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Section 7 of the United Kingdom Bribery Act 2010: A “Fair Warning” Perlustration

Jonathan J. Rusch*

INTRODUCTION

Within the past year, the tides of global corruption have begun a perceptible shift. In a growing number of countries around the world, public reactions to corruption have moved from apathy and resignation¹ to fear, anger, and even defiance,² and government agencies are pursuing corruption allegations to the

* Adjunct Professor, Georgetown University Law Center; Senior Vice President and Head of Anti-Bribery & Corruption Governance, Wells Fargo. The views in this paper are solely those of the author, and do not necessarily represent the views of Wells Fargo or any officer or employee thereof. Any errors of fact are solely attributable to the author.

1. See, e.g., Costin Ionescu, *Apathy-Hit Romanians Vote in Local Polls Marked by Fight Against Corruption and Seen as Test for Upcoming Parliamentary Elections*, HOTNEWS.RO (June 5, 2016), <http://mobile.hotnews.ro/stire/21052965>; *Apathy and Mistrust: The Disenfranchising Effect of Corruption on Institutional Trust*, AFROBAROMETER (Sept. 25, 2015), <http://afrobarometer.org/media-briefings/apathy-and-mistrust-disenfranchising-effect-corruption-institutional-trust> (survey of Ugandan attitudes toward corruption); Andrew Marshall, *How Corruption Is Holding Asia Back*, TIME (Nov. 4, 2010), <http://content.time.com/time/world/article/0,8599,2029167,00.html>.

2. The 2016 Chapman University Survey of American Fears reported that on a list of the ten fears for which the highest percentage of Americans reported being “Afraid” or “Very Afraid,” “Corrupt government officials” ranked highest at 60.6 percent. “Terrorist Attack” was a distant second, at 41 percent. *America’s Top Fears 2016*, CHAPMAN U. (Oct. 11, 2016), <http://blogs.chapman.edu/wilkinson/2016/10/11/americas-top-fears-2016>. In addition, during 2016 and 2017, popular protests against corruption in numerous countries routinely involved thousands of people. See, e.g., Tatiana Jancarikova, *Thousands of Slovaks Protest Corruption, Demand Ouster of PM Fico’s Ally*, REUTERS (Apr. 18, 2017), <http://www.reuters.com/article/us-slovakia-politics-corruption-idUSKBN17K27Z>; *Next Up in Curbing Corruption: South Africa*, CHRISTIAN SCIENCE MONITOR (Apr. 13, 2017), <http://www.csmonitor.com/Commentary/the-monitors-view/2017/0413/Next-up-in-curbing-corruption-South-Africa>; Alan Taylor, *Anti-Corruption Protests Across Russia*, ATLANTIC (Mar. 27, 2017), <http://www.theatlantic.com/photo/2017/03/anti-corruption-protests-across-russia/520902/>; *Argentina: Thousands Protest Against Crime and Corruption*, EURONEWS (Oct. 12, 2016), <http://www.euronews.com/2016/10/12/argentina-thousands-protest-against-crime-and-corruption>; Agence France-Presse, *Thousands March Against Government in Macedonia*, YAHOO! NEWS (Oct. 11, 2016), <http://www.yahoo.com/news/thousands-march-against-government-macedonia-190432625.html>; Mihai Popescu, *Romanians Are Protesting Government Corruption*, VICE NEWS (Sept. 23, 2016),

highest levels of power.³ Moreover, various nations are recognizing that they need to demonstrate their commitment to eliminating bribery and corruption through criminal and civil sanctions.⁴ That need is spurred, in part, by the two leading international anti-bribery conventions: the Organization for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions⁵ and the United Nations Convention Against Corruption (UNCAC).⁶ Both conventions broadly state the need to craft appropriate sanctions against both individuals and corporate entities engaging in bribery and corruption.

With respect to corporate liability, Article 2 of the OECD Convention says simply that each State Party to the Convention “shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official.”⁷ Article 26 of the UNCAC similarly says that each Party “shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in the offences established in accordance with this Convention.”⁸

<http://www.vice.com/read/romanians-protest-corruption-22-september-2016-876>; *Iraq: Thousands Defy Ban to Protest Against Corruption*, AL JAZEERA (July 15, 2016), <http://www.aljazeera.com/news/2016/07/iraq-thousands-defy-ban-protest-corruption-160715065405528.html>; *Thousands of Protesters Decry Moldovan Government Corruption*, DEUTSCHE WELLE (Jan. 24, 2016), <http://www.dw.com/en/thousands-of-protesters-decry-moldovan-government-corruption/a-19001431>.

3. See Choe Sang-Hun, *Park Geun-hye, Ousted President of South Korea, Is Formally Indicted*, N.Y. TIMES (Apr. 17, 2017), <http://www.nytimes.com/2017/04/17/world/asia/park-geun-hye-south-korea-president-indictment.html>. In addition, recently the former President of Peru, Ollanta Humala, and his wife voluntarily surrendered for pretrial detention pending an investigation stemming from the Odebrecht bribery case in Brazil; the former President of Brazil, Luiz Inácio Lula da Silva, was sentenced to nearly 10 years’ imprisonment on corruption charges stemming from the scandal stemming from the Brazilian oil company Petrobras; and the Pakistani Supreme Court disqualified Nawaz Sharif, Pakistan’s Prime Minister, from holding office due to corruption allegations. See Simeon Tegel, *Latin America’s Mega-Corruption Scandal Just Claimed Its Two Biggest Names*, WASH. POST (July 15, 2017), <http://www.washingtonpost.com/news/worldviews/wp/2017/07/15/latin-americas-mega-corruption-scandal-just-claimed-its-two-biggest-names>; Ernesto Londoño, *Ex-President of Brazil Sentenced to Nearly 10 Years in Prison for Corruption*, N.Y. TIMES (July 12, 2017), <http://www.nytimes.com/2017/07/12/world/americas/brazil-lula-da-silva-corruption.html>; Editorial, *Pakistan’s Prime Minister Falls, Again*, N.Y. TIMES (July 31, 2017), <http://www.nytimes.com/2017/07/31/opinion/pakistan-nawaz-sharif-ousted.html>.

4. The Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions has forty-three signatories, including all OECD countries, and eight non-OECD countries. See *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, OECD, <http://www.oecd.org/corruption/oecdantibriberyconvention.htm> (last viewed Sept. 8, 2017). The United Nations Convention Against Corruption has 140 signatories and 181 parties. See *United Nations Convention against Corruption Signature and Ratification Status as of 12 Dec. 2016*, UNITED NATIONS OFF. ON DRUGS & CRIME, <http://www.unodc.org/unodc/en/treaties/CAC/signatories.html> (last viewed Sept. 8, 2017).

5. OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, 37 I.L.M. 1 (entered into force Feb. 15, 1999) [hereinafter OECD Anti-Bribery Convention].

6. United Nations Convention against Corruption, *adopted* Oct. 31, 2003, 2349 U.N.T.S. 41 (entered into force Dec. 14, 2005).

7. OECD Anti-Bribery Convention art. 2.

8. United Nations Convention against Corruption art. 26.

Neither of these articles provides substantive guidance on how individual nations should define the scope of corporate criminal liability when proscribing and punishing bribery. For example, they fail to clarify whether and to what extent managerial knowledge of, condonation of, or involvement in bribery is to be ascribed to the corporate entity. As a consequence, nations that seek to define the specific actus reus (and mens rea, in some cases) of punishable bribery-related conduct are left to their own devices in deciding whether to borrow from existing language in their own or other nations' criminal codes or craft wholly new language.

For more than three decades, the dominant legislative model for countries in drafting corporate criminal offenses for bribery has been the United States' Foreign Corrupt Practices Act (FCPA).⁹ The FCPA broadly proscribes individual and corporate bribery of foreign public officials,¹⁰ and establishes offenses pertaining to accounting violations by corporate entities. For the latter offenses, the FCPA contains two key provisions. The first is a requirement that securities issuers "make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer [and] devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that[, *inter alia*,] transactions are executed in accordance with management's general or specific authorization."¹¹ The second is a statement of the offense that "[n]o person shall knowingly circumvent or knowingly fail to implement a system of internal accounting controls or knowingly falsify any book, record, or account [as described above]."¹² The FCPA explicitly precludes the imposition of criminal liability under the accounting provisions except for knowing circumvention, knowing failure to implement internal controls, or knowingly falsifying books and records as defined above.¹³

In 2010, a new model for anti-bribery legislation, the United Kingdom Bribery Act 2010,¹⁴ received Royal Assent.¹⁵ Intended to address a number of gaps in United Kingdom criminal law, the Act not only proscribed bribery in a broad range of commercial and government contexts, but also adopted a novel approach to corporate criminal liability stemming from the bribery. While the Act did not directly criminalize corporate noncompliance with specific bribery-related legal duties (i.e., maintaining accurate books and records and implementing an internal-controls system) as the FCPA did, it created the offenses of bribing another person,¹⁶ being bribed,¹⁷ and bribing foreign public

9. See 15 U.S.C. §§ 78dd-1 *et seq.*

10. See *id.* §§ 78dd-1–dd-3.

11. 15 U.S.C. § 78m(b)(2)(A)-(B).

12. *Id.* § 78m(b)(5).

13. See *id.* § 78m(b)(4).

14. Bribery Act 2010, c. 23 (Eng.), <http://www.legislation.gov.uk/ukpga/2010/23/contents>.

15. See U.K. MINISTRY OF JUSTICE, THE BRIBERY ACT: GUIDANCE 6 (2011), <http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>.

