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EDITOR'S INTRODUCTION TO VOLUME II

It has been an honour to work on the second volume of *De Lege Ferenda*. Created for the purpose of allowing current undergraduate students the opportunity to delve into academia, we had hoped that our robust peer review and editing system would allow students to develop their submissions to a higher level. With the second Volume now completed, I am proud of our writers and editors for writing and enhancing pieces that deal with a range of contemporary legal issues, such as the implications facing private law if cybercurrencies were to be treated as money, whether corporate veil piercing can be considered a doctrine, the impact of technological developments on competition law, the state of corporate criminal liability in the UK, and a powerful commentary on the 2016 UKSC decision of *R (on the application of Gallaher Group Ltd) v Competition and Markets Authority*. I hope our readers will enjoy and gain insights from these pieces, and I owe heartfelt thanks to our team of undergraduate editors who have worked tirelessly to ensure the highest standards of quality for this Volume, and to the Managing Board of the Cambridge Law Review for their continuous support. I wish the new Editorial Board every success with the next Volume and look forward to seeing *De Lege Ferenda* thrive in the future.

Kyra Chong

Managing Editor

COMPETITION POLICY IN THE GLOBAL CONNECTED ECONOMY: A PROMISING RESEARCH AGENDA

Beatriz Kira*

ABSTRACT

The size and power of internet companies have been considered threats to healthy markets and democratic values. Competition policy is often pointed out as one of the possible solutions to constrain these companies. However, they have particularities which distinguish them from traditional brick-and-mortar companies and defy conventional competition analysis. First, internet platforms are multi-sided markets that simultaneously serve two or more groups of users. Secondly, the collection and processing of large amounts of users' personal data are central to their business models. This article discusses how digital markets give rise to particular competition issues, and in which ways competition law and enforcement should be updated in order to cope with the dynamics of online platforms, revealing a new and challenging research agenda.

* I would like to thank Diogo R. Coutinho, Greg Taylor, and Thomas Crook for helpful comments in previous versions of this paper. I am grateful to the reviewers and the editors for their assistance. Any errors and omissions are exclusively my own.

I. INTRODUCTION

The pervasiveness of the internet has deeply changed social, political, and economic relations of our time, with consequences for different aspects of everyday life. Harvesting the benefits of being first movers in digital markets, technology companies – many of them founded only a few decades ago – are now among the largest in the world. In August 2018, Apple became the first public company to be worth US$1 trillion in market capitalisation, the collective value of all its shares of stock. At that time, the second most valuable company in the world was Amazon, with a market value of US$884.01 billion, followed by Google, worth US$854.86 billion, and Microsoft, at US$827.53 billion.[1]

The size and the concentration of power in the hands of a few internet companies are increasingly becoming the subject of political, legal, and economic concerns. Worldwide, governments, academics, and civil society have been calling for greater scrutiny of internet platforms. Competition policy[2] is often pointed to as one possible solution to constrain technology companies, challenging academics across a large spectrum of disciplines to develop analytical and regulatory tools to frame markets that are in constant and rapid evolution. Complex competition issues and controversies involving digital economies are emerging rapidly. Yet the interplay between competition policy and international regulation of online platforms is still a relatively unexplored area of research.

[1] Sean Gallagher, 'That's trillion with a T—Apple hits market value of $1 trillion', Ars Technica (2 August 2018) <https://arstechnica.com/information-technology/2018/08/thats-trillion-with-a-t-apple-hits-market-value-of-1-trillion/>

[2] In this article, competition policy is understood as the combination of antitrust legislation, both in areas of cartel and abuse of dominant positions prohibitions and merger and acquisition control, and its enforcement by competition authorities.

A growing body of literature claims that many concepts and tools derived from models of traditional businesses do not generally apply to internet companies,[3] as digital platforms have complex business models and arrangements, which distinguish them from traditional markets.[4] Furthermore, antitrust complaints and inquiries also struggle to cope with the rapid pace of innovation and transformation of the technology sector,[5] which enables constant transformation of companies' business models and turns players in the digital market into something of a moving target.

This article aims to contribute to this on-going debate by discussing some of the limitations of traditional antitrust analysis when it comes to multinational multi-sided internet platforms. The aim is to unveil the ways in which, if at all, competition law should be adapted to cope with new challenges posed by global digital markets. In other words, if it is true that web-based businesses require building distinct competition frameworks, which variables of analysis should be considered? Which issues should be addressed internationally and what is the role of international organisations in that process?

In answering these questions, this article seeks to build on the relevant literature on internet regulation, competition law, and international law. I argue that due to the characteristics of internet companies, national frameworks alone are insufficient and inefficient to tame tech giants. In particular, I argue that international cooperation and coordination mechanisms for the global governance of competition policy are required in order to cope with the challenges of multi-sided multinational

[3] David S Evans and Richard Schmalensee, 'The Antitrust Analysis of Multi-Sided Platform Businesses' NBER Working Papers 18783, National Bureau of Economic Research, Inc.

[4] David S Evans, 'Antitrust Issues Raised by the Emerging Global Internet Economy (Part II)' (2005) 102(4) Northwestern University Law Review 285.

[5] ibid; William H Page and John E Lopatka, The Microsoft Case Antitrust, High Technology, and Consumer Welfare (University of Chicago Press 2009).

internet companies. In order to build that argument, this article is structured as follows.

Section 1 discusses important working definitions and lays out the basis for the discussion that follows. Section 2 presents some of the features of internet companies and introduces an emerging debate about the relationship between privacy and competition policy in the context of digital platforms. Section 3 discusses how competition law and antitrust analysis should be updated and adapted accordingly to the challenges presented in the previous section. It proposes policy solutions to address the problems discussed. Finally, the conclusion summarises the article and discusses some of its limitations, proposing topics for a promising research agenda.

II. LEVELLING THE DIGITAL PLAYING FIELD: COMPETITION POLICY IN THE DIGITAL ERA

This subsection presents some important working definitions. First, it discusses what multi-sided internet platforms are and how to identify them. Second, it defines competition policy, its goals and scope, and discusses two misconceptions that are often associated with debates about the relationship between competition policy and regulation.

A. MULTI-SIDED MULTINATIONAL INTERNET PLATFORMS: HITTING MOVING TARGETS

From a distance, it might be difficult to pinpoint the common characteristics that link together different technology companies, which offer a plethora of distinct goods and services. Social media platforms have features and uses that are very different from the ones offered by search engines, which in turn are clearly distinct from those of an operating system. Upon closer examination, however, it is possible

to identify some shared features among the companies that are the object of this article, which justify the adoption of the joint analytical framework proposed here.

First, these companies own and control key internet platforms. Platforms markets, however, are not a new idea. Some of them date from thousands of years ago. In Athens around 300 BCE, merchants, shipowners, and lenders would gather near the docks to connect with each other in order to assemble a trading voyage.[6] But only in this century was the first economic model of multi-sided platforms developed by Jean-Charles Rochet and Jean Tirole, focusing on how the relative prices charged on two sides of a platform coordinated demand.[7] More recently, Evans and Schmalensee provided a more updated definition of a multi-sided platform, defining it as a platform that "has (a) two or more groups of customers; (b) who need each other in some way; (c) but who cannot capture the value from their mutual attraction on their own; and (d) rely on the catalyst to facilitate value-creating interactions between them".[8]

Platforms exist both in the online and the offline world. There are many traditional industries in which multi-sided platforms play important roles, including payments, financial exchanges, and shopping centres. Even though many of the competition issues discussed in the following sections also apply to brick and mortar platforms, the analysis here will focus on digital multi-sided markets. Having the Internet as their medium, these platforms offer connections and access to users,[9] and create value that could not be obtained without their intermediation and coordination.[10] For example, Alphabet Inc. is the holding company which ultimately

6 David S Evans and Richard Schmalensee, Matchmakers: The New Economics of Multisided Platforms (Harvard Business Review Press 2016).

7 Jean-Charles Rochet and Jean Tirole, 'Platform Competition in Two-Sided Markets' (2003) 1 Journal of the European Economic Association, 990.

8 Evans and Schmalensee (n 3).

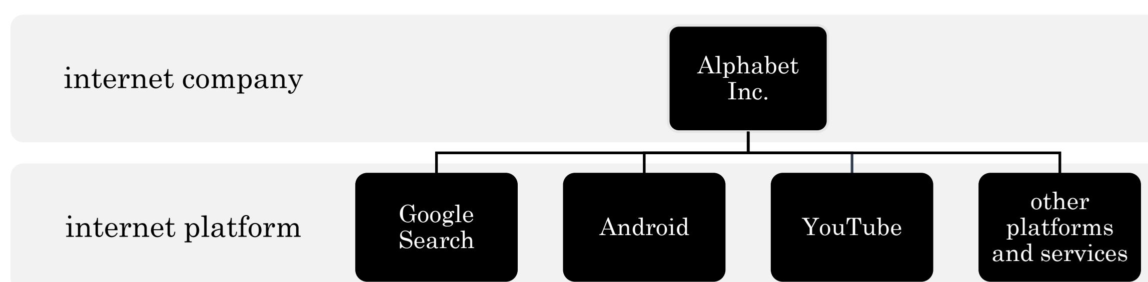
9 ibid.

10 David S Evans and Michael Noel, 'Defining Antitrust Markets When Firms Operate Two-Sided Platforms' [2005] Colum. Bus. L. Rev. 667.

controls many widely used internet platforms: The search engine Google Search, the operating system Android, and the video platform YouTube, among others. In this article, I will use platforms and multi-sided markets as synonyms. When qualifying such markets and companies, internet, digital, and online will be employed interchangeably.

FIGURE II(A)

Simplified corporate organisation of Alphabet Inc.



Source: The author.

A second common feature is that the internet platforms controlled by these companies collect and process users' personal data. Such data have a central role in the business models of these companies. Internet companies extract wealth from the collection and processing of users' personal data, in many different ways. Data collected and processed are used by the platform to enable or improve the provision of the goods and services offered by it. The ability to collect, store, and analyse data on individuals at great speed and scale in the digital environment has made it possible to deeply understand the habits, preferences, and personal features of consumers.

Thus, it is possible to tailor the offer of products and services according to the specific interest of users.[11]

Technology companies that fall within the definition proposed above defy conventional antitrust analysis. Many of the concepts and analytical frameworks which were tailored for the analogical world demand adaptations in order to frame Internet platforms. As these companies rely on users' data to thrive in the market, they give rise to privacy issues which are closely related to competition issues. They compete for data in attempts to expand their user bases and leverage users' data to gain or maintain a dominant position in the market, which requires competition policy to make room for privacy and data protection considerations, as will be discussed in section IV.

B. COMPETITION POLICY AND REGULATION: CHALLENGING MISCONCEPTIONS

Considered together, the two characteristics described in the previous subsection, i.e. control over key multi-sided platforms and reliance on the collection and processing of user data, make the application of competition law to internet companies more challenging and necessitate the adoption of a different set of economic tools for the antitrust analysis of internet platforms, as discussed in the next subsection.

In view of the above, recent studies have discussed ways in which competition policy should be adapted to build models that are better suited to explain the behaviour of economic agents, and also to inform competition law enforcement and

[11] Ian Brown and Christopher T Marsden, Regulating Code: Good Governance and Better Regulation in the Information Age (MIT Press 2013).

policy-making.[12] Many debates around antitrust concerns in online markets, however, are narrowly focused on the question of whether competition policy is enough to address the new challenges, or whether some kind of regulation is necessary. This dichotomy is misleading and underlined by two intertwined misconceptions which need to be clarified.

The first misconception involves a lack of clarity regarding what differentiates competition policy from regulation. While there are areas in which the two fields overlap, they present relevant distinctions in aims and scope. Competition policy comprises the set of policies and laws which ensure that competition in the marketplace is not restricted in such a way as to reduce economic welfare.[13] The study of regulation, in turn, is informed by debates from a range of disciplines.[14]

In the context of this paper, regulation is understood as 'the intentional use of authority to affect behaviour of a different party according to set standards, involving instruments of information-gathering and behaviour modification'.[15] In contrast, competition law is understood as one of the institutions intentionally seeking to shape the behaviour of agents operating in the market.[16] Regulation is a set of rules and standards with sectorial and long-run application, whereas competition policy

[12] Ariel Ezrachi and Maurice Stucke, Virtual Competition (Oxford University Press 2016); Maurice Stucke and Allen Grunes, Big Data and Competition Policy (Oxford University Press 2016).

[13] Massimo Motta, *Competition Policy: Theory and Practice* (Cambridge University Press 2004). Although the traditional study of competition policy is either focused on conducts – anticompetitive behaviour by agents in a given market – or in structures – how mergers and acquisitions might affect the structure and the competitiveness of a given market – the main argument of this article holds true for both groups. For that reason, the categories of competition policy usually employed to differentiate the analysis of market structure from the analysis of and anticompetitive behaviour are not examined in depth.

[14] Robert Baldwin, Martin Cave and Martin Lodge, *The Oxford Handbook of Regulation* (Oxford University Press 2010).

[15] J Black, 'Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a "Post-Regulatory" World' (2001) 54 Current Legal Problems 103.

[16] Roger Brownsword, Eloise Scotford and Karen Yeung, 'Law, Regulation, and Technology: The Field, Frame, and Focal Questions' in *The Oxford Handbook of Law, Regulation and Technology* (Oxford University Press 2016).

provides case-by-case responses to anticompetitive and abusive practices.[17] While regulation is typically prescriptive and *ex ante,* competition policy is usually reactive and *ex post*.

Competition policy seeks to ensure that markets continue to function well and prevent attempts by firms to undermine the competitive process, but is only useful if the status quo is healthy competition. Regulation, in its turn, is focused on delivering good outcomes in markets that are fundamentally not well-functioning. Thus, it is useful (and most important) even when the market is structurally incapable of functioning well.[18]

TABLE II(B)

Comparison between competition policy and regulation

	Competition policy	**Regulation**
Definition	Body of policies and laws which ensure that competition in the marketplace is not restricted in such a way as to reduce economic welfare[19]	Intentional use of authority to affect behaviour of a different party according to set standards.[20]
Nature	Reactive and *ex post*[21]	Prescriptive and *ex ante*

[17] Cento Veljanovski, 'Economic Approaches to Regulation' in The Oxford Handbook of Regulation (Oxford University Press 2010).

[18] Greg Taylor, 'Competition (Antitrust) Policy' (The Economics of the Internet, Oxford Internet Institute, 7 March 2018).

[19] Massimo Motta, *Competition Policy: Theory and Practice* (Cambridge University Press 2004).

[20] Black (n 15).

[21] Nonetheless, it is worth noting that there are situations in which competition policy also applies *ex ante*. In particular, many competition authorities require the file of premerger notification and

Intervention	Case-by-case	Geographical or sectorial
Context of application	Competitive markets	Both competitive and dysfunctional markets

Source: The author.

The second misconception underlying the debates about competition policy and regulation is a reflection of the first. The lack of clarity regarding what defines these two fields create the impression that these are exclusionary alternatives, which cannot be applied simultaneously. There are indeed many situations in which legitimate public policy objectives justify the exclusion of competition analysis.[22] States may legitimately favour other enforcement or regulatory tools over competition law when dealing with distinct industries or markets;[23] for example, in the case of regulated sectors, such as energy, oil, or even telecommunication. According to Ezrachi, these ‘bypasses’ reflect social and political preferences,[24] but they can also be reflections of limitations of competition policy to deal with the particularities of these markets.[25]

subject mergers and acquisitions to an *ex ante* review processes, depending on particularities of the companies (e.g. market share or gross annual sales) and the sector in which they operate. For example, the European Commission requires notification of concentrations based either in the combined aggregate worldwide turnover of the undertakings, the aggregate Community-wide turnover of the undertakings, or the combined aggregate turnover in each Member States, articles 2 and 3 of the Council Regulation (EC) No 139/2004 of 20 January 2004.

22 Ariel Ezrachi, ‘Sponge’ (2016) 5(1) Journal of Antitrust Enforcement 49.

23 ibid.

24 ibid.

25 Many regulated markets (telecommunication, transport, infrastructure, etc.) are also natural monopolies, i.e. they have a natural tendency to be non-competitive. In these markets, a single firm can supply a good or service to the entire market at a smaller cost than could two or more firms: N Gregory Mankiw, *Principles of Economics* (7th edn, Cengage Learning 2015). As competition policy is unlikely to work in that context, governments often choose to control the behaviour of natural monopolies through regulation. This is true especially in the case of markets that offer essential facilities, like water and electricity.

In other cases, however, competition instruments and regulatory instruments are complementary; they work together to produce markets that work well. In many circumstances, competition policy enforcement and the development of sector regulation are even under the competency of the same body[26], an arrangement that helps to ensure that competition policy objectives are considered in developing sectorial regulation. Frequently, the behaviour of a company can simultaneously be anticompetitive and violate regulatory provisions, which demands integrated intervention.

The problem with the two misconceptions outlined in this subsection is that they are misleading. They can lead to flawed analysis and generally ignore the importance of a coordinated and integrated approach when it comes to facing the challenges of technological progress. Some of these challenges are discussed in the next section.

III. COMPETITION ANALYSIS OF INTERNET COMPANIES: TOOLS AND CHALLENGES

The previous section presented some the characteristics of internet companies, arguing they are multi-sided platforms whose business models depend on the collection and processing of user data. This section discusses how these two features make more challenging the application of the traditional antitrust analytical framework. First, it discusses how some concepts and tools demand adaptation in order to frame multi-sided platforms. Second, it discusses how the collection and processing of user data bring privacy consideration into the realm of competition policy.

[26] Veljanovski (n 17).

A. WHEN NETWORKS COMPETE: APPLYING COMPETITION POLICY TO MULTI-SIDED PLATFORMS

Multi-sided platforms have been challenging antitrust analysis and economics concepts for many years. Many of the tools used to analyse single-sided firms do not apply directly to multi-sided platforms, which serve different interdependent customer groups. These mismatches, which are described in more detail in the following paragraphs, have led economists and legal scholars to propose adaptations to traditional competition policy in order to make the models better suited for multi-sided markets.[27]

The first challenging characteristic of multi-sided markets lies in the fact they are subject to stronger network effects, both direct and indirect, which allows a given platform to quickly grow to a large scale after it has reached a critical point – known as a 'tipping point'. Direct network effects, also called demand-side economies of scale, focus on one side of the market and exist when the demand for one good depends on how many other people purchase it, among the same group of users. For example, the larger the number of WhatsApp users, the greater the benefits each user can gather. Indirect network effects, in turn, are related to multiple sides of the market and are present when the number of agents engaged in one side of the market affects the value of the platform to agents operating on the other side.[28] Mobile operating systems, like the Apple iOS or the Google Android, are good examples of multi-sided platform with strong indirect network effects. The bigger the number of mobile users adopting it, the more developers write apps for that system, which in turn attracts more users to the platform. In many cases, network effects can be beneficial to users, providing them access to a wider network of other users and

[27] Evans and Schmalensee (n 3).
[28] Hal R Varian, Joseph Farrell and Carl Shapiro, *The Economics of Information Technology: An Introduction* (Cambridge University Press 2004).

suppliers. However, network effects can often harm consumers by making it harder for more efficient entrants to displace an incumbent, as new players would have difficulty gathering a sufficiently large critical mass to enter the market.[29]

Closely related to network effects, are switching costs, which are another characteristic of online platforms. Switching costs arise "when consumers value forms of compatibility that require otherwise separate purchases to be made from the same firm",[30] i.e. when users are looking for compatibility between their current purchase and a previous one, creating economies of scope between these different purchases. In this context, the benefits of swapping to a different provider must be high enough to persuade customers to pay those costs. Multi-sided markets are characterised by large switching costs for users on one end. When switching costs are too high, there is a tendency that consumers will be locked-in with the dominant firm, and only significant benefits can convince them to change to a different seller.[31] Markets with high switching costs revolve around exclusion and foreclosure, in which more efficient rivals could be prevented from entering or forced to leave the industry, thus harming competition. Platform markets are, therefore, typically served by only a few competing platforms.[32]

Another challenging aspect of multi-sided platforms are their particular pricing dynamics. Armstrong argues that in markets in which two or more groups of agents interact via intermediaries, three main factors determine the structure of prices offered to the two groups: (i) the relative size of the externalities members of one group exert on members of the other group, (ii) whether users are charged fixed fees

[29] David S Evans, 'How Catalysts Ignite: The Economics of Platform-Based Start-Ups' in Annabelle Gawer (ed), *Platforms, Markets and Innovation* (Edward Elgar Publishing 2009).

[30] Joseph Farrell and Paul Klemperer, 'Coordination and Lock-In: Competition with Switching Costs and Network Effects' (January 2007) 3 Handbook of Industrial Organization.

[31] Motta (n 19).

