OECD PUBLIC CONSULTATION ON LIABILITY OF LEGAL PERSONS

Submission by U4 Anti-Corruption Resource Centre

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Abbreviations and Acronyms

CCO	Corporate Compliance Officer
CEO	Chief Executive Officer
DOJ	Department of Justice
FCA	Financial Conduct Authority
FCPA	Foreign and Corrupt Practices Act
LP	Legal Person
LPP	Legal Professional Privilege
NGO	Non-Governmental Organisation
OECD	Organisation for Economic Cooperation and Development
P2P	Private to Private Compliance
SEC	Securities and Exchange Commission
SFO	Serious Fraud Office
UK	United Kingdom
UKBA	United Kingdom Bribery Act
US	United States
USA	United States of America

This submission is made by the U4 Anti-Corruption Resource Centre as part of the OECD Public Consultation Process on Legal Person Liability.

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The views presented in this submission are those of U4 and do not necessarily represent those of its partner agencies. This submission is not for publication or public circulation.

The U4 Anti-Corruption Resource Centre

The U4 Anti-Corruption Resource Centre at Chr. Michelsen Institute was established in 2002 by four development agencies to meet specific capacity needs in the field of anti-corruption. U4's mission is to be a leading provider of high-quality research, information, and learning opportunities to help development practitioners more effectively support anti-corruption efforts in the developing world. Currently, eight countries support U4: Australia, Denmark, Finland, Germany, Norway, Sweden, Switzerland and the United Kingdom.

1. Introduction

This contribution has been compiled by U4 in regard to a public consultation process on Legal Person Liability initiated by the Organisation for Economic Cooperation and Development.

Given the mission of U4, the specific perspectives to corporate liability of this submission refer to corruption and *the function of corporate liability as part of a wider governance system, including the role of regulation and corporate governance to achieve the ultimate goal of corporate compliance with the law*. The idea is to present a holistic view where the various parts of that governance system strengthen the ability of achieving corporate compliance, regardless of the motivations for corporate non-compliance, and with strong consideration of the cost-effectiveness of the means to achieve such corporate compliance. This view is believed to better correspond to governance realities in weaker governance contexts, as well as meet concerns regarding the effectiveness of relying on achieving compliance through general deterrence from corporate criminal liability.

The submission focuses on the US Foreign Corrupt Practices Act and the UK Bribery Act as these are the most commonly enforced pieces of legislation in regard to liability for corporate crime involving corruption-related acts, especially bribery. The submission presents some of the shortcomings of these legal frameworks before going on to make proposals for a more just and effective corporate liability regime that promotes the corporate compliance by stressing the a strategic and cost-effective use of resources to achieve improved corporate responsiveness to risks and regulation.

The paper is arranged as follows: Section 2 looks at the issue of whose acts are criminalized under current legal person or corporate liability regimes. The basis for liability is analyzed from three perspectives: the directing mind doctrine, vicarious liability and strict liability. The pros and cons of these are discussed, where it is noted that *the choice between various models has consequences for corporate responsiveness to non-compliance*. Section 3 then looks at what we consider is an often overlooked aspect of corporate liability regimes – the reliance on so called gatekeeper professions such as lawyers and auditors for the effectiveness of corporate governance to achieve corporate compliance, and the assumption that professional integrity is strong enough to resist the undermining influence of conflicting interests. In section 4 we propose the factors that an effective sanctions strategy should represent; a multitude of sanctions that enables proportionate and cost-effective responses to non-compliance, and effectiveness in achieving corporate norm-change to align with behavioral demands for corporate compliance. Section 5 concludes by noting the principles that should be borne in mind to ensure **a modern, just and effective corporate liability regime seen from the perspective**

of a wider governance system that influence corporate behavior, while also having relevance beyond developed country contexts.

2. Corporate liability for corruption – whose acts and what conditions?

This section looks at the three bases of corporate liability for corruption-related offences such as bribery under the current regulatory framework. The framework considered here is the US Foreign Corrupt Practices Act (FCPA) of 1977, the UK Bribery Act (UKBA) of 2010 and Common Law. The focus is on the US and UK because the enforcement under these legal systems is generally perceived to be relatively effective and to represent the most advanced legislation against corruption in the American and European continents respectively. While we recognise differences in legal systems as significant, we believe there are aspects of the construction of corporate liability from these countries that are relevant beyond these jurisdictions and their legal traditions.

Based on these three frameworks, three types of liability are identifiable: the "*directing mind" or identification doctrine*, *vicarious liability* and *strict liability*. The table below provides a summary of the basis for each type of liability and a very brief analysis of its corresponding pros and cons. A more detailed discussed ensues, with a view to proposing principles that should be taken into account in subsequent amendments or new enactments of regimes on corporate liability. The main argument is that **corporate liability regimes should balance the allocation of corporate and individual responsibility for crime in a manner that cost-effectively promotes corporate compliance with applicable laws. This stresses preventive effectiveness by using cost-effective regulation to elicit corporate responses in favour of the adherence to the rule of law rather than deterrence through retributive justice.**

TYPE OF LIABILITY	**LEGAL BASIS**	**WHOSE ACTS ARE CRIMINALISED?**	**ANALYSIS**
«Directing Mind» / Identification Doctrine	Case Law / Common Law UKBA s.14	Directors and managers who represent the directing mind and will of the company, and control what it does. Senior officers of the body corporate	The directing mind emphasizes that companies do not have "minds" as such, but act through their directors. Thus, the directing mind may not adequately address who actually wields power in a company unless it is determined through a material test. Moreover, the doctrine may create perverse incentives for those qualified as representing the directing mind and will of the company, especially those in larger companies, to evade liability by decentralizing decision-making to middle management or limiting access to information that could be incriminating.

Vicarious Liability / *Respondeat Superior* *"Let the Master Answer."*	Case Law / Common Law FCPA SOX s. 802 UKBA s. 8	The Corporation is liable for the acts of its officers, directors, employees or agents acting within their employment and for the benefit of the corporation. There is no requirement as to seniority of officers.	Ensures that that top management takes responsibility for risk management, as the company will be held liable even if the management itself was not involved in wrong-doing. However, this has not precluded the DOJ and the SEC from enforcing the law against individual employees as well, which could create the appearance of scapegoating especially when those targeted are mid-level, and not top-level managers, hence undermining the potential responsive effect of deterrence on corporate governance.
Strict Liability	UKBA s.7	The corporation is liable for failure to prevent crime (here: bribery) by associated persons. These include employees, subsidiaries, sub-contractors or agents. The offence is committed regardless of whether such crime was sanctioned or even known by the relevant managerial staff of the organisation.	The UK Bribery Act establishes only partial strict liability, since it is a defence for the company to argue that it had adequate procedures in place to prevent associated persons from undertaking criminal conduct. Ideally, strict liability would imply that there is no defence available. The recent enforcement action against Standard bank shows that a company can still be held liable if it has procedures in place but fails to ensure that a sister company or other intermediary (associated persons) has similar procedures. It should also be noted that corporate liability does not preclude individual lability.