16. See Bribery Act 2010, *supra* note 14, § 1.

17. See *id.* § 2.

officials.¹⁸ Each of these offenses applies, subject to certain judicial constraints on corporate liability,¹⁹ to corporate entities.²⁰

The Act also created a new corporate bribery-related offense of unprecedented scope, captioned “Failure of commercial organization to prevent bribery.” Subsection 7(1) states this “failure to prevent” offense as follows:

- (1) A relevant commercial organisation²¹ (“C”) is guilty of an offence under this section if a person (“A”) associated with C bribes another person intending—
- (a) to obtain or retain business for C, or
 - (b) to obtain or retain an advantage in the conduct of business for C.²²

Subsection 7(2) allows a company, as an affirmative defense, “to prove that [it] had in place adequate procedures designed to prevent persons associated with [it] from undertaking such conduct.”²³ This subsection is further delineated in Section 9, which requires the Secretary of State to “publish guidance about procedures that relevant commercial organisations can put in place to prevent persons associated with them from bribing as mentioned in section 7(1).”²⁴ The potential liability exposure created by Section 7 is addressed in Section 11, which subjects a company convicted under Section 7 to a fine that has no statutory limit.²⁵

Buoyed by laudatory comments by United Kingdom authorities²⁶ and the use of Section 7 by the Serious Fraud Office (SFO) in a small but growing number of cases,²⁷ the Section 7 model is becoming increasingly influential in the United Kingdom and other jurisdictions around the world. In the United

18. *See id.* § 6.

19. *See infra* p. 9.

20. *See* Peter Alldridge, *The U.K. Bribery Act: “The Caffeinated Younger Sibling of the FCPA,”* 73 OHIO ST. L.J. 1181, 1200 (2012).

21. Subsection 7(5) defines “relevant commercial organization” to mean: “(a) a body which is incorporated under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere), (b) any other body corporate (wherever incorporated) which carries on a business, or part of a business, in any part of the United Kingdom, (c) a partnership which is formed under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere), or (d) any other partnership (wherever formed) which carries on a business, or part of a business, in any part of the United Kingdom” Bribery Act 2010, *supra* note 14, § 7(5).

22. *Id.* § 7(1).

23. *Id.* § 7(2).

24. *Id.* § 9(1).

25. *See id.* § 11(3).

26. *See, e.g.*, U.K. MINISTRY OF JUSTICE, CORPORATE LIABILITY FOR ECONOMIC CRIME: CALL FOR EVIDENCE 21 (2017), https://consult.justice.gov.uk/digital-communications/corporate-liability-for-economic-crime/supporting_documents/corporateliabilityforeconomiccrimeconsultationdocument.pdf (“The Bribery Act is recognised internationally as a leading legislative model for dealing with commercial bribery alongside the United States’ Foreign Corrupt Practices Act.”); Attorney General Jeremy Wright, Speech to the Cambridge Symposium on Economic Crime (Sept. 5, 2016), <http://www.gov.uk/government/speeches/attorney-general-jeremy-wright-speech-to-the-cambridge-symposium-on-economic-crime> (hailing Section 7 as a “valuable tool[] to address the threat of economic crime” and stating that its impact is already being felt); *Anti-Corruption Summit 2016*, GOV’T OF THE U.K., <http://www.gov.uk/government/topical-events/anti-corruption-summit-london-2016/about> (describing the Bribery Act 2010, including Section 7, as “some of the world’s strictest legislation on bribery”).

27. *See infra* p. 13.

Kingdom, the Government, with the initial impetus of then-Prime Minister David Cameron,²⁸ introduced legislation that includes provisions to criminalize corporate failure to prevent tax evasion. That bill has now been passed by Parliament and has received Royal Assent.²⁹ In addition, the Government recently concluded a public consultation that includes a proposal to expand the use of the “failure to prevent” concept to corporate liability in other fields of economic crime, including money laundering and fraud.³⁰

Finally, some jurisdictions have been using Section 7 as a model for drafting new anti-bribery offenses.³¹ Bermuda, the Isle of Man, and Kenya have already adopted legislation modeled closely on Section 7, and Parliaments in Australia and Ireland are considering similar legislation.³² One American law professor has even recommended that the United States study the efficacy and impact of the Bribery Act, including Section 7, and consider whether its provisions would enhance the FCPA.³³ In addition, Amnesty International has issued a set of corporate crime principles that include, as an option, using Section 7 as a model for other countries to make companies accountable for serious human rights abuses.³⁴

Before legislators in the United Kingdom, Australia, Ireland, and elsewhere begin transplanting a corporate “failure to prevent” offense into anti-corruption law or other fields of crime, they need to examine it more closely to see whether that concept is fit for transplantation. In contrast to other offenses in the Bribery Act 2010, the elements and affirmative-defense provisions of Section 7 received

28. See David Cameron, *The Fight Against Corruption Begins with Political Will*, GUARDIAN (May 11, 2016), <http://www.theguardian.com/commentisfree/2016/may/11/fight-against-corruption-begins-with-political-will>.

29. See Criminal Finances Act 2017, c. 22 (Eng.), http://www.legislation.gov.uk/ukpga/2017/22/pdfs/ukpga_20170022_en.pdf; Parliament, Criminal Finances Act 2017, <http://services.parliament.uk/bills/2016-17/criminalfinances.html>.

30. See U.K. MINISTRY OF JUSTICE, *supra* note 26, at cover.

31. See Isle of Man, Bribery Act 2013 § 10, http://www.legislation.gov.im/cms/images/phoca/download/Acts_of_Tynwald/Primary_2013/briberyact2013.pdf; Bribery Act 2016 § 10, KENYA GAZETTE SUPPLEMENT No. 197 (Dec. 30, 2016), http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/BriberyAct_47of2016.pdf; Nick Miles, *Bermuda Bribery Act: Waiting in the Wings—Implications for the Insurance Industry*, MONDAQ (Mar. 30, 2017), <http://www.mondaq.com/x/580512/White+Collar+Crime+Fraud/Bermuda+Bribery+Act+Waiting+in+the+Wings> (reporting on Bermuda Bribery Act that received Royal Assent).

32. See Exposure Draft: Crimes Legislation Amendment Bill 2017 (Cth) § 70.5A (Austl.), <http://www.ag.gov.au/Consultations/Documents/Foreign-bribery-offence/Exposure-draft-provisions-amendments-to-the-foreign-bribery-offence.pdf> (failing to prevent bribery of a foreign public official); McCann FitzGerald, *Irish Bribery Law: Change is Coming*, LEXOLOGY (June 22, 2016), <http://www.lexology.com/library/detail.aspx?g=16110e08-f3cb-422c-b1b1-fc13e7e52061> (proposed Irish legislation). The Irish Minister for Justice and Equality has recently announced that the Criminal Justice (Corruption) Bill will be advanced in autumn 2017, as part of a “broader, cross-Government package to tackle corruption.” See A&L Goodbody, *Publication of Anti-Corruption Legislation Imminent*, LEXOLOGY (July 31, 2017), http://www.lexology.com/library/detail.aspx?g=8d04006e-c90f-4f2f-b7d2-a3916bbf0f63_.

33. See Laura LaVelle, *Catching up with Law Professor Juliet Sorensen*, NEWSWHISTLE (Nov. 30, 2016), <http://newswhistle.com/catching-up-with-law-professor-juliet-sorensen>.

34. See *Corporate Crime: New Principles Will Help Governments and Law Enforcement Tackle Corporate Abuse*, AMNESTY INT’L (Oct. 6, 2016), <http://www.amnesty.org/en/latest/news/2016/10/corporate-crime-new-principles-will-help-governments-and-law-enforcement-tackle-corporate-abuse>.

relatively scant consideration by Parliament in its consideration of the Act. Reconsideration of Section 7 and closer perusal of its provisions is long overdue.

Leading criminal law scholars have variously described the Section 7 offense, with measured understatement, as “very widely defined”³⁵ and “unusual in terms of the general principles of criminal law.”³⁶ In fact, as this Article will show, in two critical respects Section 7 violates the principle of fair warning—a fundamental requirement of English and U.S. law—which renders it a substantially flawed model for similar legislation in the United Kingdom or other jurisdictions. First, while the words of Subsection 7(1) appear to make it a “*vicarious criminal liability*” offense, both Parliament and the SFO have characterized it, and expressed their intent that it be charged, as a “*failure to prevent*” offense.³⁷ Clearly the same criminal offense cannot be grounded in language referring to two inconsistent bases for criminal liability—vicarious liability and failure to prevent—without violating fundamental principles of the rule of law. Second, even if the actus reus and gravamen of Section 7 are assumed to be “failure to prevent bribery,” the Act does not define the generic word “failure,” nor does it define the phrases “failure to prevent bribery” or “adequate procedures designed to prevent” associated persons from bribing. None of these terms has a self-evident or judicially accepted meaning in common law. As a basic proposition in English and U.S. law, the term “failure” provides a clear basis for criminal sanctions only if there is a specific corresponding, pre-existing legal duty to act. Yet Section 7 does not define a specific legal duty regarding the prevention of bribery, and specifying the pertinent legal duty to act or including definitional language is essential to providing fair warning in this case. In addition, neither the Act nor the Ministry Guidance provides any objective standard by which to determine the adequacy of “adequate procedures.” Consequently, those terms, singly and in combination, are so vague and amorphous that they fail to give fair warning and therefore pose a risk of arbitrary enforcement by prosecutors.

This Article will identify several guidelines that legislators should consider in revising Section 7’s language and structure in order to remedy these defects and make it a sounder model for bribery-related corporate criminal legislation in the United Kingdom and elsewhere.

I. THE REQUIREMENTS OF “FAIR WARNING”

To provide essential context for a review of the legislative history of Section 7, it is first necessary to summarize the key elements of the “fair warning” requirement in English and U.S. law. As a starting point, it is important to recognize that in drafting any criminal offense, legislators must always strike a defensible balance between specificity and breadth. The more general and imprecise the terms that define an offense, the broader its scope of coverage and ambit for prosecutorial discretion. In order to guard against ambiguity that

35. DAVID ORMEROD & KARL LAIRD, SMITH AND HOGAN’S CRIMINAL LAW § 10.1.2.3, at 293 (14th ed. 2015).

36. Alldridge, *supra* note 20, at 1201-02.

37. *See infra* pp. 11-13.

implicitly confers unbridled discretion on law enforcement to define and punish conduct as it sees fit, it is a central and longstanding principle in Anglo-American jurisprudence that criminal offenses must be defined with sufficient particularity to provide fair warning.