[32] Thomas Eisenmann, Geoffrey Parker and Marshall Van Alstyne, 'Platform Envelopment' (2011) 32 Strategic Management Journal 1270.

or per-transaction charges, and (iii) whether groups are single-home or multi-home. In order to attract more users, platforms often subsidise agents in the group that are most price-sensitive or more likely to multi-home, i.e. more likely to sign up to several platforms.[33] The prices for these groups of users are usually below marginal cost of production or even zero and are compensated by the profits made on the other side of the market.[34]

Defining the relevant market is, therefore, important to establish the sources of demand-side and supply-side constraints that should be taken into consideration when assessing the market power of any given company.[35] As the focus of competition policy is generally on preventing firms from acquiring or abusing a position of dominance to exercise market power, market definition is highly relevant to antitrust analysis. There are many proxy measures of market power, such as market share or price-cost margins. When it comes to traditional companies, a method traditionally used for identifying the relevant market is the SSNIP (small, but significant non-transitory increase in price).[36]

Evans and Schmalensee, however, argue that for traditional one-sided companies, there is no single reliable method for assessing the relevant market, and that the analysis should consider multiple sources of evidence.[37] The SSNIP test, for

[33] Diane Coyle, 'Practical competition policy implications of digital platforms' (2018) Bennett Institute for Public Policy working paper no: 01/2018.
[34] Evans and Schmalensee (n 3).
[35] John E Kwoka and Lawrence J White, *The Antitrust Revolution: Economics, Competition, and Policy* (6th edn, Oxford University Press 2014).
[36] It is also called "hypothetical monopolist" test, as it departs from a hypothetical situation in which the smallest unit that might plausibly be the relevant market is controlled by one company. In this context, one should ask whether this one firm could profitably increase its price above the current level. If the answer is yes, there is a market. If the answer is no, the scope of the market should be broadened and the question asked again; Howard H Chang, David S Evans and Richard Schmalensee, 'Market Definition: Assessment of the Relevant Market in Competition Matters' (2011) Report Prepared for the Federal Competition Commission of Mexico; Taylor (n 18).
[37] Evans and Schmalensee (n 3).

example, is not very reliable if the market is already uncompetitive, and the analysis should only be conducted at competitive prices. Therefore, applying the SSNIP test to multi-sided platforms can lead to an imprecise definition of the relevant market, with consequences for the assessment of market power. In particular, when it comes to multi-sided platforms that serve more than one group of users, the definition of the market on one side should be defined in relation to the relevant market on the other side. When the economics of the business is centred in linking users and providing connections, one side cannot be considered in isolation.

A recent and high-profile antitrust case involving an internet platform illustrates how failing to address the multiple sides of online platforms can lead to misguided definitions of the relevant markets. *Google Search (Shopping) v European Commission (EC)* started in 2010, when the EC decided to open formal proceedings to investigate whether Google Inc. had abused a dominant market position in online search provision by lowering the ranking of unpaid search results of competing price comparisons websites, and by according preferential placement to the results of its own shopping service. In 2017, the European Commission reached its final decision and ruled that Google has abused its market dominance as a search engine by giving an illegal advantage to another Google product, e.g. its comparison shopping service.[38] Two relevant markets were identified in the final decision: (a) general internet search, and (b) comparison shopping market. The shopping tool and the search engine, however, are only two of the many intertwined services offered within Google's platform, which also include Google News, Google Maps, and Google Books, for example. Documents from the case show that the Commission failed to engage in discussions about what it means for consumers to regard two goods as substitutes, and what it means for two firms to be competing in that market. By focusing on a

[38] European Commission. Summary of Commission decision of 27 June 2017 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (Case AT.39740 — Google Search (Shopping)).

very restricted part of the market, the EC decision failed to acknowledge all the other groups of users served by the broader constellation of Google's services that orbit around its main star: Google Search engine.

As the digital economy increasingly becomes the economy itself, cases such as *Google Search (Shopping)*, which challenge the application of traditional antitrust tools will become increasingly common. This will require competition authorities to reflect on how to further adapt the antitrust toolkit when looking at online platforms.

B. THE INTERFACE BETWEEN COMPETITION POLICY AND DATA PROTECTION

Another set of challenges arise when it comes to assessing the competitiveness in data-driven markets, which also requires the refining of analytical models and tools. As data becomes the main asset of digital markets, access to users' data is a determinant of which companies succeed in these markets. Thus, the variety and velocity of capturing and harnessing data are relevant sources of market power.[39] In that regard, internet companies compete fiercely for users' data and have few incentives to be transparent about their privacy policies, or to change them in ways that would in fact enhance data protection. On the contrary, the greater the pervasiveness of its data collection and processing techniques, the greater the chances a company will survive in data-driven markets. In this context, privacy outcomes might become a relevant means to assess competition.

Large amounts of data about user's preferences and characteristics are also crucial in informing the creation of content that is better tailored to people's interests and the development of more efficient products and services. Information harvested

[39] Maurice Stucke, 'Should We Be Concerned about Data-Opolies?' (2018) 2(2) Georgetown Law Technology Review 275.

by internet companies can thus contribute to reductions in the cost of production and improvement in quality in such markets.[40] In contrast, precisely because collection and processing of data is a determinant of which companies can compete and thrive in digital markets, good privacy outcomes can often lead to a decrease in competition. When lack of data prevents companies from building a critical database, or from offering goods and services at a competitive level, they might not survive, leading to less competitive markets.

In digital markets, anticompetitive practices also take the shape of undue use or unrestricted collection of user data. Assessing the relevant market in order to identify market power often requires identifying how and how much data a platform owns and processes. One challenge, however, is that while prices can be objectively measured and compared across firms, the same does not hold true when comparing privacy outcomes. Therefore, in order for competition policy to be able to address privacy issues, it would be necessary to reflect upon the extent to which privacy and data protection should be a part of competition law and enforcement and to develop a new benchmark against which competition in data driven markets protection could be assessed. Privacy and data protection regulation provide useful concepts and models to address some of these issues, but it is still unclear how competition authorities will enforce such overlapping regimes.

[40] Jens Prüfer and C Schottmuller, 'Competing with Big Data' (2017) CentER Discussion Paper 2017-007, Tilbury: Center for Economic Research

IV. COMPETITION POLICY AT CROSSROADS: HOW TO TAME TECH GIANTS?

Technological disruption in the context of multi-sided international markets has been caused by three intertwined factors. First, from an infrastructure perspective, more and more economic and social transactions now take place aided by information and communication technologies, which generates significant amounts of data. Second, due to further technological developments in the telecommunications infrastructure, it has become easier, faster, and less expensive to store and transmit information. Third, in terms of coding, powerful algorithms make it possible to process and analyse novel big data sets.[41]

Law, in general, and competition policy, in particular, have been struggling to cope with such transformations, which blur the contours of legal and regulatory action.[42] In this context, traditional competition policy alone often lacks the tools to deal with the particularities of internet-based platforms. As a result, legal scholars, policy makers, and competition authorities are required to reflect on how to ensure competition policy is constantly updated and to craft innovative remedies. Ezrachi and Stucke argue that product differentiation, and data portability should be included in the checklist of competition authorities worldwide.[43] Prüfer and Schottmüller showed that requiring rival companies to share their (anonymised) data about users' preferences eliminates the mechanism causing data-driven markets to tip.[44] They also demonstrated that data sharing does not affect a dominant firm's incentives to innovate, even in a dynamic model.

41 ibid.
42 Brownsword, Eloise and Yeung (n 16).
43 Ezrachi and Stucke (n 12).
44 Prüfer and Schottmüller (n 40).

These discussions reveal that, in order to tame tech giants, the adequacy of the regulatory environment in an age of rapid technological change and innovation should be considered in the context of a wider policy environment. I argue here that it is now necessary to advance towards both an international and integrated regulatory approach.

First, the new framework demands auditing the means employed by regulators for their consistency with international and liberal-democratic values, such as privacy and data protection.[45] As antitrust concerns increasingly overlap with the protection of other rights, only an integrated and coordinated approach to both competition policy and regulation can properly address the challenges of our time. An intervention in this sense implies a larger burden for the competition authority.[46]

Second, any answer to this question today needs to account for a plethora of international interests and values beyond the boundaries of national states. The alternatives presented by the global governance of competition policy are explored in the following subsection.

A. GLOBAL GOVERNANCE OF COMPETITION: SOLUTIONS FROM INTERNATIONAL LAW-MAKING AND ENFORCEMENT

In light of the issues mentioned in the previous section, are national approaches sufficient to deal with tech giants in the context of the global economy? This section reviews recent discussions about the internationalisation of competition policy and the whole played by international organisations, focusing on the challenges of the digital economy.

[45] Brownsword, Eloise and Yeung (n 16).
[46] Taylor (n 18).

The adoption of national competition regulations and policies by some countries, e.g. restrictions on mergers, even when legally justified, might have aggregated detrimental outcomes for consumers when other nations adopt different strategies. More specifically, while some jurisdictions might be concerned with regulating and limiting the size and power of internet platforms, more centralised regimes are banning foreign companies from the market and fostering the development of big national companies. These companies, protected by more favourable regulatory environments, seize competitive advantages which reduce incentives to innovate and to provide better products at lower prices.

In this regard, China is considered the biggest source of the problem. The operation of Chinese state-owned enterprises and the Great Firewall of China, which prevents foreign internet companies from operating in the country, lead to great imbalances in the international digital economy. These restrictions to the free flow of data and digital goods, however, have not been addressed by multilateral trade law, and the question remains whether international organisations such as the World Trade Organisation (WTO) have the mechanisms to solve the deadlock. As argued by Steinberg, "where views on appropriate rules, the nature of sovereignty, and the role of international law are so divergent, and where resolution of the issues imputes the political-economic structures of great powers, negative liberalization is doomed to failure".[47]

Thus, despite the observed tendency towards harmonisation and convergence of competition regimes around the world and the increase in cooperation between competition authorities worldwide through international networks such as the International Competition Network (ICN),[48] there are still many issues arising from

[47] Richard Steinberg, 'The Impending Dejudicialization of the WTO Dispute Settlement System' [2018] Proceedings of the 112th Annual Meeting of the American Society of International Law, 4.
[48] Ezrachi (n 22).

differences in competition policy across jurisdictions. Mavroidis and Neven observe how competition policy has been used strategically to favour domestic companies, and describe the asymmetric consequences that competition policy decisions taken across different jurisdictions might have.[49] The problems are especially pressing in the context of the digital economy, as the internet is a worldwide network and most of the online platforms operate across many different countries.

There are two main arguments supporting the internationalisation of competition law as a solution to the challenges of the digital world. First, there are aspects of digital markets which are already regulated by international treaties and agreements. In that sense, competition policy might benefit from integrating other intersecting international regulatory frameworks. For example, the right to privacy is recognised as a fundamental right by the Universal Declaration of Human Rights (article 12) and the European Convention on Human Rights (article 8). The European Court of Human Rights (ECHR) has also defined the concept of privacy through its judgments.[50] More recently, the EU adopted the GDPR, a detailed and comprehensive regulation, which unifies data protection law across the EU and establishes a series of detailed rules about the processing of individuals' personal data. In particular, the GPDR establishes the extraterritorial effect of its provisions, so that data from European citizens processed anywhere in the world should abide by its

[49] Petros C Mavroidis and Damien J Neven, '*Politique de la concurrence et gouvernance globale: ça se discute*' (2016) *LV Reflets et perspectives de la vie économique* 33.

[50] For example, in *Axel Springer AG v. Germany* (Application n. 39954/08, 7 February 2012), the ECHR decided that the concept of 'private life' is a broad term covers personal information which individuals can legitimately expect should not be published without their consent. In *Von Hannover v. Germany* (No. 2) (Applications n. 40660/08 and 60641/08, 7 February 2012) the court acknowledged that the scope of private life protections even interactions that take place in a public context. Also, in *Rotaru v. Romania* the court held that private data systematically collected and stored in a file held by agents of the State, falls within the scope of 'private life' (Application n. 28341/95, 4 May 2000).

rules. This might be especially relevant to govern data-based competition across different nations.

Second, the borderless nature of the internet requires some kind of international governance of competition policy. This demands closer integration and cooperation between competition authorities and regulators around the world. New challenges posed by digital markets make it even more relevant for enhanced cooperation between competition authorities across the globe. Similar investigations and procedures involving digital companies are being conducted in different jurisdictions, and authorities could benefit from working more closely together, sharing experiences and best practices in order to build up expertise and appropriate resources. This requires strengthening international mechanisms to evaluate, compare, and question competition policy implemented by different jurisdictions. Silveira, for example, discusses tools to enhance the coordination and cooperation among competition authorities regarding transnational merger control.[51] According to the author, while economic stakes are increasingly becoming international, the legal regulatory mechanisms remain confined to a national or regional scale, which creates the risk of contradictory or inconsistent decisions made by different competition authorities. This is especially true in the context of internet platforms, which operate in multiple countries, subjected to different frameworks. Similarly, Mavroidis and Neven propose a model of international governance of competition policy, with the inclusion of competition clauses in bilateral and multilateral trade agreements and the use of dispute-resolution mechanisms to enforce competition across different jurisdictions.[52] In that sense, possible solutions can be found within international organisations, in particular the WTO.

[51] Paulo Burnier da Silveira, *Le contrôle des concentrations transnationales* (L'Harmattan 2013).
[52] Mavroidis and Neven (n 49).

VI. CONCLUSION

This article reveals that there is no silver bullet to solve all the challenges for competition and international law posed by multinational multi-sided internet platforms. As Judge Colleen Kollar-Kotelly observed when analysing *United States v. Microsoft Corp*, crafting a remedy for an innovative market might be similar to "trying to shoe a galloping horse".[53] Nonetheless, this article identifies some clues about the way forward.

First, competition policy should match the evidence, not the slogans.[54] Antitrust analysis of multi-sided multinational platforms requires careful consideration of the business reality and a clear and accurate understanding of the markets in which they operate. In that sense, it is paramount that competition authorities faced with digital market cases increasingly turn to experts or to market participants in order to build knowledge about the specificity of the cases and the markets.

Second, the discussion here indicates that successful competition policy requires an institutional framework that is flexible enough to foster technological innovation, allow for experimentation, and enable review, but at the same time stable enough to protect competition goals. If, on the one hand, certain regulatory arrangements can lead to market stiffening and decreased competition, on the other hand, the appropriate mix of state intervention and market forces can foster a flexible environment, open to innovation and future technologies.

Finally, the article reveals that international law might need reform in order to face an increasingly digital and interconnected world. Difficult questions remain regarding the institutional capacity of WTO to deal with such issues. Some scholars have identified the advance of populist discontent with global liberalism and what

[53] Page and Lopatka (n 5) 20.
[54] Evans and Schmalensee (n 3).

they call a 'crisis' related to the dispute settlement within the WTO system.[55] Also, the importance of the digital goods and ICT industry to global trade has expanded on what Hale, Held and Young call "deep integration" issues.[56]

Recent trends, however, might point to a light in the end of the tunnel. Representatives of the G20, some of the biggest economies in the world, gathered in November 2018 in a summit in Buenos Aires, Argentina, and agreed to commit to reforming the WTO. On that occasion, the leaders agreed on the importance of reducing trade barriers in order to strengthen the international economy. Such barriers might include differences in the treatment of internet platforms across the globe. Thus, there might be a window of opportunity to reform the system and to address the pressing issues brought by the digital economy.

In sum, this article argues that multi-sided multinational internet companies demand the revision of national and international competition frameworks and requires international law and international organisations to play a more active role in the global governance of competition policy. From an academic perspective, this article contributes to an emerging literature on competition policy with a focus on the technology industry. Additionally, from a policy perspective, the article discusses enforcement practice and the quality of decisions taken by competition authorities. Effective assessment of the effects of different competition policy arrangements, such as the one I attempted here, could demonstrate more convincingly the benefits of competition law and enforcement in terms of better functioning markets, increase in well-being of consumers, and incentives for companies to engage in innovative activities.[57]

[55] Steinberg (n 47).

[56] Thomas Hale, David Held and Kevin Young, *Gridlock: Why Global Cooperation Is Failing When We Need It Most* (Polity Press 2013).

[57] Fabienne Ilzkovitz and Adriaan Dierx, *Ex-Post Economic Evaluation of Competition Policy Enforcement: A Review of the Literature.* (European Commission, Directorate-General for Competition 2015)

This article also opens the floor to a promising research agenda. The studies in the field indicate that different institutional designs and policy options have different effects in competition, and that specific characteristics of the broader economic and political context of each country implementing the policy can lead to different outcomes.[58] Therefore, a comparative legal analysis of competition policy in different jurisdictions worldwide could bring interesting insights to the discussion. This could be done through the analysis of, on the one hand, the legal framework in place and, on the other hand, how competition rules were enforced by competition authorities in these countries, especially when dealing with technology companies. This could help gathering empirical evidences about policymaking and enforcement processes, both nationally and internationally.

Identifying the institutional arrangements of competition policy in different jurisdictions is a challenging enterprise. In this context, it would be necessary to understand the economic roles performed by norms, processes, and legal institutions in the design and implementation of competition policy in distinct political and economic contexts. It would also be necessary to explore alternative institutional and normative designs and whether or not they are fit for the purpose of addressing the challenges posed by new technologies.

Furthermore, due to the specific characteristics of the business models employed by companies, in digital markets competition concerns increasingly overlap with the protection of other rights, such as the right to privacy. This article has identified some intersections between competition law and data protection laws and regulations. It did not, however, provide concrete proposals for a new framework. This would require careful consideration of the different interests at stake and a more

<http://bookshop.europa.eu/uri?target=EUB:NOTICE:KD0215397:EN:HTML> accessed 28 November 2017.

58 Armin Schmutzler, 'Is Competition Good for Innovation? A Simple Approach to an Unresolved Question' (2010) 5(6) Foundations and Trends in Microeconomics 355.

in-depth discussion of positive and negative aspects of each of the alternative institutional arrangements that could be pursued, which has been beyond the scope of this article. Likewise, broader social questions such as the possible implications of the digital economy for democracy and plurality online were not addressed here, but these remain interesting topics for a challenging research agenda.

WHAT WOULD BE THE CONSEQUENCES IN PRIVATE LAW OF TREATING CYBER-CURRENCIES AS MONEY?

Bilal Mohamed*

I. INTRODUCTION

The following paper explores the implications for private law if cyber-currencies are treated as money. The introductory section of this essay shall act as a primer and provide a short account of the origins and working of cyber-currencies. This will be followed by an attempt to define money under common law systems, founded on various authoritative sources. It will then build upon these foundations to analyse the private law implications. Lastly, the essay will examine methods by which relevant institutions should seek to respond to this global phenomenon. Whilst cyber-currencies are not generally recognised as money (by regulators or financial institutions), the arguments which will be put forward are built upon a theoretical set-up in which cyber-currencies are treated as money.

This essay does not advance any predictions whether or not cyber-currencies will be treated as money. It will seek to hypothesise the conceivable, practical

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consequences in private law if cyber-currencies were to be treated as money under the law. Given the complexities and the sheer number of cyber-currencies in existence, this essay will only derive its arguments from the case of Bitcoin, which is the most widely circulated cyber-currency in the world at present[1].

It is therefore to be highlighted that the terms 'Bitcoin' and 'cyber-currency' shall be used interchangeably. The essay, in exploring the legality of money shall derive its references primarily from Scots and English jurisprudence. However, in the sections dealing with the evaluation of the legality of cyber-currencies, in addition to references to Scots and English jurisprudence, references will also be sourced from other jurisdictions.

II. MONEY – WHAT DOES IT CONSTITUTE?

Whilst there exists no clear-cut, universal definition of money, I will seek to find a workable starting point by comparing different legal authorities to derive an understanding of the concept from a legal standpoint. Money, for instance, can be defined by the economic function it serves. Therefore, it could be anything that has a store of value, acts as a medium of exchange and has a unit of account.[2] Money can be broadly categorised as corporeal and incorporeal. Banknotes and coins are corporeal money, owing to their tangible status. Conversely, Bank money is a form of incorporeal money, owing to its intangible status.[3] An understanding of money in legal terms would better serve our purpose of delving deeper into the private law consequences of identifying a particular thing as money. Mann's definition of money narrows this economic definition by confining money to "all chattels which, issued by

[1] Arjun Kharpal, 'Bitcoin's' Market Share Is At The Level It Was Just After It Hit Its Near-$20,000 Record High' (CNBC, 2019) <https://www.cnbc.com/2018/08/07/bitcoin-market-share-near-level-when-price-hit-record-high.html>

[2] David Fox, *Property Rights in Money* (Oxford University Press 2008) 1.19–1.28.

[3] ibid.

the authority of the law and denominated with reference to a unit of account, are meant to serve as universal means of exchange in the State of issue".[4]

However, Fox, in his paper "Cyber-currencies in private law" criticises this description of money as restrictive because it would mean that only bank notes issued by the Bank of England, and coins struck by the Royal mint, could fall under the "core sense of money".[5] As Fox points out, Mann's view is problematic, given that 94.5% of the money in circulation is in the form of bank deposits rather than currency.[6] Therefore, restricting the definition of money solely to legal tender would be restrictive and counter-intuitive. Naturally, the understanding of money ought to be beyond this core sense of money i.e. legal tender. Private law extends this concept by treating bank money as a 'chose in action'. Choses in action are not property as defined in a 'right *in rem'* but rather, they are to be classified as a right against a person in enforcing an obligation *id est* a right *in personam*.[7] Therefore, bank money whilst not strictly legal tender is treated rather as a debt obligation that is owed by the Bank towards its customers.

