the corporate 'failure to prevent' bribery principle: (a) the liability of companies when they directly commit the offence of bribery; (b) the personal liability of senior members of the company for an offence perpetrated by the company; (c) liability of companies where they have failed to oversee their employees adequately; and (d) the personal liability of company directors for the failure of the company to supervise its employees adequately.

The draft act[21] was based on the Law Commission's recommendations and introduced the concept of corporate failure as an offence for preventing bribery. Clause 5 of the draft bill attributed individuals' acts of bribery to the company rather than its failure to prevent the bribery:

(1) A relevant commercial organization ('C') is guilty of an offence under this section if:

(a) a person ('A') performing services for or on behalf of C bribes another person;
(b) the bribe was in connection with C's business; and
(c) a responsible person, or a number of such persons taken together, was negligent in failing to prevent the bribe.

The reference to 'a responsible person' appears to describe a vicarious liability offence but section 7 attributes it to the corporation. Reference to negligence in failure to prevent bribery was also omitted from section 7, so the liability of the company is sought in the employee at any level.

PART II—THE NATURE OF CORPORATE LIABILITY AND THE ATTRIBUTION RULES

This section will analyse the basis of corporate criminal liability for the offence of bribery in the Bribery Act and ascertain whether the principle of corporate 'failure to prevent' bribery in the UK Bribery Act 2010 is vague as section 7, corporate 'failure to prevent' bribery, has

[18] David Ormerod and Karl Laird, Smith and Hogan's Criminal Law S10.1.2.3 (14th edn, OUP 2015) 293.
[19] Jonathan J Rusch, (n1) 4.
[20] Law Commission, Consultation Paper no. 185, Reforming Bribery ¶ 9.4 (2007) https://cloud-platform-e218f50a4812967ba1215eaecede923f.s3.amazonaws.com/uploads/sites/30/2015/03/cp185_Reforming_Bribery_consultation.pdf, (accessed on 11 February 2024).
[21] Ministry of Justice, Bribery: Draft Legislation (March 2009) https://www.gov.uk/government/publications/ministry-of-justice-bribery-draft-legislation-march-2009, (accessed on 20 September 2023).

been interpreted by some as an offence similar to the 'vicarious criminal liability' offence akin to the 'strict liability' principle,[22] meaning that a corporation is criminally liable for the offence if an 'associated person' executes bribery with intent.[23] However, the intention of the Parliament, which is also manifested in the guidance issued under section 9 of the Bribery Act by the Justice Department, is that it is a 'new' offence of corporate 'failure to prevent bribery'[24] subject to 'adequate procedures' defence,[25] altogether different from vicarious and strict criminal liability.

When there is a lack of legislation that explicitly establishes criminal liability for corporations, corporate liability may be based non-vicariously on the 'identification principle' because the individual who perpetrated the offence is the embodiment of the corporation. This section will discuss the rules of attribution of liability, what acts of employees are acts of the corporation to determine the rights and liabilities of the corporation, who is liable under these rules, and how section 7 of the Bribery Act has expanded the rules of attribution of liability.

Before the 2010 Act came into force, liability was established based on the principle laid down in *Meridian Global Funds Management Asia Ltd v Securities Commission*[26] to include all employees of a corporation irrespective of their status and role in the given corporation.

There are several grounds for the attribution of individual conduct to corporations.[27] The agency rules in contract law determine that the acts of an agent are acts for which the company is liable. The vicarious liability rules in tort determine that the employer is accountable for the actions of its workforce. In both cases, the employee must be operating within the extent of their authority or in the course of their employment.[28] These rules apply in civil and not criminal law unless there is a statutory requirement. However, there are exceptions to this rule, and a corporation is criminally liable for the actions of its employees in cases such as fraudulent trading,[29] knowing receipt,[30] or a situation involving the company's directing mind and will[31] (identification doctrine) which require *mens rea.*

(iii) The Rules of Attribution for Vicarious or Strict Liability

A corporation is vicariously liable for torts committed by an agent or employee operating within the bounds of their authority or in the course of their employment. The agent or employee's liability is personal and the corporation's liability is vicarious. Together, the agent or employee and the corporation are joint tortfeasors[32] and each is liable for the entire loss caused by the

[22] Jonathan J Rusch, (n1); Ormerod and Laird, (n18) S 7.3, 183; Jessica A Lordi, (n1); Bruce W Bean and Emma MacGuidwin H, 'Unscrewing the Inscrutable: The UK Bribery Act 2010', 23 Ind Int Comp L Rev 63, 64 (2013); The Bribery Act, Transparency Int UK, http://www.transparency.org.uk/our-work/business-integrity/bribery-act/ (accessed on 10 July 2023).

[23] Natasha Reurts, 'A Call for Clarity: The Uncertainty of 'Associated Person', Lexology (April 3 2017) http://www.lexology.com/library/detail.aspx?g=4e0946fc-e157-4e9a-958a-ce953465a051 (accessed on 5 July 2023). See s 7(2) *The Bribery Act.*

[24] Ministry of Justice, *The Bribery Act 2010, Guidance* 1, "The Act creates a new offence under s 7 which can be committed by commercial organisations1 which fail to prevent persons associated with them from committing bribery on their behalf". https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/832011/bribery-act-2010-guidance.pdf; Celia Wells, 'Corporate Crime: Opening the Eyes of the Sentry', 30(3) Legal Studies 2010.

[25] Section 7(2), *the Bribery Act* 2010.

[26] [1995] 2 BCLC 116, PC.

[27] See Brenda Hannigan, *Company Law*, (4th edn OUP 2016) 68–69.

[28] *Lloyd v Grace, Smith & Co* [1912] AC716. The term 'ordinary course of employment' is broadly defined: *Lister v Hesley Hall Ltd* [2001] 2 All ER, HL; *Dubai Aluminium Co Ltd v Salaam* [2003] 1 BCLC 32, HL.

[29] *Morris v Bank of India* [2005] 2 BCLC 328.

[30] *El Ajou v Dollar Land Holdings plc* [1994] I BCLC 464.