In the United Kingdom, the fair warning principle states that “those subject to the law must be able to ascertain what the law is and therefore to foresee any legal consequences of particular actions, rather than being taken by surprise after the event.”³⁸ As Lord Justice Hughes has stated, “[i]ndividuals ought not to be left to guess at what they can or cannot do without infringing the criminal law and subjecting themselves to punishment.”³⁹ In the United States, the Fifth and Fourteenth Amendments’ Due Process Clauses bar the federal and state governments from depriving any person “of life, liberty, or property, without due process of law.”⁴⁰ Implicit in those Clauses is a requirement that in any criminal statute, “a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.”⁴¹

In English law, the inadequacy of fair warning calls into play a comparable canon of statutory construction, known as “the principle against doubtful criminality or doubtful penalisation.”⁴² Starting from the premise that “[a] person is not to be put in peril upon an ambiguity,”⁴³ this principle requires “that if a penal provision is reasonably capable of two interpretations that which is most favourable to the accused must be adopted.”⁴⁴ Furthermore, “[i]f the detriment is minor, the principle will carry little weight. If the detriment is severe, the principle will be correspondingly powerful.”⁴⁵ In other words, the more severe the penalty that a criminal defendant faces under an ambiguously framed offense, the greater the weight that an English court should give to the “doubtful criminality” principle in construing the language of that offense.

In U.S. law, a similar canon, the rule of lenity, ensures fair warning “by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered.”⁴⁶ But U.S. law also has a farther-reaching consequence for inadequate fair warning, the “void for vagueness” principle. That principle “requires that a penal statute define the criminal offense with sufficient definitiveness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.”⁴⁷ The doctrine, particularly its “definitiveness” prong, “bars enforcement of ‘a statute which either forbids or requires the doing of an act in terms so vague that men of

38. RICHARD CARD, *CARD, CROSS & JONES CRIMINAL LAW* § 1.34, at 15 (21st ed. 2014).

39. *Dowds v. R.* [2012] EWCA (Crim) 281 [36], [2012] 1 WLR 2576.

40. U.S. CONST. amend. V; *id.* amend. XIV, § 1.

41. *McBoyle v. United States*, 283 U.S. 25, 27 (1931); *see also United States v. Lanier*, 520 U.S. 259, 265 (1997); Trevor W. Morrison, *Fair Warning and the Retroactive Judicial Expansion of Federal Criminal Statutes*, 74 SO. CAL. L. REV. 455, 455 (2001).

42. *See Dowds*, [2012] EWCA (Crim) 281, at [36].

43. FRANCIS BENNION, *BENNION ON STATUTE LAW* 141 (1990).

44. *Sweet v. Parsley* [1970] AC 132, 149.

45. BENNION, *supra* note 43, at 141.

46. *Lanier*, 520 U.S. at 266 (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)).

47. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

common intelligence must necessarily guess at its meaning and differ as to its application.”⁴⁸ The “arbitrary enforcement” prong requires “that a legislature establish minimal guidelines to govern law enforcement,”⁴⁹ as failure to do so would permit “a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.”⁵⁰ This “minimal guidelines” requirement would apply to any statute that “fails to describe with sufficient particularity what a suspect must do in order to satisfy the statute,”⁵¹ and that thereby vests virtually complete discretion in the hands of enforcement authorities to make that decision.⁵²

Although United Kingdom courts have not embraced the idea of invalidation of legislation under the “void for vagueness” doctrine, the House of Lords, referring to decisions affirming the definitiveness and arbitrary-enforcement prongs of the doctrine, has emphasized “that there is nothing novel about them in our jurisprudence.”⁵³ To the contrary, both the “fair warning” and the “void for vagueness” principles are embodied in another longstanding English rule-of-law principle, that of maximum certainty in defining offenses.⁵⁴

II. THE GENESIS OF SECTION 7

A. *Developments Prior to Introduction of the Bribery Act 2010*

1. *Identifying the Need for a Comprehensive Anti-Corruption Statute.*

Even though the United Kingdom was one of the first countries to ratify the OECD Convention in 1998,⁵⁵ it did not move expeditiously to implement the Convention, particularly the obligation to implement a comprehensive anti-corruption statute.⁵⁶ What sharpened the Government’s focus on this issue was a 2005 report by the OECD Working Group on Bribery in International Business Transactions. The report strongly criticized the level of United Kingdom authorities’ implementation of the OECD Convention.⁵⁷ It acknowledged that the authorities had made “substantial efforts to prepare draft legislation and

48. *Lanier*, 520 U.S. at 265 (quoting *Connally*, 269 U.S. at 391 (1926)).

49. *Smith v. Goguen*, 415 U.S. 566, 574 (1974).

50. *Id.* at 575.

51. *Kolender*, 461 U.S. at 361.

52. *See id.* at 358.

53. *R. v. Rimmington* [2006] 2 All ER 257, 276 (2005).

54. JEREMY HORDER, *ASHWORTH’S PRINCIPLES OF CRIMINAL LAW* § 4.4(e), at 85 (8th ed. 2016).

55. *See OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions: Ratification Status as of 21 May 2014*, OECD, <http://www.oecd.org/daf/anti-bribery/WGBRatificationStatus.pdf> (last visited Sept. 8, 2017).

56. *See* OECD, *DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS, UNITED KINGDOM: PHASE 2 – REPORT ON THE APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 1997 RECOMMENDATION ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS*, ¶¶ 19-20, at 8 (Mar. 17, 2005), <http://www.oecd.org/dataoecd/62/32/34599062.pdf>.

57. *See id.* ¶ 15, at 7.

engage in wide consultations in that regard.”⁵⁸ At the same time, it stated that “the absence of specific case law on the bribery of foreign public officials in a common law country makes it difficult to evaluate how effectively the current system works (with regard, for instance, to the scope of application, relevance and clarity of the terms used, or efficiency of sanctions).”⁵⁹ It further noted that “no company or individual has been indicted or tried for the offence of bribing a foreign public official since the ratification of the Convention by the UK.”⁶⁰ Accordingly, the OECD Working Group recommended “that the United Kingdom enact at the earliest possible date comprehensive legislation whose scope clearly includes the bribery of a foreign public official.”⁶¹

In crafting such comprehensive legislation, the Government faced a considerable challenge with respect to corporate liability for bribery. In 1971, in *Tesco Supermarkets Ltd. v. Natrass*,⁶² the House of Lords declined to hold a supermarket company criminally liable for a violation of the Trade Descriptions Act 1968. The court’s rationale—later defined as the “identification principle”⁶³ or “identification doctrine”⁶⁴—was that individuals’ actions should be considered the company’s actions only if the individuals were “directors and managers who represent the directing mind and will of the company, and control what it does.”⁶⁵ Subsequently, the identification principle became a formidable obstacle to surmount in a range of corporate criminal prosecutions.⁶⁶ When applied to various corporate criminal offenses, the principle would sharply narrow the scope of a company’s criminal liability to situations “where one of its most senior officers had acted with the requisite fault.”⁶⁷ As a result, the larger the company, and thus the more geographically and functionally dispersed its sales and operations, the lower the probability that one or more of its most senior officers could be proved to have so acted.⁶⁸ Prosecutors could scrutinize board minutes or articles of incorporation endlessly in their search for the “directing

58. *Id.*

59. *Id.*

60. *Id.* ¶ 249, at 80.

61. *Id.* ¶ 248, at 80.

62. [1971] UKHL 1.

63. *See, e.g. Corporate Prosecutions*, CROWN PROSECUTION SERV. ¶ 18, http://www.cps.gov.uk/legal/a_to_c/corporate_prosecutions/#a07 (last visited Sept. 8, 2017).

64. *See, e.g., JANET LOVELESS*, CRIMINAL LAW § 4.2.3, at 176 (4th ed. 2014); NICOLA PADFIELD, CRIMINAL LAW § 4.33, at 103 (9th ed. 2014).

65. *Corporate Prosecution*, *supra* note 63, ¶ 17 (citing *Bolton (Engineering) Co. v. Graham* [1957] 1-Q-B. 159, 172 (Lord Denning)). This “directing mind” test has a further antecedent in *Lennard’s Carrying Co. v. Asiatic Petroleum Co.*, [1915] A.C. 705, 713 (Lord Haldane).

66. *See, e.g., Statement from the Crown Prosecution Service: No further action to be taken in Operations Weeting or Golding*, CROWN PROSECUTION SERV., (Dec. 11, 2015), http://www.cps.gov.uk/news/latest_news/no_further_action_to_be_taken_in_operations_weeting_or_golding (citing the identification principle as a factor in taking no further action in investigation of news organizations’ telephone hacking); Peter Alldridge, *The Bribery Act 2010 Guidance to Corporations*, 6 L. & FIN. MARKETS REV. 140 (2012).

67. Celia Wells, *Corporate Criminal Responsibility*, in RESEARCH HANDBOOK ON CORPORATE LEGAL RESPONSIBILITY at 152 (Stephen Tully ed., 2005).

68. *See, e.g., BRENT FISSE & JOHN BRAITHWAITE*, CORPORATIONS, CRIME AND ACCOUNTABILITY 47 (1993).

mind,”⁶⁹ but in most cases that scrutiny would prove insufficient to show that “directing minds,” as *Tesco* narrowly defined them, had ratified or condoned, let alone authorized or directed, a criminal scheme run by subordinates.