For the purposes of clarity, it is crucial to develop a working understanding of how this 'so-called currency' operates in the real world. This can only be done effectively by making two assumptions; firstly, the scope and definition of money cannot be narrowed to Mann's definition of money as "(chattels) issued by the authority of the law and (which can be) denominated with reference to a unit of account". Secondly, as already mentioned in the introduction, cyber-currencies are to be assumed to be recognised as money within the system given the 'largely'

[4] Charles Proctor and others, *Mann On The Legal Aspect Of Money* (7th edn, Oxford University Press 2012).

[5] David Fox, 'Cyber-currencies in private law'. University of Edinburgh, (forthcoming paper)

[6] 'Money And Credit - March 2018' (Bank of England, 2018) <https://www.bankofengland.co.uk/statistics/money-and-credit/2018/march-2018>

[7] Kelvin FK Low and Ernie GS Teo, 'Bitcoins and Other Cryptocurrencies as Property?' (2017) 9 (2) Law, Innovation and Technology.

analogous function they serve *id est* a store of value, medium of exchange, and unit of account. Thus, having established what constitutes money, it is now possible to evaluate how cyber-currencies would fit within this context.

III. CYBER-CURRENCIERS – THE CASE OF BITCOIN

Pseudonymous Bitcoin creator, Satoshi Nakamoto, first conceived of the concept of cyber-currencies against the backdrop of the 2008 Financial Crisis. This pioneering concept, which he termed Bitcoin, was put forward in his whitepaper titled *'Bitcoin: A Peer-to-Peer Electronic Cash System'*.[8] Cyber-currencies, as the name suggests, have no physical existence and are decentralised digital currencies whose architecture is based on cryptography. To elucidate, Bitcoin works on a peer-to-peer system wherein all the transactions are visible to all the users so that it is decentralised and functions on a distributed ledger system.[9] This decentralised system of ledgers is called a blockchain. These block chains are contained in hundreds and thousands of computers that use this software via the internet. This is unlike a bank, where all the ledgers are stored centrally. In any given State, for example, the central bank or reserve will have records of all the bank transactions between all the customers. It could be argued that centralised ledgers give too much autonomy to these institutions, which regardless of good faith can prove to be detrimental. A cyber-attack on a centralised ledger could potentially even bring down the entire system (to the extent that it cuts off access to customers). In contrast, decentralised ledgers eliminate this concern, as the functions and storage are distributed and therefore an attack on a single point can be sustained and is not a perceived threat to the accuracy and consistency of the information.

[8] Nakamoto, 'Bitcoin: A Peer-To-Peer Electronic Cash System' <https://bitcoin.org/bitcoin.pdf>.
[9] Low and Teo (n 7).

In his paper, Nakamoto explains the benefits of his model of cryptographic proof against the universally used 'trust-based transactions' employed by financial institutions.[10] According to him, his model eliminates the requirement for a trusted third party as transactions are now directly between the two parties and the identity of the parties are pseudonymous (if not anonymous).[11] To illustrate: if A wishes to send bitcoins to B, then A will issue payment instructions, which are then disseminated across all other users in the network. These users, or miners, will then verify the transaction(s) (transactions are verified in blocks by users or miners). Miners, upon successful verification of a block of transactions, are rewarded with a newly created currency (Bitcoin in this case) and any overlying transaction fees paid by the parties to the transaction.

IV. CYBER-CURRENCIES AS MONEY OR PROPERTY

Menger, in his article *On the Origins of Money,* commences one of the chapters titled 'Influence of the Sovereign Power' with the following phrase: "Money has not been generated by law. In its origins, it is a social and not a state-institution".[12] The phrase seems relevant now more than ever given the exponential rise of several private currencies like Bitcoin and Litecoin across the world. This section will seek to consider and evaluate alternative models for understanding how cyber-currencies would fit within the boundaries of private law, and the implications thereof.

Cyber-currencies, being private currencies, do not have a unit of account attributable to a sovereign and therefore cannot be reduced to legal tender in the same way as bank money. However, cyber-currencies can be exchanged with the conventional currency at the existing market rate akin to how foreign currencies are

[10] Nakamoto (n 8).
[11] ibid.
[12] Carl Menger, *On the Origins of Money* (Ludwig von Mises Institute 2009).

converted, the implications of which are explored below. Moreover, given that conventional money can be classified into different categories of personal property in law *id est* banknotes and coins as choses in possession and bank money as choses in action, it is therefore crucial to assess if cyber-currencies as sets of information could be classified as property in law.

A. THE FOREIGN CURRENCY ARGUMENT

As mentioned above, a case for cyber-currency can be made by extending the analogy adopted for foreign currencies. As private currencies, cyber-currencies are neither backed nor regulated by the state, nor do they have any underlying asset or value, in contrast to conventional currencies, which are regulated and recognized within the territorial jurisdiction where they are used. Nonetheless, owing to globalisation and international trade, it has become common practice for individuals and businesses to accept and deal in foreign currencies. However, foreign currencies are not legal tender and are not enforceable within domestic territories.

Prima facie, it would appear foreign currencies have no recognition in the domestic legal system. However, this is not the reality as evidenced by *Miliangos* v *George Frank (Textiles) Ltd*, in which the House of Lords overturned the precedent requiring all debts in judgements to be enforced in Pound Sterling.[13] In appropriate cases, the use of foreign currencies could provide a more accurate representation of the debt, overcoming problems posed by fluctuations of value. In his *dicta*, Lord Wilberforce held that "currencies being fixed and fairly stable in value, (are) subject to the risk of periodic re- or devaluations,… so the search for a formula to deal with it becomes urgent in the interest of justice".[14] It was held that creditors could obtain

[13] *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443.
[14] ibid 463 (Lord Wilberforce).

a judgement in a foreign currency and the date of payment (actual date) would be the date of conversion for the foreign currency. Equally, In *Camdex International Ltd v Bank of Zambia*, Lord Justice Philips observed that foreign currencies, if specified in contracts as means of payment could be effected as a medium of exchange.[15] Therefore, the money of account and the money of payment only at the date on which payment is to be made would be germane to the contract.

Treating existing cyber-currencies in the same way as any other foreign currency would be treated under domestic law seems reasonable, considering it is not issued by the sovereign and there is no intermediary institution involved in the transactions (of the state). Nor would this affect the existing taxation regime as the existing taxation on cyber-currencies is analogous to that of foreign currency as HMRC typically imposes a capital gains tax on them.[16] However, this approach runs the risk of making the scope of cyber-currencies restrictive and exhaustive as cyber-currencies in the future could potentially be issued and controlled by the sovereign; an attempt to adopt the 'foreign currency' approach would only inhibit this.[17] Therefore, treating cyber-currencies as foreign currency will only limit the scope of the evolving concept that is cyber-currencies.

B. CYBER-CURRENCIES: INFORMATION AS PROPERTY?

There have already been cases involving cyber-currencies (especially Bitcoin), with different jurisdictions adopting different approaches and perspectives on its

[15] Joanna Perkins and Jennifer Enwezor, 'The Legal Aspect of Virtual Currencies' [2016] Butterworths Journal of International Banking and Financial Law.

[16] 'Cryptoassets For Individuals' (Gov.uk, 2018) <https://www.gov.uk/government/publications/tax-on-cryptoassets/cryptoassets-for-individuals>

[17] 'Govt May Launch India its Own Cryptocurrency 'Lakshmi': Reports' (*Deccan Chronicle*, 2019) <https://www.deccanchronicle.com/business/economy/160917/govt-may-launch-indias-own-cryptocurrency-lakshmi-reports.html>

legality. For instance, in the widely publicised case of *SEC v Shavers*, the Texan District Court, while holding the accused guilty of running a Ponzi scheme, held that Bitcoin was indeed a kind of money.[18] The ratio of the judgement was based on the evaluation of the functional aspects of Bitcoin: Bitcoin, regardless of its limited circulation, was used to purchase goods and services at several pay points. From our discussions on the technical aspects of Bitcoin in the preceding section, it can be inferred that cyber-currencies are sets of information with no underlying asset or value. Cyber-currencies are valued or priced based on the interaction of market forces *id est* supply and demand. This is in stark contrast to most conventional currencies, which are regulated and controlled by the central bank or government that issues it. Thus, the question that arises is how do we treat information as property, especially that which has no intrinsic value of its own?

A good analogy can be drawn from the case of *Armstrong DLW GmbH v Winnington Networks Ltd*, which involved the theft of Carbon Credits through an email phishing fraud. Justice Stephen Morris in his judgement held that intangible carbon credits can be treated as property as it met the required criteria.[19] Cyber-currencies similarly could be classified as such, as they meet the criteria set forth in the *Armstrong* case. As per Justice Morris, for something to be classified as property the requirements are: "[that] it is definable… It is identifiable by third parties... It is capable of assumption by third parties... [and] it has permanence and stability". Notably, all of said requirements would seem to describe the properties of cyber-currencies.[20]

The question that arises is how a personal property interest in cyber-currency would be classified in law: would it be a chose in action or a chose in possession?

18 *SEC v Shavers* No. 4:13-CV-416, (E.D. Tex. Sept. 18, 2014).

19 *Armstrong DLW GmbH v Winnington Networks Ltd* [2012] EWHC 10 (Ch), [2013] Ch 156 [50] (Justice Morris).

20 ibid.

Justice Morris in Armstrong contends that personal property need not be confined to traditional classifications, thus indicating a possibility of a third category.21 Green and Randall have argued for the recognition of digital assets (such as cyber-currencies) because of the similar characteristics it shares with property as choses in possession *id est* excludability and movability.22 Given that bitcoins are capable of being controlled, transferred and made inaccessible through a private key, it could be said that they are functionally analogous to property as a chose in possession. This recognition of a third category *id est* property in virtual possession could be made possible through the enactment of legislation or the development of case law wherein the definition and scope of this category is set down. Naturally, the creation of such a category of rights in property would facilitate recognition of cyber-currencies as an enforceable property right. However, the enactment or development of this doctrine would also have to take into consideration the myriad of issues that it could give rise to.

This can be illustrated through the case of *Your Response Ltd v Datateam Business Media Ltd* which runs contrary to the decision in the *Armstrong* case. In *Your Response*, following the ratio established in *OBG Ltd v Allan*, the court held that it was not possible to claim a possessory lien over intangible goods or property as common law recognises possession only for tangible goods.[23] Lord Justice Davis and Lord Justice Floyd were apprehensive of recognising such a right, because of the 'unintended consequences' that it could give rise to. [24] Lord Davis demonstrates this by highlighting the unfair position other creditors would be in if a claim for possessory lien is made during insolvency proceeding as this would effectively confer certain

[21] ibid.

[22] Sarah Green and John Randall, *The Tort of Conversion* (1st edn, Hart Pub 2009).

[23] *Your Response Ltd v Datastream Media Ltd* [2014] EWCA Civ 281, [2015] QB 41.

[24] ibid. at 40

rights to the claimant that are not afforded to other creditors.[25] Given the authoritativeness of the House of Lords case of *OBG Ltd v Allan,* it would be unreasonable for the court to extend possessory lien over intangible things like databases without distinguishing them on the facts or giving compelling justifications.

Cyber-currencies being intangible property therefore cannot be subject to a claim for conversion. However, cyber-currencies can be distinguished from the facts of the *Your Response* case from a functional standpoint. In essence, information contained in a database (as in the case of *Your Response*) serves a functionally different purpose than that of a cyber-currency. Despite only containing information, in practice cyber-currencies can, and are, used as a medium for payment analogous to conventional currencies in contrast to information contained in a database.[26] One could argue that the case could be distinguished on the facts , given that information in a database does not circulate in the same manner as with cyber-currencies. Moreover, information in databases does not have the fungibility that cyber-currencies have. However, this point can be rebutted by the fact that although cyber-currencies are fungible and circulate more readily compared to databases, they do not sufficiently resemble the conventional understanding of money, especially considering that bitcoins are primarily held as a means of investment dependent on their volatility and not because they can facilitate purchases.

Therefore, like conventional property, an individual would not be able to confer or transfer a title in Biprowess,,f he does not rightfully have one: *nemo dat quod non habet*. Thus, whilst it would be possible to follow each transactional link from its digitised record, it may not affirm or warrant the passing of legal title from each individual. For instance, in a transfer of bitcoins from A to B, it could be possible that A acquired the bitcoins (in the first place) through fraudulent means or through

[25] ibid.
[26] Fox (n 5).

coercion. Thereby making his title voidable or void (depending on the facts). For example, the title held by the hackers over the bitcoins stolen in the Mt. Gox incident would be void and would never have existed in the first place.

However, by extending the legal definition of conventional money and applying this analogous principle to cyber-currencies, a good faith purchaser of these cyber-currencies will have a defence under the common law. A special status is also conferred to promissory notes and negotiable instruments as shown in the landmark case of *Miller v Race*.[27] *In Miller v Race*, it was held that property and title in a bank note is passed by the act of delivery, and an individual who acquires it in good faith, for value, is the owner. Thus, he has the legal right over it in contrast to the former owner from which it was stolen.[28] Therefore, a good-faith purchaser for value would have an indefeasible title over cyber-currencies.

V. CLAIMS IN PRIVATE LAW

Understanding cyber-currencies as a kind of money or property would open up several new possibilities in law. Firstly, the categorisation will reduce ambiguities around taxation for appropriate revenue enforcement agencies. Secondly, it will establish a formalised and institutionalised framework, within which cyber-currencies can circulate with some legal certainty. This, in turn, will strengthen confidence amongst individuals (and prospective claimants) to engage in the use of cyber-currencies, and to seek remedies which can be attained through court actions.

A major concern in peer-to-peer transactions involving cyber-currencies would be how claims could be enforced when there are no intermediaries involved. This can be contrasted to bank transfers where the Bank acts as an intermediary and could

[27] Fox (n 5).
[28] *Miller v Race* (1758) 1 Burr 452.

therefore be held liable for any potential unjustified enrichment of the transferee. Hence, in cases involving misapplied cyber-currencies, the treatment of cyber-currencies as money would help give claimants a claim under the law of unjustified enrichment.[29] In this context, it would be conceivable to consider cyber-currency as a store of value instead of a commodity, where a successful claim would require the claimant to follow or trace the value to the defendant. The claimant would also have to prove that the defendant was unjustly enriched at the claimant's expense.[30] The defendant, in the absence of any valid claims or defence, would have to ensure that the claimant is restored back to his original position *id est* restitution.[31] For instance, if A mistakenly transfers 10 bitcoins to C's address instead of the actually intended 'B', A would then have a claim against B for unjustified enrichment provided that A can prove that C's enrichment was A's expense was unjust and C does not have any valid defence against this claim.

Unlike conventional currencies, cyber-currencies will prove to be more effective in claims that require money to be traced. As per Lord Millett, "Following is the process of following the same asset as it moves from hand to hand. Tracing is a process of identifying a new asset as the substitute for the old."[32] Bitcoin has a decentralised system and therefore "does not consist in debts owed by a centralised intermediary".[33] Thus, for tracing purposes, a parallel can be drawn between bitcoins and money: the following of a tangible currency (banknotes and coins) from one person to another would be akin to following the transactional history of the blockchain. This is because in each case the same thing can be identified as passing from successive transactions, in contrast to the tracing of intangible convention currencies which occur through a bank payment clearing system, in which intangible money does not actually pass from

[29] *Kelly v Solari* (1841) 152 ER 24.
[30] *Bank of Cyprus UK Limited v Menelaou* [2015] UKSC 66.
[31] *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221.
[32] *Foskett v McKeown* [2001] 1 AC 102, 127 (Lord Millett).
[33] Fox (n 5).

one hand to another. Thus, this essay contends that treating cyber-currencies as money in law may assist in overcoming hurdles to the effective enforceability of claims in private law which would normally arise in the presence of an intermediary.

POTENTIAL ISSUES OF ENFORCEABILITY

Emanating, naturally, from the preceding sections concerning the private law implications of treating cyber-currency as money is the enforceability of these title claims. As already observed in *Miller v Race*, a good faith purchaser for value is immune from liability and has indefeasible title. However, the test for a good faith purchaser in the case of cyber-currencies remains to be articulated, given that cyber-currencies operate on a principle of anonymity and the disestablishment of financial institutions' role in transactions between two parties. A high threshold for meeting the "good-faith" test seems unlikely or improbable, especially when it is not practically feasible to ascertain identities of the parties and the authenticity of the source. For instance, in English trusts law, the doctrine of "knowing receipt" holds individuals liable who accept trust property through unlawful or illegitimate means in spite of having knowledge of a breach of trust.[34] In actions involving cyber-currencies, it would be problematic for both the claimants and the defendants to prove or defend, because knowing all the relevant information about the other party's title to the property is antithetical to cyber-currency payment systems. The question that remains to be answered is: what would be deemed as reasonable diligence (on the defendant's part) in a cyber-currency transaction?

The disquisition so far has put forward the view that Bitcoin is a special kind of money and property *id est* neither a chose in action nor a chose in possession. A chose in action would require a third party or debtor *id est* a bank, to settle a claim. To that

[34] *El Ajou v Dollar Land Holdings* [1994] 2 All ER 685.

extent, specific implement would seem to be an equitable remedy as a response to the changing nature of property and money with no intermediary institution.[35] However, specific implement or specific performance *prima facie* do not appear to be entirely proportionate in these circumstances for two reasons.[36] Firstly, in Scots Law, specific implement is usually granted as a remedy for the enforcement of an obligation, instead of the payment of money. Thus, a remedy for specific implement for transfer of bitcoins may seem counter-intuitive, as the case in point here is that cyber-currencies are indeed money. This, however, can be rebutted by arguing that cyber-currencies are a special kind of money and property (as established above), and in this situation, they may be distinguished from the historic common law tests for specific implement. Secondly, claims for specific implement are not ordinarily accepted by the Scots courts. It is contended that this is because the ensuing sanction against the defendant in a claim for specific implement, imprisonment, is disproportionately harsh for a mere breach of contract.

Cyber-currencies can in theory override concerns of 'mixture' (which arises in bank money), as recognised in the authoritative case of *Devaynes v Noble*, which established the first-in, first out rule. It was held that as a principle, payments are as a rule of thumb, appropriated to debts based on the order in which the debts were incurred.[37] We have already seen above how each coin can be traced via its unique transactional history to determine the exact origin of each payment. Unlike conventional money, each cyber coin has a unique reference and could in theory be distinguished and followed through any mixture. Therefore, cyber-currencies, with a proper application of new technologies would largely be able to discern between

[35] Shawn Bayern, 'Dynamic Common Law And Technological Change: The Classification Of Bitcoin' 71 Washington and Lee Law Review Online 22 (2014).

[36] HL MacQueen and LJ Macgregor, 'Specific Implement, Interdict And Contractual Performance' (1999) 3 Edinburgh Law Review 239.

[37] *Devaynes v Noble* (1816) 35 ER 781.

"good coins" and stolen coins.[38] There have already been developments on this front. For instance, a recent "taint analysis" tool developed by a Cambridge team claims to have effectively applied (coded) the first-in, first out rule to accurately trace tainted coins (see below).[39] . On the whole, problems of enforceability cannot be mitigated entirely at present and the utility of cyber-currencies is thus reliant on the development of tools which can address issues pertaining to the accuracy in the traceability and identification of these coins. Furthermore, the tools of enforcement in such claims also need to be balanced with one of the original purposes of cyber-currencies, anonymity.

VI. CONCLUSION

From our discussions so far, the limitations concerning the regulation and enforcement of cyber-currencies as money within the legal system have become apparent. As Fox notes "even putting the arguments at the strongest, the doubts about how cyber-currencies would be accommodated in private law should give a reasonably prudent trustee real cause for concern".[40] Cyber-currencies therefore, would need to bear at least some semblance with contemporary payment systems to have some practical possibility of incorporation into the legal framework. This ideally would require them to be brought under the anti-money laundering provisions of enforcement agencies and requiring some level of identification, say for instance through the know-your-customer (KYC) requirements.[41]

[38] M Möser, 'Anonymity of Bitcoin Transactions' (Münster Bitcoin Conference, July 2013).
[39] Ross Anderson, Mansoor Ahmed and Ilia Shumailov, 'Making Bitcoin Legal' (Cambridge University press 2018).
[40] Fox (n 5).
[41] Anderson (n 39)

Another possibility could be the provision for registration of titles, as is the case of property or patents, wherein particular bitcoins are registered against the owners and with subsequent transfers, the titles pass correspondingly.[42] This, however, could possibly defeat the purpose and central principle of cyber-currencies, that is, the anonymity of the customer. However, a possible alternative to "registration" would be to use forensics, such as taint analysis, as a means to trace disputed and stolen coins. The use of taint analysis can be effective in resolving issues like title disputes, and complexities involving "mixture" of bitcoins and so on. A final solution could be to regulate cyber-currency exchanges with the objective of protecting parties from losses in the event of a theft (such as the one involving Mt. Gox).[43]

However, if the study of common law teaches us anything, it is that the development of law is an evolutionary process if not a revolutionary one i.e. through case law and statutes. The principles of monetary law in its early form were riddled with numerous embryonic failures, especially in its weak recognition of bank notes and other monetary instruments, which are now well established in the modern era.[44] Nonetheless, this rudimentary concept would later influence much of our present understanding about money in private law. Private law as a whole, is, therefore, a culmination of centuries of evolutionary processes. Thus, like all evolutionary processes, the recognition of the cyber-currencies in private law at present is by no means perfect. Considering how the court dealt with intangible property and showed restraint in expanding its interpretation in the *Your Response* case, it remains to be seen how the legislature responds to cyber-currencies.