[31] *KR v Royal & Sun Alliance plc* [2007] BCC522.

[32] *Lloyd v Grace, Smith & Co* [1912] AC 716 p 737, HL. However, there is a view that given the company's status as a separate personality, only the company is liable. Otherwise, that the principle of joint tortfeasors rubs against the separate personality in *Salomon v Salomon.* [1897] AC 22, HL. This view is referred to as 'disattribution' theory: see Ross Grantham and Charles Rickett, 'Directors' Tortious' Liability: Contract, Tort or Company Law?", 62 MLR 133 (1999); Ross Grantham 'Company Directors' Personal Liability in Tort", 62 CLJ 15 (2003). CF Neil Campbell and John Armour, 'Demystifying the Civil Liability of Corporate Agents', 62 CLJ 290 (2003). See also, Grantham Ross, 'The Limited Liability of Company Directors', LMCLQ 362 (2007).

conduct.[33] Normally, it is the corporation alone which be liable for the conduct of its employees and agents because the legislative body may have intended to guard against the happening of proscribed acts by imposing liability on a principal, although he does not know of and is not a party to the proscribed action committed by his agent.[34]

However, in certain circumstances, the agent or employee and the corporation may not be joint tortfeasors and employees stand personally liable for the tort committed.[35] Similarly, a company must stand vicariously liable where it has sanctioned, directed, or procured the tortious act.[36]

Generally, vicarious liability arises from violations of strict liability. Vicarious liability has limited application in common law, for example, in relation to nuisance. More commonly it is statutory law that imposes liability on corporations, for example, under the Road Traffic Act 1988. Numerous statutory and regulatory offences entail imposing liability on corporate and non-corporate employers to ensure adherence with pertinent legislation. These are types of offences which do not necessitate the establishment of intent, recklessness or negligence. However, the terms of a statute creating the offence must be carefully considered. In some cases, vicarious liability will only arise based on a statutory law which may not be a strict liability because it will only arise under certain circumstances described by the statute.

Thus, the concept of vicarious liability is foreign to criminal liability. Hence the basis of corporate criminal liability for the bribery offence under section 7 of the Bribery Act cannot be vicarious. The interpretation or understanding of section 7, corporate failure to prevent bribery as vicarious criminal liability, is grossly misunderstood in some American literature.[37] Under section 7, the corporation is criminally liable for the crime of bribery in its own right. This philosophical foundation of the bribery offence under section 7 of the Act is discussed in Part III.

(iv) The Rules Attribution for the 'Identification Principle' and Its Unsuitability to Prevent Corporate Bribery Culture

The biggest challenge in developing the new legislation for preventing corporate bribery in the United Kingdom was to overcome the so-called 'identification principle', meaning whose acts are the acts of the company. In criminal law, vicarious liability or agency is generally irrelevant and an employer is not criminally liable for an offence its employees or agents commit unless it aided or procured the commission of the offence. However, in such cases, the basis of corporate liability is not vicarious because as a general principle, the necessary *actus reus* and *mens rea* will be sought in the appropriate officers, agents, and employees as the embodiment of the corporation as a criminal law issue against the corporation, so it is a matter of identifying the corporation behind the natural person who committed the crime. Therefore, *mens rea* requirements are not a hindrance to corporate liability.[38]

Corporate criminal liability will occur in exceptional circumstances such as statutory exceptions and circumstances falling under the identification doctrine which may entail criminal

[33] *Lloyd v Grace, Smith & Co [1912 AC 716, p HL.*: "The principal is liable in a civil suit to third persons for the frauds, deceits, concealments, misrepresentations, torts, negligences and other malfeasances and misfeasances of his agent in the course of his employment, although the principal did not authorize, justify or participate in, or indeed know of such misconduct, or even if he forbade the acts, or disapproved of them."

[34] *Mousell Bros Ltd v London and North Western Railway Co* [1917] 2 KB 836.

[35] *Standard Chartered Bank v Pakistan National Shipping Corpn (No)*[2003] 1 BCLC 244, HL. See Chris Noonan and Susan Watson S, "Directors' Tortious Liability-Standard Chartered Bank and the Restoration of Sanity", JBL 539 (2004); Stephen Todd, 'Assuming Responsibility for Tort', 119 LQR 199 (2003). See also *GE Commercial Finance Ltd v Gee* [2006] 1 Lloyd's Rep 337; *Contex Drouzhba Ltd v Wiseman* [2008] 1 BCLC 631; CF *Williams v Natural Life Health Foods Ltd* [1998] 1 BCLC 689, HL.

[36] *Rainham Chemical Works Ltd v Belvedere Fish Guano Co Ltd* [1921] 2 AC 465 at 488, HL; *C Evans and Sons Ltd v Spritebrand Ltd* [1985] BCLC 105; *Daido Asia Japan Co Ltd v Rothen* [2002] BCC 589 at 32.

[37] Jonathan J Rusch, (n1); Ormerod and Laird, (n18) S 7.3 183; Jessica A Lordi, (n1); Bruce W Bean and Emma H MacGuidwin, (n1); *The Bribery Act*, Transparency Int UK (n22).

[38] Brenda Hannigan (n27).

liability for the corporation for the conduct or acts committed by its agents and employees in the course of agency and employment. In such exceptional circumstances, the liability is not vicarious; the corporation is directly liable for the offence as a legal entity. The nature of the legislation makes the corporation liable for its crime although its agent or employee committed it. In the latter case, the corporation is criminally liable for acts and omissions of the 'directing mind and will' of the corporation because the employee is an embodiment of the corporation.

