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Bridging the Accountability Gap by Enhancing UK Corporate and Personal Liability for Environmental Harms

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Abstract:

This article critically examines the limitations of the current UK approach to corporate environmental liability, arguing that there are some limits in holding companies accountable for the diffuse and cumulative environmental harms caused by their activities due to the narrow scope of the identification doctrine and the inadequacies of strict liability offences. Drawing on comparative examples from other jurisdictions and analysing the potential impact of recent reforms introduced by the Economic Crime and Corporate Transparency Act 2023, the article proposes a series of targeted reforms to establish a more comprehensive legal framework. By creating stronger frameworks for companies to prioritise environmental sustainability and accountability, these suggestions aim to bridge the existing accountability gap and contribute to the development of a more responsible corporate climate.

1. Introduction

The increasing recognition of the severe consequences of climate change and environmental degradation has catalysed a global movement to hold corporations accountable for their environmental impacts.[1] In the UK, this has led to a critical examination of the existing legal frameworks governing corporate liability for environmental harms.[2] Central to this discourse are the doctrinal foundations of corporate attribution law and strict liability offences, which are rooted in company law and criminal law, respectively. Corporate attribution law determines the circumstances under which the conduct and mental states of individuals within a company can be ascribed to the company itself, thereby establishing corporate liability.[3] Under the common law 'identification doctrine', a company can only be held criminally liable for offences committed by individuals representing its 'directing mind and will', typically limited to senior management and directors.[4] This narrow approach has been criticised

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[1] Beate Sjåfjell and Christopher M Bruner (eds), *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability* (Cambridge University Press 2019) 3; Richard Heede, 'Tracing Anthropogenic Carbon Dioxide and Methane Emissions to Fossil Fuel and Cement Producers, 1854–2010' (2014) 122(1) Climatic Change 229; Jorge E Viñuales, The *International Law of Energy* (Cambridge University Press 2022); Michael P Vandenbergh and Jonathan M Gilligan, *Beyond Politics: The Private Governance Response to Climate Change* (Cambridge University Press 2017) 189; Intergovernmental Panel on Climate Change, 'Climate Change 2021: The Physical Science Basis' (Contribution of Working Group I to the Sixth Assessment Report, 2021) https://www.ipcc.ch/assessment-report/ar6/ accessed 15 May 2024.

[2] Jorge E Viñuales, *The Organisation of the Anthropocene* (Brill 2018); Elisa Morgera, *Corporate Accountability in International Environmental Law* (2nd edn, Oxford University Press 2020) 32; Lisa Benjamin, 'The Responsibilities of Carbon Major Companies: Are They (and Is the Law) Doing Enough?' (2016) 5 Transnational Environmental Law 353.

[3] See e.g. Rachel Leow, *Corporate Attribution in Private Law* (Hart 2023).

[4] *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153 (HL); [1971] UKHL 1.

for creating a 'corporate veil' that shields companies from liability for the actions of lower-level employees and agents, particularly in the context of environmental harms.[5]

In contrast, strict liability offences in UK environmental legislation impose liability on companies for causing environmental harm, regardless of fault or intention.[6] These offences, found in statutes such as the Environmental Protection Act 1990 and the Environmental Permitting (England and Wales) Regulations 2016, are based on the 'polluter pays' principle and the need to protect the environment and public health.[7] However, the effectiveness of strict liability in promoting corporate environmental responsibility has been questioned, with concerns raised about its deterrent effect and ability to address systemic issues within corporate culture.[8]

The recent enactment of the Economic Crime and Corporate Transparency Act 2023 (ECCTA) has brought significant changes to corporate criminal liability in the UK. Section 196 of the ECCTA has broadened the scope of the identification doctrine by introducing the concept of 'senior manager' liability, extending attribution to a wider range of individuals whose actions can trigger corporate liability.[9] While this reform represents a step towards enhancing corporate accountability, its impact on environmental harms remains uncertain.

Recognising the limitations of the current legal framework, Baroness Lola Young recently introduced a Private Member's Bill in the House of Lords, the Commercial Organisations and Public Authorities Duty (Human Rights and Environment) Bill.[10] This groundbreaking bill proposes a statutory duty on commercial organisations and public authorities to prevent human rights abuses and environmental harms in their operations, subsidiaries, and value chains. Crucially, the bill would establish civil and criminal liability for companies that fail to prevent such harms and create a statutory duty of care allowing claimants to establish a rebuttable presumption of wrongfulness.[11] This shift towards a 'failure to prevent' model of corporate liability, inspired by the Bribery Act 2010 and ECCTA, represents a significant development in efforts to strengthen corporate accountability for environmental harms.

This article explores the current UK approach to corporate liability for environmental harms, examining the limitations of the identification doctrine and the role of strict liability offences. It analyses the potential impact of the ECCTA on corporate criminal liability and its relevance to environmental offences. Drawing on comparative examples from other jurisdictions, the article identifies specific features of legal frameworks that could address the limitations of the UK approach. Finally, it suggests reforms to enhance corporate accountability for environmental harms, including the adoption of a 'failure to prevent' model and the extension of parent company liability for the acts of subsidiaries and suppliers.

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[5] Shabir Korotana, 'Corporate "Failure to Prevent" Principle in the UK Bribery Act 2010: Philosophical Foundations of Economic Crime' (2024) 45 Statute Law Review 1, 9; Alice Belcher, 'Imagining How a Company Thinks: What Is Corporate Culture?' (2006) 11 DLR 1.

[6] See e.g. Jonathan Herring, *Criminal Law: Text, Cases, and Materials* (9th edn, OUP 2020) 242.

[7] See Peter Cane, 'Are Environmental Harms Special' (2001) 13(1) Journal of Environmental Law 3.

[8] See e.g. Michael G Faure, 'Effectiveness of Environmental Law; What Does the Evidence Tell Us?' (2012) 36(2) William & Mary Environmental Law and Policy Review 293, 303-304; Neil Gunningham, 'Corporate Environmental Responsibility: Law and the Limits of Voluntarism' in Doreen McBarnet, Aurora Voiculescu, and Tom Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (CUP 2007) 476.

[9] Economic Crime and Corporate Transparency Act 2023, s 196.

[10] Baroness Lola Young, 'Commercial Organisations and Public Authorities Duty (Human Rights and Environment) Bill' (UK Parliament, 2024).

[11] See Evie Clarke, 'A corporate accountability law of substance takes the floor – it's time to ensure U.K. companies finally take responsibility for human rights and environmental abuses' (Cambridge Core Blog, 26 February 2024); Corporate Justice Coalition, 'Bridging the Gap: How Could a UK Business, Human Rights and Environment Act Have Made a Difference?' (28 November 2023).

2. The Current UK Approach to Corporate Liability for Environmental Harms

A. The Identification Doctrine

The UK's approach to corporate liability for environmental harms is characterised by the interplay between the common law identification doctrine and strict liability offences in environmental legislation. The identification doctrine has been a cornerstone of corporate attribution law in the United Kingdom since the early 20th century. The doctrine was first established in the seminal case of *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd*,[12] where the House of Lords held that a company could be liable for the actions of its 'directing mind and will'. This principle was further refined in the case of *H L Bolton (Engineering) Co Ltd v T J Graham & Sons Ltd*,[13] where Lord Denning famously stated that 'a company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre'.[14] The identification doctrine was further developed in the landmark case of *Tesco Supermarkets Ltd v Nattrass*.[15] In this case, the House of Lords held that a company could only be liable for the actions of individuals who represented the 'directing mind and will' of the company, typically limited to the board of directors and senior management.[16] This narrow interpretation of the doctrine has been criticised for creating a 'identification strait-jacket'[17] that makes it difficult to hold companies accountable for the actions of lower-level employees.