[42] ibid.
[43] ibid.
[44] David Fox, 'The Case Of Mixt Monies', Money in the Western Legal Tradition: Middle Ages to Bretton Woods (Oxford University Press 2016).

FAIRNESS AND EQUALITY IN ADMINISTRATIVE LAW: THE SUPREME COURT IN *GALLAHER*

Timothy Lee*

I. INTRODUCTION

In a relatively concise judgment, the Supreme Court rejected the principles of equal treatment and fairness as free-standing grounds of judicial review in *R (on the application of Gallaher Group Ltd) v Competition and Markets Authority*.[1] While rightly expressing concerns about the extrapolation of general principles from cherry-picked *dicta*, and about the coherence of administrative law, the Supreme Court was perhaps unduly conservative in its interpretation of existing case law, and in the stance it chose to adopt in selecting between earlier lines of authority. This note will analyse the court's discussion of the principles of equal treatment and of fairness, before also briefly considering the issues of legal coherence and the role that remains for equality and fairness in administrative law.

* B.A. (Law) (*Cantab*) (Candidate). I am grateful to Dr Joanna Bell for her helpful comments as well as the reviewers for their assistance. All errors remain my own.

[1] [2018] UKSC 25, [2018] 2 WLR 1583.

II. SUMMARY OF FACTS AND JUDGMENT

In March 2003, the Office of Fair Trading (OFT) (predecessor of the defendant, the Competition and Markets Authority (CMA)) opened an investigation against thirteen manufacturers and retailers for alleged price-fixing. In 2008, several parties, including the claimants, Gallaher and Somerfield, entered Early Resolution Agreements (ERAs) with the OFT, under which they admitted liability in exchange for reduced penalties. In an internal document, the OFT listed "fairness, transparency and consistency" as principles integral to the early resolution process. One of the parties, TMR, further obtained from the OFT an assurance that, should the other parties successfully appeal an OFT ruling, the OFT would withdraw its decision or reduce the penalties, as appropriate. In April 2010, the OFT issued findings of infringement against twelve of the parties involved, including Gallaher, Somerfield and TMR. In 2012, six parties which had not entered into ERAs successfully appealed these findings before the Competition Appeal Tribunal. The tribunal's reasoning was such that, had the other parties appealed, they would certainly have been successful as well.

Given the successful appeals, TMR invited the OFT to withdraw the findings of infringement against it, citing the assurances in 2008, and the OFT did. Gallaher and Somerfield then sought a withdrawal of the findings of infringement against them too, but the OFT refused. The claimants thereafter sought judicial review of the OFT's refusal to grant them the same benefits of settlement as were afforded TMR in 2012. The judge at first instance rejected their claims. The Court of Appeal allowed the claimants' appeal, holding that that the equal treatment principle applied, since the parties were in a comparable position, and there was no objective justification for treating them differently.

The Supreme Court unanimously reversed the Court of Appeal's decision. Delivering the lead judgment, Lord Carnwath held that neither the principle of equal treatment nor the principle of fairness are distinct grounds of review, and the

claimants had no case on established principles of administrative law. Concurring, Lords Sumption and Briggs held that the OFT's decision, while discriminatory, was objectively justified and rational. It is important, Lord Sumption explained, "not unnecessarily to multiply categories".[2] The OFT's refusal stood or fell according to the "ordinary requirement[s] of rationality".[3]

III. ANALYSIS

A. THE EQUALITY PRINCIPLE

In considering the equal treatment principle, Lord Carnwath was unequivocal: it is not a distinct ground of review, or, to use his Lordship's phrase, "a distinct principle of administrative law".[4] In support of this, his Lordship relied on a passage by Lord Hoffman in *Matadeen v Pointu*:[5]

> Of course, persons should be uniformly treated, unless there is some valid reason to treat them differently. But what counts as a valid reason for treating them differently? And, perhaps more important, who is to decide whether the reason is valid or not? Must it always be the courts? … The fact that equality of treatment is a general principle of rational behaviour does not entail that it should necessarily be a justiciable principle.

To be sure, his Lordship did not entirely dismiss the relevance of considerations of fairness and equality. Rather, these are to be treated merely as aspects of established principles of substantive review: rationality and proportionality. For

2 ibid [50].
3 ibid.
4 *Gallaher* (n 1) [27].
5 [1999] 1 AC 98 (HL) 109E–F.

instance, in *A v Secretary of State for the Home Department*,[6] the detention of non-national suspects but not of British nationals was irrational and constituted a disproportionate infringement of the rights of the non-nationals.[7] In *Middlebrook Mushrooms*,[8] the exclusion of mushroom pickers from the wage rate for manual harvest workers was Wednesbury unreasonable and hence, irrational.[9]

Yet it is unclear that the prior case law compelled the court to completely dismiss equality as an independent principle. While powerful, Lord Hoffman's remarks were made in a Privy Council case ruling on the Constitution of Mauritius, which merely provided persuasive authority to their Lordships in the Supreme Court, ruling on domestic principles of administrative law. Nor was it the only line of authority their Lordships could have availed themselves of. In the Court of Appeal, Lord Dyson had referred to *Crest Nicholson v OFT*,[10] a case also concerning the OFT's regulatory activities, and held that the OFT was bound by the equal treatment principle.[11] Perhaps it was not raised in argument before the judges of the Supreme Court; but its lack of any mention or consideration is regrettable.

Regrettable also was the court's failure or refusal to engage in a more probing examination of cases such as *A v Secretary of State*. While that case, unlike *Gallaher*, involved a discussion of human rights and European jurisprudence, the analysis contained therein provided a useful guide on how to approach the question of discriminatory treatment. There, Lord Bingham explained that:

6 [2004] UKHL 56, [2005] 2 AC 68.

7 Although concerned with proportionality under the European Convention of Human Rights, the reasoning "could be applied equally to common law rationality". *Gallaher* (n 1) [27].

8 *R (Middlebrook Mushrooms Ltd) v Agricultural Wages Board of England and Wales* [2004] EWHC 1447 (Admin), The Times, 15 July 2004.

9 *Gallaher* (n 1) [28].

10 *Crest Nicholson plc v Office of Fair Trading* [2009] EWHC 1875 (Admin), [2009] UKCLR 895.

11 At least in all steps leading up to the imposition of a penalty. *R (on the application of Gallaher Group Ltd) v Competition and Markets Authority* [2016] EWCA Civ 719, [2016] Bus LR 1200 [34].

> The question is whether persons in an analogous or relevantly similar situation enjoy preferential treatment, without reasonable or objective justification for the distinction, and whether and to what extent differences in otherwise similar situations justify a different treatment in law.[12]

The Court of Appeal adopted a similar approach in *Gallaher*, finding the claimants to be in an analogous situation to TMR, without any objective justification for differential treatment.[13] Rather than dismiss the principle of equal treatment outright, the Supreme Court could have chosen to engage in a more nuanced analysis of how it applied to the present case. Lord Briggs saw a "powerful objective justification for unequal treatment" in the fact that the OFT's original assurance was a mistake, that rescinding its promise would result in TMR being better off, and in the claimants' lack of reliance.[14] The court could have considered these factors as circumstances relevant to the legality of unequal treatment, instead of throwing the baby out with the bathwater. Unfortunately, it did not.

B. THE FAIRNESS PRINCIPLE

Lord Carnwath took a similarly firm stand against the principle of fairness: "Simple unfairness as such is not a ground for judicial review".[15] As with the principle of equal treatment, his Lordship held that fairness did not add anything beyond conventional grounds of review such as improper motives or illegality.[16] This was to be seen in Lord Templeman's discussion of earlier authorities in *Preston*,[17] where

[12] *A v Secretary of State* (n 6) [50].
[13] *Gallaher* (CA) (n 12) [38]–[45], [48]–[61].
[14] *Gallaher* (n 1) [63].
[15] *Gallaher* (n 1) [31].
[16] *Gallaher* (n 1) [37].
[17] *Re Preston* [1985] AC 835 (HL) 864H–866F.

there was "unfairness" only because of the use of power for improper objectives (as in *Padfield*),[18] or because of an error of law (as in *HTV Ltd v Price Commission*).[19]

In the course of his judgment, his Lordship cautioned against seizing on individual phrases such as "conspicuous unfairness" out of context to derive some principle of law.[20] The decision in *Unilever*[21] (where the phrase was taken from) was "unremarkable on its unusual facts", and such phrases were "simply expressions used to emphasise the extreme nature of the Revenue's conduct".[22] This warning is to be welcomed, if past cases are not to be taken as authority for more than they really are.

Yet, the court's focus on whether "conspicuous unfairness" was a free-standing test led it to overlook the broader principle of unfairness developed in *Unilever*. Lord Carnwath quoted at length from Simon Brown LJ's judgment:

> 'Unfairness amounting to an abuse of power' as envisaged in Preston and the other Revenue cases is unlawful not because it involves conduct such as would offend some equivalent private law principle, not principally indeed because it breaches a legitimate expectation that some different substantive decision will be taken, but rather because either it is illogical or immoral or both for a public authority to act with conspicuous unfairness and in that sense abuse its power.[23]

His Lordship certainly took a reasonable view in rejecting an extensive extrapolation of the law based on the final words of that paragraph. Yet, his Lordship neglected to quote in full Simon Brown LJ's immediately following statement of principle: "In short, I regard the MFK category of legitimate expectation as

[18] *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 (HL).
[19] *HTV Ltd v Price Commission* [1976] ICR 170 (CA).
[20] *Gallaher* (n 1) [40].
[21] *R v Inland Revenue Commissioners, ex p Unilever plc* [1996] STC 681 (CA).
[22] *Gallaher* (n 1) [40].
[23] *Unilever* (n 21) 695.

essentially but a head of Wednesbury unreasonableness, *not necessarily exhaustive of the grounds upon which a successful substantive unfairness challenge may be based*."[24]

And again, no reference was made to the concluding paragraph of the same section (headed "Legitimate expectation or nothing?"):

> Any unfairness challenge must inevitably turn on its own individual facts. True, as Lord Templeman made clear in Preston, it can only ever succeed in 'exceptional circumstances'… I am very ready to accept that rare indeed will be the case when a fairness challenge will succeed outside the MFK parameters. It is certainly difficult to envisage many situations when, absent breach of a clear representation, a highly reputable and responsible body such as the Revenue will properly be stigmatised as having acted so unfairly as to have abused their power to accept late claims. But I am satisfied that *there exists no legal inhibition to such a conclusion*.[25]

In seeking to confine *Unilever* to its facts, it would seem the court had ignored the broader thrust of that case: that it would require unusual facts to ground an unfairness challenge, and any such challenge would turn on those facts, but nonetheless that such facts might arise (as in *Unilever* itself), and there was no reason to confine a case involving unfairness to the straightjacket of existing private or public law principles. Such an interpretation would have more accurately reflected the state of the law, while preserving the caution, certainty, and yet also flexibility of the law. A blanket dismissal of the principle of unfairness did not. It is ironic that Lord Carnwath should have cautioned against tunnel vision; yet ignored the more extensive discussion of the principle at hand.

[24] ibid (emphasis added).
[25] ibid (emphasis added).

The court also referred to, but chose not to follow, Lord Scarman's *dicta* in *National Federation*[26] and *Preston*.[27] In those cases, Lord Scarman expressed his view that an unfair use of power could be challenged in court.[28] His Lordship provided a clear and powerful, if *obiter*, defence of the duty of fairness. It is not a "mere matter of desirable policy or moral obligation"; an unfair decision gives rise to a "genuine grievance" which the courts can provide an "effective remedy" for in the form of "prerogative relief"; the courts should not shrink from this role "merely because the duties imposed… are complex and call for management decisions in which discretion must play a significant role".[29] It was open to the Supreme Court to at least engage with, even if not adopt, persuasive analysis in a line of Supreme Court cases. A well-considered restriction of the principle of fairness would still have been preferable to a thinly-supported rejection.

A similar issue has arisen in relation to the doctrine of legitimate expectations. There, commentators have regarded the principle of fairness as too uncertain,[30] abstract[31] and open-ended[32] to serve as a justification for the doctrine. In *Gallaher*, the court could have articulated similar problems with treating unfairness as an independent head of review. The court could have considered that such problems militated against a distinct principle of fairness, given its vague nature, but perhaps less so for the principle of consistency, which is less general and abstract. Such an

[26] *R v Inland Revenue Commissioners, ex p National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 (HL).
[27] *Gallaher* (n 1) [34]–[35].
[28] *National Federation* (n 26) 651E–653A; *Preston* (n 17) 851H–852C, 852F–G.
[29] ibid.
[30] Jack Watson, 'Clarity and Ambiguity: A New Approach to the Test of Legitimacy in the Law of Legitimate Expectations' (2010) 30 Legal Studies 633, 633–35.
[31] Paul Reynolds, 'Legitimate Expectations and the Protection of Trust in Public Officials' [2011] PL 330, 330–36.
[32] Mark Elliot, 'Legitimate Expectations and the Search for Principle: Reflections on *Abdi & Nadarajah*' [2006] JR 281, 282–84.

approach, too, would have been more balanced than the blanket rejection of both principles.

C. COHERENCE IN THE LAW

In his concurring judgment, Lord Sumption elaborated on the rationale for being circumspect in developing new grounds of review:

> In public law, as in most other areas of law, it is important not unnecessarily to multiply categories. It tends to undermine the coherence of the law by generating a mass of disparate special rules distinct from those applying in public law generally or those which apply to neighbouring categories.[33]

This indicates the court will likely be reticent if asked to uphold a challenge not based on a clearly established ground of review. This will guide future litigants in framing their claims. This statement also supplies an independent reason for rejecting distinct principles of equality and fairness, thus providing some explanation as to why the court chose to adopt a conservative view of the existing lines of authority discussed above.

It is worth considering whether having additional principles truly hurts legal coherence, and if so, whether there are not more useful purposes to be served by these principles. As Mark Elliot points out, the doctrine of substantive legitimate expectations does not sit in isolation from the principles of rationality and proportionality, yet none would dispute its status as a free-standing principle of administrative law.[34] Similarly, principles of equality and fairness, developed within

[33] *Gallaher* (n 1) [50].

[34] Mark Elliot, 'Consistency as a free-standing principle of administrative law?' (*Public Law for Everyone*, 15 June 2018) <https://publiclawforeveryone.com/2018/06/15/the-supreme-courts-

appropriate constraints such as the need for objective justification or exceptional circumstances, can provide a useful basis for challenging unlawful administrative action. To subsume such principles within the doctrines of proportionality and rationality is possible, but at the cost of accuracy, precision, and indeed certainty in how exactly fairness and equality factor into substantive review.

D. WHAT ROLE DO EQUALITY AND FAIRNESS PLAY?

It is worth noting that claimants can still challenge discriminatory or unfair treatment. But they must satisfy the requirements of established administrative law doctrines, as in *Middlebrooks* (irrationality),[35] *Padfield* (improper objectives) or *HTV Ltd* (error of law).[36] So it would seem, based on the foregoing analysis of *Gallaher*. Yet there is more than meets the eye. For in *Gallaher*, Lord Carnwath acknowledged that the claimants had a *legitimate expectation* of equal treatment, given the OFT's expressed commitment to that principle.[37] Yet his Lordship proceeded to dismiss that as possible grounds for granting a legal remedy.[38] Going further, Joanna Bell suggests that the claimant's case could have been made out on the ground of irrationality itself.[39] For it hardly seems that an official's blunder should be a legally acceptable reason for treating TMR differently to the claimants. Nor does the original blunder in 2008 seem to justify differential treatment in 2012. Why did the claimants lose then? It appears the court might have been influenced by "institutional features" of the case

judgment-in-gallaher-consistency-as-a-free-standing-principle-of-administrative-law/> accessed 24 Dec 2018. See section headed 'Rationality, proportionality and underlying normative values'.

35 As discussed above at II.A.

36 As discussed above at II.B.

37 *Gallaher* (n 1) [29].

38 *Gallaher* (n 1) [30], [42].

39 Joanna Bell, 'Administrative Blunders & Judicial Review: Analysing the UKSC Decision in *Gallaher v Competition & Markets Authority*' (2018) (forthcoming).

such as the huge cost to OFT of repaying the claimant's penalties, and shied away from imposing such a cost on them.[40]

If correct, this suggests that even if claimants show discriminatory or unfair treatment, they may not be able to obtain the desired result or remedy. Indeed, Bell argues that in *Gallaher*, the court should have found the discriminatory treatment in 2008 (and possibly in 2012) unlawful, while restricting the remedy to, at most, declaratory relief.[41] Once again, the Supreme Court's focus on dismissing equality and fairness as free-standing principles may have proven unhelpful. A more nuanced remedial response was available. More importantly, the court missed an opportunity to provide productive guidance as to when unequal or unfair treatment will lead to findings of unlawfulness, and what the appropriate forms of relief would be in different circumstances.

IV. CONCLUSION

The decision as it stands prevents litigants from basing their claims on independent principles of fairness and equality. It should also make them wary of straying beyond pre-existing grounds of review and raising principles not clearly established in law. Unfortunately, the court failed to provide further guidance as to how and when unfair or discriminatory treatment would be irrational, disproportionate, or violate other principles of substantive review, or what the appropriate remedies would be. But given the likelihood of further cases engaging the issues of fair and equal treatment, it is to be hoped that it will soon have occasion to do so.

[40] ibid.
[41] ibid.

THE DEATH AND RESURRECTION OF CORPORATE CRIMINAL LIABILITY IN THE UNITED KINGDOM

Shambhavi Tej Nargundkar*

ABSTRACT

The term 'Corporate Criminal Liability' has always provoked multifarious deliberations and commentaries from legal academics in the United Kingdom. These reactions have gradually evolved from denying corporate criminal liability in the early 1800s to now acknowledging that the actions of corporations are as powerful as an individual's, if not more. This article analyses the gradual progression of corporate criminal liability in the United Kingdom through common law doctrines and legislation. It will argue from this analysis that, although the state of the law of corporate criminal liability is by no means as appalling as it has been in the past, there is definitely room for further improvement. This may be achieved by incorporating a corporate crime model similar to the model that is being used in America, that would envelope both criminal sanctions and deterrent-based initiatives to not only reduce corporate crime but also increase corporate accountability. In examining

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corporate criminal liability, this article will employ a method of using case law and statutory material together with an analysis of academic material.

I. INTRODUCTION

Under English law, a company today is identified as a juridical entity that has the same legal obligations as a natural entity does, despite its intangible physical presence. This was not always the case, however, and companies often would not be held liable in the past, especially criminally, on breaching their legal obligations. The legal system at that time is reflected in the view of academics such as Thurlow, who refused to accept corporate criminal liability, stating that 'corporations have neither bodies to be punished, nor souls to be condemned; they can therefore do as they like'.[1]

However, with the growing understanding of the systemic exploitation of communities by powerful organisations, in recent times there has been a measured progress to extirpate these antiquated views. It is acknowledged that the legislation in this area has changed the state of corporate criminal liability in the United Kingdom. However, this article explores additional measures that may be taken in order to further this progress, focusing on not only prosecuting corporate crime, but also deterring it in the United Kingdom.

This article will critically analyse these issues in four sections. The first section will trace the historical understanding of corporate criminal liability in the United Kingdom and analyse the shift, after the 20th century, in the changing beliefs surrounding corporate criminal liability through the development of various doctrines. The second section will then discuss the incorporation of these theories in the present legislative framework controlling corporate crime and also discuss the

[1] John Poynder, *Literary Extracts* (1844) vol 1, 268 (Poynder quoting Lord Chancellor Thurlow on the soulless nature of corporations)

need for greater accountability of powerful companies. Whilst doing so, it will demonstrate that, although there has been a significantly assertive attitude on the part of the government to incorporate powerful legislation[2], the reality is an exiguity in reducing corporate crime. The third section will emphasise this by conducting a broad comparative analysis of the corporate criminal liability framework in the United Kingdom and the United States. First, it will present the historical evolution of corporate crime legislation in America and its progress to the present framework of regulation. Second, it will highlight the differences in the two frameworks and focus on how corporate criminal liability would be revolutionised in the United Kingdom if a similar regulatory framework as in the United States was adopted. The final section will present a reform structure for corporate criminal liability in the United Kingdom, based on preceding conclusions. It will not only present modifications for the current corporate crime legislation, but also provide a set of general reforms targeted at effective deterrence.

Finally, whilst the aim of this article is to discuss and critically analyse corporate criminal liability, the sincere hope is to leave the reader pondering on a larger picture: one that depicts the growing power that companies possess in today's increasingly capitalistic society, and the risks that this power poses for the rights of, and justice for, individuals.

