Chapter 1
Emergence and Convergence: Corporate Criminal Liability Principles in Overview

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Contents

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1.1 Emergence: An Introduction to Corporate Criminal Liability Principles

1.1.1 Corporate (A)morality and Corporate Risk

Criminal law traditionally focuses on personal guilt. Criminal law is, it seems, intricately linked to notions of culpability, blame, and the infliction of loss on an offender. Its offenses commonly require proof of an accused person's mental state.[1] And its fundamental principles hold that criminal sanctions should address the individual responsibility of the wrongdoer without harming innocent third parties.[2] With these considerations in mind, lawmakers around the world traditionally adhered to the principle *societas delinquere non potest*.[3] Corporations could, like human beings, hold rights and duties under private law but they could not be regarded as possessing the moral faculties that would enable them to be addressees of the criminal law.[4]

It is, however, equally obvious that corporations can cause substantial harm.[5] They have been drivers of industrialization and the globalization of the economy. Their negligence has resulted in severe injury to individuals, groups, and the natural environment (consider the catastrophe at Bhopal)[6] and their deliberate abuses of power have highlighted their apparently privileged position relative to other persons and entities. The power of some modern corporations,[7] especially multinational enterprises (MNEs),

[1] Allens Arthur Robinson 2008, 1; Hasnas 2009, 1329 et seq.; Weigend 2008, 938 et seq.
[2] Hasnas 2009, 1335 et seq., 1399 et seq., 1357. Cf. Beale 2009, 1484 et seq., 1500 et seq.
[3] Böse (this volume); Perrin (this volume).
[4] Hasnas 2009, 1333; Weigend 2008, 936.
[5] Beale 2009, 1482 et seq.
[6] See, e.g., Waldman 2002.
[7] Beale 2009, 1483.

may make it difficult for public authorities to apply mechanisms of legal control. The difficulties typically go beyond the simple application of political influence to decision-making processes. Increasingly, decentralized corporate structures and complex internal procedures may prevent law enforcement agencies and criminal justice authorities from identifying the individual wrongdoer(s) within a corporation. Further, though such harm may result from the acts or omissions of individual "rogue employees", it may also be the expression of a corporate culture that tacitly condones, or at least tolerates, wrongdoing. When corporate systems or cultures are to blame, sanctions against lone – possibly low-level – employees seem an inadequate response.[8]

Moreover, as systems for the provision of goods and services become more varied and complex, these problems are being replicated outside the commercial sector. In industrialized economies, companies are only one vehicle for investment. National private laws recognize other structures (trusts, partnerships, *Anstalten*, *Einzelunternehmer*, etc.) some of which have legal personality under national law and others which are legally identified with their owners. Further, individuals and groups of citizens are not the only participants in the economy: many governments and government agencies are also engaged in commercial activities, including in industries or sectors with higher levels of "compliance risk".[9] Finally, neither companies nor governments are the only large, complex institutions whose stakeholders have the opportunity to harm others through their collective operations. Non-government, non-profit entities operating in the "public" sector may provide important social services and otherwise exercise considerable influence over human health and well-being.[10]

These considerations explain the increasing willingness of lawmakers in many jurisdictions to impose criminal liability on corporations and other enterprises, particularly in the area of economic crime and particularly on the basis of devious corporate culture rather than individual wrongdoing. The stigma and sanctions of the criminal law promise greater deterrence from corporate misconduct and more opportunities for asset recovery, compensation, and mandatory corporate reform. At the same time, the peculiarities of corporate personality and the restraints posed by principles of fair procedure may limit the ability of lawmakers to check corporate power through the criminal law.

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[8]See, generally, Weigend 2008, 932 et seq.

[9]OECD Working Party on Export Credits and Credit Guarantees, OECD Council Recommendation on Bribery and Officially Supported Export Credits TD/ECG(2006)24, December 18, 2006, Paris.

[10]Humanitarian Accountability Partnership International 2008, 7 et seq.; Lloyd/Warren/Hammer 2008, 5, 9.

1.1.2 Theories of Corporate Personality and Models of Corporate Liability

If corporate liability evolved historically as a response to the changing role of corporations, it evolved doctrinally from the recognition of corporations as legal persons capable of holding rights and obligations separate to those of their human stakeholders (owners, employees, managers, etc.).[11] Private law offered two opposing explanations of corporate personality both of which relied heavily on anthropomorphic imagery[12] and each of which has given rise to models of corporate criminal liability (CCL).

First, according to the fiction (or "nominalist") theory of corporate personality,[13] the corporation is nothing more than a legal construct, a term used to describe a group of individuals constituted at any one time.[14] The corporation, on this view, can only act through its human representatives, its operational staff being its "limbs", its officers and senior managers its "brains" or "nerve center".[15] The corporation may bear criminal guilt on the nominalist view but only because it can be identified with a human being who serves as its "directing mind and will".[16] This is known as the identification (or "alter ego") model of corporate criminal liability.[17]

Second, the reality theory recognizes the corporation as possessing a distinct personality in its own right, as well as being a person under law.[18] Early on, this view of corporate personality allowed legal entities to be held vicariously liable for the civil wrongs of their servants.[19] Eventually, in some jurisdictions, it was extended to allow the imputation of criminal wrongdoing and states of mind to the corporation.[20] Elsewhere, it has given rise to holistic (or "objective") and aggregative models of liability. Holistic models, unlike the identification and vicarious liability models, do not require the imputation of human thoughts, acts, and omissions to the corporation. Rather, they regard corporations as themselves capable of committing crimes through established internal patterns of

[11] Wells 2010, C. 10.

[12] Heine 2000, 5.

[13] Deckert (this volume); Wells 1999, 120 et seq.

[14] Wells 2001, 84 et seq.

[15] *HL Bolton (Engineering) Co. Ltd.* v. *TJ Graham & Sons Ltd.* [1957] 1 QB 159 at 172 (Denning LJ).

[16] *HL Bolton (Engineering) Co. Ltd.* v. *TJ Graham & Sons Ltd.* [1957] 1 QB 159 at 172 (Denning LJ); Wells 2000, 5; Wells 2001, 84 et seq., 93 et seq.

[17] Pieth 2007a, 179 et seq.; Wells 2000, 5.

[18] Wells 2001, 85.

[19] Wells 2001, 132 et seq.

[20] See Deckert (this volume); Nanda (this volume).

decision-making (corporate culture or corporate (dis)organization).[21] Aggregative approaches also treat the corporation as the principal offender but they do so by adding together the different acts, omissions, and states of mind of individual stakeholders, particularly corporate officers and senior managers.[22] They are something of a compromise between the vicarious and holistic approaches.[23]

National CCL rules, as they have been pronounced or enacted throughout the world, reflect these models of liability. Though the two imputation doctrines are still most widely represented, there are signs that the logic of holistic liability, with its emphasis on corporate (dis)organization and culture, is increasingly popular.

1.1.3 The Development of Corporate Criminal Liability Rules in Common Law Jurisdictions: The UK, the Commonwealth, and the US

The first steps towards corporate criminal liability were taken in common law jurisdictions, common law sources having been among the first to talk about ethics in corporations and the deterrent effect of sanctions on company behavior.[24] Both in the United Kingdom (UK)[25] and in the United States (US),[26] the industrial revolution and the attendant expansion of the railroads[27] led courts to apply the civil law doctrine of vicarious liability in criminal cases. In US federal law, in particular, the doctrine of *respondeat superior* allowed courts to impute corporations with the misbehavior of employees acting within the scope of their responsibilities and for the (intended) benefit of the company.[28] The theory was first developed on the basis of specific statutes and was rapidly generalized to crimes with a mental (fault) element. The strict form of vicarious liability, which emerged in the US, enabled corporations to be attributed with crimes that they had attempted to prevent, e.g., by issuing instructions or implementing compliance systems. Only much later were prosecution and sentencing guidelines amended to allow decision-makers to take compliance programs into account.[29]

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[21] Wells 2000, 6.

[22] Pinto/Evans 2003, 220; Wells 2000, 6; Wells 2001, 6.

[23] Wells 2001, 156.

[24] Coffee 1999a, 13 et seq.; Weigend 2008, 928; Wells 2001, 81 et seq.

[25] Wells 2001, 63, 86 et seq.

[26] Coffee 1999a, 14; Nanda (this volume).

[27] DiMento/Geis 2005, 162 et seq.; Wells 2001, 87 et seq.

[28] Coffee 1999a, 14 et seq.; DiMento/Geis 2005; Nanda (this volume); Wells 2000, 4.

[29] Coffee 1999a, 27, 37; Nanda (this volume). See below at 1.6.1.2.

In the UK, vicarious liability was gradually limited to regulatory or so-called "objective" offenses created by statute; for traditional *mens rea* (or fault-based) offenses, the acceptance of nominalist theories of corporate personality by the British courts led to the application of the identification model of liability.[30] Hence, from the 1940s, corporations under English, Welsh, and Scottish law could be held responsible for the acts, omissions, and mental states of individuals who served as their alter egos.[31] Over the next 50 years, the identification theory was maintained,[32] though it was interpreted so as to apply in a very narrow range of cases.[33] Only in the 1990s, after several severe accidents[34] and considerable international pressure,[35] did British Parliament introduce new rules for corporate manslaughter[36] and bribery.[37] The Law Commission of England and Wales (LCEW [UK]) is not undertaking a general review of CCL rules,[38] despite earlier indications that it would.[39] And, though its August 2010 consultation paper included a number of proposals on CCL,[40] the commission seemed to take a general view that the criminal liability of corporations should be more limited than it is at present, at least in "regulatory contexts".[41]

The evolution of criminal corporate liability in Commonwealth countries has been far more dynamic: courts in Canada[42] and New Zealand (as affirmed by the Privy Counsel)[43] have reinterpreted the concept of the "directing mind" to go well beyond the concept recognized by English

[30] Stark (this volume); Wells 2001, 93 et seq., 103 et seq.

[31] *HL Bolton (Engineering) Co. Ltd.* v. *TJ Graham & Sons Ltd.* [1957] 1 QB 159 at 172 (Denning LJ). See further LCEW 2010, paras. 5.8 et seq.; Stark (this volume); Wells 2001, 93 et seq.

[32] *Tesco Supermarkets Ltd.* v. *Nattrass* [1972] AC 153.

[33] Wells 2001, 115.

[34] Such as the loss of the Herald of Free Enterprise and the Southall Railcrash. See further Wells 2001, 41 et seq.; below at 1.4.1.6.

[35] OECD 2005b, paras. 195 et seq.; OECD 2008b, paras. 65 et seq.

[36] CMCH Act (UK). See further Wells 1999, 119; Wells 2001, 105 et seq.; Wells (this volume).

[37] Bribery Act 2010 (Bribery Act [UK]). See further Wells (this volume).

[38] LCEW (UK) (February 19, 2010), 'Personal Email Correspondence from Peter Melleney, Criminal Law Team'. Cf. LCEW (UK) 2008a, paras. 3.13 et seq.

[39] LCEW (UK) 2008b, para. 6.39.

[40] LCEW (UK) 2010, Proposals 13–16, paras. 8.13 et seq.

[41] LCEW (UK) 2010, Parts 3, 4, 7. See further Wells (this volume). A "regulatory context" is "[a context] in which a Government department or agency has (by law) been given the task of developing and enforcing standards of conduct in a specialized area of activity": LCEW (UK) 2010, para. 1.9.

[42] *Canadian Dredge & Dock Co.* v. *R.* [1985] 1 SCR 662. See further Coffee 1999a, 19; Ferguson 1999, 170 et seq.

[43] *Meridian Global Funds Asia Ltd.* v. *Securities Commission* [1995] 2 AC 500. See further Pinto/Evans 2003, paras. 4.24 et seq.; Wells 2001, 103 et seq.

and Welsh courts.[44] Furthermore, at the federal level, Australia has passed legislation to supplement its traditional identification model of liability with a holistic approach. The Criminal Code Act 1995 (Commonwealth) (Criminal Code Act [Australia]) puts deficient corporate culture center stage, thereby shifting away from the imputation of individual guilt to the corporation and focusing more objectively on the fault of the corporation – as a collective – itself.[45]

1.1.4 The Recognition of Corporate (Criminal) Liability in the Civil Law Jurisdictions of Europe and the Americas

1.1.4.1 CCL in the Civil Law Jurisdictions of Europe and the Americas

Recent extensions of CCL principles in common law countries have paralleled the emergence of corporate liability rules in civil law jurisdictions in Europe and the Americas. Long hostile to notions of corporate mind, morality, and guilt,[46] lawmakers on the Continent found themselves under increasing pressure to sanction corporate wrongdoers in the decades after World War II. The post-War economic boom in Western Europe had increased the visibility of industrialization's pitfalls, e.g., the environmental hazards, the harms to public health, and the unscrupulous exploitation of natural resources, particularly in the Third World. The emergence of the risk society, as it has been termed,[47] motivated the introduction of CCL rules in Belgium,[48] Denmark,[49] and France.[50]

International political developments set off a much more radical extension of corporate criminal liability principles in civil law countries from 1989. The fall of the Berlin Wall and East-West détente increased the pace of globalization,[51] facilitated the expansion of the European Union (EU),[52] and generated more fears about the risk posed by transnational (economic) crime.[53] States expressed these concerns over the next two decades with

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[44] See further below at 1.4.1.4.

[45] Criminal Code Act 1995, Act No. 12 of 1995 as amended, s. 12.3; Coffee 1999a, 30; Heine 2000, 4; Wells 2000, 6; Wells 2001, 136 et seq. See further below at 1.4.1.5.

[46] Cf. Böse (this volume).

[47] Beck 1986; Giddens 1991; Giddens 1999; Prittwitz 1993; Wells 2001, 42.

[48] Faure 1999.

[49] Nielsen 1999, 321.

[50] Deckert (this volume).

[51] Beck 1998.

[52] McCormick 2009, 218 et seq.

[53] Passas 1999.

an entirely new system of international treaties and non-binding standards against organized crime,[54] money laundering,[55] corruption,[56] and the financing of terrorism.[57] These instruments typically required signatories to introduce criminal or equivalent forms of non-criminal liability or sanctions for legal persons or similar entities.[58] In many cases, their implementation at the national level is monitored by peer review bodies. So, it happens that

[54]United Nations Convention against Transnational Organized Crime, November 15, 2000, in force September 19, 2003, 2225 UNTS 209 (UN Convention on Transnational Organized Crime).

[55]FATF, FATF 40 Recommendations, adopted June 20, 2003, as amended October 22, 2004, Paris (FATF Recommendations), Recommendation 2(b).