In the wake of the Working Group’s report, the United Kingdom Law Commission prepared a comprehensive set of recommendations in 2008 to revise the law of bribery.⁷⁰ With regard to bribery-related corporate liability, the Law Commission presented four potential options:

(1) *Liability of companies where they commit the offence directly.* For this option, the Law Commission provisionally proposed “that consideration of the law relating to the direct liability of legal persons for offences of bribery should be deferred until the Law Commission’s wider review of this area.”⁷¹

(2) *Individual liability of high-ranking members of the company for an offence committed directly by the company.* For this option, the Law Commission was unable to reach a conclusion on whether the individual liability of a high-ranking employee should be specifically provided for, or should be left to be governed by the inchoate offenses of assisting or encouraging crime.⁷²

(3) *Liability of companies where they have failed to adequately supervise their workforce.* For this form of liability, the Law Commission offered three options: (a) the creation of criminal liability for companies for failing to supervise their workforce; (b) a civil or administrative provision addressing a failing to supervise; or (c) deferral of the issue until a wider review of corporate criminality is conducted.⁷³

(4) *Individual liability of company directors for a company’s failure adequately to supervise its workforce.* For this form of liability, the Law Commission offered three options: (a) creation of a new and general mode of liability of failing to supervise; (b) creation of a new mode of liability tailored to go no further than the requirements of Article 6 of the European Union’s anti-corruption convention;⁷⁴ and (c) deferral until the Law Commission’s wider review.⁷⁵

69. See *Corporate Prosecutions supra* note 63, ¶ 20.

70. See LAW COMM’N, CONSULTATION PAPER NO. 185, REFORMING BRIBERY ¶ 4.43 (2007), http://www.lawcom.gov.uk/wp-content/uploads/2015/03/cp185_Reforming_Bribery_consultation.pdf.

71. *Id.* ¶ 9.20.

72. *Id.* ¶ 9.37.

73. *Id.* ¶¶ 9.58-9.65.

74. OJC 195, 25/06/1997.

75. LAW COMM’N, *supra* note 70, ¶ 9.81.

2. The Government's Draft Bill.

Thereafter, the United Kingdom Government proposed draft bribery legislation for submission to Parliament.⁷⁶ Although the Government asserted that its draft was modeled on the Law Commission's draft legislation,⁷⁷ it used none of the four Law Commission options in toto and drew only on the general concept of corporate "failure" in proposing its corporate-bribery offense. Rather than charge corporate failure to supervise its workforce, Clause 5 of the draft bill proposed ascription to a company of certain individuals' failure to prevent the substantive offense of bribery:

- (1) A relevant commercial organisation ("C") is guilty of an offence under this section if—
- (a) a person ("A") performing services for or on behalf of C bribes another person;
 - (b) the bribe was in connection with C's business; and
 - (c) a responsible person, or a number of such persons taken together, was negligent in failing to prevent the bribe.⁷⁸

Because this draft was the basis for Section 7, it is noteworthy that Clause 5's basic structure appeared to be that of a vicarious liability offense, but included an element that would have required proof that "a responsible person," apparently meaning an individual,⁷⁹ had negligently failed to prevent a particular bribe. Clause 5 of the Government's draft also included affirmative-defense language requiring proof "that C had in place adequate procedures designed to prevent persons performing services for or on behalf of C from committing offences under section 1 or 4 in connection with C's business."⁸⁰ Thus, even before Parliament took up formal consideration of the bill, the Government was already proposing language likely to create substantial confusion about the intended standard of criminal liability.

B. Parliamentary Consideration and Action

1. The Standard of Criminal Liability.

In the end, the idea of requiring proof of an individual's "negligent failure to prevent" gained no traction in Parliamentary consideration of the Bribery Act. The report of the Joint Committee on the Draft Bribery Bill welcomed the Government's proposed corporate offense but expressed concern about the "negligent failure" standard. It deemed the proposed draft "a narrow and

76. See U.K. MINISTRY OF JUSTICE, BRIBERY: DRAFT LEGISLATION (Mar. 2009), http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/238651/7570.pdf.

77. See *id.* at 4.

78. *Id.* at 28.

79. *Id.* at 11-12. The Government's commentary restated this term to mean "another person (or persons) connected with the organisation who has the responsibility of preventing bribery," adding, "[w]here there is no person within the organisation whose responsibilities include preventing bribery, the responsibility is deemed to be that of any senior officer of the organization." *Id.* at 11.

80. *Id.* at 28; see also *id.* at 11-12.

complex solution to a pressing problem”⁸¹ because it was “concerned by the focus on whether a ‘responsible person’ was negligent, rather than on the collective failure of the company to ensure that adequate anti-bribery procedures were in place.”⁸² It recommended removal of the negligence requirement, noting that “it would lead to the commercial organization being strictly liable, subject to an adequate procedures defence.”⁸³

Subsequently, in the extensive debates on the bill, Members’ remarks reflected their acceptance of the general need for the Bribery Act⁸⁴ and “for a bespoke, targeted offence”⁸⁵ establishing corporate liability in particular. While many Members spoke in strong overall support of the Act, certain speakers attached particular significance to Section 7 as a component of the Act. The Lord Chancellor referred to it as “a really important offence,”⁸⁶ in part because it reflected the Government’s desire to have a corporate offense in the Act. Another prominent Member went so far as to declare, without further elaboration, that “the architecture of the Bill would collapse if clause 7 did not exist.”⁸⁷

Notwithstanding this dramatic statement, during Parliamentary debates Members were far from clear about the keystone of the bill’s architecture: the standard of corporate criminal liability they believed they were enacting. Compared to other issues in the Bribery Act, this issue received surprisingly little attention in debates. Only three members even used the terms “strict liability” or “vicarious liability” in referring to Section 7.⁸⁸ In contrast, other Members routinely referred in passing to the Section 7 offense as a “failure to prevent bribery.”⁸⁹ One Member firmly declared that “[i]t is clearly a serious matter when commercial organisations fail to prevent bribery,”⁹⁰ but did not explain what types of corporate conduct he considered to constitute such “failure.” In the end, during final debates on Section 7, Members referred broadly to the fact that it established corporate liability, without specifying what form of liability Section 7 embodied or defining the nature and scope of a corporate entity’s legal duty to prevent bribery by an associated person.⁹¹

That widely shared ambiguity concerning the true basis of corporate liability carried over to the guidance document that the Ministry of Justice issued to implement Section 9 of the Bribery Act. That document never mentions the concept of vicarious criminal liability. Instead, it states broadly that Section 7

81. JOINT COMMITTEE ON THE DRAFT BRIBERY BILL, DRAFT BRIBERY BILL: FIRST REPORT OF SESSION 2008-09, HC-430-I, ¶ 89, at 35 (July 28, 2009).

82. *Id.*

83. *Id.*

84. See 506 Parl Deb HC (2010), 946-47 (Lord Chancellor Straw); see also 502 Parl Deb HL (2009) 1091 (Lord Goodhart).

85. 502 Parl Deb HL (2009) 1087 (Lord Bach).

86. See 506 Parl Deb HC (2010) 948 (Lord Chancellor Straw).

87. 506 Parl Deb HC (2010) 961 (Mr. Grieve).

88. See 502 Parl Deb HL (2010) GC 45 (Lord Henley) (referencing strict liability); 505 Parl Deb HL (2010) 138; 507 Parl Deb HC (2010) 55 (Mr. Djanogly) (referencing strict liability); 507 Parl Deb HC (2010) 60 (Mr. Howarth) (making a statement on vicarious liability).

89. See, e.g., 505 Parl Deb HL (2010) 140 (Lord Goodhart); see also 507 Parl Deb HC (2010) 149 (Ms. Ward).

90. 506 Parl Deb HC (2010) 961 (Mr. Grieve).

91. See 508 Parl Deb HL (2010) 1706 (Lord Goodhart, Lord Thomas of Gresford).

“creates a new form of corporate liability for failing to prevent bribery on behalf of a commercial organization.”⁹² Neither strict nor vicarious liability can be considered “a new form of corporate liability” in English law.⁹³ The Ministry Guidance therefore indicates that the Government settled on designating Section 7 as a “failure to prevent” offense, even though numerous attorneys, scholars, and even a leading anti-corruption advocacy organization construe Section 7 to be a strict-liability offense.⁹⁴

In charging Section 7 in enforcement actions, the SFO has reinforced the confusion by referring, in public documents, to the charged conduct as a “failure to prevent.” In the first corporate conviction for a Section 7 offense, involving the Sweett Group, the relevant language stated that Sweett Group, “being a relevant commercial organisation, failed to prevent the bribing of [a specified individual] by an associated person”⁹⁵ In connection with the SFO’s first three Deferred Prosecution Agreements (DPAs) invoking Section 7—against Standard Bank, “XYZ” (an unnamed entity), and Rolls-Royce—the SFO likewise characterized the companies’ offenses as “failure to prevent bribery.”⁹⁶

2. The “Adequate Procedures” Defense.

In endorsing the concept of what it termed a strict-liability offense, subject to an “adequate procedures” defense, the Joint Committee characterized the meaning of the term “adequate procedures” as “by far the most common issue on which witnesses called for official guidance.”⁹⁷ It therefore stated that “[o]fficial guidance on how to comply with the provisions of the draft Bill should, at a minimum, cover the meaning of ‘adequate procedures’.”⁹⁸

92. See U.K. MINISTRY OF JUSTICE, *supra* note 15, at 8.

93. See, e.g., ANDREW P. SIMESTER, JOHN R. SPENCER, G.R. SULLIVAN & GRAHAM J. VIRGO, SIMESTER AND SULLIVAN’S CRIMINAL LAW: THEORY AND DOCTRINE § 8.2, at 278, 282-83 (5th ed. 2013).

94. See, e.g., ORMEROD & LAIRD, *supra* note 35, § 7.3, at 183; Bruce W. Bean & Emma H. MacGuidwin, *Unscrewing the Inscrutable: The UK Bribery Act 2010*, 23 IND. INT’L & COMP. L. REV. 63, 64 (2013); Jonathan Pickworth, *The Risks and Benefits of Extending Strict Liability*, ECONOMIA (Dec. 12, 2016), <http://economia.icaew.com/en/opinion/december-2016/the-risks-and-benefits-of-extending-strict-liability>; Mills & Reeve, *Bribery Act 2010: The New Strict Liability Corporate Offence*, (Apr. 2010), <http://www.mills-reeve.com/files/Publication/416273e0-cd24-4a1c-84d7-e3590aa2acfb/Presentation/PublicationAttachment/30c385a7-a9d0-4c49-9712-e87c4f0e617c/Bribery%20Act%202010%20-%20the%20new%20strict%20liability%20corporate%20offence%20-%20April%202010.pdf>; *The Bribery Act*, TRANSPARENCY INT’L UK, <http://www.transparency.org.uk/our-work/business-integrity/bribery-act/> (last visited Sept. 8, 2017).