[2] Peter Aldreige, 'The UK Bribery Act: The caffeinated younger sibling of the FCPA' (2012) Ohio State Law Journal vol. 73 (5) 1181–1216

II. THE HISTORICAL EVOLUTION OF CORPORATE CRIMINAL LIABILITY IN THE UNITED KINGDOM

A. EVOLUTION OF THE CORPORATE SYSTEM

By the 18th century, many businesses had been set up in England, with the main purpose of growing the economy and improving trade relations with the rest of the world. A considerable number of these business went unregistered because there was no effective legal system in place for their registration. This flaw in the legal system caused significant financial chaos. To remedy this, the Joint Stock Companies Act 1844 was enacted: it introduced a convenient way to register businesses as companies and removed the concept of 'unregistered associations'.[3] The Act revolutionised company law because registered companies gained some legal dominion in the eyes of the law. However, it was only eleven years later that the real impact of the Act was felt through the introduction of the Limited Liability Act 1855. This Act stated that members of a registered company would no longer be held personally liable for any debts of the company.

With the 1844 Act and the 1855 Act, members of the company became assured that they would only be liable to the company itself and not to any of its creditors. The Acts confirmed that a registered company had its own legal personality, distinct from its shareholders. This was affirmed in 1896 in *Salomon v Salomon*, in which it was stated that a company is a legal entity in the eyes of law and is distinct and separate from its shareholders.[4] The affirmation of this principle of separate legal personality was an important step towards recognising that liability can be imposed on a company and, just like an individual, a company is accountable for its actions. Therefore, it is

[3] Amanda Pinto, *Corporate Criminal Liability* (3rd edition, Sweet & Maxwell 2013) 10.
[4] Salomon v Salomon & Co Ltd [1896] UKHL 1 82.

clear that it was the first step in the history of the UK towards enforcing corporate liability on companies and curbing their potentially harmful corporate actions.

B. THE CASE FOR CORPORATE CRIMINAL LIABILITY PRIOR TO 1840

In spite of having identified that companies have their own legal identity, the government and courts were under the impression that giving corporations as much freedom as possible would strengthen the economy[5]. This perceptible inclination paved the way for underhanded actions of corporations. Although it had been made absolutely clear in *Salomon v Salomon* that a company 'was capable of owning and dealing with property, suing and being sued and contracting on its own behalf'[6], many within the legal coterie still maintained that a company could not, however, commit a criminal offence. This view was notably expressed by CJ Holt, who stated that 'while a corporation could not be indicted, its particular members could be'[7].

We can trace several reasons for the impetus behind denying corporate criminal liability. Essentially, it was argued that a corporation could not be held criminally liable because it possessed a juristic legal identity. This means that, unlike a natural person, it could not possess the *mens rea* needed in order to commit a criminal offence. This view was affirmed in cases such as *Sutton's Hospital Case*[8], in which the court held that 'a corporation is incapable of an act of understanding since it has no will to exercise'[9]. Another difficulty was that of procedural uncertainties surrounding the prosecution of a company. Specifically, the fact that a company could not actually be presented in court and accused of a crime, deterred many from imposing corporate

[5] Celia Wells, *Corporations & Criminal Responsibility* (2nd edn, OUP 2001) 36.
[6] Amanda Pinto, *Corporate Criminal Liability* (3rd edition, Sweet & Maxwell 2013) 12.
[7] ibid 6.
[8] *Sutton's Hospital Case* (1612) 77 ER 960.
[9] ibid.

criminal liability. Furthermore, a problem was presented by the 'ultra vires doctrine under contract law, which safeguards a corporation from being held liable for actions that fall outside the scope of activity for which it was formed': the doctrine '[ensured] that a company cannot be held criminally liable since conducting a criminal activity would clearly be stated to fall outside a corporation's scope of actions'.[10] It was clear that these reasons together with the general reluctance of courts ensured that no criminal liability was attached to corporations.

C. THE DEVELOPMENT OF CORPORATE CRIMINAL LIABILITY POST-1850

Under English law, corporate criminal liability was first imposed in 1846 in *R v. Great North of England Railway* [11]. Courts began to consider corporate criminal liability for cases of civic nuisance[12]. It was then that courts, in a revolutionary move, decided to hold companies responsible in certain cases where 'there had been a failure to perform a public duty that had been imposed by the State'.[13] Soon after, courts extended corporate criminal liability to other contexts by employing different doctrines. The notable theories are discussed below.

(i) Theory of Vicarious Liability

The first doctrine that was established by courts to extend corporate criminal liability was the theory of Vicarious Liability. It essentially 'allowed for the imputation

[10] V.S. Khanna, '*Corporate criminal liability: what purpose does it serve?*' (1996) 109(7) Harvard Law Review 1480.

[11] *R v. Great North of England Railway* (1846) 115 Eng. Rep. 1294

[12] Kathleen F. Brickey, 'Corporate Criminal Accountability: A Brief History and an Observation' (1982) 60 Wash. U. L. Q. 393, 405

[13] Khanna (n 10) 1481.

of an agent's conduct to the principal, when this conduct was within the scope of employment and had been done with some intent to benefit the principal'.[14] Whilst this theory had initially been applied only for civil cases, the wording of the principle in general terms allowed for it to be employed also in cases where courts sought to impose criminal liability on a company. The doctrine was first applied by the courts in *Mousell Bros Ltd v London and North-Western Railway*[15], in which the court held that 'if any law prohibits an act; the principle would apply to the company in the failure of compliance, even if the act is carried out by his servants'.[16] As we will see, the establishment of vicarious criminal liability for companies was influential in paving the way for courts to hold companies fully liable for any crimes that they would commit.

(ii) The Identification Doctrine

After extending the theory of vicarious liability, courts were soon able to extend corporate criminal liability for absolute liability offences beyond vicarious liability, through the Identification Doctrine. This doctrine was first established as the 'Alter Ego Doctrine' in a number of important cases such as *Kent and Sussex Contractors*,[17] *ICR Haulage*[18] and *Moore v L Breseler*.[19] Its development into the Identification Doctrine as presently understood, however, was only effected in *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd*.[20] The court held that, if a particular director of a company was working for the benefit of the company or was the 'company's directing

[14] ibid.
[15] Mousell Brothers v London and North Western Railway Company [1917] 2 KB 836.
[16] A Bassi, '*Principles and Theories of Corporate Liability*' (2016) 83 <http://shodhganga.inflibnet.ac.in/bitstream/10603/107447/10/10_chapter%203.pdf> Accessed 2 January 2018.
[17] *Kent and Sussex Contractors Limited* [1944] 1 KB 146.
[18] *Regina v ICR Haulage* [1944] 1 All ER 691.
[19] *Moore v L Breseler* [1944] 2 All ER 515.
[20] *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705.

mind and will'[21], the company can be held fully liable because its actions would no longer be considered the director's actions but the actions of the company.

The Identification Doctrine laid the foundation for convicting companies of crimes of intent, and broadened the earlier Alter Ego Doctrine by allowing 'courts to hold a company liable for all *mens rea* offence cases, even cases where a natural person may not be held liable'[22]. A recent application of the Identification Doctrine is found in *Tesco Supermarkets Ltd v Nattrass*.[23] In this case, the court applied the doctrine and held that Tesco Supermarkets Ltd was responsible for the exploitation of the customer. Bassi criticised the judgment, however, arguing that it had actually narrowed the Identification Doctrine.[24] This concern was later rectified by the introduction of legislation on corporate crime, which is discussed below.

D. CESSATION

By the 1970s, several corporate criminal liability doctrines were in place, most notably the ones examined above. Nevertheless, it was still rare for courts to convict companies for criminal offences, especially for crimes with a mental element, such as corporate homicide. However, incidents such as the King's Cross Fire of 1987 and the Piper Alpha Oil Rig explosion became the 'drivers for corporate criminal legislation to hold companies liable for death and injury'.[25] The incident that created the most public uproar was the case of Herald of Free Enterprise[26], in which the prosecution charged P&O European Ferries with corporate manslaughter under the

[21] ibid.
[22] Bassi (n 16) 70.
[23] *Tesco Supermarkets Ltd v Nattrass* [1971] UKHL 1.
[24] Bassi (n 16) 95.
[25] Iwona Sepiolo Jankowska, 'Corporate criminal liability in English law' (2016) Adam Mickiewicz University Law Review 6, 137.
[26] Department of Transport, *Herald of Free Enterprise: Formal Investigation* (1988) Report of Court No. 8074.

Identification Doctrine. Although P&O European Ferries was not convicted due to the narrow criteria provided for under the Identification Doctrine, this case triggered unprecedented deliberations concerning the development of legislation that would enable courts to impose corporate criminal liability for cases such as these. This resolutely closed any disinclination against corporate criminal liability in the UK.

III. THE PRESENT STATE OF CORPORATE CRIMINAL LIABILITY IN THE UNITED KINGDOM

A. CORPORATE CRIME

In the previous section, we analysed various theories applied in cases, that acknowledged corporate criminal liability in the UK. With the understanding that the UK needed more in order to control corporate crime, the government decided to legislate on the issue. Before analysing the legislation on corporate criminal liability, it is important to broadly outline the different categories of corporate crimes that are recognised under English Law. A company can be held liable for two categories of crimes: economic crimes and offences of corporate killing. Economic crimes, which are fiscally dependent, usually involve crimes such as taking a bribe, accounting fraud, and money laundering. Corporate killing crimes may be committed where companies have been involved in the killing of an individual or several individuals, often, though not always, out of negligence. Examples of these cases are *Attorney General's Reference (No. 2 of 1999)*[27] and the Piper Alpha Oil Rig explosion.[28]

[27] *Attorney General's Reference (No 2 of 1999)* [2000] 3 All ER 182.

[28] National Aeronautics and Space Administration, 'The Case for Safety: The North Sea Piper Alpha Disaster' (2013) NASA Volume 7 (4) <https://sma.nasa.gov/docs/default-source/safety-messages/safetymessage-2013-05-06-piperalpha.pdf?sfvrsn=3daf1ef8_6> Accessed 3rd January 2018.

B. THE LAW ON CORPORATE CRIME

Although there are many pieces of legislation, this section will critically analyse the key pieces, namely the Bribery Act 2010, Corporate Manslaughter and Corporate Homicide Act 2007, Criminal Finances Act 2017, and Deferred Prosecution Agreements.

(i) Bribery Act 2010

The Bribery Act 2010 was enacted following the scandal involving the defence giant BAE Systems, in which the UK government was confronted with public outcry and severe criticism for constraining and intervening in a SFO investigation for so-called 'national security concerns'.[29] The Act is said to have been introduced in order to counter the international criticism that suggested that the UK was lenient on corruption.[30] The main feature of the Act is its introduction of criminal liability for a company where any member or associated person to the company bribed a third party with the intention of obtaining or retaining business for the company.[31] The offence is considered a strict liability offense.[32] The only defence available to the company is under s 7(2) of the Act, which operates if the company can prove that it did everything in its power to put adequate measures in place to prevent any member of the company from bribing a third party.[33]

[29] Gordan Belch, 'An Analysis of the Efficacy of the Bribery Act 2010' (2014) 5 (134) Aberdeen Student Law Review <https://www.abdn.ac.uk/law/documents/An_Analysis_of_the_Efficacy_of_the_Bribery_Act_2010.pdf> Accessed 7th January 2018.

[30] Caroline Binham, 'Companies face criminal liability for corporate fraud' Financial Times (12 May 2016) < https://www.ft.com/content/253554c4-185f-11e6-b197-a4af20d5575e> Accessed 8th January 2018.

[31] Bribery Act 2010, s 7(1)

[32] Mark Pieth and Radha Ivory, *Corporate Criminal Liability: Emergence, Convergence, and Risk* (1st edn, Springer 2011) 28.

[33] Bribery Act 2010, s 7(2).

The first successful conviction under s 7(1) was in *R v Sweett Group Plc*,[34] where a UK-based construction service company, Sweett Group, was convicted by the SFO for making corrupt payments to a high-ranking official at a foreign company in order to secure a consultation contract.[35] The conviction had two main effects: First, it warned companies of the far-reaching grip of the Act and proved that the SFO would not hesitate to use its power to control illegal acts outside the UK jurisdiction. Second, it made clear that liability under the bribery offence is strict and that the defence under s 7(2) is not easily relied upon. It became apparent that companies would be held accountable if they did not have adequate procedures in place to prevent bribery.

S 7 of the Act has been termed the most 'overreaching' aspect of the Act.[36] Indeed, Aldreige refers to the Act as 'the caffeinated sibling of the Foreign Corrupt Practices Act (FCPA)'.[37] Aldreige is accurate, since the Act does take an overly strict approach when it comes to bribery and corruption even in comparison to United States standards, which has a legal system that is known for its tight control of corruption. The only other critique of the Act is the lack of clarity in the guidelines that has been provided by the Ministry of Justice, since the directions only pressurize companies to tackle internal issues of corruption and fail to provide any real guidance on how to do so.[38]

[34] *R v Sweett Group plc* (2016) (unreported).
[35] Judith Seddon, *Practitioner's Guide to Global Investigations* (2nd edn, David Samuels 2018).
[36] Bruce W. Bean and Emma H. MacGuidwin, 'Expansive Reach - Useless Guidance: An Introduction to the U.K. Bribery Act 2010' (2011) 18 ILSA J. Int'l & Comp. L. 323.
[37] Aldreige (n 2) 1181.
[38] Bribery Act 2010, s 9.

(ii) Corporate Manslaughter and Corporate Homicide Act 2007

As discussed in the previous section, *Tesco Supermarkets Ltd v Nattrass*[39] had unfortunately narrowed the criminal liability of companies. The failure to convict in crucial cases of corporate manslaughter and homicide, such as the Piper Alpha Oil Rig explosion and the King's Cross Fire, was blamed on the narrowness of the test laid down in *Tesco Supermarkets Ltd*.[40] It was not until the Law Commission's report in May 2000[41] that Parliament became aware of the need to address this issue of corporate liability for manslaughter and homicide through legislation. The report proposed a new offence of corporate killing that should be introduced into the legal framework. The Corporate Manslaughter and Corporate Homicide Act 2007 reflects many of the proposals made in this report. Perhaps the key achievement of the Act is the extension of the Identification Doctrine to allow 'for the first time in many years, for companies and partnerships to be easily prosecuted for corporate manslaughter'.[42]

S 1(1) of the Act allows for an organisation to be convicted of a corporate killing if any of the duties and activities managed by it: '(a) causes a person's death, and (b) amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased'.[43] The Act coverage is not limited to only UK companies. According to the guidance provided by the Ministry of Justice, it also covers companies incorporated

[39] *Tesco Supermarkets Ltd v Nattrass* [1971] UKHL 1.
[40] Bassi (n 16) 95.
[41] Home Office, '*Reforming the law on involuntary manslaughter: The government's proposals*' (May 2000) <http://www.corporateaccountability.org.uk/dl/manslaughter/reform/archive/homeofficedraft2000.pdf> Accessed 8th January 2018.
[42] Health and Safety Executive, '*Guidance on Corporate Manslaughter and Corporate Homicide Act' 2017* (Guidance Paper, 2008) <http://www.hse.gov.uk/corpmanslaughter/about.htm> Accessed 8th January 2018.
[43] Corporate Manslaughter and Corporate Homicide Act 2007, s 1(1).

overseas that operate in the UK.[44] The Act is based on the idea, linking to a clear principle under tort law, that a company has a duty of care towards its employees and clients. S 2(1) of the Act puts forward a list of duties that are covered by the Act.[45] With the extension of the tort law principal of 'duty of care' to companies, it is ensured that individuals can be protected from the often-grievous acts of companies, a guarantee that was not afforded before under the Identification Doctrine.

Although there are certain exemptions under ss 3–6[46], the Act conducts a comprehensive discussion of corporate criminal liability. The Act has been welcomed by academics: Shivam Goel, for example, welcomes it for covering the gaps in the law that had been introduced in *Tesco Supermarkets Ltd*.[47] Firstly, the Act applies to all organisations irrespective of their size and the amount of economic, financial and market power that they possess. Secondly, as stated above, the Act covers all companies regardless of whether they are incorporated in the UK or abroad; so long as the company has committed the crime in the UK, the Act allows for the prosecution of such a company. Thirdly, unlike *Tesco Supermarkets Ltd*,[48] the Act allows for the prosecution of a company not only for the actions of its high-level employees (such as directors and managers), but also for the actions of any party in the contracting chain, even third-party or sub-contractors; this results in a very wide reach over the corporation.

44 Ministry of Justice, '*A guide to the Corporate Manslaughter and Corporate Homicide Act 2007*' (October 2007) <https://www.gkstill.com/Support/Links/Documents/2007-justice.pdf> Accessed 9th January 2018.

45 Corporate Manslaughter and Corporate Homicide Act 2007, s 2 (1).

46 Sections 3, 4, 5, 6, mention the duties of care which do not qualify as "relevant" duties of care for the purposes of constituting the offense.

47 Shivam Goel, *Corporate Manslaughter and Corporate Homicide: Scope for a New Legislation in India* (1st edn, Partridge Publishing 2015).

48 *Tesco Supermarkets Ltd v Nattrass* [1971] UKHL 1.

Chris Warburton has questioned if the Act has had much practical impact on restricting corporate crime in the UK.[49] There may be some truth in these queries, considering that in the twelve years since the Act's implementation, there have only been approximately 25 convictions.[50] Most of these convictions have been of smaller companies, and the maximum fines that have been imposed have been no more than £1,200,000.[51] The lack of convictions can be blamed on two factors in the Act. First, the burden of proof, which lies on the prosecution, does not make convictions easier.[52] Many of the corporations have an extensive team of lawyers and large amounts of money at their disposal; this makes it difficult for the prosecution, which often work with fewer resources, to prosecute these cases successfully.[53] Second, the Act does not apply where British companies are responsible for committing an offense abroad.[54] Further, s 28 also makes it clear that the act is concerned with the territorial location of violation, not where the breach has occurred.[55] Hence, 'a company cannot be held liable for the death of a customer abroad even if there was an organisational or management failure at its offices in the UK and this played a substantial part in a breach of duty to the customer'.[56] The lack of accountability here

[49] Health & Safety at Work, 'Corporate Manslaughter: In Deep Water' (Health & Safety at Work News Blog, August 2017) <https://www.healthandsafetyatwork.com/corporate-manslaughter/ten-years-on> Accessed 15th January 2018.

[50] ibid.

[51] ibid.

[52] Victoria Roper, 'The Corporate Manslaughter and Corporate Homicide Act 2007: A 10 Year Review' (2018) The Journal of Criminal Law Vol 82 (1) 48.

[53] Health & Safety at Work, 'Corporate Manslaughter: In Deep Water' (Health & Safety at Work News Blog, August 2017) <https://www.healthandsafetyatwork.com/corporate-manslaughter/ten-years-on> Accessed 15th January 2018.

[54] Ministry of Justice, '*A guide to the Corporate Manslaughter and Corporate Homicide Act 2007*' (October 2007) <https://www.gkstill.com/Support/Links/Documents/2007-justice.pdf> Accessed 9th January 2018.

[55] Corporate Manslaughter and Corporate Homicide Act, s 28.

[56] Crown Prosecution Service, 'Legal guide to the Corporate Manslaughter and Corporate Homicide Act 2007' (July 2018) < https://www.cps.gov.uk/legal-guidance/corporate-manslaughter> Accessed 30 July 2018.

is controversial because many British companies could potentially set up factories abroad to forego the strict compliance maintained under UK standards.

(iii) Criminal Finances Act 2017

The Criminal Finances Act 2017 is one of the newest additions to the compendium of corporate criminal legislation in the UK. The Act effectively overhauled the Proceeds of Crime Act 2002, which previously governed confiscation procedures for money laundering in the UK. Amongst other reasons for the introduction of the Act, the primary motive was to ensure that corporations are held criminally liable for enabling tax evasion or failing to prevent an associated individual from enabling tax evasion. These were not covered in the 2002 Act.

The two main relevant sections of the Criminal Finances Act 2017 are ss 45 and 46. S 45 introduces criminal liability of an organisation that has failed, within its capacity, to prevent a person from committing a tax evasion offence in the UK. S 46 extends this liability in cases where an organisation has failed to prevent a person from committing the tax evasion offense abroad. Her Majesty's Revenue & Customs (HMRC) has issued a three-stage requirement process to identify if the offence actually falls under either of these sections, with 'stage one being a requirement for criminal tax evasion being carried out by a legal or individual taxpaying entity, stage two being the intended criminal facilitation of tax evasion by an associated person with the company; if stages one and two are completed then stage three would be to hold the relevant company criminally liable'.[57] The guidance provided by the HMRC also states that it is irrelevant to the prosecution if the organisation is incorporated in the UK or abroad: So long as the crime is committed in the UK, both sections would

[57] HM Revenue & Customs, '*Tackling Tax Evasion: Government Guidance for the corporate offences of failure to prevent the criminal facilitation of tax evasion*' (September 2017) <http://www.pdpjournals.com/docs/99019.pdf> Accessed 10th January 2018.

be applicable to the organisation.[58] As regards a defence to this strict liability offence, HMRC has taken an approach similar to s 7(2) of the Bribery Act 2010 (discussed above): 'where the Act provides for a defence if at the time of the offence the relevant body had put in force reasonable prevention procedures the organisation will not be held liable'.[59] The HMRC has also issued 'six guiding principles' that must be put in place by organisations to make sure that they can rely on the defence.[60] Whilst these guiding principles supplied by the HMRC are undoubtedly concise and detailed, they do rely heavily on risk assessments that need to be conducted by these companies on a regular basis, which could have a greater impact on the economy of the UK. This is especially relevant in relation to large multinational corporations, which might be hesitant to enter a jurisdiction such as the UK which insists on conducting risk assessments. Tuson elaborates on this, stating that "[a] large multi-national corporate which has a small branch office in the UK, may not want to continue in the UK because of the fact that its entire corporation might need to be risk assessed. The corporation might find a disproportionate legal risk of a criminal conviction being subjected on it because of its connection with the UK, which may not justify the risk of doing business in the UK'.[61]

There are other similarities with the Bribery Act 2010. For example, the Criminal Finances Act 2017 also extends to all third parties that may be associated with the organisation, including sub-contractors and other individuals in the

[58] ibid.