[56]See, e.g., Inter-American Convention against Corruption, March 29, 1996, in force March 6, 1997, Treaty B-58; OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, November 21, 1997, in force February 15, 1999 (OECD Convention on Foreign Bribery); Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the Protection of the European Communities' Financial Interests – Joint Declaration on Article 13(2) – Commission Declaration on Article 7, July 26, 1995, in force October 17, 2002, OJ No. C 316, November 27, 1995, 49 (EU Convention on the Protection of the ECs' Financial Interest); Convention made on the basis of Article K.3 (2)(c) of the Treaty on European Union, on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union, May 26, 1997, in force June 25, 1997, OJ No. C 195, June 25, 1997, 2; Second Protocol drawn up on the basis of Article K.3 of the Treaty on European Union, to the Convention on the Protection of the European Communities' Financial Interests, June 6, 1997, in force May 16, 2009, OJ No. C 221, July 19, 1997, 12 (Second Protocol to the EU Convention on the Protection of the ECs' Financial Interest); Criminal Law Convention on Corruption, January 27, 1999, in force July 1, 2002, 173 ETS (COE Criminal Law Convention on Corruption); Protocol Against Corruption to the Treaty of the Southern African Development Community, August 14, 2001, in force July 6, 2005 (SADC Protocol against Corruption); African Union Convention on Preventing and Combating Corruption, July 11, 2003, in force August 5, 2006, (2004) XLIII ILM 1 (AU Convention on Corruption); Council Framework Decision 2003/568/JHA of July 22, 2003 on combating corruption in the private sector, in force July 31, 2003, OJ No. L 192, July 22, 2003, 54 (EU Framework Decision on Private Sector Corruption); United Nations Convention against Corruption, December 9–11, 2003, in force December 14, 2005, 2349 UNTS 41 (UN Convention against Corruption). See further Pieth 2007b, 19 et seq.

[57]International Convention for the Suppression of the Financing of Terrorism, January 10, 2000, in force April 10, 2002, 2178 UNTS 197 (Terrorist Financing Convention); FATF, FATF IX Special Recommendations, adopted October 2001, as amended February 2008, Paris (FATF Special Recommendations), Special Recommendation II; FATF, Interpretative Note to Special Recommendation II: Criminalizing the financing of terrorism and associated money laundering, Paris, paras. 12 et seq.

[58]OECD Convention on Foreign Bribery, Arts. 2, 3(2); COE Criminal Law Convention on Corruption, Art. 18; Second Protocol to the EU Convention on the Protection of the ECs' Financial Interests, Art. 3; Terrorist Financing Convention, Art. 5; EU Framework Decision on Private Sector Corruption, Arts. 5(1), 6(1); UN Convention on Transnational Organized Crime, Art. 10; SADC Protocol against Corruption, Art. 4(2); AU Convention on Corruption, Art. 11(1); FATF Recommendations, Recommendation 2(b); FATF Special Recommendations, Special Recommendation 6; UN Convention against Corruption, Art. 26.

the Organization for Economic Cooperation and Development's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention on Foreign Bribery), requires state parties "to establish the liability of legal persons for the bribery of a foreign public official", to ensure "effective, proportionate and dissuasive" punishment, and to participate in evaluations by the OECD Working Group on Bribery in International Business Transactions (WGB).[59] Later instruments from the EU and Council of Europe (COE) repeated the sanctioning requirement in the OECD Convention,[60] calling on state parties to impute legal persons with the wrongdoing of "leading persons" and to treat a lack of supervision by a leading person as triggering corporate responsibility.[61] Austria,[62] Hungary,[63] Italy,[64] Luxembourg,[65] Poland,[66] and Switzerland[67] were motivated by these developments to enact new corporate liability statutes. Some of these statutes closely reflect the EU and COE rules, as we will see below,[68] whereas others adopt "open"[69] or holistic models of liability, at least for serious economic and organized crimes.[70]

1.1.4.2 Non-criminal Solutions in European and American Civil Law Jurisdictions

Several civil law countries, whilst maintaining that corporations can do no wrong, have recognized quasi-criminal forms of responsibility. German,[71]

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[59] OECD Convention on Foreign Bribery, Arts. 2, 3(1) and (2), 12. See further Pieth 2007a.

[60] COE Criminal Law Convention on Corruption, Art. 19(2); Second Protocol to the EU Convention on the Protection of the ECs' Financial Interests, Art. 4(1); EU Framework Decision on Private Sector Corruption, Art. 6(1). See also Terrorist Financing Convention, Art. 5(3); FATF Recommendations, Recommendation 2(b); FATF Special Recommendations, Special Recommendation 6. See further Weigend 2008, 928 et seq.

[61] COE Convention on Corruption, Arts. 18, 19(2); Second Protocol to the EU Convention on the Protection of the ECs' Financial Interests, Arts. 3, 4(1); EU Framework Decision on Private Sector Corruption, Art. 5(1).

[62] Verbandsverantwortlichkeitsgesetz 2006; Hilf 2008; Zeder 2006.

[63] Santha/Dobrocsi (this volume).

[64] De Maglie (this volume); Manacorda 2008; Sacerdoti 2003.

[65] Braum 2008.

[66] Kulesza 2010.

[67] Heine 2008; Perrin (this volume); Pieth 2003; Pieth 2004.

[68] See, generally, below at 1.4.2.

[69] Belgium and the Netherlands. On Belgium: Bihain/Masset 2010, 2 et seq.; on the Netherlands: Keulen/Gritter (this volume). See further below at 1.4.2.3.

[70] Switzerland. See Heine 2008, 307 et seq.; Perrin (this volume); Pieth 2003, 356 et seq., 362 et seq.; Pieth 2004, 603 et seq. See further below at 1.4.2.2.

[71] Böse (this volume); Weigend 2008, 930 et seq.

Italian,[72] Chilean,[73] Russian, and (to a more limited extent) Brazilian[74] laws are hybrids of this nature. They are frequently portrayed as compromise solutions[75] or as a "third track":[76] their nominally "administrative" sanctions are handed down by criminal judges; however, they are considered "criminal" for the purpose of mutual legal assistance and they may result in the corporation being ordered to pay considerable sums of money, cease operations, or undergo deregistration.[77]

1.1.4.3 European and American Civil Law Jurisdictions Without CCL

Finally, for all the rapid change in civil law jurisdictions during the last decade, one should not neglect to mention that a large group of European and American countries still objects altogether to the notion of corporate liability – criminal or quasi-criminal. Within Europe, Greece,[78] the Czech Republic,[79] and the Slovak Republic[80] have found it especially difficult to take the step, as has Uruguay in Latin America.[81] In Turkey, CCL rules were abolished and only reintroduced in draft form under intense international pressure.[82]

When justifying decisions not to criminalize corporate wrongdoing, many of these countries argue on principle; frequently, however, political and economic considerations are impeding the introduction of corporate liability from the background.

1.1.5 CCL Beyond Europe and the Americas: Asia, Southern Africa, and the Middle East

The social, economic, and international legal developments that precipitated the introduction of CCL laws in Europe and the Americas have also

[72] De Maglie (this volume); Manacorda 2008; Sacerdoti 2003.

[73] Salvo (this volume).

[74] OECD 2007b, paras. 149 et seq.

[75] Böse (this volume).

[76] De Maglie (this volume). See, generally, Manozzi/Consulich 2008.

[77] Böse (this volume); Pieth 2007a, 183. See further below at 1.6.2.2.

[78] Mylonopoulos 2010.

[79] Jelínek/Beran (this volume). For criticism, see OECD 2009a; OECD Working Group on Bribery in International Business Transactions (July 20, 2009), 'Letter to His Excellency, Ing. Jan Fischer CSc., Prime Minister of the Czech Republic'.

[80] For criticism, see OECD (July 20, 2009), 'Letter to His Excellency, Mr. Robert Fico, Prime Minister of the Slovak Republic'; OECD 2010.

[81] Langón Cuñarro/Montano 2010.

[82] OECD 2009c, paras. 49 et seq.

prompted law reforms in other countries and regions. Countries around the globe have come under significant pressure to ensure that corporate entities involved in money laundering, corruption, illegal trusts, or embargo-busting are taken to court. Asian jurisdictions, such as Japan,[83] Korea,[84] Hong Kong,[85] and Macau,[86] which are well-integrated into the global economy and the international financial regulatory system, have adopted general corporate liability principles along the lines of the imputation models used in other parts of the world. New Asian economic powers, the People's Republic of China[87] and India,[88] have also recognized corporate criminal liability, though in China probably only for economic crimes[89] and in India only as a result of a recent controversial Supreme Court decision.[90] According to international monitoring reports, moreover, CCL rules figure in the laws of Israel,[91] Qatar,[92] and the United Arab Emirates[93] in the Middle East, and in the law of South Africa.[94]

1.1.6 Conclusions

Therefore, CCL rules are a common – if not universal – feature of domestic criminal laws. The risks associated with industrialization and the challenges of globalization have prompted lawmakers of the civil and common law traditions to impose criminal or quasi-criminal sanctions on corporate wrongdoers. They have used three models to enable findings of corporate "guilt": (1) attributing the collective with the offenses of its employees or agents; (2) identifying the collective with its senior decision-makers; and (3) treating the corporation as itself capable of being a criminal (and moral) actor either through the aggregation of individual thoughts and behaviors or an assessment of the totality of the deficiencies in its corporate culture and organizational systems. The points of similarity and convergence between

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[83] Cf. Pieth 2007a, 182, n. 43. See, generally, OECD 2005a, paras. 158 et seq.; Shibahara 1999.

[84] OECD 2004b, paras. 101 et seq.

[85] FATF 2008, paras. 119 et seq.

[86] Godinho 2010.

[87] See, generally, Chen 2008, 274 et seq.; FATF 2007; Jiachen 1999.

[88] Asia/Pacific Group on Money Laundering 2005, para. 66.

[89] Chen 2008, 275; Coffee 1999a, 24 et seq.; Jiachen 1999, 76.

[90] *Standard Chartered Bank & Ors.* v. *Directorate of Enforcement & Ors.* (2005) AIR 2622, cited in APG on Money Laundering 2005, para. 66.

[91] OECD 2009b, paras. 47 et seq.

[92] MENAFATF 2008a, para. 154.

[93] MENAFATF 2008b, para. 92.

[94] OECD 2008a, paras. 38 et seq.

these models become apparent as we consider the substantive conditions and the defenses to CCL, the procedures for imposing CCL, and its attendant sanctions in European and American common law and civil law jurisdictions.[95]

1.2 Entities That May Be Criminally Liable

In describing the substantive conditions for corporate criminal liability, a threshold question is: "What type of collective may be held criminally or administratively responsible?" As noted above, privately-owned commercial corporations (companies) are not the only collective entities with the capacity to harm communities and confound traditional methods of regulation. Jurisdictions may impose liability on entities without legal personality that operate an "enterprise", they may impose liability on publically as well as privately-owned corporations, and they may criminalize the acts and omissions of non-government, non-profit organizations.

1.2.1 Common Law Jurisdictions

1.2.1.1 The UK and the Commonwealth

In the surveyed British and Commonwealth jurisdictions, legal persons are the traditional addressees of CCL rules. General law identification doctrines, which apply to non-statutory offenses, were developed to address the problem of whether and, if so, how groups with fictional personality could assume moral responsibility under law.[96] Even Australia's otherwise innovative codification of CCL rules is expressed to apply to "bodies corporate".[97] For statutory offenses, rules of statutory interpretation in many common law jurisdictions deem references to "persons" to include partnerships and unincorporated bodies,[98] as well as bodies corporate.[99]

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[95]We received reports on Belgium, Chile, France, Germany, Greece, Hungary, Italy, Macau (SAR), Poland, Portugal, Scotland, Spain, Switzerland, the Czech Republic, the Netherlands, the United States (US), and Uruguay, as well as a chapter on England and Wales for this volume. Our additional research was concentrated on the common law jurisdictions of Australia and Canada.

[96]Wells 2001, 81 et seq.

[97]Criminal Code Act (Australia), s. 12. See also Interpretation Act 1987 No. 15 (New South Wales) (NSW) (Australia), s. 21; Occupational Health and Safety Act 2000 No. 40 (NSW) (Australia), s. 32A(2).

[98]See, e.g., Interpretation Act 1978 c. 30 (UK), s. 5 and Sch. 1; Interpretation Act, RSBC 1996, c. 238 (British Columbia) (Canada), s. 29. See further Pinto/Evans 2003, paras. 2.14 et seq.; Stark (this volume).

[99]See, e.g., Acts Interpretation Act 1901, Act No. 2 of 1901 (Australia), s. 22(1)(a) and (aa).

British and Commonwealth jurisdictions do, however, consider a wide variety of entities as capable of possessing legal personality. Aside from companies established by individuals to engage in trade and commerce, some recognize partnerships,[100] municipalities,[101] charitable and incorporated non-profit or voluntary associations,[102] and corporations established as vehicles for public-private partnerships[103] as legal persons in their own right. The Crown itself has legal personality, though at common law it is immune from prosecution.[104] Crown immunity may also benefit crown bodies (e.g., government departments or agencies) but whether this extends to fully or partially government-owned corporations (GOCs) will depend on the jurisdiction and the offense in question.[105]

Furthermore, some common law legislatures are taking a broader view of the objects of CCL rules, shifting their focus from legal personality to qualities of "enterprise" and "organization". As a result of 2004 reforms, the Canadian Criminal Code now applies to "organizations", defined to mean "(a) a public body, body corporate, society, company, firm, partnership, trade union or municipality or (b) an association of persons that (i) is created for a common purpose (ii) has an operational structure and (iii) holds itself out to the public as an association of persons".[106] Likewise, the UK's Corporate Manslaughter and Corporate Homicide Act 2007 c. 19 (CMCH Act [UK]) applies to "organizations", including listed government departments, police forces, and other unincorporated employers.[107] Also, with the Bribery Act 2010 c. 23 (Bribery Act [UK]), the UK criminalizes the facilitation of bribery by defined "commercial organizations".[108]

1.2.1.2 The US

Whereas British and Commonwealth jurisdictions have traditionally focused on the liability of corporations *qua* legal entities, US federal lawmakers have been willing to apply CCL rules to unincorporated entities and

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[100] See, e.g., Limited Liability Partnerships Act 2000 c. 12 (UK); Stark (this volume) (Scotland).

[101] See, e.g., Local Government Act 2002 No. 84 (New Zealand).

[102] See, e.g., Associations Incorporation Act 1981 No. 9713 of 1981 and Regulation 1999 (Queensland) (Australia); Charities Act 2006 c. 50 (UK).