In these exceptional circumstances, the situation is analogous to applying the piercing of the veil principle, albeit the other way around. Circumstances in which, as an exception to the separate legal personality rule in *Solomon v Solomon and Co Ltd,*[39] the courts might identify a corporation behind a specific natural person. In the former case, the statutory legislation presumes the existence of *actus reus* and *mens rea* because of the strict liability of the corporation, and in the latter case, by virtue of the agent or employee being identified as the mind and will and embodiment of the corporation. The *actus reus* and *mens rea* are sought in one of two ways in non-statutory circumstances. It is either through applying the mind and will rule as in *Tesco Supermarkets Ltd v Nattrass*.[40] or the purposive rule found in *Meridian Global Funds Management Asia Ltd v. Securities Commission*.[41]

In the latter circumstance, a set of rules of attribution apply to determine whether a criminal act carried out by an agent or employee should be attributed to the corporation, consequently making the corporation criminally liable. The issue is whose acts should be identified as the corporations' acts, and what the rules of attribution are. These rules in non-statutory offences will determine the guilt of the corporation, not vicariously but as the acts of the corporation itself. Non-vicarious civil and criminal liability for the corporation arises from the so-called 'identification principle', and corporations in the United Kingdom may be criminally liable for offences that require a guilty mind through the application of the identification principle.

The rule of attribution in relation to the criminal liability of a corporation is 'the directing mind and will of the company', also called the identification principle or identification doctrine. The rule requires identifying the individuals understood as the embodiment of the corporation—the directing mind and will—whose acts may be ascribed to the corporation.[42] Hence, corporate criminal liability is demonstrated through their behaviour (*actus reus*) and state of mind (*mens rea*).[43]

The principle was first established in *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd*[44] in which Viscount Haldane LC said:

> My Lords, a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation.[45]

The managing director was the embodiment of the corporation as the 'mind and will' of the corporation for the purposes of section 502 of the Merchant Shipping Act 1894[46] and so the

[39] [1897] AC 22, HL.
[40] [1972] AC 153.
[41] [1995] 2 A.C. 500, PC.
[42] *Lennard's Carrying Co v Asiatic Petroleum Co* [1915] A.C. 705; *Bolton Engineering Co v Graham* [1957] 1 QB 159 (per Denning LJ); *R. v Andrews Weatherfoil* 56 C App R 31 CA.
[43] Crown Prosecution Service, *Corporate Prosecutions,* 18 https://www.cps.gov.uk/legal-guidance/corporate-prosecutions#a07, 12 October 2021.
[44] [1915] AC 705. HL.
[45] [1915] AC 705 at 713, HL.
[46] Under section 502 of the Merchant Shipping Act 1894 a company could escape liability for the loss of cargo only if it could show that the loss occurred without its fault or privity.

corporation could not claim that the loss occurred without its fault. To identify a corporation's 'will and mind', it is best to refer to its constitution which vests management powers. Hence, the board of the corporation and the decisions of the shareholders at the general meeting amount to directing the mind and will of the corporation. Any act by an employee cannot be attributed to the corporation because they would lack status and authority to form the corporation's mind and will.[47]

Junior management and ordinary employees do not form the will and mind of the corporation,[48] as was confirmed in *Tesco Supermarket Ltd v Nattrass*.[49] The Court did not identify a shop manager as the will and mind of the corporation and held that the company was not criminally liable for violating the Trade Description Act 1968. Per Lord Reid:[50]

> Normally the board of directors, the managing director and perhaps other superior officers of a company carry out the functions of management and speak and act as the company. Their subordinates do not. They carry out orders from above and it can make no difference that they are given some measure of discretion. But the board of directors may delegate some part of their functions of management giving to their delegate full discretion to act independently of instructions from them. I see no difficulty in holding that they have thereby put such a delegate in their place so that within the scope of the delegation he can act as the company. It may not always be easy to draw the line but there are cases in which the line must be drawn.

The House of Lords' rationale affirmed the identification principle[51] or identification doctrine'.[52] The House of Lords' logic was that the activities of 'individuals' should be attributed to the company only if the individuals were directors and managers who embodied the directing mind and will of the company, hence executing control over what it did.[53] Lord Diplock set out the identification principle:

> In my view, therefore, the question: what natural persons are to be treated in law as being the company for the purpose of acts done in the course of its business, including the taking of precautions and the exercise or due diligence to avoid the commission of a criminal offence, is to be found by identifying those natural persons who by the memorandum and articles of association or as a result of action taken by the directors, or by the company in general meeting pursuant to the articles, are entrusted with the exercise of the powers of the company.[54]

The principle of 'directing mind and will' was later confirmed in *R. v Andrews Weatherfoil*.[55] It held:

> It is not every responsible agent or high executive or an agent acting on behalf of a company who can by his actions make the company criminally responsible. It is necessary to establish whether the natural person or persons in question have the status and authority

[47] *R v Andrews Weatherfoil Ltd* [1972] 1 All ER 65 at 70, per Eveleigh J.
[48] *HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd [1957] 1 QB 159 at 172, CA:* "Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company and control what it doe."
[49] [1971] UKHL 1; *St Regis Paper Co. Ltd. v. R.* [2012] 1 Cr App R 14.
[50] [1972] AC 152 at 171.
[51] *Corporate Prosecutions,* Crown Prosecution Service, 18 https://www.cps.gov.uk/legal-guidance/corporate-prosecutions#a07.
[52] Nicola Padfield, Criminal Law (9th edn OUP 2014) § 4.33 103; see Janet Loveless et al., Criminal Law (4th edn OUP 2014) § 4.2.3 176.
[53] *HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd* [1957] 1 QB 159 (1957) at 172, CA.
[54] *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153.
[55] [1972] 56 C.App.R. 31 CA.

> which, in law, make their acts in the matter under consideration the acts of the company so that the natural person is to be treated as the company itself. It is necessary for the judge to invite the jury to consider whether or not there are established those facts which the judge decides, as a matter of law, are necessary to identify the person concerned with the company.