The implications of the *Tesco* case were significant, as it set a high threshold for attributing the actions and knowledge of corporate agents to the company itself. This has been particularly problematic in the context of environmental harms, where the actions of lower-level employees or agents may contribute to pollution, waste, or other forms of environmental degradation.[18] The narrow scope of the identification doctrine has been seen as a barrier to holding companies accountable for these harms.[19]

B. The *Meridian* Principle

The limitations of the identification doctrine were partially addressed in the case of *Meridian Global Funds Management Asia Ltd v Securities Commission*.[20] In this case, the Privy Council introduced a more flexible approach to attribution, known as the '*Meridian* principle'. The principle allows courts to consider the purpose of the relevant statutory provision and the policy considerations underlying it when determining whether to attribute the actions and knowledge of a corporate agent to the company.[21] The *Meridian* case was significant because it recognised that the identification doctrine might not always be appropriate, particularly where the relevant legislation is intended to promote a specific policy objective.[22] In the context of corporate environmental issues, this could potentially allow for a broader range of corporate agents to be considered when attributing responsibility for environmental harms to a company.

Despite the potential of the *Meridian* principle to expand corporate responsibility, its application in subsequent cases has been limited. In the case of *Attorney General's Reference (No 2 of 1999)*,[23] the

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[12] *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705, 713 (HL).
[13] *H L Bolton (Engineering) Co Ltd v T J Graham & Sons Ltd* [1957] 1 QB 159, 172; [1956] 3 WLR 804 (CA).
[14] ibid 172.
[15] *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153 (HL); [1971] 2 All ER 127.
[16] ibid 170-171.
[17] Brent Fisse and John Braithwaite, *Corporations, Crime and Accountability* (Cambridge University Press 1993) 47.
[18] Liz Campbell, 'Corporate Liability and the Criminalisation of Failure' (2018) 12(2) Law and Financial Markets Review 57, 58; Celia Wells, 'Corporate Responsibility for Crime: The Neglected Question' (1995) 14 International Banking and Financial Law 42.
[19] Alice Belcher, 'Imagining How a Company Thinks: What Is Corporate Culture?' (2006) 11 Deakin L Rev 1.
[20] *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500; [1995] 3 All ER 918 (PC).
[21] ibid 507.
[22] ibid 511.
[23] *Attorney General's Reference (No 2 of 1999)* [2000] QB 796; [2000] EWCA Crim 91 (CA).

Court of Appeal held that the *Meridian* principle should only be applied in exceptional circumstances, where the identification doctrine would defeat the purpose of the relevant legislation.[24] This narrow interpretation has been criticised for limiting the impact of the *Meridian* principle and reinforcing the primacy of the identification doctrine.[25] In the case of *R v St Regis Paper Company Ltd*,[26] the Court of Appeal held that the knowledge and actions of a lower-level employee (in this case, a mill manager) could not be attributed to the company for the purpose of establishing liability under regulation 32(1)(g) of the Pollution Prevention and Control (England and Wales) Regulations 2000, which required proof of intention to make false entries in environmental records.

C. Strict Liability Offences for Environmental Harms in the UK

In contrast, strict liability offences, which impose liability on companies for causing environmental harm regardless of fault or intention, have been introduced in various UK environmental statutes to overcome the limitations of the identification doctrine. For example, section 33 of the Environmental Protection Act 1990 makes it an offence to deposit, treat, or dispose of controlled waste without a permit or in breach of a permit condition.[27] Similarly, regulation 38 of the Environmental Permitting (England and Wales) Regulations 2016 makes it an offence to operate a regulated facility without a permit or to breach permit conditions.[28] Strict liability offences do not require proof of *mens rea* on the part of the company.[29] Instead, a company can be held liable for the actions of its employees or agents, regardless of whether the company itself had any knowledge or intention to commit the offence.[30] This approach contrasts with the traditional identification doctrine, which requires the *mens rea* of a senior individual who represents the 'directing mind and will' of the company to be attributed to the company itself.[31]

While strict liability offences provide a means of holding companies accountable for environmental harms caused by their employees, they have limitations. First, strict liability focuses on individual instances of wrongdoing rather than addressing the systemic and cultural factors that may contribute to environmental harms.[32] Second, strict liability may not provide sufficient incentives for companies to proactively identify and mitigate environmental risks, as it does not require proof of fault or knowledge on the part of the company.[33] Third, the deterrent effect of strict liability may be limited, as companies may view the potential fines as a cost of doing business rather than a reason to fundamentally change their practices.[34]

There are specific examples from UK environmental legislation which highlight the weaknesses of the current strict liability approach. Under the Environmental Protection Act 1990, section 33 makes it an offence for the 'unauthorised or harmful deposit, treatment, or disposal of waste'.[35] While this strict liability offence punishes the act of unauthorised or harmful waste disposal, it does not adequately address the underlying corporate culture, decision-making processes, or management failures that may

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[24] ibid 813.
[25] Stefan HC Lo, 'Context and Purpose in Corporate Attribution: can the 'Directing Mind' be Laid to Rest' (2017) 4(2) Journal of International and Comparative Law 349, 350-351.
[26] *R v St Regis Paper Company Ltd* [2011] EWCA Crim 2527; [2011] WLR (D) 317.
[27] Environmental Protection Act 1990, s 33.
[28] Environmental Permitting (England and Wales) Regulations 2016, reg 38.
[29] Jonathan Herring, *Criminal Law: Text, Cases, and Materials* (9th edn, Oxford University Press 2020) 242.
[30] Liz Campbell, 'Corporate Liability and the Criminalisation of Failure' (2018) 12(2) Law and Financial Markets Review 57, 58.
[31] *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153, 170-171; [1971] 2 All ER 127 (HL).
[32] Neil Gunningham, 'Corporate Environmental Responsibility: Law and the Limits of Voluntarism' in Doreen McBarnet, Aurora Voiculescu, and Tom Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge University Press 2007) 476.
[33] Michael G Faure, 'Environmental Crimes' in Nuno Garoupa (ed), *Criminal Law and Economics* (Edward Elgar 2009) 320.
[34] Dorothy Thornton, Neil A Gunningham and Robert A Kagan, 'General Deterrence and Corporate Environmental Behavior' (2005) 27 Law & Policy 262, 277.
[35] Environmental Protection Act 1990, s 33.

have led to the offence.[36] Similarly, the Environmental Permitting (England and Wales) Regulations 2016, Regulation 38 makes it an offence to operate without an environmental permit or to breach permit conditions.[37] The strict liability offence focuses on the immediate breach of permit conditions, but does not adequately capture the broader organisational failures or lack of due diligence that may have led to the breach. In *R v Thames Water Utilities Ltd*,[38] the company was convicted under Regulation 38 for multiple sewage pollution incidents. While the strict liability offence punished the immediate incidents, it did not fully address the systemic management failures and inadequate investment in infrastructure that contributed to the offences.[39] The examples demonstrate that while strict liability offences in UK environmental legislation serve an important purpose in punishing immediate environmental harms, they have limitations in addressing the broader corporate culture, decision-making processes, and management failures that often contribute to these offences.

The existence of strict liability for environmental harms does not seem to create a vigilance duty for directors, as the primary aim of strict liability is to punish the company rather than individual directors.[40] While directors have a general duty to ensure that the company complies with environmental laws and regulations, the current legal framework does not provide strong incentives for directors to proactively address environmental risks or to be held personally accountable for environmental harms.[41]

Under the Environmental Protection Act 1990, Section 157(1) provides for the liability of directors, managers, secretaries, or other similar officers of a body corporate where an offence is committed with their 'consent or connivance' or is attributable to their neglect.[42] Similar provisions can be found in other environmental legislation, such as the Wildlife and Countryside Act 1981, Section 69(1).[43]

While these provisions do extend liability to senior employees, they have several limitations. First, there is limited scope of attribution. The 'consent or connivance' offences primarily focus on the liability of directors and senior officers, and very rarely hold other employees accountable. In the case of *R v Milford Haven Port Authority*,[44] the port authority was convicted under the Water Resources Act 1991 for causing polluting matter to enter controlled waters, but the employees responsible for the day-to-day management of the port's environmental risks were not liable. Second, there is an emphasis on individual fault. The 'consent or connivance' offences require proof of individual fault on the part of the director or senior officer which can be difficult to establish in practice. Third, it is reactive in nature. The 'consent or connivance' offences are typically invoked after an environmental offence has already been committed by the company and does not incentivise companies to proactively identify and address environmental risks.[45] In *R v Southern Water Services Ltd*,[46] the company was convicted under the Environmental Permitting (England and Wales) Regulations 2010 for repeated sewage discharges. The company failed to proactively assess and mitigate the risks associated with its sewage infrastructure.