2.1 The Directing Mind Doctrine

The *"Directing Mind"* doctrine, also known as the *Identification Doctrine* or the *Alter Ego Principle* is a creation of Common Law, originating in the UK and applied in other Common Law jurisdictions such as Canada and Australia. Common Law is judge-made law, insofar as it represents the law of the Courts as expressed in judicial decisions. The grounds for deciding cases are in precedents provided by past decisions, as contrasted to the civil law system, which is based on statutes and prescribed texts. The discussion aims to illustrate the problems of relying on this doctrine to determine liability for corruption-related offences such as bribery, to analyse whether recent legislative developments sufficiently address these concerns, and to suggest a more appropriate response.

The historical origin of the directing mind appears to be England's reluctance to accept the idea of corporate criminal liability. Since the case of *Salomon v Salomon*[1] it had been an established principle of Company Law that a company, upon incorporation acquires an identity distinct and separate from that of its shareholders, with separate rights and liabilities. In fact, the shareholders themselves can legally transact with the company as distinct persons. Corporations were considered "legal fictions, artificial entities that could do no more than what they were legally empowered to do." This is also known as the "ultra vires" theory or doctrine. It seemed incongruous to hold corporations liable for criminal acts because corporations, as legal fictions, lacked souls; they could not have *mens rea* (a guilty mind) and could not be regarded as blameworthy or punishable. This was expressed in the maxims *societas delinquere non potest* (a legal entity cannot be blameworthy) and *nulla poena sine culpa* (no punishment without fault). Thus they could not be held criminally liable although their members could.

Moreover, since incorporation was a privilege granted by the Crown, there were initially very few corporations and their influence was minimal. However, as corporations became more common and influential, the need to control corporate misconduct became pressing. Corporations became involved in bribery and stock manipulation, and hence common law evolved to tackle these issues.

The first significant court case on attribution of corporate responsibility was *Lennard's Carrying Co v Asiatic Petroleum.*[2] A ship owned by Lennard's Carrying Company was transporting goods from Novorossiysk to the Asiatic Petroleum Company, a joint venture of the Shell and Royal Dutch oil companies. The ship sank and the cargo was lost. The judge found that the director, Mr. Lennard, did know or should have known about defects in the ship, which led its boiler to catch fire, and ultimately sink the ship. Section 502 of the Merchant Shipping Act of 1894, stated that a ship owner would not be liable for losses if an event happened without 'actual fault or privity. Asiatic Petroleum Co Ltd sued Mr. Lennard's company for negligence under the Act. The issue for determination by the Court was whether the guilty acts of a director could https://en.wikipedia.org/wiki/Negligence

The House of Lords held that liability could be imposed on a corporation for the acts of the directors because there is a rebuttable presumption that the directors are the controlling minds of the company. Here Mr Lennard did not rebut the presumption. The Judge explained the "directing mind" principle of corporate liability:

> ...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….

The directing mind doctrine was, over the years, applied to a variety of circumstances, and was later modified by the UK House of Lords in *H.L. Bolton Co. Ltd. v. T.J. Graham & Sons.* In this instance, the Court emphasised that the state of mind of the managers is that of the company. A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with

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[1] [1897] AC 22,

[2] [1915] AC 705].

directions from the centre. Some of the staff in a company can be understood as agents who simply act on the orders of management or directors who are principals and represent the mind or will of the company, controlling how its resources are used to achieve its goals. The state of mind of these managers is the state of mind of the company and is treated by the law as such.

In *Tesco Supermarkets v. Nattrass*,[3] the House of Lords further approved this approach, but in this instance decided that the acts of a branch manager were not the acts of the company. Tesco was offering a discount on washing powder which was advertised on posters displayed in its stores. When the lower priced product was out of stock, the store began to replace it with the regularly priced stock. The manager failed to take the signs down and a customer was charged at the higher price. The company was charged under the Trade Description Act 1968 for falsely advertising the price of washing powder. In its defence Tesco argued that the company had taken all reasonable precautions and practiced due diligence, and that the conduct of the manager could not infer liability upon the corporation. The House of Lords accepted the defence and found that the manager was not a part of the “directing mind” of the corporation and therefore, his conduct was not attributable to the corporation but to the store manager as an individual. The Court emphasised that in order for liability to attach to the actions of a person, it must be the case that the person who acts is not speaking or acting for the company. The company was acquitted.

The UKBA has retained elements of the “directing mind” doctrine, and given the fact that in common law traditions, statutes are interpreted with additional reference to case law, the Act may not solve the problem entirely. Section 14 emphasises that the offence should be “proved to have been committed with the consent or connivance of a senior officer of the body corporate or Scottish partnership, or person purporting to act in such a capacity.” The Act does not define who is a senior officer, and it is unclear whether it will still be necessary for prosecutors to prove fault in the boardrooms, or whether the fault of middle managers will suffice.[4] Any further guidance for how to determine the qualification as a manager has not been provided by the UK Serious Fraud Office. It has therefore been opined that the Directing Mind test in *Tesco Supermarkets Ltd v. Natrass* will continue to apply, which qualifies strict corporate liability for acts that represent the "directing mind".

The Tesco case shows that various problems can arise with the "directing mind" doctrine. Firstly, it is not clear who qualifies to be a "directing mind", given the diversity of the size and structure of companies today. The Board of Directors could be a rubber-stamp in relation to the CEO, or the CEO can have limited influence on the "corporate mind" in relation to the Board of Directors. For instance, the controlling function of a Board of Directors may be perceived as a fiction in many small and medium enterprises (SMEs). Also, junior executives may wield more power behind the scenes than more senior officers, beyond what is implied in their job titles or contracts of employment. There may be funders, consultants, and even friends and lovers who exert dominant influence over a company.[5] In addition, the "directing mind" approach does not take into account the fact that companies have differing structures. Some have horizontal decision-making, where many individuals across the company have significant authority with respect to a particular sphere of operation. Others have more vertical arrangements, but even then, few individuals, including the CEO, in reality wield any absolute authority that can be said to represent a clearly delineated corporate "directing mind". **The dilemma is then how to determine who qualifies as representing the "directing mind". Is**

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[3] [1971] UKHL 1

[4] Archibald, T, Ken Jull & Kent Roach (2013) “Critical Developments in Corporate Criminal Liability: Senior Officers, Wilful Blindness, and Agents in Foreign Jurisdictions.” Criminal Law Quarterly, Vol. 60: 92- 127.

[5] Gobert, J and M. Punch (2003) *Rethinking Corporate Crime*, Cambridge University Press

it determined by reference to formal roles, titles and job descriptions in contractual relationships or is there a material test to determine actual influence that can be understood as the "directing mind" regardless of formally discernible roles?

Secondly, **the "directing mind" doctrine unfairly prejudices smaller companies whereas it allows large and diffuse companies, where it is harder to attribute the "directing mind" and will, to escape criminal liability.**[6] This is because it establishes a perverse incentive to structure corporations in a decentralised manner that obscures the "directing mind". The problem with that is the risk that top-level management supports, or has no incentive to avoid, a corporate culture of non-compliant risk taking while knowing that any criminal accountability will rest on the decentralised employees.[7]

As the *Tesco v. Nattrass* case shows, where a firm has numerous branches, it is unrealistic to expect that a handful of executives at central headquarters would be able to keep a tab on what is happening in all the branches. Yet, the discretion given to local managers in the implementation of company policies rather than their formulation appears insufficient to qualify them as part of the "directing mind", thereby allowing the corporation to evade liability for wrong-doing.[8] Furthermore, those qualified as representing the "directing mind" and will of a company could limit access to potentially incriminating information in order to prevent the company from being held liable. This could then lead to scapegoating mid-level or lower-level officers as "rogues" acting in their own interests while in fact being heavily influenced by the corporate culture established and controlled by the "directing mind" and will of the corporation.