However, it is not always possible to identify the 'directing mind', particularly in large geographically and functionally diverse corporations.[56] Given this problem, Lord Hoffmann further crystalised the rule of attribution adopted in *Tesco v Nattrass*. He sets the law on a new and broader purposive principle, first in *El Ajou v Dollar Land Holdings Plc*[57] and then firmly in *Meridian Global Funds Management Asia Ltd Securities Commission*.[58] He expanded the understanding of the rule of attribution of 'the mind and will' of the corporation from the hierarchical position or status of the defaulting agent or employee to the purpose of a particular provision of statutory or other laws, focussing on the law's intent. Hence, it broadens the scope of the 'mind and will' rule of attribution. In *El Ajou v Dollar Land Holdings Plc,* the non-executive chairman of the corporation was treated, for the transaction at issue, as the directing mind and will. His fraudulent intent was attributed to the corporation in a 'knowing receipt' case, regardless of his authority or status in the corporation, because he had assumed the role of the directing mind and will of the company for the transaction in question. So, depending on the context, the locus of the directing mind and will of the corporation may be found in a natural person or persons exercising managerial control concerning the particular act or omission,[59] not necessarily at the board level.[60] Circumstances may confer that status on junior officials. Lord Hoffmann echoed the same view in *Meridian* that the expression directing mind and will serves as the characterization of the individual whose acts, for a particular purpose, count as the acts of the corporation.[61]

In *Meridian* (a Hong Kong investment management company), the chief investment officer utilized company funds to acquire a substantial ownership interest in a listed New Zealand company. Due to the non-disclosure of the significant stake in the New Zealand company, Meridian violated the law under the New Zealand Securities Amendment Act 1988. Meridian failed to report its status that it had become a 'substantial security holder' to the Securities Commission of New Zealand. The question before the court pertained to the attribution of employees' knowledge to *Meridian* for establishing whether the company breached statutory law. On the construction of the language of the pertinent statute in question and given the policy of the legislation, the Privy Council attributed the knowledge of the chief investment officer to the company. Hence, the Court believed that otherwise, the legislation policy would fail. Therefore, by attribution *Meridian* had the same knowledge as the employee who had the authority to purchase the shares, a natural person behind the veil. Accordingly, *Meridian* was found in breach of the disclosure requirements.

Lord Hoffmann explained that there are two attribution rules when identifying the mind and will or embodiment of a corporation for attributing corporate criminal liability. The first is that it must be found in the constitution, meaning either the board of directors, shareholders' decision at the general meeting, or a senior officer who exercises control of the company.[62] The second is the purposive rule that, depending on the context, the directing mind and will of the

[56] Brent Fisse and John Braithwaite, *Corporations, Crime and Accountability* (1993 CUP) 47.
[57] [1994] 1 BCLC 464.
[58] [1995] 2 BCLC 116, PC.
[59] [1994] 1 BCLC 464 at 473.
[60] Rose LJ [1994]1 BCLC 464 at 477.
[61] [1995] 2 BCLC 116 at 126.
[62] *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153.

company might be found in different employees in the corporation.[63] However, in both rules, the focus is identifying the mind and will of the corporation exercising control. This view was expressed in the context of liability for manslaughter in *A-G's Reference (No. 2) of 1999)*:[64]

> Lord Hoffmann's speech in the *Meridian* case, in fashioning an additional special rule of attribution geared to the purpose of the statute, proceeded on the basis that the primary 'directing mind and will' rule still applies although it is not determinative in all cases. In other words, he was not departing from the identification theory but re-affirming its existence.

In *Meridian*, Lord Hoffman acknowledged that the term 'directing mind and will' is the most suitable characterization of the individual designated for the attribution rule and through this route, guilt can be attributed to the company.[65] However, if a guilty party cannot be identified because the individual who committed the offence is far lower in status and authority than the 'directing mind and will' of *Tesco v Nattrass*, liability does not attach.[66] In such circumstances, the question is whether the rule in *Meridian* requires the use of this distinct rule of attribution befitting to safeguard that the policy of the law is enforced so both statutory and common law prohibitions or requirements can be applied to companies.

The support for the purposive principle in *Meridian* is well-established in civil and criminal contexts.[67] However, the principle does not replace the 'directing mind and will' of the corporation at the board or senior officer level principle. The principles co-exist and apply in certain circumstances. This was clarified by the Court of Appeal in *A-Gs' Reference (No.2) of 1999*.[68]

In criminal law, the starting point is always the application of the *Tesco* principle of the directing mind and will of the company. If no such person can be identified, the principle does not apply. In such circumstances, resort may be made to the *Meridian* principle but only if the statute requires it. If not, and the company cannot be convicted, the only possibility left is that the employee will be convicted instead, as their actions cannot be ascribed to the company. Such was the case in *R v St Regis Paper Company Ltd*[69] in which a corporation and an employee (a technical manager) were convicted of offences under the Pollution Prevention and Control (England and Wales) Regulations. The employee gave incorrect information to the Environmental Protection Agency, resulting in his conviction, as well as the conviction of the corporation. The company was convicted based on a special rule of attribution to uphold the policy of the legislation, thus applying *Meridian*. The Court did not apply the *Tesco* directing mind and will of the company principle. However, the Court of Appeal quashed the company's conviction and applied the rule of 'directing mind and the will' of the company requiring management's or a senior official's intention. It explained that a company could not be convicted based on the intention of junior staff, but only on the 'directing mind and will' of a controlling authority such as the board of directors or senior official. The Court also reasoned that the legislation did not intend the application of the purpose and policy rule in *Meridian.* This case clarifies that the directing mind and will rule is a distinct rule of attribution.[70]

The legal foundations of vicarious liability, identification, and the special purposive principle differ and none fit with the section 7 principle of corporate liability for failure to prevent bribery. It is thus a new development in English law, creating a new principle based on a new

[63] *El Ajou v Dollar Land Holdings Plc El* [1994] 1 BCLC 464; *Meridian Global Funds Management Asia Ltd Securities Commission* [1995] 2 BCLC 116, PC.
[64] [2000] 2BCLC 257 at 268.
[65] *Meridian Global Funds Management Asia Ltd Securities Commission* [1995] 2 BCLC 126, PC.
[66] Brenda Hannigan (n27).
[67] *Ibid*. The author seems to have some reservation regarding the clarity of the principle.
[68] [2000] 2 BCLC 257 at 265.
[69] [2012] 1 Cr App R 14.
[70] Eilis Ferran, 'Corporate Attribution and the Directing Mind and Will', 127 LQR 239 (2011).

legal foundation. The argument that corporate liability under section 7 is vicarious or arrived at under the identification or purposive principle is a common misunderstanding of the new law in US legal literature.