D. Impact of the ECCTA Reform on Corporate Criminal Liability

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[36] Liz Campbell, 'Corporate Liability and the Criminalisation of Failure' (2018) 12(2) Law and Financial Markets Review 57, 60.
[37] Environmental Permitting (England and Wales) Regulations 2016, reg 38.
[38] *R v Thames Water Utilities Ltd* [2015] EWCA Crim 960; [2015] Crim LR 739.
[39] See also *R v Southern Water Services Ltd* [2014] EWCA Crim 120.
[40] Tiffany Bergin and Emanuela Orlando (eds), *Forging a Socio-Legal Approach to Environmental Harms: Global Perspectives* (Routledge 2017) 141.
[41] Fiona Haines and Adam Sutton, 'The Engineer's Dilemma: A Sociological Perspective on Juridification and Regulation' (2003) 39 Crime, Law and Social Change 1, 15; Elise Groulx Diggs, Milton C Regan and Beatrice Parance, 'Business and Human Rights as a Galaxy of Norms' (2019) 50(2) Georgetown Journal of International Law 309, 310.
[42] Environmental Protection Act 1990, s 157(1).
[43] Wildlife and Countryside Act 1981, s 69(1).
[44] *R v Milford Haven Port Authority* [2000] 2 Cr App R(S) 423.
[45] Celia Wells, 'Corporate Failure to Prevent Economic Crime - A Proposal' (2017) 6 Crim Law Rev 426, 432.
[46] *R v Southern Water Services Ltd* [2014] EWCA Crim 120.

The introduction of the ECCTA has brought significant changes to corporate criminal liability in the UK. Section 196 of ECCTA has expanded the scope of the identification doctrine by introducing the concept of 'senior manager' liability.[47] Under this new provision, a company can be held criminally liable for offences committed by a wider range of individuals, including those who play a significant role in making decisions about or managing the company's activities.[48] The ECCTA reforms primarily focus on economic crimes, as reflected in the schedule of offences to which the new attribution rules apply. By broadening the scope of attribution beyond the traditional 'directing mind and will' test, the ECCTA may make it easier to hold companies accountable for economic harms caused by the actions of senior managers who have significant influence over corporate decision-making and culture. However, the ECCTA's scope does not include corporate environmental liability. The narrow focus on economic crimes and the retention of the individual liability model suggest that further reforms may be necessary to effectively address corporate environmental harms. The ECCTA does not directly address the limitations of strict liability offences or the challenges of proving individual culpability in the context of diffuse corporate decision-making processes.

3. Comparative Examples and Lessons for UK Law Reform

Comparative examples from other jurisdictions offer valuable insights into alternative approaches to corporate environmental liability and responsibility. By examining the specific features of these legal frameworks that are lacking in the UK, it could shed light on best practices for potential avenues for reform to address the limitations of the current UK approach.

A. Australia

Australia's 'corporate culture' approach to corporate criminal responsibility offers a valuable comparative example for the UK, highlighting the potential for a more comprehensive and nuanced framework for attributing criminal liability to corporations. The Australian Law Reform Commission (ALRC) report on corporate criminal responsibility, presented to the Australian Parliament in August 2020, underscored the challenges of applying traditional criminal law principles, designed for individual culpability, to corporate entities that lack a 'guilty mind' in the conventional sense.[49]

The ALRC report proposed reforms to Australia's federal corporate attribution landscape, which currently includes a default statutory model in Part 2.5 of the Criminal Code (Cth) and the 'TPA Model' derived from the Trade Practices Act 1974 (Cth).[50] The Part 2.5 model takes a holistic approach, holding corporations responsible for offences committed by employees, agents, or officers acting within their authority and considering whether the corporation authorised or permitted the offence through its corporate culture.[51] The TPA Model, often used in federal legislation instead of the default model, directly attributes the mental states and conduct of directors, employees, or agents to the corporation.[52]

To streamline and enhance the principles governing corporate criminal responsibility, the ALRC advocated for a uniform legislative method of attribution, with two proposed options for attributing mental states to corporations.[53] The first option expands the Part 2.5 model by allowing 'authorisation

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[47] Economic Crime and Corporate Transparency Act 2023, s 196.
[48] ibid.
[49] Australian Law Reform Commission, Corporate Criminal Responsibility (Final Report No 136, 2020) 381-382; Elise Bant and Rebecca Faugno, 'Corporate Culture and Systems Intentionality: part of the regulator's essential toolkit' (2023) 23(2) Journal of Corporate Law Studies 345.
[50] Criminal Code Act 1995 (Cth) sch 1 pt 2.5; Australian Law Reform Commission, Corporate Criminal Responsibility (Final Report No 136, 2020) 229.
[51] Criminal Code Act 1995 (Cth) sch 1 pt 2.5 ss 12.2, 12.3.
[52] Australian Law Reform Commission, Corporate Criminal Responsibility (Final Report No 136, 2020) 229.
[53] ibid 243.

or permission' to be demonstrated through the actions of a broader range of corporate actors or the corporate culture.[54] The second option, inspired by the TPA Model, establishes corporate fault when officers, employees, or agents engage in the relevant conduct with the requisite mental state or direct, agree to, or consent to such conduct.[55] Both options include a 'reasonable precautions' defence to prevent automatic corporate liability based solely on an individual's mental state.[56]

The ALRC's proposed reforms provide alternative frameworks that better capture the complexities of modern corporate structures and decision-making processes compared to the traditional common law identification theory.[57] By considering factors such as corporate culture and the actions of a wider range of corporate actors, these statutory models offer a more nuanced approach to corporate criminal responsibility.

B. France

The French Duty of Vigilance Law (loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre) provides a compelling example of a legal framework that promotes corporate environmental and human rights responsibility. Enacted in 2017, the law requires large French companies to establish and implement a 'vigilance plan' to identify and prevent human rights and environmental risks associated with their own activities and those of their subsidiaries, subcontractors, and suppliers.[58] The law applies to French companies employing at least 5,000 employees in France or 10,000 employees worldwide, including their subsidiaries.[59]

Under the Duty of Vigilance Law, companies must develop a vigilance plan that includes risk mapping, regular assessment procedures, risk mitigation actions, an alert mechanism for reporting risks, and a system for monitoring and evaluating the plan's effectiveness.[60] This comprehensive approach encourages companies to adopt a holistic and preventive approach to environmental management, proactively addressing risks throughout their supply chains.[61]

The law's enforcement mechanisms, including significant fines and the ability for stakeholders to seek judicial remedies, provide strong incentives for compliance.[62] By empowering NGOs and trade unions to hold companies accountable for their environmental impact, the law has already influenced corporate behaviour in France, with many companies developing vigilance plans and engaging more with stakeholders on environmental and human rights issues.[63]

The French Duty of Vigilance Law demonstrates the potential for legislation to drive corporate environmental responsibility and has inspired similar proposals in other countries, such as Germany and Switzerland.[64]

C. EU Corporate Sustainability Due Diligence Directive

The EU CS3D introduces far-reaching due diligence obligations for large companies operating in the EU and their business partners. The directive applies to EU companies and parent companies with over

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[54] ibid 245, 250.
[55] ibid 252-253.
[56] ibid 259.
[57] Samuel Walpole and Matt Corrigan, 'Fighting the System: New Approaches to Addressing Systematic Corporate Misconduct' (2021) 43(4) Sydney Law Review 489.
[58] LOI n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, art 1.
[59] ibid.
[60] ibid.
[61] Almut Schilling-Vacaflor, 'Putting the French Duty of Vigilance Law in Context: Towards Corporate Accountability for Human Rights Violations in the Global South?' (2021) 22 Human Rights Review 109.
[62] ibid.
[63] ibid.
[64] Christelle Coslin et al, 'Duty of Care and Vigilance in Human Rights Matters: From an International Impulse to European Implementations' (2020) 1(1) RED 71.