Accordingly, when considering future policies for corporate criminal liability, the weaknesses and risks of the "directing mind" must be considered, in particular as regards its capacity to effectively influence corporate behaviour towards compliance. **The risk for unfair exculpation of corporations with strong control over the factors that influence employee/management behaviour, while scapegoating individuals under their influence, makes the "directing mind" doctrine less than optimal.**

2.2 Vicarious Liability

Vicarious liability is the inverse of the directing mind doctrine. It is also referred to as the *respondeat superior* (let the master answer) doctrine, and is based on the theory of vicarious responsibility which imputes the acts of the agent to the principal. Here, the corporation is liable for the criminal act of its agent if the agent, *who is himself culpable,* acted "within the scope of his employment and with the intent to benefit the corporation."[9] *There need not be an express instruction or authority to engage in the particular conduct giving rise to liability*. There may have been a violation of express instructions from the corporation but it is still sufficient if the conduct falls *within the area of operation that has been assigned to the individual and also, has or is intended to have some benefits for the corporation*. This is the approach taken by the US

[6] Lim, E. (2013) "A Critique of Corporate Attribution: "Directing Mind and Will" and Corporate Objectives," *Journal of Business Law*, Vol. 3, p. 333-353

[7] Ferran, E (2011). "Corporate Attribution and the Directing Mind and Will." 127 *L.Q.R.* 239- 259. Quoting

[8] Above.

[9] Reiner H. Kraakman (1999) "Vicarious and Corporate Civil Liability," Chapter 5, G. de Geest (ed) *Encyclopaedia of Law and Economics*. Edward Elgar Publishers.

New York Central & Hudson River R.R. Co. v. United States, 212 U.S. 481, 494 (1909). 13 Id.

Foreign Corrupt Practices Act,[10] which creates corporate vicarious criminal and civil liability for the bribery of foreign public officials.

One of the pitfalls of vicarious liability is that an individual who commits wrongful acts could simultaneously be held individually responsible for them. This could be problematic, as it gives the appearance of scapegoating. It is important that legal systems establish a balance between the liability of individual employees of corporations and the corporations themselves. From the perspective of achieving effective corporate crime prevention, holding corporations responsible is important due to the strong influence of corporate culture or ethos on individual behaviour of staff. That culture is under the control of corporate management. To hold individuals solely liable for misconduct would therefore miss the opportunity to use corporate liability as a means to influence corporate culture change rather than scapegoating replaceable staff.[11]

Anand et al,[12] and Hess and Ford's analyses show how individual employees justify and rationalise corrupt behaviour in corporate settings, revealing that individuals often consider that their criminal acts are good for the company, and will even benefit the citizens of the country where bribes are being paid.[13] They draw attention to how informal norms within corporations, can circumvent efforts to promote ethical business practices, in spite of formal structure, policies and processes. For instance, an organisation's incentive system may influence attitudes towards corruption, by rewarding those who win contracts, regardless of the means used, while punishing those who cannot match the results of such corrupt practices. This signals to employees that the end justifies the means, although never explicitly expressed. Eventually, acts that seem unethical to outsiders may appear banal and day-to-day to those within the organisation.

Thus, it may be that there evolves a "mindset" that does not reflect the view of any one individual or individuals in the company, but is indeed that of the company, that is to say, companies can have their own distinct personality that is unrelated to and independent of individuals in the company.[14] Supported and rewarded by corporate culture, individual acts carried out in the pursuit of business create a normative divide between insiders and outsiders.

Moreover, some corporate cultures promote an atmosphere where employees, in seeking to stand out, take the initiative and act upon orders before they are given. If the culture also promotes obedience without question, employees may intuit what management would want based on objectives they have been asked to accomplish but do not ask too many questions. Such "assumed orders" may make employees likely to engage in unethical behaviour.[15] Employees engage in criminal behaviour, not necessarily after overt or explicit calculation, but through a complex, subtle and implicit process that has evolved over time.

An example of why it could be problematic to hold individuals accountable for crimes committed during the course of their employment can be drawn from the conviction of

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[10] 15 U.S.C. §§ 78dd-1, et seq

[11] Richman, D.C. (2014) "Corporate headhunting," Columbia Law School Public Law and Legal Theory Working Paper Group, Paper Number 14-392.

[12] Anand, V., Ashforth, B. E., & Joshi, M. (2004). "Business as usual: The acceptance and perpetuation of corruption in organizations." *The Academy of Management Executive*, *18*(2), 39-53.

[13] Hess, D. & C. Ford (2008) "Corporate Corruption and Reform Undertakings: A New Approach to an Old Problem," *Cornell International Law Journal* 41(2): Article 3. Available at http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1724&context=cilj

[14] Gobert,J and M. Punch (2003) *Rethinking Corporate Crime*, Cambridge University Press.

[15] As above.

individual employees in the recent Libor scandal. Some of the convicted traders have raised concerns about scapegoating, maintaining that senior management (and even the Bank of England) were aware of their actions and it is therefore unfair to let them take the fall for the banks' misconduct. Moreover, it is evident that the Libor scandal arose out of a banking culture that prioritises profit and rewards employees who rake in profits through risky behaviour incentivised by massive bonuses. In issuing one such sentence against Tom Hayes, the Judge explicitly stated that he was sending a message to the wider banking industry about the damage caused by market abuse, which undermines the trust on which the financial system is based.[16] This made it appear as though Mr. Hayes was made a scapegoat for the actions of his bank and indeed of the entire banking sector.

However, as evident from corporate behaviour leading up to repeated market crashes over the years, it is highly unlikely that individual corporate accountability will help overcome the prisoner´s dilemma that corporations face, i.e. the application of rational self-interest in the marketplace leads to inferior and socially irrational outcomes. The only way to coordinate corporate behaviour to achieve the socially desirable outcome is to enforce compliance with a normative framework devised to achieve the socially desirable outcome.[17] But if the enforcement of corporate criminal law does not have effect on rationally self-interested corporate behaviour, i.e. the corporate culture Tom Hayes was influenced by, why should we expect corporations to become compliant and the socially desirable outcome achieved?