[103] E.g., Partnerships UK plc, a company established to invest in public sector projects, programs, and businesses. 51% of its equity is owned by private sector institutions. The remaining shares are owned by HM Treasury. See further Partnerships UK 2010.

[104] Sunkin 2003.

[105] Cf. CMCH Act (UK), s. 11(1) and (2)(b). See further Sunkin 2003.

[106] Criminal Code RSC 1985 c. C-46 (Canada) (Criminal Code [Canada]), ss. 2, 22.1, 22.2. See further Allens Arthur Robinson 2008, 25 et seq.

[107] CMCH Act (UK), s. 1(1) and (2).

[108] Bribery Act (UK), s. 7(1) and (5).

individuals. On the one hand, the interpretative provisions of the United States Code (USC) define the words "person" and "whoever" to include "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals".[109] Other undertakings could, presumably, be covered if it were consistent with the statute. On the other hand, the US courts have developed the doctrine of *respondeat superior* from principles of vicarious liability, which renders individual masters liable for their servants' civil wrongs.

1.2.2 Civil Law Jurisdictions

Generally, civil law jurisdictions apply corporate criminal liability rules to legal persons and to organizations that lack (full) legal personality but carry on an enterprise. At § 30, the German Regulatory Offenses Act 1987 (Regulatory Offenses Act [Germany]) refers, for example, to legal persons and to associations with partial legal capacity (such as unincorporated associations and some partnerships).[110] Article 11 Portuguese Criminal Code is also specifically addressed to legal persons and their equivalents (e.g., civil societies and de facto associations).[111] Provisions to similar effect are found in Italian,[112] Dutch,[113] Belgian,[114] Polish,[115] Chilean,[116] and Spanish law,[117] as well as in the law of Macau.[118] Provisions of French[119] and Hungarian[120] law refer only to legal (or "moral") persons. However, these concepts are broadly defined to include all persons established under public and private law with or without profit goals (France) and all legal persons with commercial goals established under private law (Hungary).[121] Switzerland alone expressly abandons the dichotomies between individuals and groups, legal persons, and persons without legal personality: art. 102 of its Criminal Code applies to enterprises, i.e., legal persons in private law, legal persons in public law, societies, and sole traders.[122]

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[109] Nanda (this volume), citing 1 United States Code (USC) 1.

[110] Böse (this volume).

[111] De Faria Costa/Quintela de Brito 2010, 26 et seq.

[112] Decree No. 231 of 2001 (Italy), art. 11; de Maglie (this volume).

[113] Criminal Code (Netherlands), art. 51; Keulen/Gritter (this volume).

[114] Criminal Code (Belgium), art. 5; Bihain/Masset 2010, 1 et seq.

[115] Collective Entities' Legal Responsibility for Acts Forbidden under Penalty Act 2002 (Poland); Kulesza 2010, 2 et seq.

[116] Law No. 20.393 (Chile); Salvo (this volume).

[117] Criminal Code (Spain), art. 31bis; Boldova/Rueda (this volume).

[118] Godinho 2010, 1 et seq.

[119] Criminal Code (France), art. 121-2; Deckert (this volume); OECD 2000b, 11.

[120] Act CIV of 2001 on the Criminal Measures Applicable to Legal Persons, art. 1(1); Santha/Dobrocsi (this volume).

[121] See above nn. 118, 119.

[122] Perrin (this volume); Pieth 2003, 359; Pieth 2004, 603.

As to the state/non-state and profit/non-profit distinctions, civil law jurisdictions generally provide some measure of immunity to governments, their organs, and agencies,[123] some extending this protection to non-state actors that are highly integrated into national or international political processes.[124] The French Criminal Code, for instance, expressly excludes the state itself from the category of moral persons that may be criminally liable and imposes special restrictions on proceedings against local authorities.[125] It does, however, permit prosecutions against non-profit organizations.[126] The Belgian,[127] Italian,[128] and Hungarian[129] laws contain similarly broad exclusions for the state and public agencies, Italy also exempting organizations that carry out functions of constitutional significance (e.g., political parties, unions, and non-economic public authorities)[130] and Hungary[131] and Belgium[132] entities without commercial goals (i.e., non-profit organizations). Polish[133] and Swiss[134] laws would seem to exclude a narrower range of state organizations, though Switzerland may well exempt charitable or public interest organizations, at least for offenses perpetrated in the execution of their humanitarian mandates. It follows that the liability of GOCs and non-profit organizations under civil law CCL rules will generally depend on the scope of any express exclusions and on any explicit or implicit requirement that the alleged corporate offender is commercial in orientation.

1.3 Offenses for Which Corporations May Be Liable

Just as states may limit CCL to certain entities, so they may limit CCL to certain offenses. In fact, concerns that corporations cannot, or should not, be held liable for offenses that require proof of *mens rea*, that apparently protect "private" interests, and that are regulated only at the

[123] On France: Deckert (this volume); on Hungary: Santha/Dobrocsi (this volume); on Italy: de Maglie (this volume); on the Netherlands: Keulen/Gritter (this volume); on Poland: Kulesza 2010, 2 et seq.; on Portugal: de Faria Costa/Quintela de Brito 2010, 16 et seq.

[124] On Italy: de Maglie (this volume); on Portugal: de Faria Costa/Quintela de Brito 2010, 26 et seq.

[125] Deckert (this volume).

[126] OECD 2000b, 48.

[127] Bihain/Masset 2010, 1.

[128] De Maglie (this volume).

[129] Santha/Dobrocsi (this volume).

[130] De Maglie (this volume).

[131] Santha/Dobrocsi (this volume).

[132] OECD 2005d, 37.

[133] Kulesza 2010, 2 et seq.

[134] Pieth 2003, 359. Cf. Perrin (this volume).

national level, have characterized judicial and political debates about CCL in many countries.[135] Hence, the question, "What is the scope *ratione materiae* of CCL rules?", can be broken down into "Can corporations be held liable for offenses that require evidence of the mental state of the accused?" and "Can corporations commit all offenses or only those that are typically associated with the economic, environmental, or social impact of the modern (multinational) corporation, especially as reflected in international instruments?"

1.3.1 Common Law Jurisdictions

Though common law jurisdictions have struggled with both these questions, the imputation of offenses with a mental element has historically been the greatest point of difficulty. Initially, corporations were only regarded as capable of committing offenses of strict liability, i.e., offenses without a fault element.[136] This changed, as mentioned, with the extension of vicarious liability principles by US federal courts and the recognition of the identification doctrine in Britain and the Commonwealth.[137] Both models now allow organizations to be imputed with the states of mind of their human stakeholders.

The type of conduct that can be imputed to corporations has been less controversial in common law jurisdictions than in some civil law jurisdictions. As a rule, whether corporations may commit a particular crime is a matter of interpretation – of the statute or the common law norm.[138] And, to the extent that early authorities suggested corporations could not be liable for certain crimes involving deceit and assault (e.g., perjury, rape, and murder),[139] modern legislators in Canada,[140] the

[135] Jelínek/Beran (this volume); Pieth 2003, 360; Wells 2001, 3 et seq.

[136] Wells 2001, 89 et seq.; Pinto/Evans 2003, 15 et seq.; Nanda (this volume).

[137] Wells 2001, 93 et seq.; Pinto/Evans 2003, 39 et seq.; Nanda (this volume).

[138] Nanda (this volume); Wells 2000, 9.

[139] *R.* v. *Great North of England Railway Co.* (1846) 115 ER 1294; *New York Central & Hudson River Railroad Co.* v. *United States* 212 US 481 (1909); *Dean* v. *John Menzies (Holdings) Ltd.* [1981] SLT 50; *Canadian Dredge & Dock Co.* v. *R.* [1985] 1 SCR 662. See further LCEW (UK) 2010, Pt. 5; Nanda (this volume); Stark (this volume); Wells 2001, 89.

[140] See, e.g., Criminal Code (Canada), Pt. V (Sexual Offenses, Public Morals, and Disorderly Conduct), Pt. VI (Invasion of Privacy), Pt. VII (Disorderly Houses, Gaming, and Betting), Pt. VIII (Offenses against the Person and Reputation), Pt. IX (Offenses against Rights of Property), Pt. X (Fraudulent Transactions relating to Contracts and Trade). See also Crimes Against Humanity and War Crimes Act, SC 2000, c. 24.18.

US,[141] and the UK[142] have taken a different view, at least to the extent that such offenses can be committed by officials "in the scope of their employment".[143] The LCEW (UK) has also recently recommended the restriction of criminal laws in regulatory contexts to "seriously reprehensible conduct" for which prison terms for individuals or unlimited fines would be appropriate punishments.[144] If its proposals are adopted, many low-level criminal offenses frequently applied to corporations in England and Wales would be repealed and replaced with "civil penalt[ies] (or equivalent measure[s])".[145] Ironically, Australian "corporate culture" principles apply to the narrowest range of offenses (generally, those which are matters of international concern).[146] However, this is more likely due to the scope of the federal government's law-making power in Australia than to in-principle opposition to the "corporatization" of some criminal acts and omissions.[147]

1.3.2 Civil Law Jurisdictions

By contrast, amongst civil law jurisdictions, the type of act or omission has assumed greater importance than the presence or absence of fault as an element of a crime. For, in displacing the traditional principle of *societas delinquere non potest*, they explicitly acknowledged the possibility of corporate fault (or administrative liability for criminal offenses, as a substitute). However, since many civil law states introduced CCL rules to combat specific risks and/or to comply with specific international obligations, they were forced to deal with the questions of whether corporations should only be held liable for stereotypically "corporate" crimes, for conduct subject to an international criminalization obligation, or for all crimes on the books.

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[141] See, e.g., USC, Ch. 7, s. 116 (Female genital mutilation), s. 117 (Domestic assault by habitual offenders), s. 641 (Theft etc. of public money, property, or records). Cf. LCEW (UK) 2010, para. 5.10.

[142] Bribery Act (UK); CMCH Act (UK), s. 1; Sexual Offences Act (Scotland) 2009 (asp. 9), s. 57.

[143] Crown Prosecutions Service of England and Wales (CPSEW [UK]) 2010, para. 12.

[144] LCEW (UK) 2010, Proposals 1 and 2, see further paras. 1.28 et seq., Pts. 3, 4.

[145] LCEW (UK) 2010, Proposal 3. See further LCEW (UK) 2010, paras. 1.28 et seq., 1.61, 3.1 et seq., 6.5.

[146] See e.g., Criminal Code Act 1995 (Australia), s. 70.2 (Bribery of foreign public officials), s. 71.2 (Murder of a UN or associated person), s. 103.1 (Financing terrorism), Ch. 8, Div. 268 (Genocide, crimes against humanity, war crimes, and crimes against the administration of the justice of the International Criminal Court).

[147] Criminal Code Act (Australia), ss. 2, 12.3. See further Allens Arthur Robinson 2008, 15.

1.3.2.1 The "All-Crimes" Approach

French, Dutch, Belgian, Hungarian, and German legislators opted for the broadest "all-crimes" approach: in France[148] and the Netherlands[149] corporations may be held liable for any crime, in Belgium[150] and Hungary[151] for all crimes of intent, and, in Germany, for all "crimes and regulatory offenses".[152]

1.3.2.2 The "List-Based" Approach

Czech,[153] Italian,[154] Polish,[155] Portuguese,[156] and Spanish[157] lawmakers chose to restrict corporate criminal and quasi-criminal liability by reference to lists. The listed offenses reflect concerns about typically "corporate" risks, as well as the influence of international and regional crime control initiatives, as these have changed over time. For example, Italy's Decree No. 231 of 2001 was once limited to bribery, corruption, and fraud but, after amendments at the turn of this century, now applies to financial and competition offenses, terrorism, slavery, money laundering, handling stolen goods, female genital mutilation, involuntary manslaughter, and offenses involving serious workplace injuries; it may be extended to environmental crimes in the future.[158] Some speculate that the Czech Corporate Criminal Liability Bill of 2004 may have succeeded had it likewise contained a more limited list of crimes.[159]

1.3.2.3 The Dual Approach

Alone among the civil law states surveyed, Switzerland incorporates both the all-crimes and list-based approaches, creating one basis of liability for economic crimes addressed in international instruments and another for the remaining domestic offenses.[160] Hence, by art. 102(2) Criminal Code (Switzerland), an enterprise may be liable for organized crime,[161]

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[148] Criminal Code (France), art. 121-2 ("in the cases provided for in the law"). See further Deckert (this volume).
[149] Keulen/Gritter (this volume).
[150] Bihain/Masset 2010, 1. See also OECD 2005d, para. 123.
[151] Santha/Dobrocsi (this volume).
[152] Böse (this volume).
[153] Jelínek/Beran (this volume).
[154] De Maglie (this volume).
[155] Kulesza 2010, 3 et seq.
[156] De Faria Costa/Quintela de Brito, 27 et seq.
[157] Boldova/Rueda (this volume).
[158] De Maglie (this volume).
[159] Jelínek/Beran (this volume).
[160] See, generally, Pieth 2003, 360 et seq.
[161] Criminal Code (Switzerland), art. 260ter.

the financing of terrorism,[162] money laundering,[163] and various forms of corruption[164] simply by virtue of the fact that it failed to prevent the offense through necessary and reasonable organizational measures. For other offenses, art. 102(1) provides that the enterprise may be liable when the individual offender cannot be identified, and hence prosecuted, due to the enterprise's state of disorganization.[165]

1.4 Natural Persons Who Trigger Liability

All models of corporate criminal liability depend on the attribution of individual acts, omissions, and states of mind to a corporation or enterprise,[166] though each attributes the corporation or enterprise with the thoughts and actions of different natural persons. These differences are not merely academic: how a jurisdiction describes the category of person who can trigger corporate criminal or administrative liability determines, to a large extent, the types of organizations to which the criminal law applies. Narrow rules, which only impute corporations with offenses by corporate officers, organs, and senior executives, will rarely result in convictions against large companies in which lower-level agents, consultants, and employees collectively execute corporate operations.[167] However, broad rules, which impute the organization with any agent's or employee's misconduct, may render corporations disproportionately liable for the misdeeds of lone individuals who contravene well-established rules and internal cultural norms of good behavior (so-called "rogues").[168]

Thus, a key issue is, "Which natural persons in which circumstances are capable of triggering the criminal liability of the corporation?" The surveyed jurisdictions dealt with this issue in one of three ways:

- by imputing the corporation with offenses by any corporate agent or employee – no matter what steps others in the corporation had taken to prevent and respond to the misconduct *(strict vicarious liability)*, or if others had not done enough to prevent the wrongdoing *(qualified vicarious liability)*;

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[162] Criminal Code (Switzerland), art. 260^{quinquies}.

[163] Criminal Code (Switzerland), art. 305bis.