1,000 employees and a worldwide turnover higher than 450 million euros, as well as non-EU companies meeting the same turnover thresholds in the EU.[65] The CS3D requires these companies to prevent, end, or mitigate their adverse impact on human rights and the environment, including issues such as slavery, child labour, labour exploitation, biodiversity loss, pollution, and destruction of natural heritage.[66] The CS3D also mandates that companies adopt transition plans to align their business models with the Paris Agreement's global warming limit of 1.5°C.[67] Member states are required to establish supervisory authorities to investigate and impose penalties on non-compliant firms, including fines of up to 5% of a company's net worldwide turnover.[68] Companies will be liable for damages caused by breaching their due diligence obligations and will have to fully compensate their victims.[69]

The CS3D's comprehensive approach to due diligence and strict enforcement mechanisms set a new standard for corporate environmental responsibility and justice. By requiring companies to address environmental and human rights risks throughout their value chains and aligning their business models with climate goals, the directive represents a significant step towards fostering sustainable business practices in the EU.

D. United States: The Responsible Corporate Officer Doctrine

In the United States, the 'responsible corporate officer' doctrine has been used to hold corporate officers liable for environmental offences committed by their companies, even if they did not have direct knowledge of or involvement in the offences.[70] The doctrine is based on the principle that corporate officers have a duty to ensure that their companies comply with environmental laws and regulations, and that they can be held liable for failing to fulfil this duty.[71] The responsible corporate officer doctrine has been used in a number of high-profile environmental cases, including the prosecution of the CEO of a chemical company for violations of the Clean Water Act,[72] and the prosecution of the CEO of a coal company for violations of the Mine Safety and Health Act.[73] The doctrine has been praised for its potential to promote greater corporate accountability for environmental harms, by holding individual officers responsible for the actions of their companies.[74]

The US experience with the responsible corporate officer doctrine highlights the importance of extending liability beyond the corporate entity to individuals in positions of power and influence. By holding corporate officers accountable for environmental offences, even in the absence of direct knowledge or involvement, the doctrine creates a strong incentive for proactive environmental management and oversight.

E. European Union: The Environmental Liability Directive

The European Union has established a comprehensive framework for environmental liability through the Environmental Liability Directive (ELD).[75] The ELD establishes a 'polluter pays' principle, requiring companies to bear the costs of preventing and remedying environmental damage caused by

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[65] European Parliament, 'Due diligence: MEPs adopt rules for firms on human rights and environment' (Press Release, 24 April 2024) https://www.europarl.europa.eu/news/en/press-room/20240419IPR20585/due-diligence-meps-adopt-rules-for-firms-on-human-rights-and-environment accessed 15 May 2024.
[66] ibid.
[67] ibid.
[68] ibid.
[69] ibid.
[70] *United States v Dotterweich*, 320 US 277 (1943).
[71] *United States v Park*, 421 US 658 (1975).
[72] *United States v Iverson*, 162 F.3d 1015 (9th Cir. 1998).
[73] *United States v Blankenship*, 19 F.4th 685 (4th Cir. 2021).
[74] See e.g. Sean Lyness, 'Revitalising the State Environmental Responsible Corporate Officer Doctrine' (2023) 64 Boston College Law Review 253.
[75] Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage.

their activities.[76] Under the ELD, companies can be held liable for environmental damage based on the concept of 'strict liability', which does not require proof of fault or negligence.[77] The ELD also establishes a system of 'secondary liability', which allows authorities to hold parent companies liable for the environmental damage caused by their subsidiaries, in certain circumstances.[78] The ELD has been praised for its potential to promote greater corporate environmental responsibility and accountability, by ensuring that companies bear the full costs of their environmental impact.[79] However, the implementation of the ELD has been uneven across EU member states, and there have been calls for further harmonisation and strengthening of the directive.[80]

F. International Soft Law Instruments and Guidelines

In addition to domestic legal frameworks, international soft law instruments and guidelines play a crucial role in shaping corporate environmental responsibility and accountability. These non-binding instruments, such as the United Nations Guiding Principles on Business and Human Rights (UNGPs),[81] the OECD Guidelines for Multinational Enterprises,[82] and the International Finance Corporation (IFC) Performance Standards on Environmental and Social Sustainability,[83] provide important guidance and best practices for companies on managing their environmental and social impacts.

The UNGPs, in particular, have gained widespread endorsement from governments, businesses, and civil society organisations, becoming an important reference point for corporate environmental and human rights due diligence.[84] The UNGPs emphasise the importance of corporate transparency, stakeholder engagement, and access to remedy for victims of corporate human rights abuses and environmental harms.[85] Although not legally binding, these international soft law instruments reflect a growing global consensus on the need for greater corporate accountability and responsibility in the face of environmental challenges.[86]

4. Proposals for UK Law Reform

A. The Need for Reform

As discussed in Section 2, the current legal framework in the UK, dominated by the identification doctrine and the strict liability offences, has its limitations in holding companies accountable for environmental harms. The narrow focus on the actions and knowledge of a small group of senior corporate officials fails to capture the systemic and diffuse nature of many environmental harms, which may be the result of the cumulative actions of multiple corporate actors over time.[87] Moreover, the current framework fails to adequately consider the unique nature of environmental harms, which can have far-reaching and long-lasting consequences for ecosystems, communities, and future

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[76] ibid art 1.
[77] ibid art 3(1)(a).
[78] ibid art 2(6).
[79] See e.g. Elisa Morgera, *Corporate Environmental Accountability in International Law* (2nd edn, Oxford University Press)
[80] Esko Kivisaari et al, 'Environmental Liability Directive Financial Security and the Polluter Pays Principle' (September 2022, AAE Discussion Paper).
[81] United Nations, 'Guiding Principles on Business and Human Rights' (2011).
[82] OECD, 'OECD Guidelines for Multinational Enterprises' (2011).
[83] International Finance Corporation, 'Performance Standards on Environmental and Social Sustainability' (2012).
[84] John G. Ruggie, 'Global Governance and 'New Governance Theory': Lessons from Business and Human Rights' (2014) 20 Global Governance 5.
[85] United Nations, 'Guiding Principles on Business and Human Rights' (2011) Principles 15, 17, 18, 25.
[86] John G. Ruggie, 'Global Governance and 'New Governance Theory': Lessons from Business and Human Rights' (2014) 20 Global Governance 5.
[87] Alice Belcher, 'Imagining How a Company Thinks: What is Corporate Culture?' (2006) 11(2) Deakin L Rev 1, 10.

generations.[88] The inadequacy of the current attribution framework is particularly problematic in the context of the urgent need to address climate change. The latest scientific evidence, including the reports of the Intergovernmental Panel on Climate Change (IPCC), underscores the need for rapid and far-reaching action to reduce greenhouse gas emissions and mitigate the worst impacts of climate change.[89]

Companies, particularly those in carbon-intensive industries such as fossil fuels, energy, and transport, have a crucial role to play in the transition to a low-carbon economy.[90] However, the current framework can be enhanced so that companies prioritise climate considerations in their decision-making and operations.[91]

B. Introducing a 'Corporate Culture' Approach

Drawing on the Australian model discussed in Section 3.A, this article proposes introducing a 'corporate culture' approach to attribute liability for environmental offences. This could involve including a provision within the Companies Act 2006 or even the Environment Act 2021 to allow for the consideration of a company's culture, policies, and practices in determining whether an offence has been committed.