In order to be effective, a corporate liability regime should avoid the appearances of partiality towards corporations and hence unequal treatment of persons and legal entities before the law. If a company's structures and ethos promote criminality, it makes sense to go after the company as such –with responsive effects through corporate governance- rather than indirectly via establishing individual culpability. However, the risk with relying solely on impersonal corporate liability is of course that corporate sanctions are ineffective in eliciting a sufficient corporate response to non-compliance by simply replacing management without addressing the underlying problem. A move away from vicarious, imputed or derivative liability for corporations, where corporate liability is linked to the crime of an individual, and towards a regime where corporate blameworthiness has stronger emphasis appears the more appropriate approach. The fundamental underlying assumption in corporate law is that any legal persons have the ability to control and manage risk in its activities. **Thus, a balanced regime has merit that emphasises the strong behavioural influence of corporate management through its many carrots and sticks, while also ensuring general deterrence at individual level where it has the greatest effect on achieving corporate compliance.**

2.3 Strict Liability

Strict liability offences are those where the commission of the act or omission is by itself sufficient to incur criminal liability, regardless of the actor's state of mind. This standard of liability is exemplified in the UKBA, section 7 of which creates an offence of "failure to prevent bribery." It does not matter that top management had no knowledge of the bribery. Therefore strict liability may lead to a more effective compliance system by doing away with the

[16] See judgment in *R v. Tom Alexander William Hayes* [2015] EWCA Crim 1944. See also sentencing remarks by Justice Cooke, at https://www.judiciary.gov.uk/wp-content/uploads/2015/08/r-v-tom-hayes-sentencing1.pdfSouthwark Crown Court
[17] Cassidy, J. (2010) *How Markets Fail.* London: Penguin Books, pp. 139-165, 335-361.

complexities posed by the directing mind and will test, especially given the difficulties of determining whose mind in a corporation is the guilty one.

Section 7 has recently been enforced in a case, *Serious Fraud Office (SFO) v. Standard Bank PLC*[18] against Standard Bank, which acted together with its Tanzanian sister company, Stanbic Bank Tanzania Ltd (Stanbic), on a joint mandate in relation to a sovereign note placement for the Government of Tanzania. The charge was based on payments made to a local partner that turned out to be the conduit for bribery of government officials. The payments were made by two key individuals at Stanbic, and given their seniority, Stanbic itself. However, since both companies stood to benefit from the transaction and were acting jointly, the employees of Stanbic were deemed to be "associated persons" of Standard Bank performing services on its behalf and for its benefit. Standard Bank was therefore liable for the offence of "failure to prevent bribery" under section 7 of the Act. It could not successfully plead adequate procedures to prevent bribery as a defence, since it had relied on Stanbic to carry out the necessary compliance checks. That reliance, and the consequent failure to spot the red-flags in the transaction and ask its own questions led to the procedures being deemed inadequate.[19]

Therefore, the "directing mind" and its problems are significantly off-set by the strict liability offence of "failure to prevent bribery" in section 7 of the UK Bribery Act. Strict liability can reduce the perverse incentives that are an externality of the "directing mind" approach. It can also minimize the opportunities for scape-goating individuals for corporate misbehaviour.

Despite the developments in strengthening corporate liability through strict liability offences, *there is a discernible concomitant trend towards holding individuals responsible for corporate crime*, especially those who are regarded as being responsible for ensuring that "adequate procedures" to prevent wrong doing are in place. The emphasis on effective compliance systems under the current corporate regulatory regime has led to the proliferation of Compliance Officers, who have responsibility for ensuring that companies have in place "adequate procedures" to prevent bribery.

Corporate Compliance Officers (CCOs) may be held personally liable for wrongdoing by the company, as recently happened with the recent sanctions by the UK Financial Conduct Authority (FCA) against Sonali Bank (UK) Limited and its former compliance officer Steven Smith after years of anti-money laundering system failures. The FCA noted that the CCO "was unsupported and overworked" but nonetheless fined him, as well as the company, and banned him from other compliance oversight functions at regulated firms. The FCA pointed to a number of failings, saying; he failed to put in place an appropriate anti-money laundering arrangement; failed to identify serious weaknesses in operational controls; there was a lack of appropriate knowledge among staff members; he had reassured the board of directors and senior management that controls were working when they were not, and he had failed to report the internal auditors' concerns and results of internal testing. Furthermore, he failed to impress upon senior management the need for more resources in the anti-money laundering reporting function and to recruit more staff in a timely fashion.

The above instance shows that the on-going difficulties faced by regulatory and enforcement agencies in balancing corporate and individual fault when allocating responsibility for wrongdoing by corporations. Although formal responsibility may be clear, actual influence over corporate activities may rest elsewhere. *Without consideration of the location of actual*

[18] Case No: U20150854, at https://www.judiciary.gov.uk/wp-content/uploads/2015/11/sfo-v-standard-bank_Preliminary_1.pdf
[19] Ashurst LLP (2016) «Bribery and corruption: what now for 2016?»

influence on corporate compliance, the general deterrent effect where it has the greatest effect on corporate compliance may be lost.

All in all, the existing standards for corporate liability as contained in the directing mind, vicarious liability and strict liability, whether based on case law or statute, have various shortcomings that limit their effectiveness.

As previously pointed out, the goal of a corporate liability regime should be just and effective corporate liability regime seen from the perspective of a wider governance system that effectively influence corporate behavior towards compliance. The stability and efficiency of the economic and financial system can arguably be perceived as a public good. Its protection is not well served by allocating responsibility for corporate criminal acts solely on individuals, while leaving out the influence of corporations on criminal acts on behalf of the individual. An appropriate balance between the two should be the main goal.

The next section looks at importance of the role of gatekeepers in relation to corporate liability regimes. These are often overlooked despite their centrality to corporate governance.

3. Corporate Governance and Gatekeepers

From the perspective of ensuring legal compliance and performance, the corporate governance system is the most important means to control corporate activities. Corporate governance relies significantly on various professional agents that provide information and advice to ensure the reliability and effectiveness of corporate accountability mechanisms. Dubbed "gatekeepers," these professional agents include Auditors, Lawyers, Securities' Analysts, Investment Bankers and Credit-rating agencies.[20] The current corporate governance architecture presumes professional integrity to trump conflicts of interest inherent in professional-client relationships as the gatekeepers depend on their clients to satisfy economic interests. The gatekeeper failure arises when the professional integrity is compromised by the fact that professionals cannot bite the hand that feeds them.

The current framework presumes professional integrity and ignores the risk of bias caused by conflicts of interest between professionals and corporations. The key problem here is that the party paying the gatekeeper will be the party that the gatekeeper is expected to monitor – auditors, lawyers and investment bankers are typically paid by the corporation that hires them. Indeed, it has been stated that "all boards of directors are prisoners of their gatekeepers," and "no board of directors – no matter how able and well intentioned its members, can outperform its professional advisors."[21]

A leak from the Law Firm Mossack Fonseca in Panama, popularly referred to as the Panama Papers revealed how lawyers assisted companies in hiding illicit funds in secrecy jurisdictions.[22] The gatekeepers that ideally have a responsibility to report illicit activities, often abuse their positions to hide the commission or proceeds of crime under the veil of professional privilege. The importance of this issue was recently illustrated in *R.(on the application of*

[20] Coffee, John Jr. (2006) *Gatekeepers: The Professions and Corporate Governance,* Oxford University Press.
[21] Coffee, above, at p. 1.
[22] International Consortium of Investigative Journalists (2016), The Panama Papers at https://panamapapers.icij.org/

MacKenzie) v. Director of the SFO.[23] Mr. McKenzie was arrested on suspicion of conspiracy to commit bribery in connection with a contract for MIB Facades Ltd, a firm of which Mr McKenzie was a director and major shareholder. At his arrest, a number of electronic devices was seized under the Police and Criminal Evidence Act. He challenged the legality of SFO's right to access electronic devices containing privileged information in a Court action. The judge decided that the SFO had a duty to devise and operate a system to isolate potential legal professional privilege (LPP) material from bulk material lawfully in its possession, and to ensure that such material would not be read by members of the investigative team before review by an independent lawyer to establish whether privilege exists. The McKenzie case therefore shows the importance of considering the role of lawyers in corporate liability and governance, especially given the possibility of obscuring evidence of crime by invoking blanket claims of lawyer-client confidentiality, and to abuse it as a central part of their business models.