95. Statement, Serious Fraud Off., SFO Charges Sweett Group PLC (Dec. 9, 2015), <http://www.sfo.gov.uk/2015/12/09/sfo-charges-sweett-group-plc>.

96. See *R. v. Rolls-Royce plc*, Statement of Facts Prepared Pursuant to Paragraph 5(1) of Schedule 17 to the Crime and Courts Act 2013 ¶¶ 1, 191, 209 (Jan. 17, 2017), <http://www.sfo.gov.uk/cases/rolls-royce-plc/>; Press Release, Serious Fraud Off., SFO Secures Second DPA (July 8, 2016), <http://www.sfo.gov.uk/2016/07/08/sfo-secures-second-dpa/>; Press Release, Serious Fraud Off., SFO agrees First UK DPA with Standard Bank (Nov. 30, 2015), <http://www.sfo.gov.uk/2015/11/30/sfo-agrees-first-uk-dpa-with-standard-bank>. The SFO has since announced a fourth DPA, with Tesco Stores Limited, but is refraining from providing further details per a judicial order. See Press Release, Serious Fraud Off., SFO Agrees Deferred Prosecution Agreement with Tesco (Apr. 10, 2017), <http://www.sfo.gov.uk/2017/04/10/sfo-agrees-deferred-prosecution-agreement-with-tesco>.

97. JOINT COMMITTEE ON THE DRAFT BRIBERY BILL, *supra* note 81, ¶ 118, at 44.

98. *Id.* ¶ 121, at 45.

Subsequently, Members in both Houses addressed the “adequate procedures” language in debates, but primarily in considering whether to use the term “adequate” or “reasonable”—a semantic debate that proved devoid of practical guidance for corporations. In the House of Lords, one Member offered an amendment for the specific purpose of prompting debate on the term “adequate.” Moving to strike the word “adequate” altogether, he raised a series of fundamental questions:

Who is to judge what is adequate and what is not? If a company has stringent rules in place, checks on its employees, has transparent accounting and so on, but a determined associate of that company still manages to bribe another, were those procedures adequate? They did not, after all, prevent the offence of bribery taking place. What about a company with weak procedures in place which nevertheless managed, perhaps more by chance than anything else, to stop an embryonic plan to commit bribery? Which of those cases should be prosecuted? I am sure that the Minister will say that such matters could be left to the discretion of the prosecuting authorities; it would be quite reasonable for him to do so.⁹⁹

The Member also questioned how commercial organizations would know “if they have put in place adequate procedures,” adding, “Clearly, this is a place for guidance from the Government.”¹⁰⁰ In response, other upper-house Members offered only conclusory statements that inclusion of the word “adequate” was “an essential part of clause 7,”¹⁰¹ and that “[i]f ‘adequate’ were taken out, that would drive a loophole through the offence.”¹⁰² The amendment was eventually withdrawn, as Members’ attention shifted to whether the guidance should be included in the Act itself or in subsequent guidance from the Ministry of Justice,¹⁰³ and whether commercial organizations could submit inquiries concerning the adequacy of their procedures to an advisory service.¹⁰⁴

In a later debate in the House of Commons, one Member moved to replace the word “adequate” with “reasonable,” citing the House of Lords debate on the issue.¹⁰⁵ He asserted that it would “tighten the language to provide business with a practical and workable defence that can easily be assessed by prosecutors and jurors. Our hope in amending the clause is to save costs for business and for prosecutors by providing a more readily understandable defence.”¹⁰⁶ In response, a Member representing the Government resisted the amendment, saying, “This is one of those issues on which I thought we all agreed about what to do It was debated in the other place, and we all came to the view that guidelines should be issued to help companies to ensure that they comply.”¹⁰⁷ He also opined “that,

99. 503 Parl Deb HL (2010), GC 45 (Lord Henley).

100. *Id.*

101. 503 Parl Deb HL (2010), GC 47 (Lord Goodhart).

102. 503 Parl Deb H.L. (2010), GC 51 (Lord Tunnicliffe).

103. *See* 503 Parl Deb HL (2010), GC 52-59.

104. *See* 503 Parl Deb HL (2010), GC 63-65.

105. 507 Parl Deb HC (2010), 55 (Mr. Djanogly).

106. *Id.*

107. 507 Parl Deb HC (2010), 60 (Mr. Howarth).

in general terms, what ‘reasonable’ means in law is a sort of cost-benefit analysis.”¹⁰⁸

When another Member expressed concern about whether, if a bribe occurred, the defense would be unavailable to the company because its procedures had been in fact inadequate to stop that particular bribe, the Member representing the Government dismissed it as “what we, in the academic world, call the ex post interpretation of the defence, which does not make any sense.”¹⁰⁹

The Member elaborated:

It is an interpretation under which the defence could never apply because whenever a bribe is taking place, the measures taken by the employer could not possibly have been adequate in that sense, as otherwise the offence would not have taken place. Therefore, it cannot mean that; it must mean something else. There is then a question about what it means, and that is why it is right to have guidance.¹¹⁰

After further debate, the amendment was withdrawn.¹¹¹ No further efforts were made to define the term “adequate,” and the bill proceeded to final passage and Royal Assent.

III. SECTION 7 AND THE “FAIR WARNING” PRINCIPLE

A. “Fair Warning” and the Language of Section 7

1. The Search for the Basis of Corporate Liability.

A fair-warning analysis of Section 7 must begin with a focus on the confusion and ambiguity of its language concerning which basis of corporate liability Parliament intended to enact.¹¹² The words of Subsection 7(1), on their face, appear to make it a vicarious criminal liability offense: a corporate entity is criminally liable if an “associated person” commits bribery with the requisite intent.¹¹³ Yet, as noted earlier, both Parliament and the Government have characterized Section 7, and expressed their intent that it be charged, as a “failure to prevent” offense.¹¹⁴ Clearly the same criminal offense cannot simultaneously have two inconsistent bases for criminal liability without violating fundamental

108. *Id.* at 60-61 (Mr. Howarth).

109. *Id.* at 61.

110. *Id.*

111. *Id.* at 69.

112. One criminal law scholar has characterized Section 7 as “unusual in terms of the general principles of criminal law. It is not, strictly speaking, a form of vicarious liability nor is it a substantive bribery offence. It does not replace or remove direct corporate liability for bribery.” Alldridge, *supra* note 20, at 1201-202. If each of those statements is true, the observation concisely demonstrates the inherent confusion and ambiguity of Section 7’s language.

113. One commentator recently raised questions about the scope and meaning of this term. See Natasha Reurts, *A Call for Clarity: The Uncertainty of “Associated Person,”* LEXOLOGY (Apr. 3, 2017), <http://www.lexology.com/library/detail.aspx?g=4e0946fc-e157-4e9a-958a-ce953465a051>. Without disputing the reasoning of this commentary, it should be noted that Section 7 at least includes a definition for this term, even if it does not resolve all questions of construction.

114. *See supra* pp. 11-13.

principles of the rule of law, especially “fair warning” and the principle against doubtful criminality. To resolve this confusion, it would seem logical to conclude that “failure to prevent bribery” would be the correct interpretation.

Yet that hypothetical conclusion does not resolve the issue. Even if, applying the doubtful criminality principle, the true actus reus of a Section 7 offense is the “failure to prevent bribery,” the Act includes no definition of the generic word “failure” or the phrase “failure to prevent bribery.” That omission is critical, given that, as one Member aptly observed during the Section 7 debates, “[t]he first recourse of business owners or legal practitioners when putting in place or accessing anti-bribery guidelines will be the plain English meaning of the words chosen by Parliament when drafting the Bill.”¹¹⁵

The term “failure,” standing alone, has no single “plain English meaning.” Its multiple meanings include (i) lack of success in performing or attempting an action, (ii) neglect or omission of a mandated action, (iii) a decision not to act, (iv) a decision to take acts other than what would have prevented the ensuing harm, and (v) a conclusory judgment about the result of such a decision or action.¹¹⁶ Given this broad range of possible meanings, absent legislative or judicial guidance on which meaning is pertinent in a criminal offense, juries could easily convict a defendant for failure or omission without agreeing on what evidence of action or inaction proved that “failure.” That risk of conviction should give courts pause, especially when words such as “failure, “ or even “failure to prevent,” are by themselves innocuous and not reflective of actions that are inherently malign.¹¹⁷ For good reason, then, “English law has traditionally been reluctant to impose liability for omissions because of a fear that this would throw too wide the net of the criminal law.”¹¹⁸

2. *Failure and Legal Duties to Act.*

It is therefore important to recognize that as a general proposition in British and U.S. criminal law, the failure to act provides a clear and defensible basis for criminal sanctions only where there is a specific pre-existing legal duty to act.¹¹⁹ Statutory terms such as “failure” or “omission,” as indicated above, are unlikely to provide meaningful fair warning unless their scope and meaning are cabined by “certain positive duties to act [that] are so important that they can rightly be made the subject of criminal liability.”¹²⁰ But the importance of a duty to act, standing alone, is not enough to justify criminalization: “[S]uch a duty should also be defined with sufficient certainty, and should be adequately discoverable

115. 507 Parl Deb HC (2010), 55 (Mr. Djanogly).

116. See *Failure*, ENGLISH OXFORD LIVING DICTIONARIES, <http://en.oxforddictionaries.com/definition/failure> (last visited Sept. 8, 2017).

117. See *Arthur Anderson LLP v. United States*, 544 U.S. 696, 703-704 (2005).

118. PADFIELD, *supra* note 64, § 2.5, at 25.

119. John Kleinig, *Criminal Liability for Failures to Act*, 49 L. & CONTEMP. PROBS. 161, 161 (1986); see, e.g., CATHERINE ELLIOTT & FRANCES QUINN, *CRIMINAL LAW* 12 (5th ed. 2004); NICOLA LACEY, CELIA WELLS, & OLIVER QUICK, *RECONSTRUCTING CRIMINAL LAW* 47 (3d ed. 2003); ORMEROD & LAIRD, *supra* note 35, § 4.4.2.2 at 78.