[164] Criminal Code (Switzerland), arts. 322ter (bribery of Swiss public officials), 322^{quinquines} (abuse of influence of Swiss judicial and military officials), 322(1)^{septies} (bribery of foreign public officials); Federal Law of December 19, 1986, on Unfair Competition (Switzerland), art. 4a(1) (active and passive bribery in the private sector).

[165] Perrin (this volume); Pieth 2003, 365 et seq.; Pieth 2004, 604.

[166] Pieth 2003, 360.

[167] Pinto/Evans 2003, para. 4.20; Wells 2001, 115.

[168] Cf. Beale 2009, 1488.

- by identifying the corporation with its executive bodies and managers and holding it liable for their acts, omissions, and states of mind *(identification)*; and
- by treating the collective as capable of offending in its own right, either through the aggregated thoughts and deeds of its senior stakeholders *(aggregation)* or though inadequate organizational systems and cultures *(corporate culture*, *corporate (dis)organization)*.

A similar schema is used in a 2009 OECD recommendation on the implementation of the Convention on Foreign Bribery.[169]

As to the conditions for attribution, these would seem to play a greater role in jurisdictions that regard corporations as vicariously liable for offenses by non-executive stakeholders. They have, however, been recognized as part of common law identification doctrines in the Commonwealth and they are embedded in holistic corporate liability principles. Moreover, all the jurisdictions surveyed seemed to require some degree of connection between the offense and the corporation's objectives, whether that connection is established by reference to the scope of the individual offender's powers or duties, the corporation's perceived interests, or the actual or intended corporate benefit.[170]

1.4.1 Common Law Jurisdictions

1.4.1.1 Strict Vicarious Liability: US Federal Law

Vicarious liability principles, as they have been developed in US federal law, allow legal entities to be imputed with offenses by all agents and employees, regardless of their individual functions within the corporation, their status in the organizational hierarchy, or the organization's attempts to prevent the individual wrongdoing.[171] Once the prosecutor shows the person to be a corporate agent or employee, the issue becomes whether the person was acting, at least in part, for the corporation's benefit and within the scope of his/her duties; if so, the corporation is imputed with the agent's or employee's offense,[172] even if it had developed and implemented appropriate

[169] OECD, Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions, November 26, 2009, Paris (OECD 2009 Recommendation), Annex I, para. B.

[170] Pieth 2003, 361 et seq.

[171] Hasnas 2009, 1342.

[172] Coffee 1999a, 14 et seq.; Nanda (this volume).

corporate compliance systems.[173] In this way, vicarious corporate criminal liability norms in US federal law have assumed a uniquely strict form.[174] Corporate liability principles under US state law tend to be less strict, many of these state legislatures and courts having adopted rules similar to those set out in the US Model Penal Code.[175]

1.4.1.2 Qualified Vicarious Liability: UK Regulatory Offense Legislation

The UK uses a milder version of vicarious liability to impute corporations with some statutory offenses.[176] Typically, these statutes deem a "person" guilty of an offense without requiring evidence of intent, negligence, or another state of mind. In other words, they employ principles of strict liability. However, they are also typically accompanied by a due diligence defense, which allows the offender to avoid liability if he/she can prove that he/she took all reasonable precautions to prevent the commission of the criminal act or omission.[177] Therefore, such regulatory offense statutes are better regarded as examples of qualified vicarious liability than a strict vicarious liability approach.

1.4.1.3 Identification: The Narrow UK View

Such legislation was at issue in *Tesco Supermarkets Ltd.* v. *Nattrass (Tesco Supermarkets)*,[178] ironically the leading case on who acts as the directing mind and will under general law identification principles in England and Wales. In *Tesco Supermarkets*, the House of Lords asked whether the corporate owner of a supermarket chain could be imputed with the criminal negligence of its employee. A supermarket store manager had failed to correctly display a sale item and the company was charged with a breach of the Trade Descriptions Act 1968. The company defended the charges, arguing, first, that it was a different person to the store manager and, second, that it had exercised due diligence to prevent the store manager's offense.

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[173] Cf. American Law Institute 1962, para. 2.07; *United States* v. *Ionia Management SA* 555 F. 3d 303 (2009) at 310 (McLaughlin, Calabresi, and Livingston JJ). See further Nanda (this volume). Note also that the LCEW (UK)'s provisional proposals include a suggestion that Parliament create a generic due diligence defense to all statutory strict liability offenses in England and Wales: LCEW (UK) 2010, Proposal 14 and Pt. 6. See further below at 1.5.1; and Wells (this volume).

[174] Nanda (this volume).

[175] American Law Institute 1962, para. 2.07. See Nanda (this volume); Wells 2001, 131.

[176] See, generally, Wells 2001, 85 et seq.

[177] LCEW (UK) 2008b, 118 et seq.

[178] [1972] AC 153 at 1 (Reid LJ).

The House of Lords agreed.[179] For slightly different reasons, each of the law lords found that the store manager was not the corporation's "directing mind and will" and so did not offend as the company. *Tesco Supermarkets* became authority for the proposition that companies are criminally responsible for the offenses of their corporate organs, corporate officers, and other natural persons who have been delegated wide discretionary powers of corporate management and control.[180]

1.4.1.4 Identification: The Broader View from the Commonwealth

Tesco Supermarkets is the leading case on the concept of the alter ego in England and Wales and has been extremely influential throughout Great Britain and the Commonwealth. However, the House of Lords did not take a clear view on the nature of the power that makes a person the directing mind and will. As a result, it is not clear whether it is necessary that the directing mind and will is a person formally empowered to manage the corporation's general affairs under general or specific rules of association or whether it is sufficient that he/she controls a relevant aspect of the corporation's operations (in law or in fact). Subsequent English courts tended to adopt a narrower view in criminal contexts,[181] whilst some Commonwealth courts have adopted broader interpretations.

First, since *Canadian Dredge and Dock Co.* v. *R. (Dredge and Dock)*,[182] the Supreme Court of Canada has treated a person's capacity for decision-making in a particular operative sector of a corporation as determinative of his/her capacity to act as the corporation. So, in that case, the defendant companies could be imputed with bid-rigging by non-executive managers as those managers had been acting within the scope of their duties and to

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[179] Pinto/Evans 2003, para. 4.14.

[180] *Tesco Supermarkets Ltd.* v. *Nattrass* [1972] AC 153 at 171 et seq. (Reid LJ), 179 et seq. (Morris of Borth-y-Gest LJ), 187 et seq. (Dilhorne LJ), 192 et seq. (Pearson LJ), 198 et seq. (Diplock LJ). See, generally, Pinto/Evans 2003, paras. 4.12 et seq.; Wells 1999, 120 et seq.; Wells 2001, 98.

[181] *Attorney General's Reference (No. 2 of 1999)* [2000] QB 796; [2000] 2 Cr. App. R. 207; [2000] 3 All ER 182; *R.* v. *P&O European Ferries (Dover) Ltd.* [1991] 93 Cr. App. R. 72. Cf. *El Ajou* v. *Dollar Land Holdings Ltd*. [1993] EWCA Civ. 4; *Director General of Fair Trading* v. *Pioneer Concrete (UK) Ltd.* [1995] 1 AC 456; *Stone & Rolls Ltd. (in liq.)* v. *Moore Stephens (a firm)* [2009] 1 AC 1391 at paras. 39 et seq. (Phillips of Worth Matravers LJ), paras. 221 et seq., 256 et seq. (Mance LJ). See, generally, LCEW (UK) 2010, paras. 5.48 et seq.; Pinto/Evans 2003, paras. 4.23 et seq., paras. 13.9 et seq.; Wells 2001, 112 et seq. Cf. CPSEW (UK) 2010, para. 20 (requiring prosecutors to consider the purpose of certain regulatory offenses and referring to *Meridian Global Funds Asia Ltd.* v. *Securities Commission* [1995] 2 AC 500, discussed next).

[182] [1985] 1 SCR 662, paras. 29, 32 (Estey J). See further Allens Arther Robinson 2008, 24 et seq.; Wells 2001, 130 et seq.

benefit the corporation, at least in part.[183] The companies could not avoid liability on the basis that they had issued "general or specific instructions prohibiting the conduct".[184] The limits of imputation were fraud against the company that solely benefited the individual and "form[ed] a substantial part of the regular activities of [their] office".[185]

Second, in *Meridian Global Funds Asia Ltd.* v. *Securities Commission (Meridian)*, the Privy Council upheld a New Zealand court's decision to determine the directing mind and will "by applying the usual canons of [statutory] interpretation [to the norm in question], taking into account the language of the rule (if it is a statute) and its content and policy".[186] In that case, the legislation required disclosure of share purchaser information in fast-moving financial markets.[187] The Privy Council found that only senior operative personnel could effectively act as the company for those purposes and, moreover, that the general rules of attribution were sufficient to determine who these people were and the scope of their authority.[188]

1.4.1.5 Corporate Culture: Australian Federal Law

At the federal level, Australia relies on both identification and holistic models of corporate criminal liability. Section 12.2 Criminal Code Act (Australia) provides that the physical elements of an offense committed by an employee, agent, or officer of a body corporate must be attributed to the corporation if the individual was acting within the actual or apparent scope of his/her employment or authority. Section 12.3 then elaborates that the fault elements of intention, knowledge, or recklessness must be attributed to a body corporate that expressly, tacitly, or impliedly authorized or permitted them. The code also contains special rules for establishing corporate criminal negligence.[189]

Authorization or permission is established in one of four ways, i.e., by proving that:

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[183] *Canadian Dredge & Dock Co.* v. *R.* [1985] 1 SCR 662 at para. 21 (Estey J).

[184] *Canadian Dredge & Dock Co.* v. *R.* [1985] 1 SCR 662 at para. 43 (Estey J).

[185] *Canadian Dredge & Dock Co.* v. *R.* [1985] 1 SCR 662 at para. 65 et seq. (Estey J).

[186] *Meridian Global Funds Asia Ltd.* v. *Securities Commission* [1995] 2 AC 500 at 507 (Hoffman LJ).

[187] *Meridian Global Funds Asia Ltd.* v. *Securities Commission* [1995] 2 AC 500 at 511 (Hoffman LJ).

[188] *Meridian Global Funds Asia Ltd.* v. *Securities Commission* [1995] 2 AC 500 at 506, 511 et seq. (Hoffman LJ).

[189] Criminal Code Act (Australia), ss. 5.5, 12.4(2). See further Beale 2009, 1499 et seq.

- the body corporate's board of directors carried out the relevant conduct intentionally, knowingly, or recklessly, or authorized or permitted the commission of the offense expressly, tacitly, or impliedly;[190]
- a high managerial agent of the body corporate engaged in the conduct intentionally, knowingly, or recklessly, or expressly, tacitly, or impliedly authorized or permitted the commission of the offense[191] unless the body corporate proves that it exercised due diligence to prevent the conduct or the authorization or permission;[192]
- a corporate culture existed within the body corporate that directed, encouraged, tolerated, or led to non-compliance with the relevant provision;[193] or
- the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.[194]

"High managerial agents" are corporate employees, agents, or officers "with duties of such responsibility that [their] conduct may fairly be assumed to represent the body corporate's policy".[195]

Therefore, under Australian federal law, it is permissible but not necessary to prove that an offense was committed by a human stakeholder whose thoughts, acts, and omissions were attributable to the body corporate. If the prosecution relies on the corporate culture provisions, it will look more broadly for evidence of attitudes, policies, rules, and general or localized patterns of behavior or practices.[196] Evidence of the high-level individual's acts, omissions, and states of mind remains relevant to the question of fault, since s. 12.3(4) authorizes the court to consider, in assessing corporate culture, whether a high managerial agent authorized the act or a lower-level offender reasonably believed that he/she would have received the high managerial agent's authority or permission. However, until these provisions are judicially considered, it is not possible to know exactly how much weight individual managerial (in)action will be given by the Australian courts.

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[190] Criminal Code Act (Australia), s. 12.3(2)(a). Note that under s. 12.3(6), "Board of directors" is defined to mean "the body (by whatever name called) exercising the executive authority of the body corporate."

[191] Criminal Code Act (Australia), s. 12.3(2)(b).

[192] Criminal Code Act (Australia), s. 12.3(3).

[193] Criminal Code Act (Australia), s. 12.3(2)(c).

[194] Criminal Code Act (Australia), s. 12.3(2)(d).

[195] Criminal Code Act (Australia), s. 12.3(6).

[196] Criminal Code Act (Australia), s. 12.3(6).

1.4.1.6 UK Law Reforms

The particular narrowness of the British identification doctrine has prompted criticism and calls for reform.[197] Unsuccessful attempts to introduce aggregation principles before the courts prompted legislative action by Parliament in relation to specific high-profile "corporate" offenses and LCEW (UK) proposals in relation to statutory offenses more generally.

Case Law: Aggregation Rejected

The capsize of the Herald of Free Enterprise on its way from Zeebrugge in 1987 resulted in the deaths of almost 200 people and the prosecution of P&O European Ferries (Dover) Ltd. (P&O Ferries) for reckless manslaughter.[198] The coroner found that the events leading to the accident could have been prevented had proper organizational measures been considered and implemented by the board of P&O Ferries.[199] However, none of the board members had sufficient knowledge of these deficiencies to themselves be criminally liable for the deaths nor had any of them performed the errors of omission that led to the ferry's capsize. The prosecution argued, nonetheless, that the facts known to each of them could be regarded collectively and treated as the recklessness of the corporation. The coroner and the Queen's Bench on appeal rejected this approach. For Lord Justice Bingham (Justices Mann and Kennedy agreeing) aggregation of individual acts and states of mind was inconsistent with the local doctrine of identification.[200] Notably, such an approach had been regarded as consistent with corporate criminal liability principles under US federal law.[201]

Statutory Reforms of Manslaughter and Bribery Offenses: A Holistic, Aggregative, or Qualified Identification Approach?

UK Parliament has subsequently enacted two laws that appear to depart from the narrow identification doctrine and, at least at first blush, to introduce elements of a holistic approach into UK law.

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[197] See, e.g., Drew/UNICORN 2005, 3; LCEW (UK) 2010, paras. 5.81 et seq.; OECD 2005b, paras. 295 et seq.; OECD 2008b, paras. 65 et seq.

[198] *R.* v. *HM Coroner for East Kent; Ex parte Spooner* (1989) 88 Cr. App. R. 10; *R.* v. *P & O European Ferries (Dover) Ltd.* [1991] 93 Cr. App. R. 72. See further LCEW (UK) 1996, para. 6.05; Wells 2001, 106 et seq.

[199] *R.* v. *HM Coroner for East Kent; Ex parte Spooner* (1989) 88 Cr. App. R. 10 at 13 (Bingham LJ).