The Arthur Andersen collapse was another quintessential example of gatekeeper failure. Throughout the 1990s, Andersen was involved in several accounting scandals, including WorldCom,[24] Sunbeam, Enron and others.[25] The Andersen case is a typical example of "not biting the hand that feeds you," by failing to detect financial impropriety and fraud and was in effect, an "indifferent watchdog who conducted largely perfunctory investigations."[26]

Another more recent example of gatekeeper failure was provided by the credit ratings agencies in the last global financial crisis. Credit rating agencies came under scrutiny following the mortgage crisis for giving investment-grade, "money safe" ratings to securitized mortgages (in the form of securities known as mortgage-backed securities (MBS and collateralized debt obligations (CDO)) based on "non-prime" or subprime mortgages loans.[27] The gatekeeper integrity failure is, in other words, not a small matter seen from the devastating consequences and enormous costs of corporate non-compliance. Interestingly, the ratings agencies remain unreformed.

On the whole, the relative inattention paid to gatekeepers as part of a wider governance system that effectively influences corporate behavior towards compliance is a cause for concern. It is indeed notable that efforts to regulate corporations have not been matched by corresponding efforts to reign in their gatekeepers. Professions such as lawyers and auditors are largely self-regulating through their professional associations, and their misconduct and misbehaviour is largely a civil as opposed to a criminal matter. An effort that seeks to enhance the effectiveness of influencing corporate behaviour towards compliance will need to take a closer look at the systemic weakness represented by the conflict of interest that undermines the reliability of gatekeeper professions. This includes those supposedly independent professional contributions to important market functions.

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[23] [2016] EWHC 102

[24] Although Andersen had internally assigned WorldCom its highest risk rating, the post-mortem report of the Bankruptcy examiner Andersen relied too heavily on WorldCom's internal controls without adequately determining that they were worthy of reliance. Coffee observes that this is how gatekeepers seeking to ingratiate themselves to lucrative clients in order to market other services would be likely to behave. See Coffee, above, at p. 41.

[25] As Above, p. 29.

[26] Coffee, at p. 47

[27] Efing, M and H. Hau, *Corrupted credit ratings: Standard & Poor's lawsuit and the evidence*, 18 June 2013. Vox –CEPR´s Policy Portal.

4. Regulatory Regime and Sanctions Strategy

This section outlines some proposals regarding the elements of an effective compliance system. Firstly, in order to be effective, sanctions should be perceived as just and fair. In this regard, it is important for regulators to bear in mind the proposed "support and sanctions pyramid," which is further explained below.

Secondly, the trend towards self-regulation by corporations is desirable for a number of reasons, one of which is reducing the cost of regulatory efforts on the public purse. The current strategy for dealing with corporate crime under the FCPA and UKBA places significant emphasis on having adequate procedures and compliance systems to prevent wrongdoing. Top management is responsible for managing risks throughout the corporation and ensuring that wrong doing is prevented, detected if it occurs, and immediately reported to enforcement agencies. The fact that corporations can be held liable for the acts of agents, subsidiaries, associated persons and other components of the supply chain has a number of implications for development elucidated below.

Lastly, the approach to sanctions should promote normative change in corporate culture. This is a long-term strategy that is facilitated by the support and sanctions pyramid and the emphasis on compliance systems.

4.1 Cost-effective enforcement through the "support and sanctions" pyramid

As noted above, corporate liability can create negative externalities and fail to address the root cause of non-compliance, which lies in corporate culture. However, to ensure that a corporate liability regime is included in a wider governance system that promotes normative change, there is a need to adopt an effective regulation that economises on resources and provides regulators with more options to respond to various motivations for non-compliance. Such options should start with less severe measures, escalating towards punishment for more egregious conduct and non-responsiveness.

So far, the FCPA has proven to be the most commonly applied piece of legislation for the criminal offence of bribery of foreign public officials. The sanctions most commonly applied under this law are monetary (fines) in combination with requirements on improved compliance systems. The sanctions under the UK Bribery Act are similar. The purpose of the sanctions under both the FCPA and UK Bribery Act is to deter companies from corruption with large fines and demands on implementing comprehensive compliance systems.[28] Accordingly, the current system has been criticised for lack of flexibility and not addressing the root cause of non-compliance.[29]

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[28] Joseph Warin et al, *The British Are Coming!: Britain Changes Its Law on Foreign Bribery and Joins the International Fight Against Corruption*, 46 Texas. International Law Journal. 1 (2010), David Hess & Cristie L Ford, *Corporate Corruption and Reform Undertakings: A New Approach to an Old Problem*, Cornell International Law Journal: Vol. 41: Iss. 2, Article 3 (2008)

[29] Ian Ayers & John Braithwaite, *Responsive regulation: Transcending the regulatory debate*, New York: Oxford University Press (1992); Cristie L Ford, *Towards a New Model for Securities Law Enforcement*, Administrative Law Review, Vol 57, No.3, pp. 757-828 (2005); Thomas W. Dunfee & David Hess, *Getting from*

When sanctions are perceived as not being responsive or addressing the root cause, there is very little prospect of achieving lasting change.[30] A responsive regulation should start with dialogue, to understand the context and also to identify which offences/offenders are considered to be more severe than others. The idea of a responsive regulation is to maximize the potential of self-regulation in order to minimize the costs for the regulation body to achieve wanted response towards compliance. A good example of a more flexible regulatory system is the support and sanctions pyramid.[31]

The idea behind Braithwaite's dual pyramid is that regulators should not rush to law enforcement solutions to problems before considering a range of approaches that support capacity building. It involves celebrating ethical business through publicity supporting it with grants or other means. The idea of a pyramid of supports is not just about celebrating ethical businesses, but is also a way to make it easier to increase demands upon "laggards."[32] A similar development can be seen in the context of trade facilitation regarding the WCO SAFE Framework of Standards, which rewards compliant businesses to benefits such as faster processing of goods through customs and reduced examination rates.[33]

Having a pyramid of supports allows the regulator to solve more and more problems of concern to the regulator, and when that fails, the regulator can start moving up a pyramid sanctions instead. However, sanctions do not start with fines and punishments, but with a dialogue-based, restorative justice approach for securing compliance. This approach assumes that the law is just. Sanctions are escalated reluctantly when dialogue fails, and punitive sanctions utilized only when modest sanctions fail. Thus, a regulator should escalate with a recalcitrant company from persuasion to warning to civil or criminal penalties, and ultimately to corporate capital punishment – permanently revoking the company's license to operate, which effectively amounts to liquidation.[34]

Salbu to the Tipping Point: The Role of Corporate Action within a Portfolio of Anti- Corruption Strategies, 21 Nw. J. Int'l L. & Bus. 471 (2000-2001)