(v) The Relevance of the Identification Rule to the Bribery Act

Since *Meridian* and *St Regis Paper*, Parliament legislated in relation to bribery offences in the form of the Bribery Act 2010 which introduces an exception to the identification principle.[71] Section 7 clarifies the basis on which corporate criminal liability can arise. In the case of bribery offences, the Act is clear that the offence is presumed to have been as committed by the corporation, regardless of the level, status, or authority of the employees who committed the act.[72] The legislation makes the rules of attribution redundant in the context of bribery.

The intent of the Parliament allows the statute, section 7 of the Bribery Act, to be interpreted in a plausible manner.[73] The plausible interpretation of corporate 'failure to prevent bribery' can be discerned in two ways. First, the location of men rea is in every employee irrespective of their status in the corporation that is attributed to the corporation. Second, mens rea is primarily located with the corporation per se; With this interpretation, the employee status is not an issue. The corporate failure to prevent bribery occurred as a result of corporate failure per se, and the corporation is liable for this failure in its own right.[74] The latter view expounds a better interpretation of the statute.[75] The rules are straightforward: it is presumed under section 7 that the corporation commits the offence per se, albeit committed by an employee or agent of any status or description. The *mens rea* (corporate knowledge and ignorance[76]) and *actus reus* are sought or located in every corporation employee irrespective of status. So, the description of a person (employee) who commits the crime differs from what Lord Hoffman describes in Meridian while interpreting the identification doctrine. It is an offence primarily committed by the corporation; therefore, a corporation is liable for its offence.

Corporate criminal liability under section 7 of the Bribery Act is not vicarious liability. Corporate criminal liability vicariously determines that the acts are the acts of an employee for which the company is liable and the corporate criminal liability under the identification principle determines that acts of employees are the company's acts. The philosophical foundation of corporate criminal liability under section 7 of the Bribery Act is different and is a new legal development in English law. Under section 7, the corporation is primarily and directly liable in its own capacity. Under section 7, all acts are acts of the company *ab initio* regardless of the hierarchical nature of the firm or the status of an employee. Thus, vicarious liability and the identification principle are irrelevant, and critics of section 7 misunderstand the principle.

PART III—THE PHILOSOPHICAL FOUNDATION OF THE 'FAILURE TO PREVENT' BRIBERY PRINCIPLE IN THE BRIBERY ACT 2010

(vi) Institutional bribery culture and corporate governance and the Bribery Act

Section 7(1) provides that a corporation may be guilty of an offence if an 'associated person' bribes another person to either obtain or retain business or gain an advantage in the conduct

[71] Tina Soreide and Kasper Vogle, 'Settlements in Corporate Bribery Cases: An Illusion of Choice? Eur J La Econ 278 (2022).
[72] Ministry of Justice, *The Bribery Act 2010*, Guidance, which outlines the procedures that business organisations can put into place to deter individuals associated with them from engaging in bribery (section 9 of the *Bribery Act* 2010), 16 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/832011/bribery-act-2010-guidance.pdf, (accessed on 20 September 2023).
[73] Ronald Dworkin, *Law's Empire* (Hart 1986), 314.
[74] James Gobert, 'Corporate Criminality: New Crimes for the Times', Crim LR 722 (1994).
[75] Ibid.
[76] CF James Gobert, 'Corporate Criminality: Four Models of Fault',14(3) Legal Stud 408 (November 1994).

of business. It applies to all employees and seeks to eradicate the institutional bribery culture,[77] both within the UK and extra-territorially.[78] An associated person includes an employee, an agent, or a subsidiary company.

The identification and the corporate failure to prevent bribery principles both acknowledge the existence of a corporate criminal offence but they differ in theoretical foundations and purposes. The former allows criminal prosecution only if the crime was committed by the 'directing mind and will' of a director or senior responsible person referred to in the corporation's constitution. This principle has also been interpreted purposively to widen its scope in the *Meridian* to allow the prosecution of corporations regardless of the status of the employee who committed the bribery crime as long as directing mind and will be found in lower status staff in the corporation.

The identification principle does not support vicarious liability. It acknowledges the 'directing mind and will' of 'controlling officers' of the corporation who are to be regarded in law as the embodiment of the corporation when conducting its business. However, depending on the circumstances, the controlling officers may also be prosecuted along with the corporation in a personal capacity[79] but corporate liability cannot follow personal liability.[80] Hence, two parallel prosecutions could occur for two different theoretical reasons in law because the prosecutors may consider proceedings against the corporation employees even though the act in question was performed in fraud of the corporation itself.[81]

A section 7(1) offence is not a vicarious liability offence because it is directed at the companies, not at associated persons who were the instruments of bribing. It creates a new basis for criminal liability for companies which may be criminally liable for the offence of 'failure to prevent' bribery. It is a specific statutory offence that only companies can commit. Section 7(1) does require *mens rea* and does not apply the identification principle of directing mind and will, meaning directing the mind of a director or a senior officer because the *mens rea* of any associated person will incriminate the corporation. The perpetrator does not have to be a senior officer of the organization.

It was designed to be an effective deterrent against corporate institutional bribery to protect the public and support ethical business practices, both nationally and internationally. The prosecution of corporations will increase public confidence in businesses and the criminal justice system. The Section does not contain vicarious liability or identification principles and represents a new theoretical development in English law. The concept of 'negligent' responsible persons in the Law Commission's recommendations was removed in favour of the new concept of the collective failure of the company.[82] Hence, it created a bespoke targeted offence establishing corporate criminal liability.[83]

In line with the general understanding of the law,[84] prosecuting corporations under section 7(1)(2) is not a substitute for prosecuting criminally culpable individuals regardless of their standing or hierarchal position in the corporation. This provides a strong deterrent against future corporate bribing and supports the primary purpose of section 7(1), which is to eliminate