120. HORDER, *supra* note 54, § 5.4, at 118.

by those to whom it applies.”¹²¹ The more specific the duty, such as a failure to file tax returns by a specified date, the less pressing the need for a statutory definition of what would constitute “failure” to carry out that duty.

As a result, while English criminal law is replete with examples of criminal offenses that use “failure” in defining the actus reus,¹²² United Kingdom courts have been careful to recognize liability for failure to act only in exceptional cases.¹²³ These cases consist principally of (i) a specific statutory duty applicable to the defendant, (ii) a contractual duty to which the defendant has voluntarily agreed, (iii) the defendant’s voluntary assumption of responsibility for another’s welfare (e.g., small children or infirm adults), and (iv) a defendant’s creation of a danger to persons or property that gives rise to the accused’s duty to act to prevent resultant harm.¹²⁴ In each case, specification of the duty to act is essential to reduce ambiguity in the term “failure” and to clarify the ambit of the offense. If the legislature wishes to enact a statutory offense in which a failure to perform some act is charged, it must first specify the pertinent legal duty to act (as the FCPA does) or include definitional language. Without such specification or definition, the legislature has not provided fair warning.

Section 7 contains none of those limitations requisite for fair warning. The Act contains no specification of a statutory duty applicable to corporate entities. Nor does it contain any language that could be read to create a general contractual duty pertaining to bribery, an articulable bribery-related responsibility for others’ welfare, or a duty stemming from a specific danger. There is little point in saying that Section 7 seeks “to place a clear onus upon the employer to do something to ensure that employees do not engage in the proscribed activity”¹²⁵ if it fails to provide any clarity about what that “something” is.

3. “Failure” and the Complexity of Corporate Compliance.

Beyond shortcomings in the use of the term “failure” itself, the concept of imposing broad and amorphous criminal liability for “failure to prevent bribery” is particularly troublesome. Over the past decade, law enforcement, executive, and regulatory authorities’ expectations about what constitutes an effective corporate compliance program have increased dramatically, in both volume and intensity.¹²⁶ In response, anti-bribery compliance programs have necessarily

121. *See id.*

122. *See* LACEY ET AL., *supra* note 119, at 47.

123. ORMEROD & LAIRD, *supra* note 35, § 4.4, at 73; Alldridge, *supra* note 20, at 1202.

124. *See, e.g.*, ELLIOTT & QUINN, *supra* note 119, at 12-13; JONATHAN HERRING, CRIMINAL LAW § 2.1, at 72-78 (6th ed. 2014); Andrew Ashworth, *Ignorance of the Criminal Law, and Duties to Avoid It*, 74 MODERN L. REV. 1, 8, 14 (2011).

125. Alldridge, *supra* note 20, at 1202.

126. *See, e.g.*, U.S. DEP’T OF JUSTICE & SEC. & EXCH. COMM’N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 57-62 (2012) (summarizing hallmarks of effective compliance programs), <http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf> [hereinafter FCPA RESOURCE GUIDE 2012]; UNITED NATIONS OFF. ON DRUGS & CRIME, AN ANTI-CORRUPTION ETHICS AND COMPLIANCE PROGRAMME FOR BUSINESS: A PRACTICAL GUIDE (2013) (presenting a detailed twelve-point anti-corruption compliance program); Fraud Section, Criminal Div., *Evaluation of Corporate Compliance Programs*, U.S. DEP’T OF JUSTICE, (Feb. 8, 2017), [http://www.justice.gov/criminal-fraud/page/file/937501/download_\(listing more than 100 questions for](http://www.justice.gov/criminal-fraud/page/file/937501/download_(listing more than 100 questions for)

become more sophisticated, complex, and elaborate.¹²⁷ Companies must devise and apply a wide array of internal controls that enable them to identify patterns of activity and, where possible, individual actions by employees that could be indicative of bribery and corruption risk.

To carry out such programs consistently and ensure their effectiveness month after month and year after year, the number, variety, and costs of actions that corporate managers and employees must take increase almost exponentially.¹²⁸ This is especially true in medium to large enterprises. Mindful of enforcers' admonitions that effective compliance programs be "dynamic"¹²⁹ and "constantly evolve,"¹³⁰ compliance officers must continuously oversee the execution and consistent application of their existing anti-bribery policies and procedures, including the day-to-day operation of their internal controls for higher-risk issues such as transfers of things of value to foreign government officials, while simultaneously planning and adjusting for policy and operational changes that may become necessary due to business growth and regulatory oversight.

In this complex and fluid environment, it is very possible that, at any time, a corporate employee could make an individual improper payment or gift to a foreign official before a corporate compliance program can react and pursue the matter, no matter how well-staffed and resourced the program is. A "facilitation payment"¹³¹ of cash to a customs official, or the purchase of a high-end watch or an expensive restaurant meal with a foreign official, can be a completed act of bribery well before compliance authorities can discover the true nature of the transaction.

4. *The Ministry of Justice Guidance.*

The Ministry Guidance appears at first glance to preclude a Section 7 prosecution in such a case. It states that "[i]t is a full defence for an organisation to prove that *despite a particular case of bribery* it nevertheless had adequate

evaluation of compliance programs); Fin. Crimes Enforcement Network, *Advisory to U.S. Financial Institutions on Promoting a Culture of Compliance*, U.S. DEP'T OF THE TREASURY (Aug. 11, 2014), <http://www.fincen.gov/sites/default/files/advisory/FIN-2014-A007.pdf>.

127. See Alexandra Wrage, *Compliance and Enforcement Trends from the 2017 TRACE Forum*, FCPA BLOG (Apr. 4, 2017, 8:08 AM), <http://www.fcpablog.com/blog/2017/4/4/alexandra-wrage-compliance-and-enforcement-trends-from-the-2.html> (quoting a comment from Kara Brockmeyer, then Chief of the SEC FCPA Unit, on "the tremendous increase in sophistication in compliance programs" over the last ten years).

128. See, e.g., Lucy McNulty, *Compliance Costs to More Than Double by 2022*, FIN. NEWS (Apr. 27, 2017), <http://www.fnlonon.com/articles/compliance-costs-to-more-than-double-by-2022-survey-finds-20170427>; Steve Culp, *As New Risks Emerge, Compliance Costs Are Rising for Financial Institutions*, FORBES (Apr. 18, 2017), <http://www.forbes.com/sites/steveculp/2017/04/18/as-new-risks-emerge-compliance-costs-are-rising-for-financial-institutions>; *Conquering Compliance: Shining a Light on Customer Due Diligence*, DUN & BRADSTREET 7-8 (Apr. 11, 2017), <http://www.dnb.co.uk/content/dam/english/economic-and-industry-insight/cdd-study-report.pdf>.

129. FCPA RESOURCE GUIDE 2012, *supra* note 126, at 56.

130. *Id.* at 61.

131. The Ministry Guidance defines facilitation payments as "[s]mall bribes paid to facilitate routine Government action." U.K. MINISTRY OF JUSTICE, *supra* note 15, ¶ 44, at 18. Neither the Bribery Act 2010 nor prior bribery legislation exempted such payments from treatment as bribes. *Id.* ¶ 45, at 18.

procedures in place to prevent persons associated with it from bribing.”¹³² Law enforcement guidance documents, however, are no substitute for clear legislative language, and the Act includes no language that tracks the Ministry’s “particular case of bribery” phrasing. Indeed, it is entirely plausible that a single instance of bribery would suffice to show that a company’s procedures should be considered inadequate.¹³³ The SFO’s first DPA, with Standard Bank, involved a single, large-sum bribe to a local Standard Bank partner in Tanzania for the apparent benefit of a foreign government official.¹³⁴ As the DPA does not specify in which respect the bank’s procedures were inadequate to prevent this single act of bribery,¹³⁵ the Ministry Guidance’s “particular case” language still leaves companies to guess at the true scope and meaning of the “adequate procedures” language.

To explore the “adequate procedures” issue in greater detail, it is important to recognize that in any criminal offense, affirmative-defense language must be read and applied with the same care as offense-conduct language. When Subsection 7(2) states that the procedures must be both “designed to prevent [associated persons] . . . from undertaking such conduct” and “adequate,” it leaves two critical questions unanswered.

The first unanswered question turns on the meaning of the word “undertaking.” That word has no single meaning in common usage: its ordinary or natural meanings, on which courts should necessarily draw in construing the term,¹³⁶ can include such diverse degrees of action as (i) simply promising to do a particular thing (e.g., the associated person emails the bribe recipient, “We’ll send the money tomorrow”), (ii) committing oneself to and beginning something (e.g., the associated person sends instructions to subordinates to arrange a wire transfer to the bribe recipient),¹³⁷ or (iii) beginning to do something¹³⁸ (e.g., the associated person wire-transfers the bribe himself). Each of these three readings is plausible, depending on underlying facts and circumstances. With respect to Section 7, the question is whether Parliament intended that the procedures in question must be designed to prevent an associated person from “undertaking”—

132. U.K. MINISTRY OF JUSTICE, *supra* note 15, ¶ 1, at 6 (emphasis added). In a similar vein, the U.S. Department of Justice and the Securities and Exchange Commission (SEC) guide to the FCPA states that “if designed carefully, implemented earnestly, and enforced fairly, a company’s compliance program—no matter how large or small the organization—will allow the company generally to prevent violations, detect those that do occur, and remediate them promptly and appropriately.” FCPA RESOURCE GUIDE 2012, *supra* note 126, at 57. See Wrage, *supra* note 127 (quoting then-SEC FCPA Unit Chief Kara Brockmeyer, who stated that “we know you’re never going to get it right 100% of the time”).

133. See Alldridge, *supra* note 20, at 1203; Bean & MacGuidwin, *supra* note 94, at 64, 89.

134. See SFO agrees first UK DPA with Standard Bank, *supra* note 96.

135. See Serious Fraud Office v. ICBC Standard Bank PLC, Deferred Prosecution Agreement, (updated May 18, 2016), <http://www.sfo.gov.uk/download/deferred-prosecution-agreement-sfo-v-icbc-sb-plc>. The DPA states that Standard Bank must commission an independent report to be completed by a leading consulting firm on “current anti-bribery and corruption policies (not including KYC or client due diligence procedures) and their implementation.” *Id.* ¶ 28(a).