Under this approach, a company could be held liable for an environmental harm if: (a) the harm was committed by an employee, agent, or contractor of the company (an 'associated person') acting within the scope of their authority; (b) the company's corporate culture directed, encouraged, tolerated, or led to the commission of the offence; or (c) the company failed to create and maintain a corporate culture that required compliance with relevant environmental laws and regulations.

The proposed offence would define 'corporate culture' broadly, encompassing the attitudes, policies, rules, practices, and procedures within the company that relate to environmental compliance and risk management. This would allow courts to consider a wide range of factors in determining whether a company's corporate culture contributed to the commission of an environmental harm.

The introduction of a corporate culture approach to attribution law would have significant implications for corporate environmental responsibility in the UK. By focusing on a company's overall attitudes, policies, and practices related to environmental compliance, rather than the actions of individual employees, the proposed offence would create stronger incentives for companies to prioritise environmental considerations throughout their operations.[92] The corporate culture approach recognises that environmental harms are often the result of systemic failures and inadequate corporate oversight, rather than individual wrongdoing.[93] By holding companies accountable for these systemic failures, the proposed offence would encourage companies to develop and implement robust environmental management systems, training programs, and compliance procedures.[94]

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[88] Polly Higgins, *Eradicating Ecocide: Laws and Governance to Prevent the Destruction of Our Planet* (Shepheard-Walwyn 2015) 63; Brent Fisse and John Braithwaite, *Corporations, Crime and Accountability* (Cambridge University Press 1993) 48; On future generations discourse in the context of company law, see Ben Chester Cheong, ''Sowing Seeds of Change: Intergenerational Justice in Corporate Law and Governance' (2024) Journal of Business Law (forthcoming)

[89] Intergovernmental Panel on Climate Change, 'Special Report on Global Warming of 1.5°C' (2019) https://www.ipcc.ch/sr15/ accessed 10 May 2024.

[90] Ben Caldecott, 'Introduction to Special Issue: Stranded Assets and the Environment' (2017) 7(1) Journal of Sustainable Finance & Investment 1.

[91] Lisa Benjamin, 'The Responsibilities of Carbon Major Companies: Are They (and Is the Law) Doing Enough?' (2016) 5(2) Transnational Environmental Law 353; Henry Shue, *Climate Justice: Vulnerability and Protection* (Oxford University Press 2014) 40.

[92] Neil Gunningham, 'Corporate Environmental Responsibility: Law and the Limits of Voluntarism' in Doreen McBarnet, Aurora Voiculescu, and Tom Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (CUP 2009) 476.

[93] Brent Fisse and John Braithwaite, 'The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability' (1988) 11 Syd L Rev 468, 511.

[94] Michelle Welsh and Helen Anderson, 'Directors' Personal Liability for Corporate Fault: An Alternative Model' (2006) 26(2) Adel L Rev 299, 307.

Moreover, the corporate culture approach would allow for a more holistic assessment of a company's environmental impact, considering the cumulative effects of its activities over time and across different locations.[95] This would better capture the complex and diffuse nature of many environmental harms, which may not be attributable to a single event or individual.[96]

The introduction of a corporate culture approach may undoubtedly face challenges. One concern is that the proposed offence could lead to a proliferation of prosecutions against companies for minor or technical breaches of environmental regulations, placing an undue burden on businesses.[97] To address this concern, the proposed offence could incorporate a 'materiality' threshold, requiring that the environmental harm in question be of a sufficient magnitude or severity to warrant prosecution.[98]

C. Adopting a 'Failure to Prevent' Model for Environmental Harms

Inspired by the 'failure to prevent' offences introduced by the Bribery Act 2010 and the ECCTA, the UK should consider adopting a similar model for environmental harms. This would involve creating a new offence of 'failure to prevent environmental harm', which would hold companies liable for environmental damage caused by their subsidiaries, contractors, or suppliers, subject to a 'reasonable procedures' defence, which strict liability offences may not adequately cover

The offence's focus on holding organisations liable for the actions of associated persons, subject to a 'reasonable procedures' defence, could be adapted to attribute responsibility for environmental harms caused by a company's subsidiaries, contractors, and suppliers.[99] By drawing on the principles and mechanisms established by the 'failure to prevent fraud' offence, the proposed reforms to UK attribution law could create a more comprehensive and effective framework for promoting corporate environmental accountability.

The principles and mechanisms established by the ECCTA could serve as a model for reforms. The introduction of the 'failure to prevent fraud' offence under section 199 of ECCTA, which holds organisations liable for the actions of associated persons subject to a 'reasonable procedures' defence,[100] could be adapted to attribute responsibility for environmental harms caused by a company's subsidiaries, contractors, or suppliers.

Drawing on the ECCTA model, a 'failure to prevent environmental harms' offence could be developed, placing a positive obligation on companies to implement effective environmental management systems and due diligence processes throughout their operations and value chains. This would create a strong incentive for companies to proactively identify and mitigate environmental risks, complementing the extended attribution of liability under section 196 of ECCTA and promoting a more comprehensive approach to corporate environmental responsibility.

A company would be liable if it fails to prevent an associated person from causing environmental harm, unless it can demonstrate that it had adequate procedures in place to prevent such harm. The definition of 'associated person' should be broad, encompassing employees, agents, and any other person performing services for or on behalf of the company, including subsidiaries and suppliers.

To establish the offence, prosecutors would need to prove that: (a) the associated person caused environmental harm; (b) the associated person was acting within the scope of their authority or services

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[95] Jonathan Clough, 'Bridging the Theoretical Gap: The Search for a Realist Model of Corporate Criminal Liability' (2007) 18(3-4) Crim Law Forum 267, 280.
[96] Sara Sun Beale and Adam Safwat, 'What Developments in Western Europe Tell Us about American Critiques of Corporate Criminal Liability' (2004) 8 Buff Crim L Rev 89, 142.
[97] Celia Wells, *Corporations and Criminal Responsibility* (2nd edn, Oxford University Press 2001) 153.
[98] Australian Law Reform Commission, 'Corporate Criminal Responsibility' (Discussion Paper No 87, 2019) 248.
[99] Economic Crime and Corporate Transparency Act 2023, s 199(4).
[100] ibid, s 199.

performed for the company; and (c) the company did not have reasonable procedures in place to prevent the environmental harm.

The 'reasonable procedures' defence would incentivise companies to implement robust environmental management systems, conduct thorough due diligence, and provide adequate training and oversight to prevent environmental harms throughout their operations and value chains. Guidance on what constitutes 'reasonable procedures' could be developed by the government, drawing on best practices and international standards.

D. Extending Parent Company Liability for Subsidiaries and Suppliers

In line with the Supreme Court's decisions in *Vedanta v Lungowe*[101] and *Okpabi v Shell*,[102] which recognised the potential for parent company liability for the actions of overseas subsidiaries, the law could be reformed to establish a clear statutory basis for such liability in the context of environmental harms. This could be achieved by amending the Companies Act 2006 to impose a statutory duty of care on parent companies to prevent environmental harms caused by their subsidiaries, both in the UK and abroad. The duty of care should be based on the degree of control, supervision, and involvement of the parent company in the subsidiary's activities, as well as any public commitments made by the parent company regarding environmental standards and practices. Furthermore, the statutory duty of care should be extended to cover environmental harms caused by a company's suppliers, where the company has significant influence or control over the supplier's activities. This would align with the proposed 'failure to prevent' model and the growing recognition of the need for companies to address environmental risks throughout their value chains.