[77] Man Yip and James Lee, 'The Commercialisation of Equity', 37(4) Legal Stud 647 (December 2017).
[78] Section 6 the Bribery Act 2010: Bribery of foreign public officials, Yeoh, P. (2012), "The UK Bribery Act 2010: contents and implications", *Journal of Financial Crime*, Vol. 19 No. 1, pp. 37–53. S 45–46 https://doi.org/10.1108/13590791211190713, (accessed on 25 August 2023); See generally, Jessica A Lordi, (n1).
[79] *El Ajou v Dollar Land Holdings Plc El* [1994] 1 BCLC 464.
[80] James Gobert, (n76) 410.
[81] *Moore v I. Bresler Ltd* [1944] 2 All ER 515, which was approved in *Meridian Global Funds Management Asia Ltd v. Securities Commission* [1995] 2 A.C. 500, PC.
[82] UK Ministry Of Justice, *Bribery: Draft Legislation* (Mar. 2009), P28 http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/238651/7570.pdf.
[83] 506 Parl Deb HC (2010) 948 (Lord Chancellor Straw): 506 Parl Deb HC (2010) 961 (Mr Grieve).
[84] *Standard Chartered Bank v Pakistan National Shipping Corpn* (No) [2003] 1 BCLC 244.

corporate bribery. In *Glencore v SFO*,[85] Glencore Energy (UK) Ltd was convicted on seven charges of bribery initiated by the Serious Fraud Office (SFO), five under section 1 and two under section 7.[86] The company admitted engaging in numerous bribing instances to obtain access to oil and earn illicit profits. The SFO's investigation uncovered that Glencore, through its employees and agents, had been involved in bribing to secure advantageous access pertaining to oil, including increased cargoes, valued oil grades, and better delivery dates. The illicit practices were witnessed across Glencore oil operations in Nigeria, Cameroon, the Ivory Coast, Equatorial Guinea, and South Sudan. There could have been two prosecutions, one against the corporation under section 7 for a 'failure to prevent bribery' by not having 'adequate procedures' in place, and a second against an individual for bribery under sections 1 and 2 of the 2010 Act. The SFO fought complicated financial crime to deliver justice and protect the United Kingdom's standing as a safe business place.[87] The fact that the SFO operated similarly to the United States and with Dutch and Swiss prosecutors[88] is evidence that the rationale for the Bribery Act is to combat bribery both domestically and internationally. The case clearly shows that a corporation's prosecution should occur before the prosecution of 'associated persons'.

To understand the basis of the offence of corporate failure to prevent bribery in section 7(1) and the application and the scope of section 7, one must dwell on the purpose of the Act, which is to eradicate institutional bribery culture in a national and international environment. Institutional bribery causes an asymmetrical balance of opportunities, lack of competition, distortion of markets, and agency problems and leads to market failure. The Bribery Act emerged in the public interest to stop the harm to the public associated with such market failure that otherwise could not be dealt with efficiently.

The recommendations by the Law Commission and Parliament subsequently omitting reference to a 'negligent'[89] person in the drafting of the Bribery Act suggest that the emphasis of the would-be legislation was to eradicate institutional bribery. It may also be visualized as an issue of improper corporate governance that encourages bribery. The principle is linked with corporate governance and the institutional culture of corporations. This was confirmed in the unreported *Sweett Group plc* case, where the judge remarked that the bribery offence resulted from 'system failure', emphasizing the importance of corporate culture for eradicating bribery.[90] Hence it is logical that the bribery crimes committed by a corporation's workforce should be ascribed to the corporation.

Through the Bribery Act, corporate failure to prevent has emerged as a new principle of English law, a new basis of liability designed to deal with the institutionalized bribery culture of a corporation.

(vii) The 'Adequate Procedures' Defence

Section 7(2) affords a corporation a defence against its failure to prevent bribery which is similar to the corporate compliance defence.[91] This absolute defence applies only to section 7, and to enjoy its

[85] SFO https://www.sfo.gov.uk/2022/06/21/serious-fraud-office-secures-glencore-conviction-on-seven-counts-of-international-bribery/#:~:text=Glencore%20Energy%20%28UK%29%20Ltd%20has%20today%, (accessed on 11 July 2023).
[86] *Ibid.*
[87] *Glencore v SFO* (2022) https://www.sfo.gov.uk/2022/06/21/serious-fraud-office-secures-glencore-conviction-on-seven-counts-of-international-bribery/#:~:text=Glencore%20Energy%20%28UK%29%20Ltd%20has%20today%, (accessed on 11 July 2023).
[88] Ibid.
[89] UK Ministry of Justice, *Bribery: Draft Legislation* (March 2009).
[90] *Sweett Group PLC, Unreported*. 'Sweett Group sentenced after first ever corporate conviction for failing to prevent bribery' https://www.sfo.gov.uk/cases/sweett-group, (accessed on 11 July 2023); *R v Skansen Interiors Limited, unreported, first contested case* https://uk.practicallaw.thomsonreuters.com/w-013-8901?contextData=(sc.Default)&transitionType=Default&firstPage=true.
[91] Sharifa G Hunter, 'A Comparative Analysis of the Foreign Corrupt Practices Act and the UK Bribery Act, and the Practical Implications of Both on International Business', 18(1) ILSA J Int Comp L, 106 (2023).

protection, the corporation must demonstrate that it has implemented adequate procedures to prevent individuals associated with it from engaging in bribery. Section 9(1) requires that the Secretary of State release guidance pertaining to procedures that relevant commercial organizations can implement to prevent individuals associated with them from bribing, as outlined in section 7(1). 'Adequate procedures' means corporations should develop and enact a range of effective internal controls to aid them in identifying activities and individual actions of the workforce that could indicate bribery. Section 11 exposes a corporation guilty under section 7 to an unlimited fine.[92]