136. See *Arthur Andersen LLP v. United States*, 544 U.S., 696, 705 (2005); *Bailey v. United States*, 516 U.S. 137, 145 (1995).

137. See *Undertake*, ENGLISH OXFORD LIVING DICTIONARIES, <http://en.oxforddictionaries.com/definition/undertake> (last visited Sept. 25, 2017).

138. See *Undertake*, CAMBRIDGE DICTIONARY, <http://dictionary.cambridge.org/us/dictionary/english/undertake> (last visited Sept. 25, 2017).

i.e., promising to do, committing to do, or beginning to do—any act of bribery. If that were the case, some companies may be unable to establish the affirmative defense for the simple reason that they cannot prove the impossible—that their, or any other, compliance procedures can be both designed and effected to prevent every type of “undertaking” of bribery, from promise to initial execution to performance.

The second question that the Ministry guidance leaves unanswered is what Parliament intended by the addition of the word “adequate.” Like other critical terms in Section 7, that word, too, has no clear meaning in the abstract, and no statutory definition. As described earlier, both Houses, in effect, chose to leave the term “adequate” undefined in statutory language and to leave it to the Ministry of Justice to define the term through broad guidance after enactment.¹³⁹ One of the key exchanges noted earlier during the House of Commons debates is particularly telling. In dismissing the concern that the defense might not be available to a company whose employee had committed bribery because the company’s procedures, by definition, had failed to prevent that particular bribery, the House Member representing the Government’s views stated: (a) the words of the statute can be read that way, (b) but the statute cannot mean that, (c) therefore it must mean something else; (d) we (Parliament) do not know what it means, and (e) that is why we leave it to the Ministry to craft the guidance on its meaning.¹⁴⁰ A more deliberate decision to let companies guess the boundaries of the offense and corresponding legal defense at their own peril is hard to imagine.

Furthermore, the decision to abdicate to the Ministry of Justice the task of defining the scope of an affirmative defense poses a risk of arbitrary enforcement in the future. Absent some external and objective standard for “adequacy,” prosecutors in Section 7 cases have effectively unlimited discretion to reach their own subjective conclusions that a company’s anti-bribery compliance procedures are not “adequate.” One need not question the good intentions and integrity of prosecutors who have been enforcing the Act to recognize that what one prosecutorial team may do today in deciding whether to charge based on the breadth of the “adequate procedures” defense, another can undo at a later date by construing the ambit of that defense more narrowly or broadly in making charging decisions and negotiating resolutions.¹⁴¹ It is always a critical task in drafting criminal offenses—as a preeminent legal scholar, Anthony Amsterdam, observed—“to assure responsible control over the scope and probable regularity of exercise of governmental force.”¹⁴² Any offense that implicitly cedes responsibility for defining its scope to prosecutors “is likely to function erratically—responsive to whim or discrimination unrelated to any specific determination of need by the responsible policy-making organs of society.”¹⁴³ It

139. See *supra* pp. 13-15.

140. 507 Parl Deb HC (2010), 60 (Mr. Howarth); see also *supra* p. 15.

141. See *Serious Fraud Office Under Threat From Tory Plans*, BBC (May 18, 2017), <http://www.bbc.com/news/business-39960303>.

142. Anthony G. Amsterdam, Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 90 (1960).

143. *Id.*

is not difficult to imagine circumstances in which partisan political or ideological forces over time could lead to the exercise of whim or discrimination, absent some form of regulation or review.¹⁴⁴

Moreover, it would be contrary to fundamental notions of due process that a criminal statute would allow prosecutors to expand or contract the scope of an affirmative defense at will. A defendant whose statutory defense is dependent on the effectively unreviewable discretion of prosecutors to define as they see fit, with no assurance that either the public or legislators will have a voice in that definitional process, has no defense at all.¹⁴⁵ In light of the extreme breadth of the key terms already discussed, there is no constraint in the Act to preclude such arbitrary enforcement hereafter.

Given these significant flaws in its key terms—the confusion about the correct basis of criminal liability, the inherent vagueness and ambiguity of the terms “failure” and “failure to prevent bribery,” the absence of a corresponding specific duty to act or other limiting language, and the further ambiguity of what constitutes “adequate procedures”—Section 7 lacks the clarity needed for conformity to the rule of law, and more particularly to the requirement of fair warning.¹⁴⁶

B. *Implications for Other “Failure to Prevent” Economic Crimes Offenses*

Under the preceding analysis, each of the corporate offenses included in other proposals—failure to prevent the criminal facilitation of tax evasion, failure to prevent money laundering, and failure to prevent fraud—will be subject to the same “fair warning” defects as Section 7 if they adhere to Section 7’s structure and language. While the money laundering and fraud offenses that the United Kingdom Government proposed in its public consultation¹⁴⁷ have not yet been published in draft, two “failure to prevent” facilitation of tax offenses have just been enacted in the Criminal Resources Act.¹⁴⁸ Both would adopt the same vicarious liability structure and language, as well as the same undefined and vague terms “failure” and “failure to prevent,” as Section 7.¹⁴⁹ Because those terms, under the fair-warning and doubtful-criminality principles, are inherently inadequate in the absence of a specific duty to act when applied to bribery, they would be no less defective if applied to other corporate economic-crime offenses such as tax-evasion facilitation, money laundering, or fraud in the absence of a comparable specific duty to act for those offenses.

144. See *Skilling v. United States*, 561 U.S. 358, 412 (2010); *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

145. See Rebecca Krauss, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Developments*, 6 SETON HALL CIRC. L. REV. 1, 2 (2012).

146. See SIMESTER ET AL., *supra* note 93, § 2.3, at 26-29.

147. See *supra* p. 5.

148. See Criminal Finances Act 2017, c. 2 §§ 45-46 (Eng.).

149. See Karolos Seeger, Alex Parker, Andrew Lee, Ceri Chave, & Ed Pearson, *UK Criminal Finances Act 2017*, COMPLIANCE & ENFORCEMENT (May 23, 2017), http://wp.nyu.edu/compliance_enforcement/2017/05/23/uk-criminal-finances-act-2017.

Both tax-evasion facilitation offenses also include a corporate affirmative defense that contemplates the adoption of compliance procedures. The Act's language replaces the Section 7 concept of "adequate" procedures with an alternative defense, i.e., proof that the company either "had in place such prevention procedures as it was reasonable in all the circumstances to expect B to have in place," or "it was not reasonable in all the circumstances to expect B to have any prevention procedures in place."¹⁵⁰ Parliament abandoned the term "adequate" procedures in favor of "reasonable" procedures, which has been used in affirmative defense language in other criminal offenses. The Act, however, includes no language to define what might constitute "reasonable" prevention procedures to prevent tax-evasion facilitation—likely because there is no way to draft such language with the concision necessary for criminal offenses. As with Section 7, it defers that critical task to future action by the Chancellor of the Exchequer to "prepare and publish guidance about procedures that relevant bodies can put in place to prevent persons acting in the capacity of an associated person from committing UK tax evasion facilitation offences or foreign tax evasion facilitation offences."¹⁵¹ This provision would place an inordinate burden on the Treasury to draft guidance critical to defining the limits of corporate criminal liability.

CONCLUSION

In law, as in sculpture and architecture, even the most initially impressive works may contain internal flaws that are potentially catastrophic.¹⁵² So may corporate laws. While the United Kingdom Solicitor General recently declared that "[t]he threat of conviction is greater under 'failure to prevent' [in Section 7],"¹⁵³ the gravity of that threat flows directly from statutory language that is structurally compromised, though in ways that have not yet been exposed in any contested criminal prosecution. Those faults are the direct result of two critical errors in judgment. With respect to the confusion relating to the standard of criminal liability, the error lies in Parliament's overlooking of a basic legal principle that a criminal offense can have only one clearly stated basis of liability.¹⁵⁴ With respect to the use of nebulous terms such as "failure" and "prevent bribery," the error presumably stems from a combination of

150. Criminal Finances Act, *supra* note 148, §§ 45(2)(a), 46(3)(b). The Act further defines "prevention procedures" to mean "procedures designed to prevent persons acting in the capacity of a person associated with B from committing," respectively, UK or foreign tax evasion facilitation offences. *Id.* §§ 45(3), 46(4).

151. *Id.* § 47(1).

152. See, e.g., Sam Anderson, *David's Ankles: How Imperfections Could Bring Down the World's Most Perfect Statue*, N.Y. TIMES MAGAZINE (Aug. 17, 2016), <http://www.nytimes.com/2016/08/21/magazine/davids-ankles-how-imperfections-could-bring-down-the-worlds-most-perfect-statue.html>; Larry Jiminez, *10 Famous Structures with Catastrophic Hidden Flaws*, LISTVERSE (June 26, 2014), <http://listverse.com/2014/06/26/10-famous-structures-with-catastrophic-hidden-flaws>.

153. Robert Buckland, Solicitor General's Speech at Cambridge Symposium on Economic Crime (Sept. 4, 2017), <http://www.gov.uk/government/speeches/solicitor-generals-speech-at-cambridge-symposium-on-economic-crime>.

154. For a discussion of this principle, see J.R. Spencer, *The Drafting of Criminal Legislation: Need It Be So Impenetrable?*, 67 CAMBRIDGE L.J. 585, 595 (2008).

governmental determination to circumvent the “identification principle” and deliberate decisions to avoid defining those terms in the Act. Consequently, the offense and affirmative defense language of Section 7, as currently drafted, reflects such extraordinary breadth and vagueness that it fails to provide fair warning and creates the potential for arbitrary prosecutorial decisionmaking in the future.