[200] *R.* v. *HM Coroner for East Kent; Ex parte Spooner* (1989) 88 Cr. App. R. 10 at 16 et seq. (Bingham LJ). See Wells 2001, 108. See also CPSEW (UK), para. 25.

[201] *United States* v. *Bank of New England NA* 821 F. 2d 844 (1987) at 856 (Bownes J), cited in Podgor 2007, 1541.

First, to broaden the range of circumstances in which legal entities may be held criminally liable for an individual's death,[202] the CMCH Act (UK) creates the offense of "corporate manslaughter" ("corporate homicide" in Scotland).[203] Other things being equal, an organization commits corporate manslaughter "if the way in which its activities are managed or organized (a) causes a person's death and (b) amounts to a gross breach of a relevant duty of care owned by the organization to the deceased".[204] The act removes the requirement of an offense by a company officer, organ, or senior manager and enables the jury to consider "the extent to which… there were attitudes, policies, systems or accepted practices within the organization that were likely to have encouraged [a failure to comply with health and safety legislation]… or to have produced tolerance of it".[205] The CMCH Act (UK) is thus said to depart from the identification model, even to approach an aggregative[206] or a corporate culture model of responsibility.[207] Still, the prosecution must show that "the way in which [the corporation's] activities [were] managed or organized by its senior management [was] a substantial element in the breach…".[208] So, successful prosecutions will depend, in practice, on evidence of the acts, omissions and knowledge of senior corporate figures.[209]

Second, to address bristling domestic and international criticism,[210] the Bribery Act (UK) creates an offense of "Failure of commercial organizations to prevent bribery" in England, Wales, Northern Ireland, and Scotland.[211] In line with the OECD's anti-bribery convention and 2009 recommendations, the act deems relevant commercial organizations guilty of an offense if a person associated with them bribes someone else with the intention of obtaining or retaining specified benefits for the organization.[212] The offense is one of strict liability, a Parliamentary joint committee having rejected a recommendation that the offense include an element of negligence on the part of a natural person employed or connected with the company and responsible for ensuring corporate compliance with anti-bribery laws.[213]

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[202] Explanatory Notes: Corporate Manslaughter and Corporate Homicide Act 2007 (July 27, 2007), 8 et seq.; Wells 2001, 106 et seq.

[203] CMCH Act (UK), s. 1(1).

[204] CMCH Act (UK), s. 1(1).

[205] CMCH Act (UK), s. 8(3).

[206] LCEW (UK) 2010, para. 5.92; Cartwright 2010, para. B.31.

[207] Belcher 2006, 6; Gobert 2008, 427.

[208] CMCH Act (UK), s. 1(3).

[209] Gobert 2008, 428.

[210] Parliament 2009, para. 72; OECD 2005b; OECD 2008b.

[211] Bribery Act 2010 (UK), s. 7(1).

[212] Explanatory Notes: Bribery Act, paras. 50 et seq.

[213] Parliament 2009, para. 89. Cf. LCEW (UK) 2008b, paras. 6.100 et seq.

Nonetheless, the act's "adequate systems defense" allows the organization to avoid liability by proving "[it] had in place adequate procedures designed to prevent [associated persons] from undertaking such conduct".[214] It would seem that the reference to the commercial organization's procedures was intended to allow the courts to look at the practical measures that had been implemented throughout the company to prevent bribery.[215] On this basis, it could be regarded as akin to a requirement that organizations accused of bribery demonstrate the existence of an adequate "corporate culture".

Future Law Reforms: New General Principles for Statutory Offenses?

Finally, if the preliminary proposals of the LCEW (UK) are any guide, some British jurisdictions will adopt a more open, "context-sensitive, interpretative" approach to attribution of liability for statutory offenses.[216] In its August 2010 consultation paper, the LCEW (UK) called on Parliament to specify principles of attribution for statutory offenses and, in the absence of such provisions, on the English and Welsh courts to use general rules of statutory interpretation to determine how corporate liability for particular offenses is to be established.[217] It saw "no pressing need for statutory reform or replacement of the identification doctrine",[218] as, in its view, there was already authority for the proposition that the courts should select the most appropriate approach to liability for the statutory offense in question.[219] It would seem, moreover, that it considered holistic ("corporate culture") models of liability to figure among the approaches available to the courts, in addition to the vicarious and identification models for liability they have traditionally used.[220]

Thus, the LCEW (UK) has arguably attempted to recast the Privy Council's approach in *Meridian* as the basic approach to attribution of individual acts and omissions to corporations in English and Welsh law. It would seem, moreover, to have taken a broad and quite "open" view of the

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[214] Bribery Act (UK), s. 7(2).

[215] Parliament 2009, para. 92.

[216] LCEW (UK) 2010, paras. 5.7, 5.013 et seq.

[217] LCEW (UK) 2010, Proposal 13: "Legislation should include specific provisions in criminal offenses to indicate the basis on which companies may be found liable, but in the absence of such provisions, the courts should treat the question of how corporate fault may be established as a matter of statutory interpretation. We encourage the courts not to presume that the identification doctrine applies when interpreting the scope of criminal offenses applicable to companies." See further LCEW (UK) 2010, 1.60 et seq., Pt. 5.

[218] LCEW (UK) 2010, para. 5.104.

[219] LCEW (UK) 2010, para. 5.104 and the discussion of the case law in Pt. 5 generally.

[220] LCEW (UK) 2010, paras. 5.103 et seq. See further Wells (this volume).

individuals or collections of individuals through whom a corporation may think or act in accordance with the *Meridian* doctrine. Whether English and Welsh legislators and courts are willing to accept the commission's flexible but uncertain approach to liability remains to be seen, however. And, having completed its consultations in late 2010, the LCEW (UK) is not itself expected to issue its final report until Spring 2012.[221]

1.4.2 Civil Law Jurisdictions

1.4.2.1 Jurisdictions with Imputation Models: Identification and Vicarious Corporate Liability

Of the civil law jurisdictions that employ imputation models of corporate criminal or quasi-criminal liability, all enable the corporation to be identified with its organs, officials, and senior executives and most enable it to be held vicariously liable for the offenses of its junior employees, agents, and (in some cases) third parties. Placing these laws on a continuum, the French provisions are triggered by the narrowest range of stakeholders (corporate organs and representatives), Polish and Hungarian rules by the widest (leading persons and persons under their supervision, as well as third parties), and German, Italian, Portuguese, Spanish, and Chilean laws occupy positions between the two extremes, being triggered by varying assortments of individuals and bodies. In all cases, express conditions of liability, such as the requirement of a connection between the corporation's aims and the offense, limit the types of individual acts imputable to the collective.

Identification with Senior Corporate Organs and Representatives: France

At one end of the continuum, French law imputes corporations only with offenses by their organs and representatives, "organs" being individuals and bodies who act as the corporation under its rules of association in law or in fact[222] and "representatives" being those who have been delegated executive powers within a certain area of corporate operations.[223] A further condition – that the organ or representative was acting on behalf of the legal person in committing the offense – has been interpreted broadly to capture acts in the name of the legal person and activities intended to advance "the organization, operations, and objectives of the [legal] person".[224]

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[221] LCEW (UK) 2010, iii.

[222] Criminal Code (France), art. 121-2. See further Deckert (this volume).

[223] Deckert (this volume).

[224] OECD 2000b, 13.

Identification and (Indirect) Vicarious Liability: Germany

Like France, Germany enables corporations to be imputed with offenses by senior managers and, somewhat indirectly, with offenses by junior personnel that result from an omission by senior corporate figures.

First, § 30 Regulatory Offenses Act (Germany) allows courts to impose administrative sanctions on corporations for offenses by a broad range of senior managerial stakeholders:

- representative organs of a legal person or a (human) member of such an organ;
- the chairperson or a board member of an unincorporated association;
- a partner authorized to represent a partnership;
- a person with general authority to represent a legal person, unincorporated association, or partnership or who is a general managerial agent or authorized representative of one of these entities; and
- other persons responsible for the management of the business or enterprise of one of the above entities, including those who supervise the management of the entity or are involved in other ways in controlling it at the executive level.[225]

Once it is established that the human offender was acting in one of these capacities, the prosecutor must demonstrate either that the entity's duties were violated through the commission of the offense or that the entity was enriched, or should have been enriched, through the commission of the offense.[226] The corporation's duties (and the range of offenses for which it can be held liable) are determined having regard to its objectives, these indicating in turn the scope of its corporate risk *(Unternehmensrisiko)*. Given the ancillary nature of the corporate sanction, the conviction of an individual is a de facto criterion as well.

Second, under § 130 Regulatory Offenses Act (Germany), a corporation may be (indirectly) punished for any breach of corporate duties when such a breach resulted from a failure by a corporate representative to faithfully discharge his/her duties of supervision.[227] In this second provision, the corporation is not made liable for the breach per se but for a natural person's intentional or negligent failure to carry out his/her supervisory duties,[228] including careful selection, appointment, and oversight by corporate representatives.[229]

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[225] Regulatory Offenses Act (Germany), § 30(1). See further Böse (this volume).
[226] OECD 2003, 32.
[227] Böse (this volume).
[228] Böse (this volume).
[229] Böse (this volume).

Identification and Vicarious Liability: Italy, Portugal, Spain, and Chile

Italian, Portuguese, Spanish, and Chilean CCL rules go a step further than the German rules by allowing corporations to be imputed with offenses by senior managers and persons under their supervision. For example, art. 5(1) of Italy's Decree No. 231 of 2001 provides for the imposition of administrative penalties on organizations for offenses by persons with representative, directorial, or managerial functions of a corporation or one of its organizational units, as well as by persons who exercise (de facto) management and control of the corporation. They may also be liable for offenses by persons "subject to the authority" of a representative, director, or manager. In any case, the offense must have been committed in the interest of the organization or to its advantage and not solely in the interests of the individual or third party.[230]

Portuguese, Spanish, and Chilean criminal liability provisions also allow the corporation to be held liable for the acts and omissions of leading persons. Article 11(2) Portuguese Penal Code provides that a corporation may be criminally liable for offenses by natural persons who occupy leadership positions or by other persons who act under a leading person's authority.[231] Persons with leadership positions are those within the entity's organs, those who represent the organization, and those with authority to exercise control over the entities' activities.[232] To offend for the corporation, the leaders or subordinates must have acted in the collective name and interest of the entity and due to a breach of the leader's duties of supervision and control.[233] Likewise, the new art. 31bis(2) Spanish Criminal Code establishes the criminal liability of certain entities for offenses committed by their legal representatives, administrators (de jure and de facto), and employees with power of agency, as well as other persons who act under the authority of such senior figures.[234] Managers trigger art. 31bis when they commit an offense on behalf of the entity or for its benefit; for anyone else, liability arises when the offense is committed in the exercise of the entity's "social activities", on its behalf, for its benefit, and due to a lapse in control by senior figures.[235] Chilean law also attributes corporations with offenses by their owners, controllers, responsible persons, chief executives,

[230] De Maglie (this volume).

[231] De Faria Costa/Quintela de Brito 2010, 28 et seq.

[232] De Faria Costa/Quintela de Brito 2010, 30.

[233] De Faria Costa/Quintela de Brito 2010, 30 et seq., esp. 33.

[234] Boldova/Rueda (this volume).

[235] By contrast, Spanish Criminal Code, art. 129(1)(a), which allows for the imposition of administrative sanctions on entities, does not identify a particular person as the primary author of the offense, nor does it set out conditions for the imposition of liability, except to require a hearing between the prosecutor and the owners of the undertaking and its representatives.

representatives, administrators, or supervisors and persons who are under direction or supervision of one of those people.[236]

Identification and Vicarious Liability: Poland and Hungary

At the other end of the continuum, Poland and Hungary are prepared to impute corporations with offenses by leading persons, persons under the supervision of leading persons, and third parties. Article 2 Polish Act of October 28, 2002 on the Liability of Collective Entities for Acts Prohibited under Penalty (Liability of Collective Entities Act [Poland]) distinguishes between natural persons who act under the authority or duty to represent the entity, natural persons who are allowed to act by such leading persons, and natural persons who act with the consent or knowledge of leading persons.[237] The Hungarian Act CIV of 2001 on the Criminal Measures Applicable to Legal Persons similarly imputes entities with offenses by members or officers authorized to represent the legal person or participate in its management, members or agents of the supervisory board, members and employees of the corporation, and other people.[238] Had it succeeded, the 2004 Czech Corporate Criminal Liability Bill would have provided for CCL in similar situations.[239]

The apparent breadth of the Hungarian and Polish provisions is qualified by their extensive conditions for liability.[240] In both states, criminal proceedings may only be brought against the corporation when a human offender has been convicted first – a potential impediment to corporate prosecutions according to international monitoring bodies.[241] Other conditions for imputation depend on the human offender's proximity to senior management; they repeat the concepts of representation ("behalf of"), authority ("scope" of activities or power), mismanagement, and knowledge familiar from other civil law jurisdictions.[242]

1.4.2.2 Corporate (Dis)organization: Switzerland

Alone among the surveyed civil law jurisdictions, Switzerland takes an overtly holistic approach to the question of corporate liability.[243] Under

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[236] Salvo (this volume).

[237] Kulesza 2010, 4 et seq.

[238] Santha/Dobrocsi (this volume).

[239] Jelínek/Beran (this volume).

[240] Kulesza 2010, 4; Santha/Dobrocsi (this volume).

[241] GRECO 2004, 56; OECD 2005c, paras. 43 et seq.; OECD 2007a, 155 et seq.; OECD 2009 Recommendation, Annex I, para. B. See also GRECO 2006, para. 84.

[242] On Hungary: see Santha/Dobrocsi (this volume); on Poland: see Kulesza 2010, 5.

[243] Heine 2000, 4; Perrin (this volume). See further Pieth 2003; Pieth 2004.

art. 102(1) Criminal Code (Switzerland), an enterprise is liable for offenses committed within the framework (scope) of its entrepreneurial objectives and in the execution of its business activities provided that the offense cannot be attributed to a particular individual because of organizational deficiencies in the enterprise itself. Under art. 102(2), an enterprise is liable for listed economic crimes "if [it] may be accused of not having taken all necessary and reasonable organizational measures to prevent such an offense."