E. Mandatory Environmental Due Diligence and Reporting

Drawing on the French model discussed in Sections 3.B and the CS3D discussed in 3.C, this article proposes introducing mandatory environmental due diligence and reporting requirements for large companies operating in the UK. This would require companies to assess and address environmental risks throughout their operations and value chains, and to report on their due diligence processes and outcomes publicly. The due diligence obligations should cover both a company's own activities and those of its subsidiaries, suppliers, and subcontractors.[103] The proposed duty of vigilance would apply to companies that meet certain size and risk thresholds, such as those with more than 1,000 employees worldwide or those operating in high-risk sectors such as extractive industries, energy, and agriculture.[104] These thresholds would ensure that the duty is targeted at companies with the greatest potential impact on the environment and the resources to implement effective vigilance plans.[105]

The vigilance plan would be required to include: (a) a mapping of environmental risks associated with the company's activities and supply chains; (b) procedures for regularly assessing and monitoring these risks; (c) actions to mitigate identified risks and prevent serious environmental harms; (d) a mechanism for reporting and addressing concerns raised by affected stakeholders; and (e) a system for monitoring and evaluating the effectiveness of the plan.[106]

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[101] *Vedanta Resources plc v Lungowe* [2019] UKSC 20; [2019] 3 All ER 1013.
[102] *Okpabi v Royal Dutch Shell plc* [2021] UKSC 3; [2021] 3 All ER 191.
[103] Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, art 1.
[104] European Coalition for Corporate Justice, 'French Corporate Duty of Vigilance Law: Frequently Asked Questions' (2017) 3.
[105] Elsa Savourey and Stéphane Brabant, 'The French Law on the Duty of Vigilance: Theoretical and Practical Challenges Since Its Adoption' (2021) 6(1) Business and Human Rights Journal 141.
[106] Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, art 1.

Companies would be required to disclose their vigilance plans publicly and to report annually on their implementation and outcomes.[107] Failure to establish or implement an adequate vigilance plan could result in liability for any environmental harms that occur because of this failure.[108] Introducing a duty of vigilance would have significant implications for corporate environmental responsibility in the UK. By requiring companies to proactively identify, assess, and mitigate environmental risks throughout their operations and supply chains, the proposed duty would shift the focus from reactive compliance to preventative action.[109]

The duty of vigilance would encourage companies to adopt a more holistic and integrated approach to environmental risk management, taking into account the full range of their potential impacts and the concerns of affected stakeholders.[110] This could lead to the development of more innovative and effective strategies for preventing and mitigating environmental harms, such as the adoption of circular economy principles, the use of green technologies, and the strengthening of community engagement and consultation processes.[111] Moreover, the public disclosure and reporting requirements of the proposed duty would enhance transparency and accountability, allowing stakeholders to better understand and assess a company's environmental performance and impacts.[112] This could create reputational incentives for companies to improve their environmental practices and to engage more proactively with stakeholders on environmental issues.[113]

The CS3D also provides a model for strengthening the proposed duty of vigilance for large companies in the UK. The CS3D's requirements, such as the adoption of climate transition plans and strict enforcement mechanisms, could be incorporated into the proposed UK reforms to enhance their effectiveness in promoting corporate environmental responsibility. By aligning the UK's legal framework with the progressive standards set by the CS3D, the proposed reforms would ensure that the UK remains at the forefront of efforts to achieve environmental justice and sustainable development. Implementing a duty of vigilance for large companies in the UK would undoubtedly face challenges and potential resistance. One concern is the compliance burden and costs associated with establishing and maintaining a comprehensive vigilance plan, particularly for companies with complex and globally dispersed operations and supply chains.[114]

To mitigate this burden, the proposed duty could be phased in gradually, with longer timelines and additional support provided to smaller companies and those in lower-risk sectors.[115] The government could also provide guidance, tools, and resources to assist companies in developing and implementing their vigilance plans, drawing on best practices and lessons learned from other jurisdictions.[116] Another challenge is ensuring effective enforcement and accountability for non-compliance with the duty of vigilance. The proposed duty could be enforced through a combination of administrative, civil, and criminal penalties, depending on the severity and nature of the violation.[117] The government could also

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[107] ibid.
[108] ibid art 2.
[109] Elsa Savourey and Stéphane Brabant, 'The French Law on the Duty of Vigilance: Theoretical and Practical Challenges Since Its Adoption' (2021) 6(1) Business and Human Rights Journal 141.
[110] Beate Sjåfjell and Benjamin J Richardson (eds), *Company Law and Sustainability: Legal Barriers and Opportunities* (Cambridge University Press 2015) 1.
[111] John Elkington, 'Towards the Sustainable Corporation: Win-Win-Win Business Strategies for Sustainable Development' (1994) 36(2) California Management Review 90, 104.
[112] Charlotte Villiers, *Corporate Reporting and Company Law* (Cambridge University Press 2006) 13.
[113] Tineke Lambooy, *Corporate Social Responsibility: Legal and Semi-Legal Frameworks Supporting CSR* (Kluwer 2010) 242.
[114] Almut Schilling-Vacaflor, 'Putting the French Duty of Vigilance Law in Context: Towards Corporate Accountability for Human Rights Violations in the Global South?' (2020) 22 Human Rights Review 109.
[115] Claire Bright, 'Creating a Legislative Level-Playing Field in Business and Human Rights at the European Level: Is the French Duty of Vigilance Law the Way Forward?' (EUI Working Papers MWP 2020/01).
[116] European Commission, 'Study on Due Diligence Requirements Through the Supply Chain' (2020) 17.
[117] Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, art 3.

establish a dedicated enforcement agency or task force to monitor compliance and investigate potential breaches.[118] To further strengthen accountability, the proposed duty could include provisions for civil liability, allowing affected stakeholders to bring claims against companies for environmental harms resulting from inadequate vigilance plans.[119] This could create additional incentives for companies to take their environmental responsibilities seriously and to engage meaningfully with stakeholders in the development and implementation of their plans.

F. Subjecting Employees to Criminal Liability

While the reforms proposed in this article are positioned as corporate liability, individuals including lower-level employees, such as plant managers, safety officers, and compliance personnel should also face personal liability more readily for environmental harms. This would include: (a) employees and agents with specific environmental compliance responsibilities; (b) employees and agents with decision-making authority over activities that pose significant environmental risks; and (c) employees and agents whose actions or omissions contribute materially to the commission of an environmental harm.[120]

Extending liability to encompass a wider range of corporate actors would have significant implications for corporate environmental responsibility in the UK. By subjecting employees and agents at different levels of the organisation to criminal liability, the proposed amendments would create better accountability.[121] This would create stronger incentives for employees to ensure that environmental considerations are integrated into decision-making and risk management processes throughout the organisation, not just at the senior management level.[122] It would also encourage employees to seek adequate training and resources in relation to environmental issues within the company.[123] By holding employees accountable, this would be an effective means of achieving environmental justice and deterring future harms.[124]

Extending criminal liability to employees raises concerns about fairness and proportionality. There is a risk that an employee could be held liable for the actions of other employees acting outside the scope of their authority, or for environmental harms that were not reasonably foreseeable.[125] To address these concerns, the proposed amendments could incorporate a 'reasonable steps' defence.[126] This defence would allow employees to avoid liability if they can demonstrate that they had taken all reasonable steps to prevent the commission of the environmental harm in question.[127] The proposed amendments could also include a 'proportionality' requirement, ensuring that the imposition of liability is commensurate with the level of culpability and harm involved in each case.[128] This could involve the consideration of factors such as the seniority and authority of the employees involved, the foreseeability and severity of the harm caused, and the company's overall record of environmental compliance.[129] By