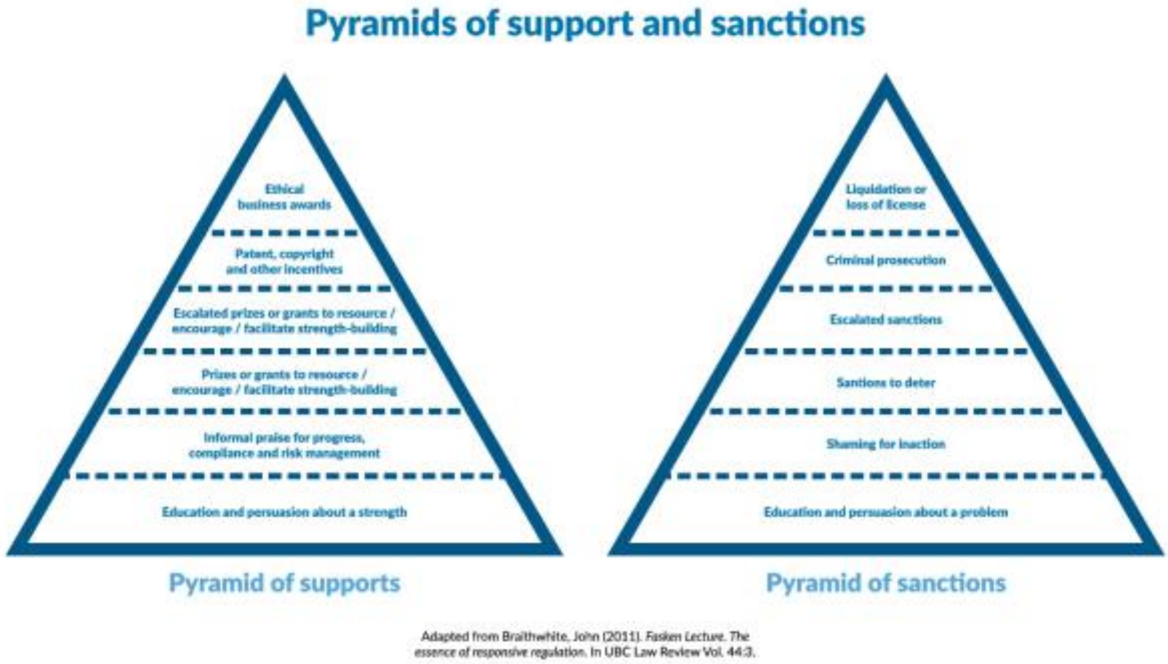
[30] Ayers &Braithwaite, above. See also Mark Schwartz, *Universal moral values for corporate codes of ethics.* Journal of Business Ethics, 59, 27–44 (2005)

[31]Ayers & Braithwaite, above. See also Braithwaite (2010) *The Essence of Responsive Regulation*, Fasken Lecture, University of British Columbia, 21 September 2010.

[32] Brathwaite, J. (2010) *The Essence of Responsive Regulation.* Fasken Lecture at the University of British Columbia. 21 September 2010.

[33] WCO (2015) WCO Safe Framework of Standards.

[34] As above.



The support and sanctions pyramid offers the regulating body with a wide variety of instruments from punishment to persuasion depending on the offence and offender. *Central to the model is the option to choose regulatory response in relation to how a corporate offender responds to a regulation. It recognises that various actors have different motivations for breaches of law.*[35]

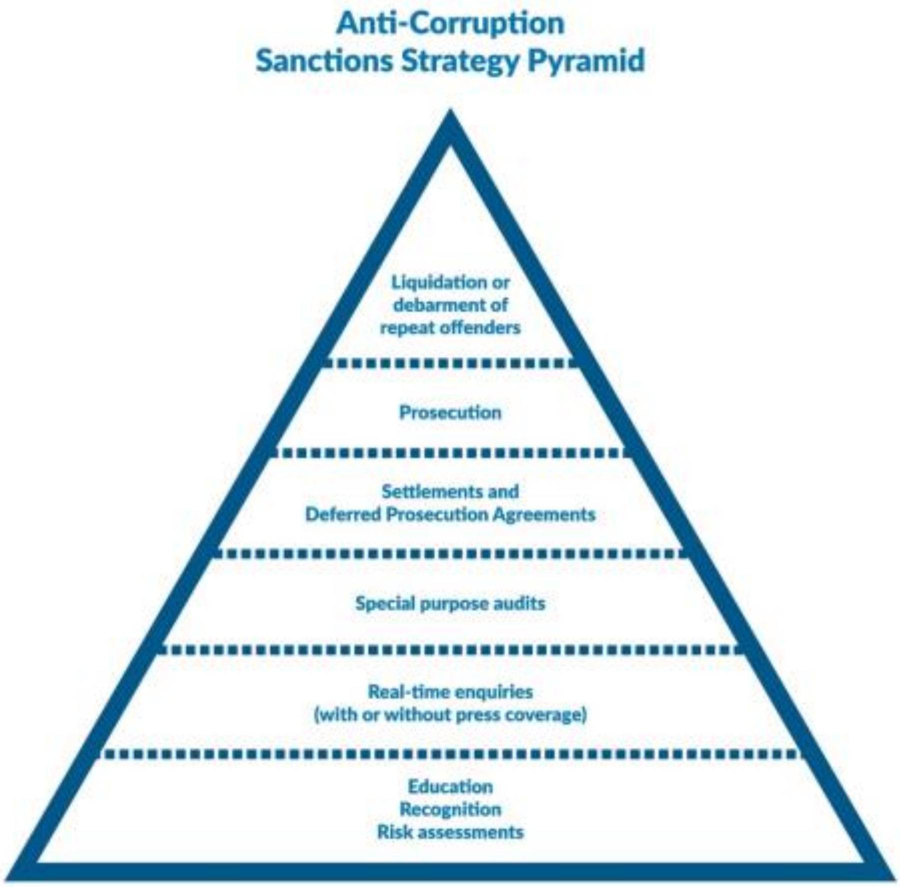
The pyramid below, which focuses only on sanctions, shows how an escalating response can be used in relation to corporate liability for corruption-related crimes. It starts at the bottom with an emphasis on education of corporations on risk and specially recognising those who make concerted efforts to assess and minimise risk. Enforcers can then make enquiries from particular companies if they suspect wrongdoing, followed by special purpose audit if the response to the enquiry shows that such an audit is necessary. If the audit uncovers evidence of wrongdoing, the enforcer may use settlements and deferred prosecution agreements depending on the level of cooperation exhibited by the corporations and the efficacy of their previous efforts to have adequate risk management procedures in place. Companies that do not cooperate would then be prosecuted. At the very top of the pyramid, it should be possible for repeat offenders to be debarred from conducting their business and thereby in effect liquidated.

From an efficiency perspective, it is simply not possible for any agency to conduct thorough assessment of all companies it regulates. It is important to identify and classify which companies are most at risk or the so-called worst actors according to the sanction pyramid. The Australian Tax Office (ATO) applied this approach to the issue of transfer pricing where they assessed the companies' procedures and identified those who lacked adequate procedures for transfer pricing. By focusing on these companies and allowing companies that had adequate procedures in place to operate on a more self-reporting standard, the ATO were able to considerably increase efficiency in tax collection – they were able to collect a billion dollars for every million spent on enforcement by applying a sanction pyramid structure.[36] This example

[35]As above.

[36] John Braithwaite, *Meta Risk Management and Responsive Regulation for Tax System Integrity*, for Law & Policy, Vol 25 No.1 (2003)

shows the importance of maximizing the efficiency of public spending, especially in developing country contexts.