Corporate liability is subsidiary to individual liability under art. 102(1) and primary under art. 102(2); however, in neither case is it strict.[244] Each paragraph should be read as making corporate liability conditional on proof of corporate fault, i.e., deficiencies in organization.[245] Specifically, each requires proof, not only that an offense was committed, but also that it was reasonably foreseeable for an enterprise with the aims, objectives, and characteristics of the accused enterprise and that it was allowed to occur – in the case at hand – because of the absence or inadequacy of systemic preventative measures.[246] In addition, the subsidiary nature of liability under para. 1, means that there must be a connection between the enterprise's organizational deficiencies and the fact that an individual offender cannot be identified.[247]

In determining what standard of organization is required of the enterprise, it has been submitted elsewhere that the courts will look at the general law of agency and negligence, industry-specific statutory regulations, private or non-binding standards, and the particular risk profile of the enterprise (its size, operations, aims, customers, geographical presences, etc.).[248] Moreover, in assessing the sufficiency of the level of organization in the accused enterprise, it would seem that courts should have particular regard to the decisions of corporate organs, the existence, scope, and enforcement of compliance policies or systems, the knowledge, acts, and omissions of corporate officers and senior executives, and the patterns of behavior amongst individuals connected to the organization as employees or otherwise.[249]

1.4.2.3 "Open" Models: Imputation, Aggregation, and/or Holistic Approaches

Two civil law jurisdictions under review dispense with the need to prove the commission of an offense by an identified human stakeholder without

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[244] Perrin (this volume); Pieth 2003, 362 et seq.; Pieth 2004, 604 et seq.
[245] Pieth 2003, 363 et seq.; Pieth 2004, 603 et seq.
[246] Perrin (this volume); Pieth 2004, 604 et seq.
[247] Perrin (this volume).
[248] Perrin (this volume); Pieth 2003, 365 et seq.; Pieth 2004, 604 et seq.
[249] Perrin (this volume); Pieth 2004, 606 et seq.

committing to a single alternative model of imputation. In so doing, they invite the application of holistic principles, aggregative models, and traditional imputation doctrines of liability.

First, in the Netherlands, a corporation will be regarded as having committed an offense when this is "reasonable" in the circumstances. For Dutch courts, imputation is reasonable when the offense was committed "within the scope" of an entity having regard to certain "guiding principles".[250] The courts ask (amongst other things) whether the person worked for the entity, whether the conduct was part of the everyday business of the entity, whether the entity profited through the criminal act or omission, and whether the entity controlled and accepted the criminal acts or omissions given its relationship with the alleged individual offender and its managers' acts and omissions.[251] The Dutch open model, while not expressly holistic or aggregative, enables the courts to attribute corporations with the acts of potentially all employees taking into account the conduct of other individuals in the organization.[252]

Second, in Belgium, art. 5 Criminal Code deems legal persons "criminally liable for offenses that are intrinsically connected with the attainment of their purpose or the defense of their interests or for offenses that concrete evidence shows to have been committed on their behalf." Insofar as art. 5 does not mention a person (or persons) who offends as or on behalf of the corporation, it signals that liability is not contingent upon proof of the commission of an offense by a certain type of human stakeholder. Hence, the Belgian law leaves open the question of how corporations incur criminal liability, particularly for offenses that include an element of *mens rea*.[253] Belgian authorities are yet to take a clear position on whether – as a matter of fact – a corporation is liable whenever an offense is intrinsically connected to its purpose or was committed in defense of its interests or whether imputation presumes some element of corporate fault.[254] The former interpretation would see Belgium adopt a form of strict liability based on the subjective or objective relationship between the company and offense. If corporate fault is required, it remains to be seen whether it is based on the acts or omissions of corporate organs or senior executives with supervisory responsibilities or whether it is established having regard to the adequacy of the corporation's systems for preventing and responding to this kind of offense. So, the Belgian law could move closer to the standard European model of qualified vicarious liability or the holistic Swiss (dis)organization model.

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[250] Keulen/Gritter (this volume).
[251] Keulen/Gritter (this volume).
[252] Keulen/Gritter (this volume).
[253] OECD 2000a, 8.
[254] Bihain/Masset 2010, 2 et seq.

1.4.3 Liability of Corporations for Acts of Related Entities

The 2010 oil spill in the Gulf of Mexico and the subsequent attempts at "blame shifting" between the corporate owner of the drilling platform, operator, and contractor[255] have highlighted further issues relating to the question of who can trigger CCL: can corporations be criminally liable for acts or omissions committed by, or in association with, other collective entities, particularly their own subsidiaries, contractors, and agents? Other recent academic surveys[256] have found that states are generally willing to hold corporations liable in civil law for damage caused by their foreign subsidiaries, at least where there is evidence of parent-company control.[257] Moreover, it would seem that, in most states, corporations may be liable in criminal law for complicity in another company's offense[258] and (in the US, at least) through imputation with their offense.[259] Though a detailed examination of these principles is beyond the scope of our introductory chapter and this volume, we observe that many of the same issues relating to the identification of a single (corporate) perpetrator arise[260] and that objective ("enterprise") liability[261] and due diligence[262] models are being suggested as alternatives to imputation between corporations.

1.5 Special Defenses to Liability for Corporate Offenders

Given the peculiarities of corporate personality, it could be supposed that corporations would benefit from specialized exculpatory rules relating to the existence and general effectiveness of their governance and compliance systems. It would seem, however, that such explicit exculpatory rules are rare and that jurisdictions – civil and common law alike – generally consider the (in)effectiveness of compliance measures as part of the substantive conditions for liability.

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[255] Fifield 2010, 6.

[256] Thompson/Ramasastry/Taylor 2009, 873 et seq.; Zerk 2006, 215 et seq.

[257] Zerk 2006, 235 et seq.

[258] Ruggie 2007, 831 et seq.

[259] Clough 2008, 916 et seq.

[260] Zerk 2006, 229.

[261] Pitts 2009, 421 et seq.

[262] Clough 2008, 917 et seq. (suggesting parent companies be required by law to take reasonable steps to prevent criminal violations by their subsidiaries).

1.5.1 Common Law Jurisdictions

On the one hand, appeal courts in common law jurisdictions have failed to recognize a general law "corporate compliance" excuse or defense. In the UK, a narrow interpretation of the identification doctrine makes evidence of corporate good practice irrelevant: the corporate defendant will only avoid liability if its alter ego could rely on a general law defense or excuse to avoid personal liability.[263] Even Canada, which takes a broader view of the directing mind and will, does not regard one employee's or officer's good conduct as cancelling out another's criminal act or omission.[264] The US approach to vicarious liability is stricter still, though the existence and effectiveness of corporate compliance programs are highly relevant factors at other points in the proceedings and at sentencing.[265]

The general law position is modified by statute in some jurisdictions. In the UK, due diligence is already a defense to many strict liability statutory offenses (see e.g., the Bribery Act [UK]). Further, if the provisional proposals of the LCEW (UK) are accepted, it will be available in broader form in relation to *almost any* statutory offense that does not include fault as an element (this to ensure fairness to the accused corporation).[266] In Australian federal criminal law, meanwhile, a body corporate may avoid liability for the conduct of a high managerial agent by proving that it "exercised due diligence to prevent the conduct or the authorization or permission".[267] The traditional excuses of mistake of fact and intervening conduct or event are also modified to accommodate the special features of corporate criminal liability.[268]

1.5.2 Civil Law Jurisdictions

Equally few civil law jurisdictions have been willing to consider corporate compliance as capable of removing liability. Exceptionally, Italy, Portugal, Spain, and Chile have created or are contemplating express defenses that allow the court to assess corporate compliance programs. Article 6 Decree No. 231 of 2001 (Italy) sets out the "defense of organizational models".

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[263] *Canadian Dredge & Dock Co.* v. *R.* [1985] 1 SCR 662 at para. 43 (Estey J).

[264] *Canadian Dredge & Dock Co.* v. *R.* [1985] 1 SCR 662 at paras. 48 et seq., esp. 65 et seq. (Estey J).

[265] Nanda (this volume).

[266] LCEW (UK) 2010, Proposals 14 and 15 and Questions 1 and 2; paras. 1.68 et seq.; Pt. 6, esp. paras. 6.19 et seq., 6.67 et seq., 6.70 et seq., 6.95 et seq.; Wells (this volume).

[267] Criminal Code Act (Australia), s. 12.3(3).

[268] Criminal Code Act (Australia), ss. 12.5, 12.6.

It allows companies that have "adopted and effectively implemented appropriate organizational and management models…" to avoid liability for offenses of senior managers or junior employees when other listed conditions are met.[269] Article 11(6) Portuguese Penal Code excludes liability for junior employees and senior figures when "the actor has acted against the orders or express instructions of the person responsible", though it is uncertain whether "instructions" may be given as part of a general corporate compliance program and, if so, whether they must be credibly monitored and enforced.[270] Spain's art. 31bis also allows entities to avoid liability if they confess after the fact, collaborate with authorities, make reparations, and take preventive measures.[271] Switzerland, by contrast, takes the opposite approach, imputing the corporation with liability only when deficiencies in organization are positively established by the prosecutor.

1.6 Sanctions and Procedure: Charging, Trying, and Punishing Corporate Offenders

Recognizing corporations as capable of committing offenses is the first step in making them objects of criminal law. However, when the substantive conditions for liability are met, the offender still has to be charged, tried, and punished. The issue then becomes whether to treat corporations the same as human offenders during the investigation and trial and at sentencing and, if not, where and how adjustments to, or departures from, traditional rules are warranted. In the area of criminal procedure, it manifests in questions about the procedural rights of the corporation.[272] If lawmakers in the past were generally content to treat corporate defendants like individuals,[273] in the last two decades, they have been more willing to amend procedural rules to reflect the peculiarities of corporate personality and the perceived power of corporations in adversarial proceedings against the state. In sentencing, this issue manifests in questions about the appropriate sanctions and sanctioning principles for corporations: are financial penalties the optimal sanction for corporate offenders? Do they best express society's indignation and deter other organizations from similar acts (or omissions)? In any case, is deterrence the only legitimate goal for sanctioning corporate offenders or could corporations, like human beings, be rehabilitated or otherwise prevented from committing further crime?[274]

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[269] De Maglie (this volume); OECD 2004c, para. 43.

[270] De Faria Costa/Quintela de Brito 2010, 32.

[271] Boldova/Rueda (this volume).

[272] See, generally, Pieth 2005, 603 et seq.

[273] Pinto/Evans 2003, paras. 8.1 et seq.; Stark (this volume).

[274] Henning 2009, 1426 et seq.

1.6.1 Common Law Jurisdictions

1.6.1.1 The UK and the Commonwealth

Procedure

The general rules of criminal procedure in the UK and the Commonwealth treat corporations in much the same way as individuals: the prosecutor has discretion to charge a corporation and brings the charges in accordance with consolidated or court-specific procedural rules.[275] In England and Wales, a joint guidance on corporate prosecutions for offenses other than manslaughter[276] sets out additional factors to be considered in determining whether a corporate prosecution is in the public interest.[277] Weighing in favor of prosecution are a corporate history of offenses, warnings, sanctions, and charges, together with the facts that "(b) The conduct alleged is part of the [company's] established business practices; (c) The offense was committed at a time when the company had an ineffective corporate compliance system;... (e) [The company failed] to report wrongdoing within a reasonable time... [and] (f)... properly and fully...".[278] Conversely, the lack of prior enforcement actions, a "genuinely proactive approach" (evidenced by the provision of sufficient information about corporate operations "in [their] entirety" and "the making of witnesses available"), "genuinely proactive and effective corporate compliance program[s]", and "[t]he availability of civil or regulatory remedies" militate against a prosecution, amongst other things.[279] The guidance does not mention the rights to silence or the privilege against self-incrimination, though prosecutors have a general duty to act in a way that is compatible with rights under the European Convention on Human Rights (ECHR).[280]

Further, in July 2009, the UK Serious Fraud Office published a guidance in which it indicated it would consider pursuing "civil outcomes" and "global settlements" with "corporates" that self-report overseas corruption. The guidance sets out the issues for consideration, among them, whether "the Board of the corporate [is] genuinely committed to resolving the issue and moving to a better corporate culture" and whether "at the end of the investigation... the corporate [will] be prepared to discuss restitution

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[275] CPSEW (UK) 2010, paras. 1, 4 ("A company... should not be treated differently from an individual because of its artificial personality."); Pinto/Evans 2003, paras. 8.1 et seq.; Stark (this volume).

[276] CPSEW (UK) 2010.

[277] CPSEW (UK) 2010, para. 32.

[278] CPSEW (UK) 2010, para. 32, "Additional public interest factors in favor of prosecution", (a)–(f).

[279] CPSEW (UK) 2010, para. 32, "Additional public interest factors against prosecution", (a)–(d), see also (e)–(h).

[280] Human Rights Act 1998, c. 42, s. 6(1).

through civil recovery, a program of training and culture change, appropriate action where necessary against individuals and at least in some cases external monitoring in a proportionate manner".[281] The first such global settlement between American and British prosecutors and a corporate defendant (Innospec Ltd.) was considered *ultra vires* by the UK courts[282] and it is speculated that the Serious Fraud Office (UK) may revise its policy.[283] Nonetheless, the guidance is remarkable for its apparent similarity to CCL procedures and sanctions under US federal law and for the comments on corporate sentencing options and principles it drew from the UK courts.[284]

The fact that corporations are often charged under regulatory statutes may also raise special procedural issues in practice. As noted above, regulatory offenses are frequently established through simplified procedures without evidence of the mental state of the accused person and subject to a reversed burden of proof for the fact of due diligence.[285] They may also require cooperation between the accused corporation or its employees, agents, or officers and regulatory authorities in other (administrative) proceedings.[286] Presuming that regulatory offenses give rise to criminal charges, some commentators ask whether they violate the presumption of innocence and the privilege against self-incrimination, such as those in Art. 6 ECHR as incorporated into the UK's own Human Rights Act 1998.[287] If so, the question is whether corporate defendants are entitled to claim these protections or whether such rights are unnecessary – even inappropriate – in litigation against such potentially powerful inhuman actors.[288] As it stands, the European Court of Human Rights and many common law courts have accepted that corporations may claim at least some procedural rights, such as those mentioned in Art. 6.[289] Moreover, in our view, it is good policy to preserve basic procedural rights in criminal proceedings against corporations. Fair procedure rules are not merely mechanisms for equalizing power imbalances between governments and defendants nor are they merely reflective of the need to preserve human dignity in a situation of coercion; equally, they respond to the nature of the adversarial

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[281] Serious Fraud Office (UK) 2009, 3.

[282] *R.* v. *Innospec Ltd.* [2010] EW Misc. 7 (EWCC).

[283] Cleary/Candey 2010; Eversheds Fraud Group 2010.

[284] *R.* v. *Innospec Ltd.* [2010] EW Misc. 7 (EWCC) at paras. 39 et seq. (Thomas LJ).

[285] See above at 1.4.1.2.

[286] Pinto/Evans 2003, paras. 12.39 et seq.