Companies subject to United Kingdom jurisdiction, of course, must make every reasonable effort to comply with the Bribery Act, including Section 7. That means, among other things, making the most of the Ministry Guidance in building their compliance programs.¹⁵⁵ Nonetheless, as one Law Reform Commission has stated, “if legislators expect citizens to acquaint themselves with the contours of criminal law they have a duty to make laws clear and consistent.”¹⁵⁶ That duty, it must be said, extends equally to individuals and corporate entities. There is no principled basis to maintain that the dictates of fair warning apply with less force to corporate persons than to natural persons; vagueness is vagueness, regardless of the nature of a criminal offense or the identity of the persons to which it is intended to apply. As one Member remarked during the Section 7 debates, “words are always difficult,”¹⁵⁷ but it is an obligation of legislators to make difficult choices about words in criminal statutes if those persons subject to the statutes’ coverage are to know how to govern their conduct.

For those reasons, legislators who are considering whether to enact corporate economic-crime offenses should refrain from slavishly copying the Section 7 model, with all its flaws. Instead, they should craft each offense with reference to the following guidelines based on the “fair warning” principle:

1. *Recognize that in defining even corporate crime offenses, the greater the potential sanction, the greater the importance of carefully balancing breadth of coverage and clarity.*

While that balance can be difficult to strike, there is a direct correlation between the severity of a proposed criminal sanction and the weight that courts will place on the “doubtful penalization” principle. If a proposed sanction creates the risk of an unlimited criminal fine, as Section 7 does, that weight should be considerable to avoid an injustice in the ascription of culpability under an ambiguously worded offense.¹⁵⁸

155. See Alldrige, *supra* note 20, at 1206.

156. IRISH LAW REFORM COMM’N, DEFENCES IN CRIMINAL LAW ¶ 1.30, http://www.lawreform.ie/_fileupload/Reports/rDefencesinCriminalLaw.pdf; see also Matt Korris, *Standing up for Scrutiny: How and Why Parliament Should Make Better Law*, 64 PARLIAMENTARY AFF. 564 (2011); Spencer, *supra* note 154, at 604-05.

157. 503 Parl Deb HL (2010), GC 51 (Lord Lyell of Markyate).

158. See BENNION, *supra* note 43, at 141.

2. *Be clear about the standard of corporate criminal liability to be applied to a particular offense.*

In English and U.S. law, as in various other legal systems, legislatures may choose from several models of criminal liability in drafting corporate criminal offenses: vicarious liability offenses, direct liability offenses, omissions or “failures,” and so-called “hybrid” offenses that involve some form of affirmative defense.¹⁵⁹ For any particular offense, however, a legislature must choose only one of those and be articulate about the standard it is choosing. That degree of clarity is essential if individuals and companies are—as Professor Andrew Ashworth put it—to “be able to plan their lives so as to avoid falling foul of the criminal law.”¹⁶⁰

3. *In choosing between vicarious and direct liability alternatives, acknowledge the virtues as well as the vices of the “identification principle” as courts have applied it.*

It has become conventional for prosecutors to criticize *Tesco* and the identification principle on various grounds. For example, a senior SFO official maintained that the principle focuses narrowly on only the topmost officials as “directing minds,” is unhelpful in its impact because it allows “directing minds” to insulate themselves from accountability for intra-corporate criminal actions, and supports an “unprincipled theory of corporate liability.”¹⁶¹ It should be remembered that in *Tesco*, the Law Lords were being asked to hold an entire supermarket company criminally liable under the Trade Descriptions Act 1968, on the grounds that a single shop assistant in a single Tesco store, without consulting her manager, on one evening chose to put out washing-powder packs marked with a price one shilling higher than the price on specially-marked packs of the same type.¹⁶² Not surprisingly, the Law Lords declined that invitation, and in so doing made a calculated judgment that the Act’s purpose “must have been to penalize those at fault, not those who were in no way to blame.”¹⁶³ In order to make that judgment about Parliamentary intention, the *Tesco* court effectively used the identification principle to cabin the scope of an Act that otherwise would have warranted questions about fair warning and doubtful criminality.

If judicial extension of *Tesco* in other cases has created barriers to some corporate criminal prosecutions, it is not a foregone conclusion that prosecutors

159. See, e.g., LOVELESS, *supra* note 64, § 2.2.3, at 46 (omissions), § 4.2.2, at 174-75 (vicarious liability), § 4.2.3, at 176 (direct liability); Celia Wells, *Corporate Liability and Consumer Protection: Tesco v. Nattrass Revisited*, 57 MODERN L. REV. 817 (1994).

160. Ashworth, *supra* note 124, at 10.

161. Alun Milford, General Counsel of SFO, Speech at the Cambridge Symposium on Economic Crime 2016, Jesus College, Cambridge, (Sept. 6, 2016), <https://www.sfo.gov.uk/2016/09/06/control-liability-good-idea-work-practice>.

162. See *Tesco*, [1971] UKHL at 2.

163. *Id.* at 9 (Lord Reid).

can never prove the involvement of “directing minds” in Section 7 cases.¹⁶⁴ Even so, it is not beyond the power of legislators to draft offenses with greater specificity about the class of corporate employees whose acts should provide the basis for corporate liability, as well as the obligations assigned to those employees to prevent violations. In the wake of the Bank of England and Financial Services Act 2016,¹⁶⁵ for example, there is now a Senior Managers Regime in the financial services industry that links specified categories of managers and supervisors to a defined “duty of responsibility”—i.e., a duty assigned to those Senior Managers “to take such steps as a person in the senior manager’s position could reasonably be expected to take to avoid the contravention occurring (or continuing).”¹⁶⁶ A similar approach for corporate economic-crime offenses, such as specifying a legal duty for a broader category of management than “directing minds” to adopt and implement compliance procedures, could well avoid the flaws inherent in charging a corporate “failure to prevent” a crime without specifying the duty to act with regard to prevention of that type of crime. It could also assist the courts in moving beyond the relatively strict confines of the identification principle¹⁶⁷ and thereby enhance the applicability of Section 1’s bribery prohibition on the basis of direct corporate liability.¹⁶⁸

4. In drafting corporate crime-related legislation, recognize that it should promote responsible corporate conduct as well as prohibit serious corporate misconduct.

To tout corporate criminal legislation on the ground that it is “some of the world’s strictest”¹⁶⁹ means little if a legislature has not carefully considered why it should be strict. To be sure, a corporation that has systematically paid tens of millions, even hundreds of millions, in bribes over multiple years has every reason to expect that the severity of criminal sanctions to be imposed will be proportionate to the illicit benefits it obtained.¹⁷⁰ But promotion of effective

164. See *Serious Fraud Office v. Rolls-Royce PLC*, Approved Judgment ¶ 4 (Southwark Criminal Court) (Jan. 17, 2017) (investigation revealed “the most serious breaches of the criminal law in the areas of bribery and corruption (some of which implicated senior management and, on the face of it, controlling minds of the company)”), <http://www.judiciary.gov.uk/wp-content/uploads/2017/01/sfo-v-rolls-royce.pdf>.

165. Bank of England and Financial Services Act 2016, c. 14, http://www.legislation.gov.uk/ukpga/2016/14/pdfs/ukpga_20160014_en.pdf.

166. *Id.* §§ 25(2)(f), (3)(f) (amending Financial Services and Markets Act 2000 §§ 66A(5)(c), 66B(5)(c)). See Financial Conduct Authority, *Guidance on the duty of responsibility: final amendments (including feedback on CPI6/26) to the Decision Procedure and Penalties Manual*, PS 17/9, §1.10, at 4 (May 2017), <http://www.fca.org.uk/publication/policy/ps17-09.pdf>.

167. See Indira Carr, *Development, Business Integrity, and the UK Bribery Act 2010*, in *MODERN BRIBERY LAW: COMPARATIVE PERSPECTIVES* 128, 152 (Jeremy Horder & Peter Alldridge eds., 2013).

168. See Bob Sullivan, *Reformulating Bribery: A Legal Critique of the Bribery Act 2010*, in *MODERN BRIBERY LAW: COMPARATIVE PERSPECTIVES*, *supra* note 167, at 32.

169. *Anti-Corruption Summit 2016*, *supra* note 26.

170. See, e.g., Press Release, U.S. Dep’t of Justice, *Odebrecht and Braskem Plead Guilty and Agree to Pay at Least \$3.5 Billion in Global Criminal Penalties to Resolve Largest Foreign Bribery Case in History* (Dec. 21, 2016), <http://www.justice.gov/usao-edny/pr/odebrecht-and-braskem-plead-guilty-and-agree-pay-least-35-billion-global-criminal>.

corporate-compliance programs should also be a significant objective of any legislation designed to foster responsible corporate conduct. While Section 7 adopts the approach of allowing “adequate procedures” as an affirmative defense, that approach inadvertently fosters a perception that an anti-bribery compliance program is a liability-avoiding device, rather than a mutually beneficial measure for both the corporate entity and society overall.

Legislators should therefore strive to include provisions in corporate crime legislation that require their governments to provide ex ante guidance,¹⁷¹ both generically and specifically, to ensure that companies intent on remaining on the right side of the law know how to do so.¹⁷² Such provisions would be a welcome resource for compliant companies and would thereby broaden the appeal of global anti-corruption enforcement.¹⁷³ As the United States’ experience with formal FCPA guidance has shown, governments can provide such guidance without constricting the ability of their prosecutors to investigate and prosecute specific cases of bribery.

* * *

In sum, legislators need to recognize and take into account the “fair warning” principle in enacting future corporate economic-crime offenses. Rigid insistence on the Section 7 model would constitute an unjustified abandonment of fundamental principles in English and U.S. criminal law.

171. See Jonathan J. Rusch, *Memorandum to the Compliance Counsel, United States Department of Justice*, 6 HARV. BUS. L. REV. ONLINE 69, 71 (2016).

172. For example, the U.S. Department of Justice has regulations authorizing certain corporate entities “to obtain an opinion of the Attorney General as to whether certain specified, prospective—not hypothetical—conduct conforms with the Department’s present enforcement policy regarding the [FCPA’s] antibribery provisions” 28 C.F.R. § 80.1 (2016).

173. See generally Rachel Brewster & Samuel W. Buell, *The Market for Global Anticorruption Enforcement*, 80 LAW & CONTEMP. PROBS. 193 (2017).