[59] HM Revenue & Customs, '*Tackling Tax Evasion: Government Guidance for the corporate offences of failure to prevent the criminal facilitation of tax evasion*' (September 2017) <http://www.pdpjournals.com/docs/99019.pdf> Accessed 10th January 2018.

[60] HM Revenue & Customs, '*Tackling Tax Evasion: Government Guidance for the corporate offences of failure to prevent the criminal facilitation of tax evasion*' (September 2017) <http://www.pdpjournals.com/docs/99019.pdf> Accessed 10th January 2018.

[61] Andrew Tuson, 'Criminal Finances Bill 2016: Corporate Offences of Failure to prevent facilitation of tax evasion' (Bryan Cave Leighton Paisner, October 2016) <http://www.blplaw.com/expert-legal-insights/articles/criminal-finances-bill-2016-corporate-offences-of-failure-to-prevent-facilitation-of-tax-evasion> Accessed 15th January 2018.

contractual chain.[62] It also includes not only companies, but also extends to government bodies, partnerships, and various other organisations.[63] Whilst the 2010 Act was an influential piece of legislation and provided as positive guidance for the 2017 Act, Tuson argues that the similarities between the two Acts could impede convictions under the 2017 Act. According to him, the lack of differentiation in between the two Acts regarding the categories of associated persons is problematic.[64] This is mainly because 'those who pose risks from a bribery perspective are generally entirely different from those who could facilitate the evasion of tax, since the process of seeking to identify how an associated person facilitates the evasion of tax is more challenging than identifying who may pay bribes'.[65]

What is certain for now is that since the Act has been introduced recently it will need to be given time before anyone can make a fair evaluation of its practical benefits.

(iv) Deferred Prosecution Agreements

Deferred Prosecution Agreements (hereinafter 'DPA') have been used for several years now in jurisdictions such as the United States. In 2014, the UK, in a historic move, decided to introduce the concept of DPAs in order to increase the conviction of companies. Their inception can be majorly attributed to the insistence of David Green, the Director of the SFO. HMRC defines a DPA as 'an agreement that is reached between a prosecutor and an organisation which could be prosecuted,

62 Criminal Finances Act 2017, s 44.
63 ibid.
64 Andrew Tuson, 'Criminal Finances Bill 2016: Corporate Offences of Failure to prevent facilitation of tax evasion' (Bryan Cave Leighton Paisner, October 2016) <http://www.blplaw.com/expert-legal-insights/articles/criminal-finances-bill-2016-corporate-offences-of-failure-to-prevent-facilitation-of-tax-evasion> Accessed 15th January 2018.
65 ibid.

under the supervision of a judge'.[66] The procedure and content of DPAs are enshrined in Schedule 17, s 1 of the Crime and Courts Act 2013. Ss 15–28 of the Act also provide a varied list of all the common law, statutory, and ancillary offences that can be covered by a DPA. A DPA can be compared to whistle-blower schemes which are employed in the United States, except that, instead of the company or a member of the company approaching the Crown, the SFO that approaches the company. After approaching a company that might be guilty, the SFO tries to discuss a deal with them that imposes financial sanctions and does not involve a criminal conviction. The scheme proves to be advantageous for both parties because they both save on expensive litigation costs. Moreover, the company misses a criminal conviction, saving its reputation, whilst still allowing the SFO to control companies that are guilty of misconduct.[67]

The SFO secured its first conviction with Standard Bank in late 2015.[68] Since then, it has used a DPA only two more times, most recently in the case of *Rolls Royce Plc*.[69] This case is known as the UK's largest conviction so far with the financial sanctions being for a 'total of approximately £497 million, relating to a number of charges of carefully planned bribery, corruption, false accounting, and conspiracy to corrupt, across several jurisdictions (Nigeria, Indonesia, Russia, Thailand, India, China and Malaysia) involving foreign public officials over an extended period (1989–2013), resulting in over £250 million of gross profit'.[70] Whilst the system of using

[66] HM Revenue & Customs, '*Tackling Tax Evasion: Government Guidance for the corporate offences of failure to prevent the criminal facilitation of tax evasion*' (September 2017) <http://www.pdpjournals.com/docs/99019.pdf> Accessed 10th January 2018

[67] Jonathan Grimes, Rebecca Niblock and Lorna Madden, 'Corporate criminal liability in the UK: the introduction of deferred prosecution agreements, proposals for further change, and the consequences for officers and senior managers' (Practical Law Multi-Jurisdictional Guide, 2014)

[68] Binham (n 30).

[69] *SFO v Rolls Royce Plc; Rolls- Royce Energy Systems Inc*. (2017) Southwark Crown Court, Case Number: U20170036.

[70] Daniel Smith, 'Corporate Criminal Liability: The UK is now talking the talk and walking the walk' Mondaq (29 March 2017)

DPAs has been successful so far, only time will tell if DPAs are truly beneficial towards the UK's legal system of corporate criminal liability.

C. CESSATION

The introduction of legislation such as the Bribery Act 2010, Corporate Manslaughter and Corporate Homicide Act 2007, and Criminal Finances Act 2017, together with the guidelines issued by the SFO and HMRC, have been greatly influential in prosecuting companies. Consonant with this, the UK employs theories of corporate criminal liability from case law to indict companies for corporate crimes. From this analysis, one can identify that the criminal model employed by the UK for corporate criminal liability takes a punishment-based approach. Whilst such an approach may be at least satisfactory, it fails to deter corporate crimes from occurring in the first place. To truly address the problem of corporate crime, it is helpful to examine the possibility of a 'mixed approach' which incorporates both punishment and preventative models. This would be desirable because it not only deals with the problem at its root, but also provides sanctions where a company does commit the crime. Employing preventative measures might also lead to a decrease in the number of companies that are comfortable with committing crimes since such a model would find a company liable if it failed to implement the mandated measures.[71] This mixed approach is employed by the United States, where there is greater emphasis on the corporate governance structure employed by the company[72]: for example, does the company and its rules make it subconsciously easier for its employees to commit the

<http://www.mondaq.com/uk/x/577986/Corporate+Crime/Corporate+Criminal+Liability+The+UK+Is+Now+Talking+The+Talk+And+Walking+The+Walk> Accessed 8th January 2018

71 Bassi (n 16) 106

72 ibid.

crime for the benefit of the company? If it does not, then when a corporate crime is committed, the company will be given an opportunity of a lesser sentence or a plea agreement. Such an approach encourages a systemic change by allowing companies to establish corporate structures that prevent corporate crime in the first place. This will be discussed in further detail in the final section.

IV. A COMPARATIVE STUDY OF CORPORATE CRIMINAL LIABILITY WITH THE AMERICAN LEGAL SYSTEM

A. HISTORICAL EVOLUTION OF CORPORATE CRIMINAL LIABILITY IN AMERICA

Much like the UK, the historical development of corporate criminal liability in America was almost negligible prior to the 1900's. Cases like the *Bank of U.S. v. Dandridge*[73] had vehemently refused to acknowledge the fact that criminal liability was attributable to a corporation. However, with the rising number of incidents that took place post the industrial revolution, courts found it necessary to establish some level of liability to curb the power of corporations. The US courts first ascribed criminal liability in cases of public welfare offenses where corporations had created nuisance accidents[74] much like the UK. *The People v. Corporation of Albany*[75] was one of the earliest cases that attributed criminal liability for corporations[76], where Justice Clifford stated that, 'A corporation's powers may be modified at any time to meet the criteria for public exigencies".[77] A similar verdict was given in *State v. Morris & Essex Railroad*[78] where the courts held that a company could be held liable for offenses of

[73] *Bank of the United States v. Dandridge* [1827] 25 U.S. 12 Wheat. 64.
[74] Brickey (n 12) 405.
[75] *The People v Corporation of Albany* [1834] N.Y. Sup. Ct.11 Wend. 539, 543.
[76] Brickey (n 12) 406.
[77] *Comm'rs of Laramie County v. Comm'rs of Albany County* [1875] 92 U.S. 307.
[78] *State v Morris & Essex Railroad* [1852] 23 NJ.L. 360.

corporate nonfeasance.[79] The reasoning of the courts behind this was that "if a corporation could be held civilly liable as a natural person for tortious acts of its agents, there was no reason for denying its capacity to be made accountable for the same actions in a criminal prosecution."[80]

However, the decision to establish full corporate criminal liability was seen in the Supreme Court decision of *New York Central & Hudson River Railway v. United States*,[81] a decision that was famously based the 'Respondeat Superior' theory, which had been previously used to prove tortious claims. Extending the Respondeat Superior Doctrine allowed courts to establish vicarious criminal liability for companies as long as it could be proven that the employee committed his actions for the benefit of the company and within the scope of his duty.[82]

New York Central attracted the attention of various high standing executives of the government, who began taking corporate criminal liability more seriously. This was seen through government mandated actions, for example, 'President Roosevelt showed a greater interest in the enforcement of the relevant laws, and Congress tried to appropriate special funds for enforcement and also provided for expedited appeal of similar cases to the Supreme Court'.[83] Dervan amongst many other scholars[84] also attributes *New York Central* as the main trigger for the revolutionary state of corporate criminal liability in America[85]since, corporations today can be liable for almost all

[79] Brickey (n 12) 405.
[80] ibid 406.
[81] *New York Central R. Co. v. United States* [1909] 212 U.S. 481.
[82] Lucian E. Dervan, 'Revaluating Corporate Criminal Liability: The DOJ's Internal Moral Culpability Standard for Corporate Criminal Liability' (2011) 41 Stetson L. Rev. 7, 112.
[83] Sara Sun Beale, 'The Development and Evolution of the U.S. Law of Corporate Criminal Liability' (2014) 126 Zeitshrift Für Die Gesamte Strafrechtswissenschaft 3.
[84] Also see Anca Iulia Pop, "Criminal Liability of Corporations - Comparative Jurisprudence" (2006) Michigan State University College of Law (5) and Sara Sun Beale, 'The Development and Evolution of the U.S. Law of Corporate Criminal Liability' (2014) 126 Zeitshrift Für Die Gesamte Strafrechtswissenschaft 27–54.
[85] Dervan (n 82) 113.

mens rea offenses. Thus, making corporate criminal liability as expansive as individual criminal liability.[86]

B. THE CURRENT STATE OF CORPORATE CRIMINAL LIABILITY IN AMERICA

(i) Key Legislation

By the twentieth century, corporate criminal liability had been enforced fully in America through the efforts of Parliament and the work of judges. This could be seen through a few pieces of legislation that explicitly referred to the criminalisation of illegal activities conducted by companies such as the Elkins Act and the FCPA.[87] The main difference when it comes to legislation on corporate criminal liability between UK and America, is that the latter has chosen to extend all its criminal legislation to apply to and include 'corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals'[88] which makes it nearly impossible to not convict a company for a crime that a normal individual could be convicted for. Apart from this, several States have enacted the Model Penal Code to convict "a company for the reckless actions of the board of directors or a high managerial agent who was acting on behalf of the corporation within their scope of employment".[89] On the other hand, States which have chosen not to ratify this specific penal code, still have to abide by the verdicts provided under case law.[90]

[86] Anca Iulia Pop, "Criminal Liability of Corporations - Comparative Jurisprudence" (2006) Michigan State University College of Law (5) 38. <http://www.law.msu.edu/king/2006/2006_Pop.pdf.> Accessed 11 January 2018

[87] Sun Beale (n 83) 4.

[88] United States Code, Title 1 (1 U.S.C. § 1).

[89] Model Penal Code 1985, Title 2, Section 7 (Model Penal Code § 2.07).

[90] Mark Pieth and Radha Ivory, *Corporate Criminal Liability: Emergence, Convergence, and Risk* (1st Edition, Springer 2011) 71.

(ii) Case Law

Although, courts still follow the judgment in *New York Central,* there has been an extension of the Respondeat Superior Doctrine in subsequent cases. The extension of vicarious liability in *United States v. Hilton Hotels Corp*[91] to include the actions of an employee who was acting under the policies that had been implemented by the same company[92] ensures that if the policies that are implemented by a company are not up to a certain standard they would be vicariously liable. This was decided on the basis that these policies encourage a subconscious behaviour that promotes corporate crime amongst employees. In *US v Ionia Management*,[93] it was established that a company could be held liable for the actions of not only it's high level managerial staff (as stated in the Model Penal Code[94]) but also of all its other employees irrespective of their position in the company.[95]

The courts also established the Aggregate Theory to help them extend corporate criminal liability. The theory was first established in the case of *US v Time-DC Inc*.[96], and was reaffirmed in United *States v Bank of New England*.[97] Here, the court held that a corporation could be held liable if it can be proven that its employees have a collective and aggregate knowledge of the said requirements,[98] i.e. if multiple employees were aware about different parts of the provisions, and if their collective knowledge adds up to the necessary requirement. The Aggregate Theory can be, perhaps, in some ways problematic because it can often be tough to prove what each employee knew and if all of it could actually add up to proving the company's wilful

91 *United States v. Hilton Hotels Corp* [1973] 9th Circuit Court of Appeal 467 F.2D 1000.
92 ibid.
93 *United States of America v. Ionia Management S.A* [2009] 2nd Circuit Court of Appeal 467 F.2D 1000 07-5801-cr.
94 Model Penal Code 1985, Title 2, Section 7 (Model Penal Code § 2.07).
95 *Ionia Management S.A* (n 93).
96 *United States v. TIME-DC, INC* [1974] W.D. Va 381 F. Supp. 730.
97 *United States of America, Plaintiff v. Bank of New England* [1987] 1st Circuit Court of Appeal 821 F.2D 844.
98 ibid.

ill-intent.[99] However, if proven correctly it would be difficult for a prosecutor to fail to indict a company because of such an exacting requirement, especially if the company is trying to hide 'behind the lines of multiple departments that may exist within it'.[100] Further, it is surprising that the theory continues to be rejected by UK courts for being austere,[101] because it has been stated to combine the best segments of the Respondeat Superior Doctrine and the UK's Identification Doctrine.[102] May reiterates this argument, stating that the Aggregate Theory is actually a good substitute for the Identification Doctrine used in the UK since unlike the latter it provides for a more rational and unfaultable theory of corporate criminal liability.[103]

(iii) Department of Justice Guidelines

While there is an extensive amount of legislation and case law under the American Legal system with relation to corporate criminal liability, it must be kept in mind that, "the decision to prosecute a corporation is vested in the Department of Justice (DoJ) and courts can only review the exercise of that discretion in instances where the constitutional rights of a defendant are challenged".[104] The guidelines which were first issued in 1991, are now comprised within Chapter 8 of the United States Sentencing Guidelines Manual,[105] which is additionally reviewed every few

[99] Khanna (n 9) 1484
[100] ibid 1515.
[101] *R v Australasian Films Ltd* [1921] 29 CLR 195.
[102] Bassi (n 16) 115.
[103] Richard Mays, 'Towards Corporate Criminal Fault as the Basis of Criminal Liability of Corporations' (1998) Mountbatten Journal of Legal Studies 54 <http://ssudl.solent.ac.uk/965/1/1998_2_2.pdf> accessed 11 January 2018.
[104] Congressional Research Service, *Corporate Criminal Liability: An Overview of Federal Law* (October 2013, CRS Report R43293, 7-5700).
[105] United States Sentencing Commission, *Sentencing of Organisations* (2016, Chapter 8) < https://www.ussc.gov/guidelines/2016-guidelines-manual/2016-chapter-8> accessed 11 January 2018.

years by the United States Sentencing Commission.[106] The current guidelines integrate a mixed model approach of corporate crime, where there is a fair share of sanctioning measures and rehabilitative proposals. However, this was not always the case in the past, and the previous guidelines were found to be problematic and resulted in the criticism of the DoJ for allowing prosecutors to have too much power over the conviction of a corporation.[107] The criticism came following the infamous Enron and Arthur Anderson Scandal in 2001, where many felt that while Enron deserved the punishment it received, Arthur Anderson had received a rather harsh castigation.[108] The Enron scandal proved that, "Changing criminal laws and increasing penalties will not lead to an unconscious instinct to comply, and a punishment based approach only masked the need for a more comprehensive solution".[109] Based on this, the Attorney General's office passed the Thompson Memorandum, which advised prosecutors and courts to consider a more rehabilitative approach that takes into account the company's cooperation and previous criminal history when imposing financial penalties. However, the Thompson Memorandum's success was short lived since it was criticised for suppressing constitutional rights.[110] Since then, the Thompson Memorandum has been replaced by the McNulty Memorandum and the Filip Memorandum. The Filip Memorandum which is the current memorandum in place keeps in accordance with the same mixed model approach that has been incorporated in the sentencing guidelines. The memorandum introduces the concept of alternate sanctioning programmes like Deferred Prosecution Agreements, Non-Prosecution Agreements

[106] Sentencing Reform Act 1984.

[107] United States Sentencing Commission, *Variable Codebook for Individual Offenders* (1999) <https://www.ussc.gov/sites/default/files/pdf/researchandpublications/datafiles/Variable_Codebook_for_Individual_Offenders.pdf> accessed 11 January 2018.

[108] Geraldine Szott Moohr, 'An Enron Lesson: The Modest Role of Criminal Law in Preventing Corporate Crime' (2003) 55 Fla. L. Rev. 937, 953.

[109] ibid 974.

[110] *United States v. Stein* [2006] WL 2556076.

(NPA's) and Corporate Compliance Programs, many of which should be incorporated under the legal structure of corporate criminal liability in the UK.[111] In addition to this, the US Attorney's Manual (USAM) 9-28.900 has also recently adopted various other corporate compliance programmes such as Plea Agreements and Voluntary Disclosures to allow for corporations to be prosecuted in an effective manner.

C. CESSATION

Unlike the UK corporate crime model, the model retained in America concerns itself with how a company may be prosecuted together with the rehabilitation and prevention of corporate crime.[112] This has been done by introducing agreements that provide for a lenient sentence in exchange for the company promising to focus on improving its corporate governance structure which in turn prevents future offenses from occurring.[113] While it can be argued that, there is nothing wrong with a purely punishment based approach, the inherent consequence of using such a methodology is undeniable since it "does not allow for focus on correcting the systemic physiognomies of corporate crime, such as corporate subcultures that encourage illegal conduct. Moreover, employing a purely punishment-based approach also allows for legislators to neglect initiatives that are more productive in preventing future fraud".[114] Hence, replicating a corporate crime model like the one in America

[111] United States Attorneys, *U.S Attorney's Manual: Principles of Federal Prosecution of Business Organizations* (2010, Title 9) < https://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations> accessed 11 January 2018.

[112] Markus Dubber, 'The American Model Penal Code: A Brief Overview' (2007) New Criminal Law Review Vol. 10, 327 <https://scholarship.law.upenn.edu/faculty_scholarship/131/> Accessed 11 January 2018.

[113] Cristina De Maglie, 'Models of Corporate Criminal Liability in Comparative Law' (2005) 17(1), 560 Washington University Global Studies Law Review <https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1213&context=law_globalstudies > Accessed 11 January 2018.

[114] Szott Moohr (n 108) 974.

may not only lead to a reduction in corporate crime numbers but also should decrease the need for expensive prosecution. Furthermore, the adaptation of such an approach by the UK government may also encourage a "structural reform that encourages law-abiding behaviour by corporations, while conveying a consistent message that inspires a subconscious law-abiding conduct".[115]

V. POSTULATING A REFORM STRUCTURE FOR CORPORATE CRIMINAL LIABILITY IN THE UNITED KINGDOM

Over the last three section, there has been an effort to undertake a methodical analysis of corporate criminal liability. Whilst conducting the said examination, there seemed to be certain recurring problems, and the solution for these issues will be encapsulated in this section.

A. LEGISLATIVE REFORMS

As seen earlier, there has been a significant amount of progress in corporate criminal liability in the UK. Today, it is clear that the UK government and the legal coterie has made a conscious political and legal decision to establish a rigorous judicial system that would regulate the contrived actions of corporations. Having said that, there are still some concerns regarding the effectiveness of some of these Acts.

(i) Reform: Bribery Act 2010

The Bribery Act 2010 was introduced as a subtle way to negotiate and defuse the political tensions that arose after the BAE scandal.[116] The introduction of the Act

[115] ibid 940.
[116] Belch (n 29).

was successful, save for the lack of clarity in the guidance issued by the Ministry of Justice.[117] This manifests in the unclear interpretation of technical terms such as who is a 'foreign official' or what defines 'corporate hospitality'.[118] Furthermore, the guidelines also introduce uncertainties specifically for Section 7 of the Act, which states that an 'associated' person acting on behalf of the company can result in the prosecution of the company for corporate crime.[119] Here, the problem centres on the guideline's lack of direction on who constitutes an 'associated' person.[120] Hence, if reforms are undertaken for the Bribery Act they would have to be heavily focused around elucidating the technical terms in the Act.