The guidance in section 9 issued by the Ministry of Justice elaborates.[93] It asserts that a commercial organization can claim full defence by demonstrating that despite a specific bribery case, it had adequate procedures to prevent individuals associated with it from engaging in bribery.[94] A 'particular case' phrase indicates that each case's circumstances are unique; therefore, it will be judged objectively whether the corporation's 'adequate procedures' were adequate in the circumstances.[95] For example, in the Standard Bank case[96], the SFO's first Deferred Prosecution Agreements (DPAs)[97] involved a single bribe and the DPA did not identify how the bank's procedures were inadequate to prevent bribery,[98] and there was no effort on the part of the bank to claim the 'adequate procedures' defence. In the Sweett Group case[99], the defendant did not have adequate procedures and the defence was not asserted.[100] However, in *R v Skansen Interiors Limited,*[101] *the adequate procedures defence was asserted but was unsuccessful.*

Adequate procedures provide defence against prosecution and must be constructed to deter an associated individual from engaging in an act of bribery in all circumstances although the term is undefined in the Act. However, the responsibility for determining adequacy lies with the Court and not the prosecutors as it would be contrary to the notion of due process were prosecutors to be allowed to interpret the scope of an affirmative defence.[102] The term 'adequate' is similar to the term 'reasonable' which is well understood in English law. The Law Commission has proposed a change in the 2010 Act from 'adequate' to 'reasonable' procedures.[103] English law can objectively analyse the meaning of 'adequate' and must arrive at the best meaning of 'adequate procedures' in the given circumstances.[104]

The term 'adequate' is purposive because there is no other way to precisely define the ambit of bribery cases. The court will interpret 'adequate' in view of its intended purpose by the parliament.

[92] *The Bribery Act* 2010 s 11(3).

[93] Ministry of Justice, *The Bribery Act 2010, Guidance*. The guidance displays six principles that business organisations should use when putting in place their 'adequate procedures'. The principles are: (1) proportionate procedures; (2) top-level commitment; (3) risk assessment; (4) due diligence; (5) communication (including training); and (6) monitoring and review. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/832011/bribery-act-2010-guidance.pdf, 20, (accessed on 20 September 2023).

[94] Ibid. Similarly, the U.S. Department of Justice and the Securities and Exchange Commission (SEC) guide to the FCPA states that "if designed carefully, implemented earnestly, and enforced fairly, a company's compliance program—no matter how large or small the organization—will allow the company generally to prevent violations, detect those that do occur, and remediate them promptly and appropriately". FCPA Resource Guide 2012, at 57.

[95] Bruce W Bean and Emma H MacGuidwin, (n22) 89; Peter Alldridge, 'The U.K. Bribery Act: 'The Caffeinated Younger Sibling of the FCPA,'' 73 Ohio St. L.J. 1181, 1203 (2012).

[96] *Unreported.* https://www.judiciary.uk/wp-content/uploads/2015/11/sfo-v-standard-bank_Final_1.pdf, (accessed on 17 July 2023).

[97] Qingxiu Bu, 'The Viability of Deferred Prosecution Agreements (DPAs) in the UK: The impact on Global Anti-Bribery Compliance', 22 Eur Business Organisat L Rev 173–201 (2021).

[98] *Serious Fraud Office v. ICBC Standard Bank PLC*, Deferred Prosecution Agreement, https://www.sfo.gov.uk/cases/standard-bank-plc/ (accessed on 6 July 2023).

[99] *Unreported.* https://www.sfo.gov.uk/cases/sweett-group/, (accessed on 17 July 2023).

[100] Serious Fraud Office statement, 'SFO Charges Sweett Group PLC' (9 December 2015), http://www.sfo.gov.uk/2015/12/09/sfo-charges-sweett-group-plc. (accessed on 6 July 2023).

[101] *Unreported,* https://uk.practicallaw.thomsonreuters.com/w-013-8901?contextData=(sc.Default)&transitionType=Default&firstPage=true.

[102] Jonathan J Rusch, (n1) 21.

[103] https://www.lawcom.gov.uk/law-commission-sets-out-options-to-government-for-reforming-how-companies-are-convicted-of-criminal-offences/.

[104] Ronald Dworkin, (n73) 240–250

Failure to prevent or failure to act provisions provide a defence for corporations against criminal sanctions where the pre-existing duty to act by providing 'adequate procedures' has been performed.[105]The meanings of 'failure' and 'prevent' in Article 7 are essentially linked with the positive duty of corporations to have 'adequate procedures' in place for the guidance of their workforce.[106] Thus, section 7(2) puts the onus on the corporation to ensure employees do not participate in prohibited activity.[107] Many English criminal law offences use the word 'failure' to define the *actus reus*.[108] Therefore, the essential element—the statutory duty to act which is the focus of the criminality of the corporation in Article 7(2) – is to provide 'adequate procedures' for its workforce. Otherwise, this would be a statutory 'failure to prevent' corporate bribery. However, beyond this, the individuals will be personally criminally liable for their offence of bribery.

The challenge for the corporation is knowing whether their procedures will be seen as adequate[109] and whether they will be understood by the workforce. However, the offence still being committed would not necessarily mean the defence was unavailable.[110] Because according to such an interpretation the defence of adequate procedures could never operate. The *ex-post* explanation and understanding of the defence lack coherence and do not make sense.[111] Furthermore, among other circumstances, for example, the cost-benefit analysis in individual cases will also influence the adequacy of the 'adequate procedures'.[112] Thus, the adequacy of 'adequate procedures' is also determined objectively.

The Act does not define 'failure' or 'prevent' in section 7, nor does it define the phrase 'adequate procedures designed to prevent' associated individuals from bribing. The term 'prevent' may be interpreted as its best meaning to 'avoid', and it does not mean 'to stop' bribery in an absolute sense, which would be impossible to achieve. In common law, it is left to the Court to objectively interpret the words and phrases of the legislation to determine the intention of Parliament.

Thus, the corporate offence of 'failure to prevent' bribery is a statutory offence but not one of strict liability as the Act offers a statutory defence.