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[118] Elsa Savourey and Stéphane Brabant, 'The French Law on the Duty of Vigilance: Theoretical and Practical Challenges Since its Adoption' (2021) 6(1) Business and Human Rights Journal 141, 154.
[119] Sandra Cossart, Jérôme Chaplier, and Tiphaine Beau De Lomenie, 'The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All' (2017) 2(2) Business and Human Rights Journal 317, 323.
[120] Adapted from Corporate Manslaughter and Corporate Homicide Act 2007, s 1(3).
[121] James Gobert and Maurice Punch, *Rethinking Corporate Crime* (Butterworths 2003) 83.
[122] Kelvin Hiu and Ernest Lim, 'Optimal Deterrence, the Illegality Defence, and Corporate Attribution' (2020) 21 European Business Organization Law Review 641.
[123] Michael Faure, 'Effective, Proportional and Dissuasive Penalties in the Implementation of the Environmental Crime and Ship-Source Pollution Directives: Questions and Challenges' (2010) 19 European Energy and Environmental Law Review 256, 265; Michelle Welsh, 'Civil Penalties and Responsive Regulation: The Gap Between Theory and Practice' (2009) 33(3) Melbourne University Law Review 908, 923.
[124] Brent Fisse and John Braithwaite, 'The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability' (1988) 11 Syd L Rev 468, 511.
[125] Celia Wells, 'Corporate Criminal Liability: A Ten Year Review' (2014) Crim LR 849, 860.
[126] Bribery Act 2010, s 7(2).
[127] Ministry of Justice, 'The Bribery Act 2010: Guidance' (2011) 15.
[128] Law Commission, 'Criminal Liability in Regulatory Contexts' (Consultation Paper No 195, 2010) para 5.88.
[129] ibid para 5.89.

incorporating these safeguards, the proposed amendments would strike a balance between enhancing corporate accountability for environmental harms and ensuring that employees are not subject to disproportionate or unfair liability.

5. Potential Challenges and Responses

The proposed reforms to enhance corporate environmental responsibility in the UK may face several challenges, including increased compliance costs, unintended consequences, and interaction with other areas of law. This section addresses these potential challenges and proposes responses to mitigate their impact.

A. Compliance Costs and Differentiated Requirements

One potential challenge to the proposed reforms is the concern that they would impose significant compliance costs on companies, particularly in the short term. Developing and implementing comprehensive corporate culture programs, establishing vigilance plans, and subjecting employees to criminal liability would require substantial investments of time, resources, and expertise.[130] These costs may be particularly burdensome for small and medium-sized enterprises (SMEs), which may lack the economies of scale and in-house expertise to easily absorb the additional compliance requirements.[131]

To address these concerns, the proposed reforms could incorporate differentiated requirements based on company size and resources. For example, the duty of vigilance could be phased in over a longer timeframe for smaller companies or apply only to companies above a certain size threshold.[132] Similarly, the requirements for corporate culture programs and subjecting employees to criminal liability could be tailored to the specific circumstances and capacities of different types of companies. The government could also provide guidance, tools, and resources to assist companies in developing and implementing the required programs and plans, drawing on best practices and lessons learned from other jurisdictions.[133]

Furthermore, it is important to balance the short-term compliance costs against the potential long-term benefits of the proposed reforms. By creating a more robust framework for companies to prioritise environmental considerations and adopt more sustainable practices, the reforms could lead to significant cost savings and competitive advantages over time, such as through reduced energy and resource consumption, improved risk management, and enhanced reputation and customer loyalty.[134]

B. Preventing Unintended Consequences and Evasion

Another potential challenge is the risk that companies may seek to evade liability under the proposed reforms through creative corporate structuring or by outsourcing environmentally harmful activities to third parties.[135] For example, companies could attempt to distance themselves from the actions of subsidiaries or suppliers, or could relocate high-risk operations to jurisdictions with weaker environmental regulations.[136] To mitigate these risks, the proposed reforms would need to be carefully drafted to ensure that liability extends to the actions of a company's subsidiaries, contractors, and

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[130] Michael Nietsch, 'Corporate illegal conduct and directors' liability: an approach to personal accountability for violations of corporate legal compliance' (2018) 18(1) Journal of Corporate Law Studies 151.
[131] European Commission, 'Study on due diligence requirements through the supply chain: Final report' (2020) 318; Paul Watchman, 'Banks, Business and Human Rights' (2006) 2 Journal of International Banking and Financial Law 46, 50.
[132] Robert McCorquodale and Justine Nolan, 'The Effectiveness of Human Rights Due Diligence for Preventing Business Human Rights Abuses' (2021) 68 Netherlands International Law Review 455.
[133] European Commission, 'Study on due diligence requirements through the supply chain: Final report' (2020) 318.
[134] Paul Watchman, 'Banks, Business and Human Rights' (2006) 2 JIBLR 46, 50.
[135] Arik Levinson, 'Are Developed Countries Outsourcing Pollution?' (2023) 37(3) Journal of Economic Perspectives 87.
[136] Jennifer A Zerk, 'Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas' (2010) Corporate Social Responsibility Initiative Working Paper No 59, 22.

suppliers, regardless of their location or corporate structure. The French duty of vigilance law, for example, applies to a company's subsidiaries and subcontractors both within France and abroad.[137]

The reforms could also include anti-evasion provisions, such as requirements for companies to disclose their corporate structures and supply chains, and penalties for companies that engage in misleading or fraudulent practices to avoid liability.[138] Moreover, the proposed reforms could incorporate general safeguards and anti-avoidance measures such as provisions for regular review and adjustment of the requirements based on implementation experience and feedback from stakeholders.[139] This would allow for the identification and correction of any loopholes or unintended effects that may emerge over time. The reforms could also include mechanisms for stakeholder engagement and consultation, such as requirements for companies to involve workers, communities, and civil society organisations in the development and implementation of their environmental management systems and vigilance plans.[140]

C. Interaction with Other Areas of Law

The proposed reforms would intersect with and complement existing systems of environmental regulation and enforcement in the UK. To ensure effective coordination and integration, the requirements and standards of the reforms should be aligned with those of existing environmental laws, and clear protocols for cooperation and information-sharing between different regulatory and enforcement bodies should be established.[141]

The proposed reforms would also interact with and potentially reshape systems of corporate governance and shareholder engagement in the UK. The integration of environmental concerns into corporate decision-making could create new opportunities for shareholders to engage with companies on environmental issues and influence corporate behaviour.[142] However, it may also create tensions between shareholders and directors, particularly if some shareholders resist the incorporation of environmental considerations into corporate decision-making.[143] To navigate these challenges, the proposed reforms should be accompanied by efforts to build shareholder awareness and capacity on environmental issues and to facilitate constructive dialogue and engagement between shareholders and directors.[144]

Furthermore, the proposed reforms would need to be designed and implemented in a way that is consistent with the UK's obligations under international trade and investment agreements.[145] To minimise the risk of trade or investment disputes, the proposed reforms should be developed in consultation with trade and investment policy experts, framed in terms of their legitimate public policy objectives, and applied even-handedly to all companies operating in the UK.[146] The reforms should also