(ii) Reform: Corporate Manslaughter and Corporate Homicide Act 2007

The CMCHA was introduced as a way to extend the Identification Doctrine to efficiently prosecute a company that had committed a crime such as corporate manslaughter.[121] While the introduction of the Act was welcomed by scholars such as Goel,[122] the true effect of the Act on corporate crime was questioned by others.[123] A good example of the latter statement is provided by Tombs, who drew a comparison between the numbers of corporate deaths that have occurred every single year to the

[117] ibid 2.

[118] ibid.

[119] Bribery Act 2010, s7(1).

[120] Belch (n 29) 4.

[121] Health and Safety Executive, *Guidance on Corporate Manslaughter and Corporate Homicide Act 2017* (Guidance Paper, 2008) <http://www.hse.gov.uk/corpmanslaughter/about.htm> accessed 8th January 2018.

[122] Shivam Goel, *Corporate Manslaughter and Corporate Homicide: Scope for a New Legislation in India* (1st Edition, Partridge Publishing 2015), 225.

[123] Health & Safety at Work, 'Corporate Manslaughter: In Deep Water' (Health & Safety At Work News Blog, August 2017) <https://www.healthandsafetyatwork.com/corporate-manslaughter/ten-years-on> Accessed 15 January 2018.

number of prosecutions under the CMCHA.[124] Statistics showed that while there was an average of 13,000 deaths a year at the hand of corporations, there had only been 25 successful prosecutions under the CMCHA since its introduction.[125]

The reasons for this aberration can be attributed to two core issues with the Act. The first and prime issue was the burden of proof element that placed the onus on the prosecutor.[126] This was considered challenging mainly because of the power dynamics that went into play in such a situation — a powerful company with comparatively unlimited resources fighting a legal battle against prosecutors who often don't have the same amount of time or money to spend on a single trial. While this could clearly be fixed by a structural amendment in the legislation itself, some have argued otherwise. For example, Roper makes an interesting suggestion stating that instead of trying to rectify the problem through an amendment, a process that has proven time and again to be immensely long-drawn-out and tedious, the alternative should be to focus on prosecutor training.[127] Prosecution training could be conducted much like the training used by the European Union Commission, which has trained its prosecutors to combat the resources of multi-national companies with unique tactics and schemes during both the investigation and the legal trial.[128] Further, if the government increased funding for the SFO, it would help their department to combat the uneven power dynamics since corporations often have

[124] Steve Tombs, 'The UK's corporate killing law: Un/fit for purpose?' (2017) Criminology & Criminal Justice Vol 1 (18), 506 <http://oro.open.ac.uk/50458/3/50458.pdf> Accessed 25 January 2018.

[125] Health & Safety at Work, 'Corporate Manslaughter: In Deep Water' (Health & Safety At Work News Blog, August 2017) <https://www.healthandsafetyatwork.com/corporate-manslaughter/ten-years-on> Accessed 12 February 2018.

[126] ibid.

[127] Roper (n 52) 55.

[128] Directorate General, 'Training on corporate criminal liability for prosecutors and investigators in Belarus' (Council of Europe Portal, May 2016) < https://www.coe.int/en/web/human-rights-rule-of-law/-/training-on-corporate-criminal-liability-for-belarusian-prosecutors-and-investigators> Accessed 27 March 2018.

access to substantial funds that facilitate their ability to engage in prolonged legal battles using a barricade of legal experts.

The second problem was in relation to the 'senior management' requirement. The senior management provision proves difficult especially in the case of prosecuting a large corporation because many big organisations often delegate their work to 'mid-level' workers thus successfully shifting much of the onus off their directors.[129] The removal of this condition can therefore prove to be crucial when trying to increase the number of prosecutions for large multi-national organisations. A reform structure for this is to replace the 'senior management' wording with placing the whole burden on every worker, placing the burden on everyone in the company. However, Tingle states that this must be done with caution since doing so might make it problematic for the Act to address certain kinds of corporate failings.[130]

In addition to these two main issues that need to be reformed under the CMCHA, there are also issues relating to the sentencing and sanctioning guidelines in the Act itself.[131] However, since this is a common problem within all the Acts, it will be considered later on in the paper.

(iii) Reform: Criminal Finances Act 2017

The most recent addition to the stack of legislation revolving around corporate criminal liability is the Criminal Finances Act 2017 (CFA).[132] The introduction of this

[129] Roper (n 52) 56.
[130] Simon Tingle, 'New sentencing guidelines have shown up shortcomings in corporate manslaughter legislation, says expert' (2017) OutLaw Blog <https://www.out-law.com/en/articles/2017/september/new-sentencing-guidelines-have-shown-up-shortcomings-in-corporate-manslaughter-legislation-says-expert/> Accessed 20 March 2018
[131] Roper (n 52) 59.
[132] Criminal Finances Act 2017.

Act was allowed for an extension of the deep-rooted principle of "failure to prevent" that had been established in the Bribery Act to economic crimes.[133] While the Act is relatively new, Cronin and Coop have already raised doubts about the effectiveness of the 'failure to prevent' element in a financial context.[134] Cronin and Copp state that, while the introduction of the 'failure to prevent' element might be easily understood in the context of the 'giving and taking' of a bribe, it might not be as straightforward when applying it to economic crimes such as tax evasion.[135] Hence, one of the reforms would be to focus more on adopting a corporate crime theory such as the Aggregate Theory, that is used in the USA to approach economic crimes, instead of using more legislation.[136] Furthermore, the Act could also be adapted to hold economic crimes as crimes of strict liability, which not only erases the problematic 'failure to prevent' element but also may result in increased prosecution numbers.[137] However, all of these apprehensions are only hypothetical at this time and the effectiveness of the Act can only be tested with time.

(iv) Reform: Deferred Prosecution Agreements

The introduction of Deferred Prosecution Agreements (DPA's) by the SFO can be seen as a radical step in advancing the cause of corporate criminal liability. The employment of this new legal tool effectively cuts through the bureaucratic red tape that often occurs in the process of prosecuting multi-national companies. However, academics such as Grasso have debated the structure of the DPA that is being used

[133] Copp, S. and Cronin, A, 'New Models of Corporate Criminality: The Development and Relative Effectiveness of "Failure to Prevent" Offences' (2018) 39(4) *Company Lawyer*, 108.
[134] ibid 109.
[135] ibid.
[136] ibid 110.
[137] ibid.

by the UK to target corporate crime.[138] Grasso proposes that the DPA's issued in the UK should be similar to the sanctions in the US, where they not only place an emphasis on imposing financial penalties but also include the implementation of compulsory corporate governance solutions by the company so as to prevent the company from committing the crime again.[139] Grasso goes on to explain that the only way this can be done is "through a cultural shift in the understanding of the legal instrument".[140] This highlights specific issues that have already been mentioned earlier on, namely, the change that the UK must undergo from employing a purely punishment based corporate crime model to a deterrence based model so as to effectively target corporate crime. The importance of this, consistent with the reform structures that enable such a model are discussed below.

B. GENERAL REFORMS

Having discussed the legislative reforms that need to be undertaken to improve the current condition of corporate criminal liability, it's important to now analyse the general reforms that could be employed to advance the regulation of corporate crime in the UK. These corrective measures will include the consideration of reforming current sentencing and sanctioning standards together with contemplating a shift from the current purely punishment-based approach to a mixed corporate crime model that would incorporate sanctioning methods and deterrent mechanisms to curb corporate crime.

[138] C. Grasso, 'Peaks and troughs of the English deferred prosecution agreement: the lesson learned from the DPA between the SFO and ICBC SB Plc.' (2016) 5 Journal of Business Law 388.
[139] ibid 408
[140] ibid.

(i) Reform: Sentencing Guidelines & Sanctioning Agreements

With reference to the reform of already established financial penalties, there has been great criticism of the sentencing parameters in both the CMCHA and the Bribery Act.[141] In both these Acts, there appears to not only be an inconsistency in the financial penalties that are being imposed across cases but also a need to increase the maximum financial penalty.[142] Firstly, it is vital to fix the rising incongruities in the case filings to ensure that there are no unnecessary appeals, especially considering the already high costs that prosecutors face when indicting a company. Secondly, the reason for increasing the maximum financial penalty is to ensure that large companies are strongly dissuaded from committing the crime again. Yet, the effects of increasing the financial penalty can have a greater impact on shareholders and often the dire consequences are not faced by the company. For this reason, there is a need to reflect on an alternate sentencing technique, i.e., the introduction of a death penalty for corporations.[143]

The consideration of introducing an alternate sentencing technique such as a 'death penalty' for corporations comes from the increasing 'repetitive patterns of criminal indulgences by companies that have exposed a new degree of crony capitalism in which the most economically and politically powerful (corporations) can commit financial crimes as long as they can afford to pay the financial penalty'.[144] The death penalty imposed on a company would have similar repercussions, to a life imprisonment sentence that is imposed on an individual. The easiest way to impose a death penalty on a company has been put forward by Grossman, where he states that such a company should be shut down and have its licensed revoked after three

[141] Tombs (n 124) 492.
[142] ibid 497.
[143] Drew Isler Grossman, "Would A Corporate 'Death Penalty' Be Cruel and Unusual Punishment?" (2016) 25 Cornell J. L. & Pub. Policy, 697.
[144] Mary Kreiner Ramirez and Steven A. Ramirez, *The Case for the Corporate Death Penalty Restoring Law and Order on Wall Street* (1st Edn, NYU Press 2017).

major violations.[145] The invocation of the death penalty should prevent the company from being able to operate its business or reopen a new business in any other areas.[146] During the process of shutting down the company, it would also have to pay off all its debts to its creditors and shareholders, thus ensuring that the only real impact is felt on the company and there is no collateral damage.[147]

With regards to the reform of sanctioning agreements, there should be a focus on introducing more self-reporting agreements such as whistle blower agreements and NPA's, all of which have shown great results in countries like America. Whilst the introduction of the DPA by the SFO has been seen as a helpful step, it has not provided the same results seen in America since it has only provided for financial penalties instead of including methods of deterrence to prevent companies from committing crimes in the future. Going ahead, there should not only be an emphasis on introducing different sanctioning agreements but also on including clauses in these agreements that impose corporate governance reforms to deter corporate crime, the importance of which is be analysed below.[148]

(ii) A Shift in the Corporate Crime Model

Corporate criminal liability in the UK has so far only been developed by penal legislation. While this in itself is prodigious, the model has failed to pay attention to the use of deterrent measures to prevent corporate crime. The use of a deterrence based corporate crime model alongside a punishment-based approach has proven to be very beneficial when used in countries like America as is endorsed in the earlier section.[149] This paper advocates that the incorporation of this latter model would

[145] Grossman (n 143) 697.
[146] ibid 698.
[147] ibid 698.
[148] Grasso (n 138) 405.
[149] Bassi (n 16) 112.

make a real difference in how corporate crime is being perceived today. In respect of establishing such a model, there have been considerations of incorporating corporate governance measures that would create a shift in the understanding of corporate crime. An example of a popular measure has been the changing of the discretional 'corporate commitments' to corporate obligations.[150] An illustration of how this would work in practice is by making the non-obligatory commitment of Corporate Social Responsibility (CSR) mandatory,[151] which has been proven to hold companies to a greater standard of accountability than a company that does not take on the commitment.[152]

Another change that could be made while incorporating a deterrence based model, is to encourage the development of corporate governance measures like 'Triple Bottom Line' reporting.[153] 'Triple Bottom Line' reporting is a concept that is used to judge the success of a company beyond just its monetary income.[154] The report bases its judgement on two additional factors: the social impact of the company and the environmental contributions it makes .[155] Incorporating this as a measure could prove to be very useful in preventing corporate crime, especially since it has been found that one of the key drivers for corporations to commit a crime is due to financial distress faced when trying to keep up with competitive economic conditions

[150] John Sullivan, 'The Moral Compass of Companies: Business Ethics and Corporate Governance as Anti-Corruption Tools' (2009) International Finance Corporation, Washington Volume 7, 17 <http://hdl.handle.net/10986/23980> Accessed 2 January 2018.

[151] Barbara Del Boscoa and Nicola Misani, 'Keeping the enemies close: The contribution of corporate social responsibility to reducing crime against the firm' (2014) Scandinavian Journal of Management 27, 89.

[152] ibid 90.

[153] Rick Sarre, 'Re-thinking Corporate Practice and Corporate Governance in light of Recent Corporate Collapses: Some evaluative questions and agenda items' (Australasian Evaluation Society International Conference, University of South Australia, 2002), 4 <https://www.aes.asn.au/images/stories/files/conferences/2002/papers/Sarre.pdf> Accessed 28 March 2018.

[154] ibid 5.

[155] ibid.

imposed by financial markets.[156] Changing this idea of 'success' by including factors such as social accountability and environmental consciousness would enable corporations to understand the responsibility that they owe to the community beyond just their own financial gain. Hence, the system of 'Triple Bottom Line' reporting if employed correctly can effectively reduce the number of crimes that are committed against the society and environment by companies.

C. CESSATION

The state of corporate criminal legislation in the UK is certainly not in the same alarming condition that it used to be in several decades ago. Having said that, the UK still has some measures that need to be undertaken in refining some of its legislation and also incorporating general reform measures that would be beneficial to prosecutors while prosecuting corporations. The introduction of some of the reforms discussed above are vital in making corporate criminal liability more transparent and efficient in the UK. Notwithstanding, the insistence of the SFO to use only conventional measures of punishment can be potentially pejorative. Hence, consonant with undertaking the reforms proposed herein, it's essential to moderate the approach that is undertaken by the SFO to reflect a criminal prosecution model that not only enforces corporate criminal liability but also deters and rehabilitates the apathetic attitudes that are emulated by some companies when it comes to corporate crimes.

[156] Nolan Naidoo, 'The role of corporate governance in addressing the factors contributing to commercial crime in large organisations in South Africa' (2016), 1 University of Pretoria, Gordan Institute of Business Science 15388795 <https://repository.up.ac.za/handle/2263/59734> Accessed 28 March 2018.

VI. CONCLUSION

Over the last four sections, there has been a critical analysis of corporate criminal liability in the United Kingdom. The paper started by presenting an account of the various reasons given by courts and legal academics for denying corporate criminal liability in the 19th century. Nonetheless, as observed, there has been a slow but definite progress in the understanding of corporate crime and corporate criminal liability post the 1900s. With the rising number of corporate crimes, there was finally an acceptance that corporations are juridical entities who have to be held liable for their actions, just like an individual would. This attitude was soon actualized by the government into a few pieces of legislation that strived to reduce corporate crime. The legislation on corporate crime compromised of powerful Acts such as the Corporate Manslaughter and Corporate Homicide Act 2007, Bribery Act 2010, and the most recent addition, the Criminal Finances Act 2017. The Serious Fraud Offices with the help of Parliament also enacted additional sanctions such as Deferred Prosecution Agreements to secure more prosecutions. Despite all these improvements, there still were growing concerns and awareness that more needs to be done to improve the state of corporate criminal liability in the United Kingdom as has been voiced by several academics.

Through a scrutiny of the status of corporate criminal liability in America, this paper concluded that there was a requirement for general reforms as well as a shift from the purely punishment-based crime model that is currently employed. It is considered that a well-adapted mixed model that focuses not only on punishing corporate criminal liability but also on more systemic changes that would deter companies from committing these corporate crimes in the first place would prove much more effective. With companies becoming more brazen every single day with regards to their criminal activities, corporate criminal liability has never mattered more. Denying any further progress from being made on corporate criminal liability would be analogous to reverting back to an archaic school of thought that denied

corporate criminal liability would be inimical. A focus on a mixed based crime model that incorporates both sentencing methods and deterring techniques might be the redemption needed for corporate criminal liability in the United Kingdom. When broadening the scope of penalty for corporate criminal liability, it is also crucial that sentencing guidelines extend beyond strong monetary punishments, and impose the death penalty for companies that are repeat offenders in order to prove that powerful organisations with money cannot just buy justice for their victims. Finally, importance has to be attributed towards changing the very concept of success in today's progressively capitalist society and to ensure that a company's success doesn't depend only on its financial prowess, but it unreservedly depends on its contribution to society and environment also. This may be effected by aligning the assignment of a higher credit rating as well as, possibly, awarding important government approvals to large companies for the inclusion of corporate governance measures such as 'Triple Bottom Line' reporting as mentioned earlier.

To conclude, two things must be kept in mind when navigating through today's raging neoliberalist and capitalist society. Firstly, to secure the rights of individuals means not only to protect them from each other but also against a greater force, which is the dynamism of powerful organisations that patiently wait for the legal system to falter. Secondly, the law must be used as a tool to achieve a meaningful existence in society for individuals, through a just and fair legal system, that not only protects those with money but also defends those without it.

VEIL PIERCING IN THE UK: AN EVOLUTION OF DOCTRINAL APPROACHES

Jamie McGowan*

ABSTRACT

This article examines the recent development of the legal doctrine of piercing the corporate veil in the UK, in light of the judgment given in *Prest v Petrodel*. The *Prest* case has significantly altered our understanding of veil piercing and has completely brought into question whether or not it may be called a "doctrine" at all. This article firstly establishes the different approaches to legal doctrine, namely one approach being generalist and broad, and another approach being methodical and exegetical. Then, by considering the case law on veil piercing before and after *Prest*, the article attempts to reconcile the change in law as being a change from a generalist position to one which is much more 'coherentist'; that is, before *Prest*, the concept of veil piercing was arbitrary and subject to circumstance, whereas now veil piercing is subject to a strict syntax. The article also contains a brief analysis of a similar division in the doctrinal understanding of veil piercing in the US. All in all, this work intends

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to solidify not only the modern methodical understanding of the doctrine, but also it tries to give a feel for the way in which future veil piercing cases will be decided.

I. INTRODUCTION

The corporate veil is a fundamental aspect of Company Law in many legal jurisdictions, separating the artificial legal personality of corporations from the real legal personalities of shareholders. However, there are certain given situations in both statutory and common law where the corporate veil can be "lifted" or "pierced", and the supposed separate personality is disregarded in order to establish justice. The issue, however, is that the situations in which the veil has been pierced have been rather inconsistent in the past. Therefore, this gives rise to the question; should we consider piercing the corporate veil as a consistent and independent doctrine, a general and broadened doctrine, or a mere concept which is invoked arbitrarily when the courts see that justice is left undone? This piece seeks to examine the various situations in which the corporate veil has been pierced in the past in the UK, to consider two distinct approaches to the legal doctrine, and also to establish a doctrinal evaluation through the examination of precedent in the US, where piercing the corporate veil is considered to be a doctrinal matter.

This piece seeks to examine the various situations in which the corporate veil has been pierced in the UK, to consider two distinct approaches to the legal doctrine, and then to establish whether or not piercing the corporate veil in the UK has developed into a much stricter doctrine, as opposed to one which is characterised by arbitrariness. By looking also at US law, this piece also explores how another common law system has been faced with the same issue, where there are also divides between coherentist and generalist schools, as a result of having to draw on such a wealth of conflicting precedents.

II. BACKGROUND: PREST V PETRODEL

Prest v Petrodel Resources Ltd[1] is a monumental case in UK Company Law and English Family Law. The final decision took place in the UK Supreme Court in 2013. The case concerned a couple, Mr and Mrs Prest, who were undergoing a divorce. Mrs Prest had claimed for ancillary relief against the companies owned by Mr Prest, due to the fact that these companies owned the family homes where Mrs Prest had been living throughout their marriage.

In the first instance, the Family Court decided to force Mr Prest to grant ancillary relief to Mrs Prest by using the Matrimonial Causes Act to effectively pierce the corporate veil. The Companies then appealed, and the decision was overturned. When the decision reached the Supreme Court, the court took the view that Mrs Prest did have a right to claim ancillary relief, but only to the assets which her husband held rather than the properties themselves.

This decision then led the Supreme Court to give a substantial amount of *obiter dicta* on the various issues relating to piercing the corporate veil in the United Kingdom. Essentially, the court held that piercing the corporate veil is only permissible in cases where there is impropriety, which occurs by interposing a company in order to escape existing legal obligations. However, when the court does pierce the veil, it is only allowed to do so to the extent necessary which would deprive the company director of their advantage over the company which has procured the evasion of the legal obligations.

The decision given in *Prest* was met with a lot of complicated discussion over what the approach of the UK Courts are to piercing the corporate veil on a more legal theoretical basis. Giving his opinion, Lord Walker said: "For my part I consider

[1] [2013] UKSC 34.

that 'piercing the corporate veil' is not a doctrine at all [...] it is simply a label."[2] The intention of this paper is not so much to discuss the actual details of *Prest v Petrodel*,[3] but rather to discuss the veracity of Lord Walker's statement, and whether we are to understand piercing the corporate veil as a doctrine, label, or otherwise.