(viii) A New Form of Criminal Liability

The basis of the corporate liability of 'failure to prevent' is that the offence of bribery relates to the corporate failure to prevent it. The corporation is charged for the crime in its own right. Glencore was convicted of seven counts of bribery under the 2010 Act, five substantive charges under Section 1 and two under Section 7. In the *Sweett Group case,* the SFO charged it as 'being a relevant commercial organisation, failed to prevent the bribing of [a specified individual] by an associated person'.[113] In its first three DPAs, the SFO applied the section 7 'failure to prevent' bribery principle against Standard Bank[114], an unidentified company referred to'XYZ' and Rolls-Royce for the companies' offences as 'failure to prevent bribery'.[115]

[105] John Kleinig, 'Criminal Liability for Failures to Act', 49 L. Contemp. Probs. 161 (1986); see also Catherine Elliott and Frances Quinn, Crim L (5th edn Pearson 2004) 12.
[106] Jeremy Horder, *Ashworth's Principles of Criminal Law* (8th edn OUP 2016) § 4.5, 118.
[107] Peter Alldridge, (n95)
[108] Nicola Lacey, Celia Wells, and Oliver Quick, Reconstructing Criminal Law 47(3d edn CUP 2003); Ormerod and Laird, (n18) § 4.4.2.2, 78.
[109] 503 Pal Deb HL (2010), GC45 (Lord Henley).
[110] 507 Pal Deb HL (2010), 61 (Mr Howarth).j
[111] Ibid.
[112] 507 Pal Deb HL (2010), 60-61 (Mr Howarth).
[113] SFO, 'SFO Charges Sweett Group PLC' (9 December 2015), http://www.sfo.gov.uk/2015/12/09/sfo-charges-sweett-group-plc.
[114] See Serious Fraud Office reached an agreement (press release), First UK DPA with Standard Bank (November 30, 2015), http://www.sfo.gov.uk/2015/11/30/
[115] See Statement of Facts Prepared in accordance with Paragraph 5(1) of Schedule 17 to the Crime and Courts Act 2013 ¶¶ 1, 191, 209 (17 January 2017), http://www.sfo.gov.uk/cases/rolls-royce-plc/

Further clarification of 'failure' and 'failure to prevent' will emerge in due course through judicial guidance as has always been the case in English law. The guidance does not dwell on explaining the concepts of vicarious liability or strict liability. Rather, it explains that section 7 establishes a novel type of corporate liability for failure to prevent acts of bribery on behalf of a commercial entity[116] and can therefore only be imagined as a new theoretical development in English law. The legislature clearly meant it to be a new form of corporate criminal liability given that neither vicarious nor strict liability is a new form of corporate liability. This is a substantial statutory expansion as it has served as a catalyst for improving anti-bribery internal controls[117] and raises international standards[118] for fighting bribery.[119]

The corporate liability's purpose, function, context, and scope under section 7 are unique. It is a new development in English law to stem institutional bribery culture in the national and international environments. Corporate vicarious liability, corporate strict liability, corporate liability under the identification doctrine, and the new corporate liability for 'failure to prevent' in sections 1 and 2 are four distinctive offences based on different theoretical foundations. However, the new corporate liability for 'failure to prevent' in sections 1 and 2 is philosophically different from the other three in that the offence is deemed to have happened before the actual crime of bribery by the employee. The offence committed by the employee reveals the offence committed by the company in not implementing adequate procedures for the guidance of the workforce.

The offence of 'failure to prevent' is a theoretical departure from vicarious or strict criminal liability and corporate liability based on the identification doctrine; by moving away from the existing theoretical foundations of these offences, the law in subsections 7(1) and (2) imagines a new theoretical basis which is meant to be wider, inclusive and easy to apply to deal with the problems of 'institutional bribery culture' both nationally and internationally, which defines the role and scope of the application of the law. This is about the law's role in dealing with market failure.

CONCLUSION

This article has examined the philosophical foundations of the corporate 'failure to prevent' bribery principle found in the Bribery Act 2010, a new development in English law. It is not vague, as suggested in some American literature, and does not encourage arbitrary interpretation by prosecutors. Rather it broadens the frontiers of corporate liability far beyond its restrictive scope in the common law. This article discusses those issues that have received relatively little attention in the literature and offers four contributions.

First, it establishes that the corporate liability for failure to prevent bribery is not vicarious or strict liability or based on the identification doctrine. Under section 7 of the Act, corporate liability arises from failing to develop 'adequate procedures' to prevent bribery. The standard of corporate liability does not hinge on employees' actions but on the company's failure to establish adequate procedures to prevent bribery. Failure means that a corporation did not perform this duty. However, the individual who executed the crime of bribery may still be prosecuted for bribery under sections 1 and 2.

[116] Ministry of Justice, *The Bribery Act 2010, Guidance*, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/832011/bribery-act-2010-guidance.pdf (accessed on 6 January 2023) (emphasis added); JJ Child, ' The Structure, Coherence and Limits of Inchoate Liability: The New *Ulterior* Element', 34(4) Legal Studies 537 (December 2014).

[117] Lawrence J, Trautman L and Joanna Kimbell, 'Bribery and Corruption: The COSO Framework, FCPA, and U.K. Bribery Act', Florida J Int L, 191, 212 (2018).

[118] Eric Engle, ' I Get by with a Little Help from My Friends? Understanding the UK Anti-Bribery Statute, by Reference to the OECD Convention and the Foreign Corrupt Practices Act', 44 Int L 1173, 1188 (2011).

[119] Susan Rose-Ackerman, 'Corruption: Greed, Culture, and the State', 120 Yale L J Online 1 (2010).

Second, the rule of corporate liability found in section 7 is a clear theoretical and philosophical departure from the existing law of corporate vicarious liability, strict liability, and the identification doctrine and creates a new rule making the application of attribution rules associated with corporate vicarious liability, strict liability and identification doctrine redundant with respect to preventing bribery. Under section 7, corporate liability applies directly to the corporation.

Third, the purposive interpretation of section 7 is that it is intended to discourage bribery in the domestic and international environment and to discourage bribery both domestically and abroad.

Fourth, failure to prevent is an *ex-ante* breach of duty for not having the adequate procedure to prevent bribery. The emphasis is on the *ex-ante* nature of 'failure to prevent' corporate crime. This also suggests that the law is focused on discouraging and eradicating institutional bribery culture. It highlights that the nature of the principle is misunderstood in most of the American literature.