Adapted from Braithwaite, John (2005), Markets in Vice, Markets in Virtue, Oxford University Press, pp. 77–83

The pyramid is particularly relevant from a development perspective, as developing countries can ill afford to adopt lengthy and human resource intensive investigative processes to address corporate wrongdoing. Hence, there is a need to develop sanctions that are appropriate to the offence and more importantly, differentiate between offenders so that adequate sanctions are chosen in a cost-effective manner depending on response and severity of breach of law. An effective regulation should be cost-effective and not place unnecessary burdens on organisations or the public budget.[37] The ultimate purpose of sanctions should not just be to punish but to achieve normative change within an organisation to avoid/prevent future offences. The underlying principle of a cost-effective regulatory system is to reward reform and punish refusal to reform.[38]

[37] Brent Fisse & John Braithwaite, *Corporations, Crime and Accountability. 134 – 138,* Cambridge University Press (1993)

[38] John Braithwaite, *Responsive Regulation and Developing Economies*, World Development Vol. 34, No.5 pp. 884-898 (2006).

4.2 The potential benefits of expansive corporate liability for corporate behavior in weak governance contexts

The emphasis on compliance systems and adequate procedures denotes an appropriate move towards corporate self-regulation. Companies are increasingly accountable not only for their own compliance, but also that of their supply and distribution chains. The current regulatory system implies that companies must seek corresponding contractual assurances from multiple third-party-partners, especially in view of the fact that they can be held liable for the acts of "associated persons" under the UK Bribery Act or "agents" under the FCPA.[39] This form of Private to Private (P2P)[40] may have significant potential to influence business practices in developing countries characterised as "corrupt."

A resource guide by the Department of Justice (DOJ) and the Securities Exchange Commission (SEC) provides that as part of risk-based due diligence, companies should understand the qualifications and associations of its third party partners, including its business reputation, and relationship, if any, with foreign officials and that the degree of scrutiny should increase as red flags surface. Further, companies should understand the business rationale for including the third party in the transaction and the contract should specifically describe the services to be performed. Companies are also required to undertake third party monitoring, including periodically renewing due diligence, exercising audit rights, providing periodic training and requesting annual compliance certifications by the third party.

Such guidelines for transacting with third parties hold significant potential for promoting ethical business practices in governance contexts with weak rule of law, many of which are also considered "very corrupt". If UK and US companies indeed extend their due diligence in the manner recommended, there is an opportunity for triggering norm change and institutional change in different sectors where such companies invest. Promoting awareness of the FCPA and the UK Bribery Act, and the premium placed on doing business only with "clean" third parties, could go a long way in in creating a culture of transparency and accountability in the private sector that could in turn, have positive ripple effects in the economy and the country as a whole. For instance, the Standard Bank case referred to above involved an intermediary - a Tanzanian consultancy firm owned by Tanzania government officials, which served as the conduit for bribes. The UK SFO enforcement action against the bank could therefore initiate more ethical and transparent banking practices in Standard Bank Tanzania that could in turn influence the entire banking sector, the private sector and possibly further.

The role of MNCs as agents of positive change in developing countries has been recognised elsewhere. Wrage and Wrage argue that MNCs are moral entrepreneurs in the global prohibition regime against corruption.[41] Similarly, Kwok and Tadesse show that MNCs can be agents of change for host-country institutions, and that foreign direct investment generates positive spill-over effects on the institutional environment of host-countries.[42] Therefore the ongoing emphasis on compliance systems should be regarded as a tool that has significant potential to change corporate norms in the global economy as a whole.

[39] Killingsworth, S. (2014) *The privatisation of supply chain compliance* (part 1), FCPA blog, 223 June 2014.
[40] As above.
[41] Wrage, S., & Wrage, A. (2005). Multinational enterprises as "moral entrepreneurs" in a global prohibition regime against corruption. *International Studies Perspectives*, *6*(3), 316-324.
[42] Kwok, C & S. Tadesse (2006) *The MNC as an Agent of Change for Host-Country Institutions: FDI and Corruption*. William Davidson Institute, University of Michigan, Working Paper No. 882.

4.3 Promoting normative change in corporate culture

As noted, behaviour within organisations is not just dependent on policies and procedures but more importantly norms. Norms establish informal rules and can explicitly or implicitly encourage staff to break written policies/procedures.[43] As pointed out above, informal norms can develop in relation to formal norms as in the examples above; the Board of Directors and senior management can cite lack of knowledge or blame individual scapegoats to avoid sanctions.[44]

A responsive regulatory system that is effective in achieving compliance should seek to allocate responsibility for corporate crime to all responsible – be it individuals, gatekeepers, subsidiaries or industry associations.[45] This can be overcome by **emphasizing the assumption of knowledge and/or a failure to prevent**, which is provided for under the UK Bribery Act. The presumption of knowledge at top-level management should be reflected in corporate liability through a stronger emphasis on an integrated risk management system, that is, one that integrates risk analysis into the core business of the company.[46] Integrating risk analysis would require the senior management and the Board of Directors to make informed decisions with full knowledge of the risk situation.[47] This would in turn ensure that senior management are part of the risk analysis, thereby establishing knowledge of corporate risks as a fact, and the responsibility to act to effectively prevent it.

The OECD Principles of Corporate Governance (1999) highlight, under Principle VI.D that "*boards have an essential responsibility in setting the risk policy by specifying the types and degree of risk that a company is willing to accept in pursuit of its goals."*[48] This principle has been amended to also include Board of Directors' responsibility to set and enforce clear lines of responsibility and accountability throughout the organisation.[49] However, a study by Webster & Wasieleski on companies it the United States found that Chief Executive Officers were only involved in risk assessment 34% of the time.[50] This highlights the issue of lack of integration, where risk assessments and ethical issues are not considered to be a central component of high-level strategic decision making. This problem was also featured in the recent OECD report on corporate governance in the wake of the latest financial crisis.[51]

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[43] Ethics Resources Center, *Ethics in American Business: Policies, programs and perceptions*. Washington, DC: Ethics Resource Center (1994); Cristie L Ford, *Towards a New Model for Securities Law Enforcement*, Administrative Law Review, Vol 57, No.3, pp. 757-828 (2005)

[44] OECD (2007) *Informal Institutions –How social norms help or hinder development*. Paris: OECD; Cristie L Ford, above.

[45] Brent Fisse & John Braithwaite, *Corporations, Crime and Accountability. 134 – 138,* Cambridge University Press (1993)

[46] Committee of Sponsoring Organizations of the Treadway Commission, *Enterprise Risk Management — Integrated Framework* (2005); Mark S. Beasley et al, *Enterprise risk management: An empirical analysis of factors associated with the extent of implementation*, Journal of Accounting and Public Policy 24 (2005) 521–531

[47] Committee of Sponsoring Organizations of the Treadway Commission, *Enterprise Risk Management — Integrated Framework* (2005); Singapore Corporate Governance Council, *Risk Guidance for Listed Boards* (2012)

[48] Organisation For Economic Co-operation and Development, *G20/OECD Principles of Corporate Governance* (1999)

[49] As above.