[287] See, generally, Pinto/Evans 2003, paras. 12.9 et seq.

[288] Arzt 2003, 457; Nijboer 1999, 317. See further Pieth 2005, 603 et seq.; Pieth 2009, 201 et seq.

[289] Emberland 2006, 56; Pinto/Evans 2003, paras. 12.57 et seq.; van Kempen (this volume); Woods/Scharffs 2002, 552. Cf. Australia, Evidence Act 1995, Act No. 2 of 1995 as amended, s. 187.

criminal proceeding as a mechanism for negotiating competing versions of the truth and allocating legal responsibility.[290] In any case, when small private corporations are the subject of criminal prosecutions, it may be difficult to distinguish, in fact, between individual and corporate economic interests.[291]

Sanctions

When it comes to punishing corporate offenders, fines are still the primary sanction in the UK and the Commonwealth, though other financial and non-financial penalties are also available depending on the jurisdiction, the organization, and the offense in question.[292] The significance of fines is explained, at one level, by the inapplicability of custodial sentences to corporate offenders. At another level, it reflects the dominant conception of corporate personality and corporate liability in British and Commonwealth criminal law: if the corporation is a legal fiction that facilitates commercial collaborations, a monetary sanction may be regarded as the most appropriate punishment and incentive for corporate reform.[293] Similarly, if corporate guilt is derived from a senior individual's wrongdoing, there is no logical reason to require corporate cultural reform.

Given the importance of corporate fines in British and Commonwealth corporate criminal law, it is somewhat surprising that the level of fines has been low historically, at least in the UK.[294] For Wells, this is due primarily to the type of offenses for which corporations are convicted: most successful corporate prosecutions are for regulatory offenses, which do not include an element of harm and are generally tried in the lower courts.[295] At the same time, it may be symptomatic of the relative lack of statutory or judicial guidance on how to impose fines large enough to restrict corporate profits without endangering the entity's financial viability – and with it the livelihoods of "innocent" creditors, employees, contractors, and agents. Australian and Canadian federal legislation deals with the calculation of the maximum fine for corporate offenders but not with the principles for

[290] Pieth 2005, 605 et seq.; Pieth 2009, 202 et seq.

[291] LCEW (UK) 2010, para. 7.10; van Kempen (this volume).

[292] On the UK: see Pinto/Evans 2003, 133 et seq.; Wells 2001, 32; on Australia: Crimes Act 1914, Act No. 12 of 1914 as amended (Crimes Act [Australia]), s. 14B; Australian Law Reform Commission (ALRC) 2006, Pt. H.30; on Canada: Criminal Code (Canada), s. 735(1).

[293] Wells 2001, 34.

[294] Black 2010, paras. A.15 et seq. (on fines for regulatory offenses generally); Clarkson/Keating/Cunningham 2007, 260; Wells 2001, 32 et seq.

[295] Wells 2001, 33.

determining which level of fine is appropriate;[296] they are vulnerable to the same criticism.

The emphasis on fines in the UK and the Commonwealth may be changing. Regulatory statutes already enable courts to impose a wider range of non-financial sanctions than is available under general law[297] and Commonwealth jurisdictions have identified corporate sentencing options and principles under general law as in need of reconsideration and possibly reform.[298] Further, in our view, the expansion of CCL rules to cover non-profit and public sector agencies will, in due course, prompt lawmakers to reconsider the appropriateness of fines and deterrence in punishing corporations. Also, and perhaps most significantly, the guidances discussed above indicate that UK prosecutors and regulators are keen to apply US-style enforcement strategies, particularly in relation to economic crimes.[299]

1.6.1.2 The US

Procedure

Of all the jurisdictions surveyed, the US has made the most substantial adjustments to its criminal procedure rules for corporations. Recognizing that an indictment may itself seriously threaten a corporation's financial viability, the federal government has empowered prosecutors to defer charges or forestall an investigation against a corporation by means of deferred and non-prosecution agreements (DPAs and NPAs). In exercising their discretion to conclude such agreements with corporations, prosecutors are to have regard to factors determined by the US federal Department of Justice (USDOJ). The memorandum, "Bringing Criminal Charges Against Corporations", issued by US Deputy Attorney General Holder in 1999 (Holder Memo) initially listed eight company-specific and offense-specific factors, including:

- "The corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of the corporate attorney-client and work product privileges";

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[296] Crimes Act (Australia), s. 4B(3); Criminal Code (Canada), s. 735(1). See also Crimes Legislation Amendment (Serious and Organized Crime) 2010, Act No. 2 (Australia), Sch. 8 (increasing the maximum penalty for bribery offenses for bodies corporate without introducing principles for the application of such penalties).

[297] See, e.g., Regulatory Enforcement and Sanctions Act 2008, c. 13. See further Allens Arthur Robinson 2008, 11, n. 17; Black 2010, A.45 et seq.; DOJ (Canada) 2002.

[298] ALRC 2006; DOJ (Canada) 2002; New South Wales Law Reform Commission 2003, para. 5.17.

[299] Cotton 2009.

- the corporation's remedial actions "including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution and to cooperate with the relevant government agencies"; and
- the collateral consequences of indictment "including disproportionate harm to shareholders and employees not proven personally culpable".[300]

The Holder Memo was revised and made stricter still by Deputy Attorney General Thompson. His 2003 "Principles of Federal Prosecution of Business Organizations" (Thompson Memo)[301] emphasized "the authenticity of a corporation's cooperation. . ." and "the efficacy of corporate governance mechanisms".[302] It made clear that corporate attempts to "impede the quick and effective exposure of the complete scope of wrongdoing under investigation. . . should weigh in favor of a corporate prosecution".[303] As examples of such non-cooperative behaviors, the memo cited "Overly broad assertions of corporate representation of employees or former employees; inappropriate directions to employees or their counsel,. . . incomplete or delayed production of records; and failure to promptly disclose illegal conduct known to the corporation".[304] The Thompson Memo was criticized for encouraging prosecutors to make adverse decisions on the basis of a corporation's refusal to waive privileges, to pay large sums in settlement, and to undertake extensive (and expensive) administrative, operational, and personnel changes,[305] often under the supervision of an external "monitor" with powers and functions sometimes akin to those of a probation officer.[306] Others have noted the lack of objective and well-researched criteria for determining the terms and measuring the effectiveness of such arrangements[307] and hence their mixed effectiveness in practice.[308]

Reform bills on DPAs and NPAs are currently before US legislators.[309] Meanwhile, Sixth Amendment arguments have been accepted by US courts

[300] United States Department of Justice (USDOJ), Office of the Deputy Attorney General 1999, points 4, 6, 7. See further Nanda (this volume).

[301] USDOJ, Office of the Deputy Attorney General 2003.

[302] USDOJ, Office of the Deputy Attorney General 2003, third paragraph.

[303] USDOJ, Office of the Deputy Attorney General 2003, third paragraph.

[304] USDOJ, Office of the Deputy Attorney General 2003, Principle VIB.

[305] Hasnas 2009, 1353 et seq.; Nanda (this volume). Cf. Beale 2009, 1492 et seq.

[306] Khanna/Dickinson 2007; Nanda (this volume).

[307] Coffee 2005; Ford/Hess 2009; United States Government Accountability Office (USGAO) 2009, 21 et seq.

[308] Ford/Hess 2009, 728 et seq.

[309] Nanda (this volume).

in *United States* v. *Stein & Ors*[310] and (implicitly) by the successors to Deputy Attorney General Thompson. They amended the rules relating to the conclusion of DPAs and NPAs[311] and clarified the primary responsibilities of monitors and principles for negotiating their appointments, duties, and terms in office.[312] Commentators have also called for the recognition of a good faith affirmative defense to CCL[313] or a requirement that the prosecution prove a lack of due diligence to prevent the offense by the corporation.[314] All the same, DPAs and NPAs remain a common means of obtaining financial payments, admissions of wrongdoing, and commitments to reforms from suspected corporate offenders in the US – all without conviction or charge.[315]

Sanctions

Presuming the corporation is indicted and convicted, US federal law also provides a particularly wide range of sanctioning options. US federal courts may impose large fines and may order corporate offenders to make restitution to identified victims of crime, to otherwise remediate the harm, to eliminate or reduce the risk of future harm (e.g., through the introduction of corporate compliance and monitoring systems), and to undertake community service.[316] The appointment of compliance monitors and advisors is particularly in vogue. The United States Sentencing Commission's Guidelines Manual contains also the most detailed corporate sentencing guidelines of any jurisdiction considered here.[317] They set out general principles for corporate punishment and state how specific factors are to be weighed in determining the level of fine.[318] Amongst other things, they empower courts to make substantial reductions for companies that had in place effective compliance and ethics programs at the time of the offense.[319] For Wells, these rules on mitigation of sentence effectively provide

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[310] 435 F. Supp. 2d 330 (2006); aff'd 541 F. 3d 130 (2008); remedy 495 F. Supp. 2d 390 (2007). See further Nanda (this volume).

[311] USDOJ, Office of the Deputy Attorney General 2006; USDOJ, Office of the Deputy Attorney General 2008b. See further Nanda (this volume).

[312] USDOJ, Office of the Deputy Attorney General 2008a; USDOJ, Office of the Deputy Attorney General 2010; USDOJ, US Attorneys 1997, §§ 9-28.000 et seq. and Criminal Resource Manual, Title 9, §§ 163 and 166. See further Nanda (this volume).

[313] Nanda (this volume), 33; Podgor 2007.

[314] Hasnas 2009, 1356 et seq.; Weissman/Newman 2007, 449 et seq.

[315] Nanda (this volume); USGAO 2009, 13 et seq.

[316] Nanda (this volume).

[317] United States Sentencing Commission (USSC) 2009, Ch. 8. See further Nanda (this volume).

[318] USSC 2009, Introductory Commentary and § 8C.

[319] USSC 2009, §§ 8B2.1, 8C2.5(f).

an affirmative defense to strict vicarious corporate liability under US federal law.[320] At the very least, they evidence the deterrent and rehabilitative function of US CCL rules.

1.6.2 Civil Law Jurisdictions

1.6.2.1 Procedure

Civil law jurisdictions take a middle road between the minimalist or assimilationist approach of Australia and Canada and the exceptionalist approach of the United States and (to a more limited extent) England and Wales. France,[321] Germany,[322] the Netherlands,[323] Switzerland,[324] Hungary,[325] and Poland[326] have all introduced special rules for criminal proceedings against corporations. These enable individuals, not only to appear for the corporation, but also to exercise certain rights on the corporation's behalf during the proceedings. They clarify, in addition, the competence and compellability of other corporate "insiders" to testify against the corporation and the interaction between charges against corporations and individuals.

For example, an enterprise charged under Swiss law appears in the proceedings through a representative of its choice. The representative must be an individual with unlimited power to represent the enterprise under private law and may not be a person who is him-/herself accused of an offense on the same or related facts.[327] The representative has the same rights and obligations as the accused,[328] including the enterprise's privilege against self-incrimination (the *nemo tenetur* principle).[329] The enterprise's other human representatives are similarly non-compellable (i.e., they cannot be required to give evidence as witnesses against the enterprise), however, they may be asked to give information in another capacity (as *Auskunftspersonen*, i.e., informants).[330] All other employees and agents are competent and compellable – including individuals who do not exercise formal power but are nonetheless extremely well-informed about executive decisions and corporate operations (e.g., personal assistants to company

[320] Wells 2001, 35.
[321] Deckert (this volume).
[322] Böse (this volume).
[323] Keulen/Gritter (this volume).
[324] Perrin (this volume). See further Pieth 2005.
[325] Santha/Dobrocsi (this volume).
[326] Kulesza 2010, 6 et seq.
[327] Pieth 2005, 609.
[328] Art. 102, para. 2, first sentence. See Pieth 2005, 610.
[329] Pieth 2005, 610.
[330] Pieth 2005, 611 et seq.

officers).[331] Similarly, a corporation defending administrative proceedings in Germany has the right to be heard and be represented by one or more legal representatives provided those individuals have not been charged in relation to the matter. Except for the representative/s, any natural person may be called as a witness against the corporation, even if his/her conduct could have been attributed to the corporation.[332]

There is little to suggest that prosecutorial discretion has been used to obtain waivers or admissions or secure concessions from corporations without indictment or trial in civil law jurisdictions. This may be due simply to the lack of prosecutorial discretion not to charge suspects in some civil law jurisdictions (the legality principle) or to the failure of prosecutors to seriously consider corporate charges in exercising the discretion they are given. Responding to the latter criticism, Hungarian legislators curtailed prosecutorial discretion in 2008, requiring investigative authorities to "notify the prosecutor without delay" of information incriminating a legal entity.[333] Following the amendments, prosecutors lost their power to discontinue an investigation, though they retained discretion to later discontinue the proceedings.[334] German officials responded to similar criticisms by announcing that they would consider introducing prosecutorial guidelines.[335] It remains to be seen whether they draw on the American (and now British) approach.

1.6.2.2 Sanctions

The sanctioning options and principles for corporate offenders in civil law jurisdictions are also broadly similar to those in common law jurisdictions. All the jurisdictions surveyed enable their courts to impose fines on corporate offenders[336] and many enable (or require) them to confiscate or forfeit the proceeds and/or instrumentalities of offenses.[337] The rules for calculating the fine and determining the things liable for confiscation and so the

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[331] Pieth 2005, 612 et seq.

[332] Böse (this volume).

[333] Santha/Dobrocsi (this volume).

[334] GRECO 2006, para. 85; Santha/Dobrocsi (this volume).

[335] OECD 2003, paras. 122 et seq.

[336] The exception was Spain. Until reforms to its criminal code were enacted, Spanish courts could only fine individuals as a result of which corporations would be jointly liable. See Boldova/Rueda (this volume).