III. DOGMATIC CONSIDERATIONS AND PIERCING THE VEIL

We can begin with Lord Walker's assertion above.[4] He says that it is merely a concept we use to "describe the disparate occasions on which some rule of law produces apparent exceptions to the principle of the separate juristic personality of a body corporate." There are various key questions which arise with this statement, most prominently that the definition of legal doctrine remains—lamentably—one of the most neglected areas of modern legal theory. Moreover, the statement instead shifts the onus of "piercing" from being an independent concept, to one which depends on another doctrine: the rule of law.[5] It is also hard to understand where Lord Walker seeks to place his definition; if it expressly does not lie—*sui iuris*—in the realm of independent doctrine, does a "label" constitute being part of another doctrine, or is it simply a term we are using to define situations where judges individually decide to impose a natural justice in commercial disputes?

The judgment given in *Prest* however, did not seem to be favourable to this liberal attitude to the application of piercing the veil. In *Prest*, Lord Sumption asserted two very distinct principles; the "concealment" principle and the "evasion" principle. The concealment principle[6] is understood to be when the court looks under

[2] ibid 106.
[3] *Prest* (n 1).
[4] ibid.
[5] For more analysis of the rule of law being a doctrine sui juris, see Vernon Bogdanor, "Human Rights and the New British Constitution" (Tom Sargant Lecture 2009).
[6] *Prest* (n 1) 28.

the corporate veil to assess the facts that the corporate structure is concealing, but it is not piercing the veil; and this concept is oft used in situations where the veil should *not* be pierced. The evasion principle[7] however grants that the corporate veil can be pierced where a person is already under a legal obligation or liability and, on purpose, takes the decision to avoid it or frustrates an arrangement by way of company control. The courts are then allowed to take away the privilege of separate legal personality from the company or its controller in order to see that justice is done.

A. DISCOURSE: *PREST* AND ITS RELATION TO PRECEDENT

If we assess the circumstances whereby the veil was pierced in *Prest* and its preceding cases, we can perhaps gain an insight about the consistency of the concept, or lack thereof. Lord Sumption sets out in *Prest* an application of the aforementioned evasion principle. This principle is consistent with some common law precedent. For example, in the case of *Jones v Lipman*,[8] Lipman had a contract to sell to Jones, but he had purposefully avoided his obligation by using his company to make a fake purchase. Similarly, another example where the test would be proved notably successful is in *Gilford Motor Company v Horne*[9] wherein Horne, after having been excluded from working in an area close to his previous employer, Gilford Motor Company, decided to found a company in his wife's name and operate in the area under that alias. Nonetheless, the court held that this was a clear evasion of his obligation by the intentional interpositioning of his new company.

[7] ibid.
[8] [1962] 1WLR 832.
[9] [1933] Ch 935.

The decision in *Prest* is not entirely in harmony with preceding case law however. For example, *Macaura v Northern Assurance Co Ltd*[10] designated quite transparently that: "No shareholder has any right to any item of property owned by the company, for he has no legal or equitable interest therein."[11] Yet in *Prest*, this principle was overturned to give Mr Prest—and thus his wife—an insurable interest in company property; for which *Macaura*[12] did not allow. This resulted in Mr Prest being held liable for his abuse of company control (albeit not through veil piercing). This broadening of a previously restricted position could be seen as a revolutionary overturning of precedent regarding the rights of shareholders to company property.

The concept of piercing by evasion alone is also arguably inconsistent with some preceding cases. The case of *Kremen v Agrest*[13] held that the veil could be pierced if there was a strong practical reason for it, whereas Lord Sumption explains in *Prest* that the application of any doctrine in this case was "unsound".[14] This shows a very transparent inconsistency between the rubrical nature of the evasion principle and the seemingly arbitrary decision to allow piercing on a merely practical basis. Another case that *Prest* supposedly would contradict is *Trustor AB v Smallbone*.[15] In *Prest*, Lord Sumption noted that this case was actually decided incorrectly; that the veil itself should not have been pierced, but rather the thought that this was an example of where the concealment principle should have been applied. Lord Sumption also makes a potent and direct attack upon the precedent, rather than upon constancy.

Lord Sumption's definitions in *Prest* would create significant issues in the situations where there were exceptions to the evasion principle. There are two cases which jointly define some exceptions to the principle, before *Prest* came into force.

[10] [1925] AC 619.
[11] [1925] AC 619.
[12] ibid 626.
[13] [2012] EWHC 45 (Fam).
[14] *Prest* (n 1) 68.
[15] (No 2) [2001] EWHC 703 (Ch).

CMS Simonet v Dolphin[16] demonstrated that default fiduciaries who facilitate business to insolvent companies are to be held liable for the profits they make. This generally followed the premises provided for by the evasion principle, until it was refined in a tighter manner by the *Ultraframe*[17] case where it was held that if the fiduciary had not "received any benefit" from the profits, then it is the company which is held liable rather than the individual. This is a defiance of the evasion principle in its granting of an exception; the company was essentially established in *Ultraframe* so that the fiduciary could evade his liability. Now, it appears Lord Sumption has overturned the precedent by enforcing a stricter definition of the evasion principle.

B. DOCTRINAL BREADTH: CONSISTENCY VS. GENERAL CONCEPTUALISATION

It is necessary that we establish the nature of doctrine itself before setting out to apply it to the case directly. Tiller notes that doctrine may take many different forms; that it could be "fact dependent, and therefore limited, or sweeping in its breadth".[18] Doctrines such as the rule of law could be arguably broad, debatable and leave a lot of room for discussion. In fact, doctrine itself is a concept which lies without any solid legal definition, which—without pointing out the elephant in the room—is why this particular case is so hard to bring any definition to.

On the contrary, there are many strict and limited doctrines which apply to our legal system, such as the Corporate Veil itself, the origins of which stem from *Salomon v A Salomon & Co Ltd*.[19] The doctrine is rarely disputed, and separate legal personality itself is a specific, strict, and consistent doctrine which deserves little accusation of

[16] [2001] 2 BCLC 704.
[17] [2005] EWHC 1638 (Ch).
[18] Emerson H. Tiller and Frank B. Cross, 'What is Legal Doctrine?' (2005) Northwestern Public Law Research Paper No. 05-06, 3.
[19] [1896] UKHL 1.

ambiguity. In this way, doctrine becomes a matter of coherence and consistency. The traditional understanding of doctrine is a conventional one; that all law stems from dogmatic theory.[20] This requires an ethic of robust consistency in judicial decision making so that doctrine can form and be refined.[21] Legal academics argue that this consistency requires a form of judicial decision making based on "reasoned response to reasoned argument".[22] An historical argument in defence of traditional legal doctrine was boated by Savigny who posed that legal doctrine depends on a hermeneutical and methodical approach: "I state that the essence of the systematic method lies in the knowledge and exposition of the internal connection or affinity linking single legal concepts and legal rules in one great unit."[23] The systematic method of which the scholar speaks implies taking a methodical approach to the law, and the affinity implies a certain hermeneutic of continuity in legal thinking. Coherence, thus, is a matter of maintaining a historical method and a philosophical chain of thought.[24]

(i) Application of Prest to Doctrinal Theory

The principles which the *Prest* case establishes have now tightened the concept of piercing the veil and made it limited. Lord Sumption alludes to a coherent and strict doctrine when comparing our approach to piercing to civil law systems in his granting of specific principles to the action of veil piercing.[25] He states that there is no "general doctrine"[26] in our jurisdiction on piercing the veil. The use of the word "general" might imply two things; either that there is no doctrine at all or that the

[20] *Trustor AB* (n 15).
[21] ibid 4.
[22] David L. Shapiro, 'In Defense of Judicial Candor' (1987) 100 Harvard Law Review 731, 737.
[23] Savigny 1840, xxxvi.
[24] Savigny 1993, xxx.
[25] *Prest* (n 1) 18.
[26] ibid.

doctrine is very specific rather than generalised. Given Lord Sumption's extensive comment on the evasion and concealment principles, it would be reasonable to assume that he considers the doctrine to be quite specific.

Lord Neuberger conceded that, in future cases, veil piercing should be limited to the evasion principle and that concealment should be applied where appropriate.[27] Neither judges denied the doctrinal nature of veil piercing. Rather, Sumption sought to establish that there are specific principles, invoking the situations where dealings between two separate legal persons are in any way dishonest.[28] It seems that, if there had not been a strict, consistent and limited doctrine on veil piercing before; it had now been consolidated in *Prest*.

Lord Mance and Clarke similarly do not deny the doctrinal nature of Veil Piercing, but they grant it the broadened and generalised status which it had always held. Clarke further elaborated on this by saying that its limitations should not be understood to be clear *per se*. He authorised this with the case of *Ben Hashem v Al Shayif*,[29] stating that piercing the corporate veil should be a last resort when all other remedies have been exhausted. It should be noted that whilst the cases of *Gilford*[30] and *Lipman*[31] were pushed by Lord Neuberger as having been correctly decided, yet in his view there should have been other remedies sought, pushing a notion similar to Lord Clarke that piercing should be viewed as a last resort. Mance and Clarke were not in any way opposed to the use of the evasion and concealment principles in this regard, but argued that this was an extreme and unnecessary.

[27] ibid 61.
[28] ibid at 21.
[29] [2008] EWHC 2380 (Fam).
[30] *Gilford Motor Company* (n 9).
[31] *Jones* (n 8).

IV. THE AMERICAN APPROACH TO CONSISTENCY AND GENERALISATION

Since the birth of company law was most prominently an English project,[32] it is not surprising that other Anglo-American legal systems such as that of Canada and the US have all adopted similar models of company law, be it in forms of limited liability[33], corporate governance,[34] legal capital[35] or takeover regulations.[36] As a result, the UK and the US share a commonality in their company law *cultus*, most particularly because the common law systems in both the UK and the US have the privilege (or curse) of having to rely on wealth of conflicting decisions in order to reach their *ratio* in company law cases. Like the UK, the US courts have over the years developed two kinds of doctrine to deal with piercing the corporate veil; one of which boasts a very Savignesque, methodical and hermeneutical approach to veil piercing and the other forms a more broad and realist interpretation, just as the UK did before *Prest*. In light of the *Prest* decision, it would be beneficial to look at the two approaches which the US has favoured in this area, in order to 1) understand the emerging dualism between liberal generalist approaches and stricter coherentist approaches and 2) set down which of these would two approaches best reflect the post-*Prest* situation in the UK.

The two schools of thought in the US regarding veil piercing are known as the "alter ego doctrine" and the "instrumentality doctrine".

[32] See Julia Chaplain, *The origins of the 1855/6 introduction of general limited liability in England* (University of East Anglia, 2016) 12.

[33] *The key to industrial capitalism: limited liability (*The Economist, 23 December 1999). <https://www.economist.com/finance-and-economics/1999/12/23/the-key-to-industrial-capitalism-limited-liability> Accessed 18 February 2019.

[34] See Armour, Jacobs & Milhaupt, *The Evolution of Hostile Takeover Regimes in Developed and Emerging Markets: An Analytical Framework* (Harvard Law Review, 52, 1, Winter 2011).

[35] Martin Gelter & Alexandra M. Reif, *What is Dead May Never Die: The UK's Influence on EU Company Law* (40 Fordham Int'l L. J. 1413(2017))

[36] n 34

The "alter ego doctrine" however is an example of a broad form of doctrine, and far more in line with the concept of a "label", as boated by Lord Walker in *Prest*. It has a looser focus on the independence of shareholders from the corporation itself. The doctrine hails from the case of *Hamilton v. Water Whole International Corporation*[37] where the main test which made veil piercing admissible was wherever the plaintiff can show that a corporation is fundamentally indistinguishable from its shareholders. This test is quite similar to the judgment given in the English case of *Macaura v Northern Assurance Co Ltd*,[38] which prevented veil piercing when the shareholder had an "insurable interest" in an asset of the company.[39] The alter ego doctrine's allowance for more realism in decision making would place it in good stead with the English precedent before *Prest*, where there was a lot of room for taking a pragmatic approach to each situation which resulted in this very generalised and loose approach to any doctrinal understandings of piercing the corporate veil. One could also look to the UK case of *Beckett Investment Management Group Ltd v Hall,*[40] where Lord Kay emphasised that he does not "feel inhibited by a purist approach to corporate personality"[41]. Thus, in the UK, we do see that the doctrine of veil piercing has, at times, taken on a character of arbitrariness similar to that of the alter-ego doctrine, whereby the court was at liberty to pierce in whatever situation it saw fit.

The instrumentality doctrine is the most systematic of the two, and follows an exegetical process in order to establish situations in which the veil may be pierced. The doctrine was first established by the case of *Lowendahl v. Baltimore & Ohio Railroad*,[42] wherein three criteria were laid down for veil piercing to be admissible: (a) control of the business in such a way that the company could not be seen as an

[37] 302 F. App'x 789, 793 (10th Cir. 2008).
[38] [1925] A.C. 619 (H.L.).
[39] ibid 626.
[40] [2007] EWCA Civ 613
[41] ibid, 18.
[42] 247 App. Div. 144 (N.Y. App. Div. 1936).

obviously separate entity; (b) the defendant must have used his control in a fraudulent or abusive manner; and (c) such practices by the defendant must have "proximately" caused the injury or loss. The explicit nature of the specific circumstances whereby piercing the veil is permitted shows the systematic nature of the instrumentality doctrine. In this regard, the formalistic approach of the courts to the instrumentality doctrine certainly mirrors the strict conditions which *Prest* established for veil piercing to take place. Furthermore, this approach has another immense similarity to the situation we find in *Prest*. Frederick Powell, the scholar who formulated the instrumentality doctrine, established eleven situations which would be considered as an "instrumentalization" of the company to avoid legal obligations,[43] and an additional seven situations which would be considered as "improper purposes".[44] This is not dissimilar to the distinction made by Lord Sumption when he establishes "evasion" and "concealment" principles – except that both situations in the US can lead to different intensities of veil piercing.[45] Like the instrumentality doctrine, *Prest* establishes that veil piercing can no longer be characterised by arbitrariness, and veil piercing in the UK is now subject to specific conditions. At High Court level, Moylan J makes out that company law in the UK now has specific rules regarding piercing,[46] by codifying previous jurisprudence (particularly that of *Hashem*[47]): (a) ownership and control were not sufficient conditions alone for veil piercing;[48] (b) no matter whether there is a third party interest or not, the veil cannot be pierced simply because of "justice"[49]; (c) there must be impropriety in order for veil piercing to take place;[50] (d) impropriety has to be linked to use of company to

[43] Frederick J. Powell, *Parent and Subsidiary Corporations* (Callaghan 1931) 9.
[44] ibid.
[45] ibid.
[46] YP v MP (Fam), 208–219.
[47] n 29, 159-164.
[48] n 46
[49] ibid.
[50] ibid.

"evade" or "conceal"[51]; (e) proof of impropriety must be coupled with proof of control by wrongdoer;[52] (f) companies can be considered 'façades' even if they were established without malicious intent.[53] Thus, what we see with both the *Prest* decision and the American instrumentality doctrine is that there is evidence of a strict and cohesive "Doctrine with a capital 'D'", rather than a loose set of easily-manipulated legal principles.

However, the similarities of *Prest* and the instrumentality doctrine do not come without their differences. The commonality that *Prest* and the instrumentality doctrine share is in their similarly exegetical trends, but their underlying *rationes decidendi* still differ substantially. The main difference lies in the fact that English Company Law makes exceptions for any negligence which is still carried out in a *bona fide* capacity, whereas the instrumentality doctrine is oblivious to the good faith of the wrongdoer. Many cases in English Law would adequately fulfil the last two prongs of the instrumentality doctrine (abuse of company control and the cause of injury or loss), but because of *bona fide*, many cases would create problems with the first (inability to see the company as a separate entity). The first prong requires a clear lack of distinction between the economic substance of the controllers of the company and the separate legal personality of the company. This would be problematic in English Law because the courts have previously refused to pierce the veil of companies who, despite a clear lack of distinction in economic substance, acted nonetheless in a *bona fide* capacity. For example, in the case of *Wallersteiner v Moir*,[54] the company of the defendant had its veil pierced primarily because the defendant's actions had been "intentional and contumelious"[55] – despite the fact Lord Denning had admitted that he was willing to accept that the defendant's companies were clear

[51] ibid.
[52] ibid.
[53] ibid.
[54] [1974] 1 W.L.R. 991 (A.C.) 993, 1013.
[55] ibid 1019.

separate legal personalities. Additionally, in the case of *Yukong v. Rendsburg Investment Corp*,[56] the corporate veil was not pierced because the "director's predominant purpose had not been to injure the plaintiff",[57] despite that there was a clear lack of distinction between the economic units of the company and the company.[58] This requirement of proving a lack of *bona fide* causes a small issue for when we attempt to reconcile the US approach with both the pre-*Prest* labelling, and even the post-*Prest* rigid Doctrinal approach probably still requires an explicit regard for the *bona fide* conduct of company directors.

Nonetheless, this transatlantic example gives us an idea of how the difference between a general conceptualisation of doctrine compared to a coherentist position has a significant impact on how piercing the corporate veil has been tackled and how it might be tackled in the future after *Prest*.

V. PREST V PETRODEL AND DOCTRINAL EVOLUTION

The question is, which of these two understandings of doctrine can we apply to *Prest*? Do we seek to understand *Prest* as having sustained what was a sweeping and generalised doctrine or having transformed piercing the veil into a coherentist doctrine? It is necessary perhaps to separate the progression into two parts: the Pre-*Prest* situation and the Post-*Prest* situation. Furthermore, we can also assume that both situations respectively portray a difference between the *de lege lata* and the *de lege ferenda*.

There can be many ways of making an application of doctrine by merit of consistency or doctrine by merit of generalisation; sometimes the generalised form

[56] [1998] 1 W.L.R. 294.
[57] Yukong Line Ltd. of Korea v Rendsburg Investments Corporation of Liberia and Others (No. 2) [1998] 1 W.L.R. 294, 295.
[58] ibid 305–310.

comes by way of “rules” and “standards”,[59] or even some may even boldly suggest that this is where the very difference between formalist and legal realist schools are brought into battle. For realists, of course, there comes a modern pragmatic understanding that judicial decisions cannot be made without bias or arbitrariness.[60] In this regard, Lord Walker’s comment would make perfect sense; before *Prest* the breadth of the concept of veil piercing lent itself to realism, and his coinage of the term “label” perhaps alludes to the variable nature of the pre-*Prest* situation. Thus, before *Prest*, the *de lege lata* held that piercing the corporate veil could be considered a wholly broad and general doctrine (with a small “d”). There are no specific rules and no strictly coherent precedent to follow. In this sense, the use of the word “label” by Lord Walker was entirely correct, if we are referring to the past decisions in common law.

However, the term “label” does not satisfy the decision of the court in *Prest,* a case which essentially changed the law. The post-*Prest* decision lends itself to a far more traditional and consistent understanding of dogmatic legal theory. In this sense, Lord Sumption, when setting out clear principles where the corporate veil can be pierced, has altered our understanding of the Corporate Veil *de lege ferenda*. Like any traditional legal doctrine, these new rules fail to provide any great amount of scope for broad judicial interpretation. It is reasonable then to assume then that there is little chance that sporadic judicial decisions happen.

Thus, Lord Walker’s statement about doctrine is actually a dissent from the others, in the sense that his convictions rely on the inconsistent precedent. The others on the bench did not directly reject any dogmatic ideals, but instead attempted to define or adjust the intensity of the doctrine in order to guide it into a more coherentist canal. It is plausible that after the principled clarifications given by Lord

[59] Kathleen Sullivan, ‘The Justices of Rules and Standards’ (1991) 106 Harvard Law Review.
[60] Neil Duxbury, *Patterns of Jurisprudence* (OUP 1995) 65–159.

Sumption, alongside the language used by the other judges, veil piercing can now be seen as a strict and limited doctrine in the United Kingdom - and its coherent application should be expected in future cases. In this regard, the law has indeed changed, or rather it has been tidied up.

VI. CONCLUSION

Lord Walker's comments on diminishing the dogmatic nature of piercing the corporate veil are not entirely accurate, nor in concordance with others on the bench. This raises a lot of questions about the nature of legal doctrine itself and whether it requires consistency or if it can be generalised and sweeping in nature. The preceding cases to *Prest* concerning veil piercing are generally quite inconsistent, and thus before *Prest*, it would be difficult to call veil piercing a coherent doctrine in the traditional sense; but if doctrine is viewed from a more generalised and broad perspective, Lord Walker's use of the word "label" is probably rather fitting.

We can also draw a similarity between the development of veil piercing in the UK and the two jurisprudential approaches to the veil piercing in US Corporate Law; one of which boats a far more generalised approach (similar to the pre-*Prest* situation) and the other boats a far more rigid and coherentist approach to doctrine (similar to the post-*Prest* situation).

By making the distinction between the generalist and coherentist approaches to legal doctrine, it could be concluded that, based on the way in which *Prest* has tightened and refined the concept of veil piercing, Lord Walker would be correct in calling veil piercing a label if he were assessing what it was before *Prest v Petrodel*.[61] Yet, following on from the principles which were established in *Prest*, alongside the

[61] *Prest* (n 1).

comments made by other judges, it can now be concluded that piercing the corporate veil has now become a doctrine in the traditional sense, or at least it has become in greater concordance with that which we might traditionally define as a legal doctrine.

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