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[137] Elsa Savourey and Stéphane Brabant, 'The French Law on the Duty of Vigilance: Theoretical and Practical Challenges Since its Adoption' (2021) 6(1) Business and Human Rights Journal 141, 144.
[138] Rachel Chambers and Anil Yilmaz-Vastardis, 'The New EU Rules on Non-Financial Reporting: Potential Impacts on Access to Remedy?' (2016) 10(1) Human Rights and International Legal Discourse 18.
[139] Anne Lafarre and Bas Rombouts, 'Towards Mandatory Human Rights Due Diligence: Assessing Its Impact on Fundamental Labour Standards in Global Value Chains' (2022) 13(4) European Journal of Risk Regulation 567.
[140] Karin Buhmann, 'Public Regulators and CSR: The 'Social Licence to Operate' in Recent United Nations Instruments on Business and Human Rights and the Juridification of CSR' (2016) 136 Journal of Business Ethics 699, 707.
[141] Neil Gunningham, 'Enforcement and Compliance Strategies' in Robert Baldwin, Martin Cave and Martin Lodge (eds), *The Oxford Handbook of Regulation* (Oxford University Press 2010) 120.
[142] Cynthia E Clark and Elise Perrault Crawford, 'Influencing Climate Change Policy: The Effect of Shareholder Pressure and Firm Environmental Performance' (2011) 51(1) Business and Society 148; Benjamin J Richardson, 'Enlisting Institutional Investors in Environmental Regulation: Some Comparative and Theoretical Perspectives' (2002) 28(2) North Carolina Journal of International Law 247.
[143] David Millon, 'Enlightened Shareholder Value, Social Responsibility, and the Redefinition of Corporate Purpose Without Law' in PM Vasudev and Susan Watson (eds), *Corporate Governance After the Financial Crisis* (Edward Elgar 2012) 68.
[144] Jennifer G Hill, 'Images of the Shareholder - Shareholder Power and Shareholder Powerlessness' in Jennifer G Hill and Randall S Thomas (eds), *Research Handbook on Shareholder Power* (Edward Elgar 2015) 53.
[145] Jorge E Viñuales, *Foreign Investment and the Environment in International Law* (Cambridge University Press 2012).
[146] Andrew D Mitchell and James Munro, 'No Retreat: An Emerging Principle of Non-Regression from Environmental Protections in International Investment Law' (2019) 50 Georgetown Journal of International Law 625, 673.

be accompanied by efforts to promote international cooperation and harmonisation on corporate environmental responsibility standards to create a more level playing field for companies operating across borders.[147]

D. Implications of the CS3D for UK Companies Operating in the EU

The introduction of the CS3D in the EU presents challenges for UK companies with operations or business relationships in the EU. These companies will need to comply with both the proposed UK reforms to attribution law and the CS3D's due diligence obligations, potentially leading to increased compliance costs and legal complexities.[148] To address these challenges, UK policymakers should consider strategies for harmonising and coordinating the proposed UK reforms with the CS3D to minimise conflicts and promote consistency. This could involve aligning the scope and requirements of the UK's duty of vigilance with those of the CS3D and establishing mechanisms for cooperation and information-sharing between UK and EU supervisory authorities.[149] By proactively addressing the implications of the CS3D, the UK can ensure that its legal framework remains effective and compatible with international best practices in promoting corporate environmental responsibility and environmental justice.

6. Conclusion

The current UK approach to corporate and personal liability for environmental harms, characterised by the limitations of the identification doctrine and the inadequacies of strict liability offences, can be improved to make it easier to hold companies and individual employees accountable for their environmental impacts. The recent reforms introduced by the ECCTA, while not directly addressing environmental harms, provide a foundation for further legal developments to enhance corporate environmental responsibility.[150] Baroness Lola Young's recent introduction of a Private Member's Bill in the House of Lords, the Commercial Organisations and Public Authorities Duty (Human Rights and Environment) Bill, is just one of the many ways in which we could think about how to enhance accountability for corporate environmental harms, but enforcement must be consistent and regular.[151]

Drawing on comparative examples from other jurisdictions, such as the 'corporate culture' approach in Australia, the Duty of Vigilance Law in France, and the proposed EU CS3D, the UK can develop a more comprehensive and effective legal framework for corporate environmental liability. The proposed reforms, including the adoption of a 'failure to prevent' model for environmental harms, the extension of parent company liability for subsidiaries and suppliers, the incorporation of a 'corporate culture' approach, the introduction of mandatory environmental due diligence and reporting, and personal liability for employees, would address the limitations of the current UK approach and promote greater corporate accountability for environmental harms.[152]

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[147] Marie-Claire Cordonier Segger, Markus W Gehring and Andrew Paul Newcombe (eds), *Sustainable Development in World Investment Law* (Kluwer Law International 2011) 183.

[148] Lois Elshof, 'Corporate Sustainability Due Diligence and EU Competition Law' (2024) Journal of European Competition Law & Practice 1, 2-3.

[149] Liebrich M Hiemstra, 'Energy trading and the exchange of information between supervisors: effectiveness of fragmented supervision and information sharing' (2021) 39(2) Journal of Energy & Natural Resources Law 159.

[150] Alice Belcher, 'Imagining How a Company Thinks: What is Corporate Culture?' (2006) 11(2) Deakin L Rev 1, 10.

[151] Baroness Lola Young, 'Commercial Organisations and Public Authorities Duty (Human Rights and Environment) Bill' (UK Parliament, 2024).

[152] Elsa Savourey and Stéphane Brabant, 'The French Law on the Duty of Vigilance: Theoretical and Practical Challenges Since its Adoption' (2021) 6 BHRJ 141; European Parliament, 'Due diligence: MEPs adopt rules for firms on human rights and environment' (Press Release, 24 April 2024) https://www.europarl.europa.eu/news/en/press-room/20240419IPR20585/due-diligence-meps-adopt-rules-for-firms-on-human-rights-and-environment accessed 15 May 2024.

These reforms aim to create stronger regulatory framework for companies to prioritise environmental considerations in their decision-making and to adopt more sustainable and responsible practices. They also seek to provide more effective legal tools for holding companies and employees (not just senior managers) accountable for their environmental impacts and promoting environmental justice.[153]

As major contributors to greenhouse gas emissions and other environmental harms, companies have a crucial role to play in the transition to a more sustainable and low-carbon economy.[154] By ensuring that companies bear the full costs of their environmental impacts and are held responsible for their contributions to climate change, these reforms can help to drive the transformative changes needed to mitigate the worst impacts of the climate crisis and to protect the rights of affected communities.[155] Moreover, by establishing clearer legal standards and expectations for corporate environmental responsibility, these reforms can help to level the playing field for companies and to prevent 'free-riding' by those who seek to gain a competitive advantage through environmental degradation.[156]

Company law has the potential to shape corporate behaviour and decision-making in ways that prioritise environmental considerations and the public good.[157] However, realising this potential will require a fundamental rethinking of the purpose and principles of company law, balancing traditional notions of shareholder primacy and profit maximisation with broader stakeholder interests and the imperative of environmental sustainability.[158] The reforms proposed in this article represent a starting point for this process of transformation.[159] Company law can play a vital role in this effort, by enhancing the legal frameworks needed to drive corporate action on climate change and environmental sustainability.[160]

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[153] Henry Shue, *Climate Justice: Vulnerability and Protection* (OUP 2014) 40.
[154] Oliver Hailes and Jorge E Viñuales, 'The energy transition at a critical juncture' (2023) 26(4) Journal of International Economic Law 627; Beate Sjåfjell and Christopher M Bruner (eds), *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability* (Cambridge University Press 2019) 3.
[155] Henry Shue, *Climate Justice: Vulnerability and Protection* (Oxford University Press 2014) 167.
[156] Humberto Llavador, John E Roemer and Joaquim Silvestre, *Sustainability for a Warming Planet* (Harvard University Press 2015) 55.
[157] Beate Sjåfjell, 'The Courts as Environmental Champions: The Norwegian Hempel Cases' (2016) 13(5) European Company Law 199; Jorge E Viñuales, *The Organisation of the Anthropocene* (Brill 2018).
[158] Andrew Keay, 'Shareholder Primacy in Corporate Law: Can it Survive? Should it Survive?' (2010) 7(3) European Company and Financial Law Review 369, 405.
[159] Simon Nicholson and Paul Wapner, *Global Environmental Politics: From Person to Planet* (Routledge 2015) 284.
[160] Jorge E Viñuales, *The Organisation of the Anthropocene* (Brill 2018); Ben Chester Cheong, 'A Rethink of Limited Liability to Promote the Corporate Purpose of Sustainable Value Creation' (2023) 34(6) International Company and Commercial Law Review 351.