[50] James Weber & David M. Wasieleski, *Corporate Ethics and Compliance Programs: A Report, Analysis and Critique*, Journal of Business Ethics, Volume 112, Issue 4, pp 609–626 (2013)

[51] Organisation for Economic Co-operation and Development, *Corporate Governance and the Financial Crisis* (2010)

Under the US Organization Sentencing Guidelines it is required that compliance/ethics officers have a direct reporting obligation to the Board of Directors.[52] This is an important step towards a better integrated compliance/ethics system but a fully integrated approach to corporate risks such as non-compliance requires that risks are fully integrated in the business strategy process involving senior management and Board of Directors. Risk management systems are not seeking ways to eliminate risk but to identify possibilities where there is a good balance between risk and opportunity, referred to as the sweet spot.[53] This risk integration can contribute to minimize the risk for scapegoating and enable regulatory systems to be more effective in achieving corporate normative change.

By recognising the norms of a corporate culture in corporate liability regimes, governments can create the necessary external pressure to drive change.[54] The models that focus on monetary sanctions and compliance checklists is a weak driver for addressing issues related to corporate culture and norms. It appears that optimally effective compliance programs are those that also align with a strong internal ethical culture.[55] Subsequently, **effective compliance program implementation in this context is not based on an organisation's capacity to fulfil a pre-determined checklist, but rather the organisation's capacity to identify, prevent and redress wrongdoings or an unsuitable corporate culture in a sustainable way**.[56]

The FCPA gives companies credit for compliance systems, self-reporting and cooperation. This is regarded as a necessity for uncovering corruption offences that otherwise might have gone unreported.[57] Even though this is important, the availability of "adequate procedures" as a mitigating factor for sanction rebate, such procedures may also be used for scapegoating and window-dressing and may have very little to do with actual good corporate governance.[58] This type of regulation might influence organisations to implement measures and compliance system to address short-term legal risks, without addressing root causes. Research has confirmed the the adoption of more generic versions of corporate ethics and compliance systems that are not anchored in the companies' culture.[59]

Accordingly, an effective regulatory system for corporate liability should include provisions on corporate culture and the sanctions imposed should have an increased focus on normative long-term change within organisations.[60]

[52] US Organization Sentencing Guidelines, *Amendments 2010*
[53] Committee of Sponsoring Organizations of the Treadway Commission, *ERM Risk Assessment in Practice* (2012)
[54] Michael L, *Business ethics: The law of rules.* Business Ethics Quarterly, 16(4), 475–504 (2006)
[55] Muel Kaptein, *Ethics programs and ethical culture: A next step in unravelling their multifaceted relationship*. Journal of Business Ethics, 89, 261–281 (2009)
[56] John Braithwaite, *Responsive Regulation and Developing Economies,* World Development Vol. 34, No.5 pp. 884-898 (2006).
[57] Mike Kohler, *Revisiting a foreign corrupt practices act compliance defense*, Wisconsin. Law. Rev. 609 (2012)
[58] Cristie L Ford, *Towards a New Model for Securities Law Enforcement*, Administrative Law Review, Vol 57, No.3, pp. 757-828 (2005)
[59] Foster et al, *Commonality in codes of ethics*. Journal of Business Ethics, 90, 129–139 (2009)
[60] Cristie L Ford, *Towards a New Model for Securities Law Enforcement*, Administrative Law Review, Vol 57, No.3, pp. 757-828 (2005)

5. Conclusion

The function of corporate liability shall be seen as part of a wider governance system, which includes the role of regulation and corporate governance to achieve the ultimate goal of corporate compliance with the law. The various parts of that governance system strengthen the ability of achieving corporate compliance, regardless of the motivations for corporate non-compliance, and with strong consideration of the cost-effectiveness of the means to achieve such corporate compliance. This view is believed to better correspond to governance realities in weaker governance contexts beyond OECD countries, as well as meet concerns regarding the effectiveness of relying on achieving compliance through general deterrence from corporate criminal liability.

The analysis of the basis for liability in the "directing mind" doctrine, vicarious liability and strict liability expose externalities as well as different consequences for corporate responsiveness to non-compliance. Corporate liability regimes should ultimately be geared towards balancing corporate with individual fault, emphasising the strong behavioural influence of corporate management through its many carrots and sticks, while also ensuring general deterrence at individual level where it has the greatest effect on achieving corporate compliance.

To stress prevention and corporate compliance with the law rather than retribution requires a cost-effective regulatory regime. Such a regime emphasises responsiveness of corporate actors to regulatory measures and considers the strong influence of corporate culture on individual behaviour, as well as the ability of corporations to control that culture. An effective regulatory regime represents a multitude of sanctions that enables proportionate and cost-effective responses to non-compliance, and stresses effectiveness in achieving corporate norm-change to align with behavioral demands for corporate compliance.

From the perspective of ensuring legal compliance and performance, the corporate governance system is the most important means to control corporate activities. An often overlooked aspect of the wider governance system relevant for corporate compliance is the reliance on so called gatekeeper professions such as lawyers and auditors. Their role rests on the assumption that professional integrity is strong enough to resist the undermining influence of conflicting economic interests. An effort that seeks to enhance the effectiveness of influencing corporate behaviour towards compliance will need to take a closer look at the systemic weakness represented by the conflict of interest that undermines the reliability of gatekeeper professions.

In line with the conclusions of this submission, Fisse and Braithwaite have presented the "Desiderata" for an effective corporate crime enforcement framework:

- Individual responsibility is a pillar of social control in western societies. However, corporate action is not merely the sum of individual actions and therefore it can be just and effective to hold corporations responsible as corporations. Thus, a corporate liability strategy should maximize allocation of responsibility to all who are responsible, be they individuals, sub-units of corporations, parent corporations, industry associations, gatekeepers or even regulatory agencies. Scapegoating should be avoided and remedied. Additionally, spill over effects of sanctions onto actors who bear no responsibility for wrongdoing should be avoided.
- Enforcement should be pursued in a cost-effective manner that does not place unrealistic burdens on corporations or on the public purse. High penalties that jeopardise the economic viability of corporations that are the lifeblood of the economy should be avoided.

- Enforcement should be pursued justly in such a way as to safeguard the right to fair trial and the right to equal treatment before the law.
- Corporate liability regimes should acknowledge that profit maximization is not the only important motivation for corporations, and that actors also pursue a good reputation, dignity, self-image, and good citizenship. It is also important to bear in mind that corporate action can be ambiguous and paradoxical, and enforcement systems should promote dialogue that enables multiple interpretations of corporate action to be articulated.
- While the State is an important enforcer, corporate internal disciplinary systems should be taken more seriously as legal orders with realised and unrealised potential for justice and effectiveness. However, these private justice systems should work in harmony with, and not against, state justice systems.
- Criminal theories and models that emphasizes retribution may not be as useful as those that emphasize deterrence.
- Corporate liability regimes should bear in mind the differences between large and small organisations in regard to structure, culture, decision-making and accountability.
- The law should not strait jacket management systems into conformity with legal principles.
- The dynamic nature of corporate action necessitates an approach to corporate liability that does not impose time-limits on enforcement actions.
- The international nature of corporate action makes it imperative to have extra-territorial jurisdiction.
- Corporate liability regimes should be equally enforceable against public, as well as private entities where necessary.[61]

The above principles can guide the work on finding a modern frame and definition of a corporate liability regime that also has relevance in countries beyond OECD member states, given the global presence of economic actors and corporate crime.

[61] Fisse & Brathwaite, above. Pp. 135-138.

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