[337] Belgium, France, Germany, Hungary, Italy, the Netherlands, Poland, Switzerland, and Portugal. On Belgium: Bihain/Masset 2010, 20; on France: Deckert (this volume); on Germany: Böse (this volume); on Hungary: Santha/Dobrocsi (this volume); on Italy: de Maglie (this volume); on the Netherlands: Keulen/Gritter (this volume); on Poland: Kulesza 2010, 5; on Switzerland: Perrin (this volume); on Portugal: Faria Costa/Quintela de Brito 2010, 40 et seq.

possible quantum of financial penalties, differ considerably between the jurisdictions and, within jurisdictions, between offenses. Some jurisdictions specify a minimum and/or maximum,[338] whilst others multiply the penalty for individual offenders.[339]

As to sentencing factors, in addition to general considerations relating to the offense, the offender, the investigation, and the proceeding, courts in a number of civil law jurisdictions may have regard to the economic capacity of the corporation, the impact of the fine on third parties, and the actual or intended financial benefit to the corporation from the offense.[340] Recalling the American approach, Italy has enabled its courts to reduce a fine by up to half if the corporation makes restitution to victims, otherwise attempts to remedy the consequence of the offense, and undertakes preventative reforms to its organizational model.[341] Corporate compliance systems and subsequent remedial or reparative actions are also considered in the German administrative penalty regime, though some argue that this is inconsistent with the imputation of liability.[342]

In addition, many of the civil law jurisdictions surveyed provide alternative non-financial penalties for corporations. France pioneered this approach, developing an elaborate system of restraint orders for corporate offenders, which was later the blueprint for the penalties recommended in the EU Second Protocol to the Convention on the Protection of the ECs' Financial Interests.[343] Thus, when financial sanctions (alone) are inappropriate,[344] French courts may injunct corporations from performing specific professional or social activities, from tendering for public contracts, and from engaging in certain types of financial transaction; they may also order the closure of one or more of its establishments or the dissolution of the corporation itself (the corporate death sentence).[345] French courts may also

[338] Chile, Belgium (crimes punishable with life imprisonment), Germany, Hungary, the Netherlands, and Poland. On Chile: Salvo (this volume); on Germany: Böse (this volume); on Hungary: Santha/Dobrocsi (this volume); on the Netherlands: Keulen/Gritter (this volume); on Poland: Kulesza 2010, 5.

[339] France and Portugal. On France: Deckert (this volume); on Portugal: de Faria Costa/Quintela de Brito 2010, 35 et seq.

[340] France, Italy, Germany, Hungary, Poland, and Portugal. On France: OECD 2004a, para. 150 and Deckert (this volume); on Italy: OECD 2004c, para. 204; on Germany: OECD 2003, para. 124 and Böse (this volume); on Poland: Kulesza 2010, 6; on Portugal: de Faria Costa/Quintela de Brito 2010, 37; on Hungary: Santha/Dobrocsi (this volume).

[341] De Maglie (this volume); OECD 2004c, para. 204.

[342] Böse (this volume).

[343] Second Protocol to the EU Convention on the Protection of the ECs' Financial Interests, Art. 4(1).

[344] Deckert (this volume).

[345] Deckert (this volume).

appoint a *mandataire de justice* who, like the US corporate monitor, supervises the measures taken by the corporation to prevent the repetition of the breach.[346] Other jurisdictions similarly provide for temporary injunctions on trade, business, and other related activities,[347] exclusion from eligibility for public contracts and funding,[348] license restrictions or cancellations,[349] supervision or corporation probation orders,[350] publication of the sentence,[351] and dissolution or deregistration.[352] Some of these penalties are ordered as part of the criminal or quasi-criminal proceeding, others may be imposed as ancillary consequences by regulatory bodies.

1.7 Convergence: The Past, Present, and Future of CCL

1.7.1 Historical Concepts

At the beginning of this chapter, we introduced three models of corporate criminal or quasi-criminal liability. These, we noted, have emerged around the world in response to historical events and changing attitudes towards corporate risk and regulation.

The first model of vicarious liability was developed from the *respondeat superior* doctrine in tort law by which the master was liable for the civil wrongs of his/her servant. By analogy, the company was said to assume

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[346] Deckert (this volume).

[347] Chile, Belgium, Italy, Hungary, Poland, and Portugal. On Chile: Salvo (this volume); on Belgium: Bihain/Masset 2010, 21; on Hungary: Santha/Dobrocsi (this volume); on Italy: de Maglie (this volume); on Poland: Kulesza 2010, 5 et seq.; on Portugal: de Faria Costa/Quintela de Brito 2010, 40.

[348] Chile, Poland, and Portugal. On Chile: Salvo (this volume); on Poland: Kulesza 2010, 5; on Portugal: de Faria Costa/Quintela de Brito 2010, 40. Belgium and Germany indirectly exclude companies with criminal records from public contracting and licensing: on Belgium: OECD 2005d, para. 134; on Germany: Böse (this volume).

[349] Italy and Portugal. On Italy: de Maglie (this volume); on Portugal: de Faria Costa/Quintela de Brito 2010, 40.

[350] Belgium, Italy, and the Netherlands (for some economic crimes). On Belgium: Bihain/Masset 2010, 21 et seq.; on Italy: de Maglie (this volume); on the Netherlands: Keulen/Gritter (this volume);

[351] Chile, Belgium, Italy, the Netherlands, Poland, Portugal, and Switzerland. On Chile: Salvo (this volume); on Belgium: Bihain/Masset 2010, 21; on Italy: de Maglie (this volume); on the Netherlands: Keulen/Gritter (this volume); on Poland: Kulesza 2010, 6; on Portugal: de Faria Costa/Quintela de Brito 2010, 40; on Switzerland: Perrin (this volume). See further on Hungary: Santha/Dobrocsi (this volume) and on Germany: see Böse (this volume).

[352] Chile, Belgium, Germany, Hungary, and Portugal. On Chile: Salvo (this volume); on Belgium: Bihain/Masset 2010, 21; on Germany: Böse (this volume); on Hungary: Santha/Dobrocsi (this volume); on Portugal: Faria Costa/Quintela de Brito 2010, 35 et seq.

responsibility for its agents and employees.[353] Initially used in criminal law in relation to strict liability offenses, it was expanded in the US to enable the imputation of all crimes to a corporation, even when the company had reasonably attempted to prevent the wrongdoing. The vicarious liability model has been criticized.[354] Nonetheless, it has been adopted – in its qualified form – as a basis of liability in international instruments, in many of the surveyed civil law jurisdictions, and common law regulatory offense statutes.

The second model identifies the corporation with its directing mind and will and holds the corporation liable only for his/her criminal acts and omissions.[355] Emanating from the fiction theory of legal personality, the identification theory was developed in the UK to hold corporations liable for *mens rea* offenses. It was adopted in Commonwealth jurisdictions and has been integrated into civil law approaches and international standards, albeit in less restrictive form. Critics consider the traditional form of the identification doctrine, as applied to date in the UK, ill-suited to prosecuting larger companies and therefore of limited use in combating economic crime.[356]

A third model of liability is described as holistic or objective insofar as it treats the corporation as the offender and shifts the focus of the inquiry from imputing fault from individuals to identifying deficiencies in the corporate structure.[357] Central to this model of responsibility is the organogram, the corporate regulations, and the procedures that reflect the corporation's particular "organizational culture".[358] Critics of this approach object to its apparent breadth and uncertainty.[359] Its supporters argue that it more accurately reflects the nature of corporate responsibility, corporate decision-making, and community (consumer) expectations about corporate identity and risk-management.[360] For these reasons, it is said to be the more appropriate basis for imposing liability on corporations in criminal law.

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[353] Coffee 1999a; Nanda (this volume); Pieth 2007a, 178 et seq.; Wells 2001, 85, 88, 93, 131, 133.

[354] Heine 2000, 4; Nanda (this volume); Pieth 2007a, 179; Wells 2000, 5; Wells 2001, 152 et seq.

[355] Stark (this volume); Wells 2001, 85, 93 et seq.

[356] OECD 2008b, 65 et seq.; Stark (this volume).

[357] Coffee 1999a, 30; Heine 2000, 4; Pinto/Evans 2003, para. 4.20; Wells 2000, 6.

[358] Coffee 1999a, 20; Wells 2001, 156 et seq.

[359] Stratenwerth 2005, 416.

[360] Wells 2001, 158 et seq.

1.7.2 Convergence

To summarize these developments in Europe and the Americas in the last two decades is to observe the adoption and extension of CCL and equivalent non-criminal liability rules, as well as their apparent convergence around the notion of organizational systems and culture as the loci of corporate fault.[361] Our survey of national corporate criminal liability rules in selected common and civil law jurisdictions enables us to draw the following specific conclusions about legal developments in this area:

First, it would seem that corporate criminal liability rules generally apply to legal persons and unincorporated groups that carry out an enterprise. Though a number of civil law jurisdictions restrict CCL rules to enterprises with commercial goals, all surveyed common law countries and some civil law countries are prepared to apply criminal law norms to non-profit non-government entities, at least when they are engaged in trade and commerce. Both common law and civil law jurisdictions provide some exclusions from liability for the state; the extent to which this exclusion applies to government-owned corporations is an open question, especially under general CCL rules in common law jurisdictions.

Second, as to the offenses for which organizations may be liable, all jurisdictions that recognize corporate criminal or quasi-criminal liability allow corporations to be held liable for crimes of *mens rea*. There is some discomfort, particularly in civil law jurisdictions, with the notion that corporations may be liable as principals for all crimes, especially those that do not reflect "typical" corporate risks. That said, legislators in common law and civil law jurisdictions alike have been willing to recognize corporate liability for a variety of offenses that protect "private" interests under domestic law. On this basis, we observe a general, if sometimes tentative, expansion of the notion of corporate crime – from crimes committed in the context of industrial and commercial activity to crimes committed in the context of a group that facilitates or at least stands to benefit from the individual wrongdoing.

Third, corporations can be imputed with the misconduct of an increasingly broad group of human beings. The US has long acknowledged that a wide range of people is capable of triggering vicarious liability and, already in the 1980s and 1990s, decisions in the Commonwealth broadened the narrow UK reading of the directing mind and will to further decision-makers. More recently, UK legislators have been using vicarious – even holistic – notions of liability for regulatory offenses and statutory reforms of offenses at common law. Civil law jurisdictions have drawn on the experience in common law countries and the models developed in international

[361] See, generally, Heine 1995, 248 et seq.; Pieth 2007a, 181 et seq.; Wells 2001, 140 et seq. On Australia: Wells 2001, 137; on Switzerland: Pieth 2004.

instruments. Generally, they permit the qualified vicarious liability of the corporation for acts of agents, employees, and (in some cases) third parties, as well as the identification of the corporation with its organs and senior executives. A minority applies open or holistic models of liability, which treat the company as itself capable of committing criminal offenses through the aggregated acts, omissions, and states of mind of its senior stakeholders and generalized organizational deficiencies. An emerging issue is the scope and basis for corporate-to-corporate liability under national law.

Fourth, the vast majority of jurisdictions considers the adequacy of corporate compliance systems and the relationship between the corporate offense and objectives at some point. American criminal lawyers have taken the most innovative – and controversial – approach to the issue, imposing liability without fault but allowing corporations to mitigate their punishment or to avoid indictment on the basis of their compliance systems. Courts in Britain and the Commonwealth have generally been less receptive to evidence of compliance systems, though recent law reforms and reform proposals, prosecutions guidelines, and civil actions indicate that UK lawmakers and prosecutors may see some merit in the US approach. In civil law jurisdictions, these considerations are usually embedded in criteria for determining whether the company can be imputed with a natural person's offense or (as in Switzerland) treated as having behaved "criminally" itself. A minority of civil law jurisdictions have provided adequate systems defenses.

Fifth, the adoption of CCL rules has precipitated modifications to principles of criminal procedure and punishment in many jurisdictions. To accommodate corporate defendants, many states have refashioned their rules on representation, the competence and compellability of witnesses, the role of the parties in the proceeding, and the privileges of the accused. Some have gone to considerable lengths to provide appropriate alternatives to imprisonment and probation, which are available in relation to individual offenders. Again, in both respects, US federal law stands out even though it is not uniformly admired by American legislators and scholars.

1.7.3 Implications

The adoption, extension, and convergence of European and American CCL rules is significant for stakeholders in, and observers of, corporate regulatory processes.

For company promoters and managers, the frequency of CCL or equivalent administrative rules in diverse jurisdictions reduces the scope for "forum shopping", i.e., the selection of home and host states less likely

to prosecute corporate wrongdoing. In this way, CCL laws complement extraterritorial jurisdictional rules, which enable home states to prosecute crimes committed abroad, and voluntary corporate social responsibility initiatives, which encourage legal actors to adhere to governance standards throughout their groups and operations. At the same time, as CCL models converge around notions of defective corporate systems or culture, and corporate penalties and prosecution strategies around corporate compliance reforms, it becomes possible for MNEs to standardize their internal compliance strategies internationally, thus potentially reducing compliance costs and actual incidences of wrongdoing. Such cost savings may support other incentives for corporations to adopt more exacting governance standards.[362]

For regulators and commentators, the spread of CCL rules based on notions of corporate culture or organization is likely to lead to greater interest in the actual impact of criminal or quasi-criminal liability norms on corporate behavior. Do such liability rules reduce the likelihood that individuals, communities, and natural environments will be put at risk by corporate operations?[363] And, in any case, do they adequately reflect community condemnation of such events when they occur? In answering these questions, academics and policy makers alike will face other difficult questions, including the appropriateness of public-*cum*-moral condemnation as a goal of the corporatized criminal law, the means for measuring the effectiveness of CCL rules, and the place for normative check-and-balances in an increasingly future-oriented and rehabilitative criminal law.[364]

1.7.4 Outlook

The continued extension, expansion, and convergence of CCL rules in Europe and the Americas will be determined by a number of factors, among them, the willingness of national legislators and judges to embrace the regulatory/preventative dimension of criminal law and to recognize the legitimacy of collaborations between public prosecutors and corporate defendants as mediated by technical experts and standards. A further and related question is whether CCL or comparable rules are likely to be introduced and/or extended and enforced in states with growing markets and corporate groups,[365] such as Brazil, the Russian Federation, India, and the People's Republic of China (BRIC). On the one hand, if the European and

[362] Coffee 1999b, 663 et seq., 692.
[363] Laufer 2006, 184 et seq.; Pitts 2009, 379.
[364] Henning 2009, 1419 et seq., 1426 et seq.
[365] The Economist 2010, 3 et seq.; Wagstyl 2010, 7.

American experience is any guide, industrialization, economic globalization, and international regulation may prompt BRIC lawmakers to make greater use of CCL rules in controlling corporate risks and power. Moreover, the proliferation and enforcement of legal rules in European and American states may make it politically more difficult for them to refuse to recognize and punish corporate wrongdoing, regardless of any international legal obligation to do so.[366] On the other hand, CCL rules are only one means of approaching corporate control. They are not yet a universal feature of national criminal laws and, where they exist, they are often new and/or sporadically enforced. Furthermore, factors peculiar to the BRIC states and the international economic and political system of the early twenty-first century, may militate against the adoption, expansive interpretation, or aggressive enforcement of criminal or quasi-criminal corporate liability laws in emerging markets. This could, in turn, affect the willingness of lawmakers and enforcers in Europe and the Americas to extend and/or enforce their own CCL rules, as well as their conceptions of the regulatory alternatives.

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[366] Cf. Bismuth 2010, 226.

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