Modern slavery and directors' disqualification: a convergence of opportunity and challenge

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Abstract

Prevention and elimination of modern slavery is a priority of this era, eliciting responses at an international level and in domestic laws. The duty of organisations to ensure transparency in their supply chains is the strongest representation of corporate responsibility in this field. Less attention has been given to the current/potential role of insolvency mechanisms, in relation to companies' commission of modern slavery offences, and in relation to their failure to comply with their supply-chain obligations. This paper engages with this novel question by examining the proposition to incorporate a directors' disqualification sanction into the United Kingdom framework governing companies' modern slavery supply chain obligations. This represents an opportunity, insofar as the disqualification regime is ostensibly well-placed to address weaknesses in companies' compliance with their responsibilities. However, it represents a challenge in that adoption and implementation would have to navigate drawbacks such as the limitations of existing grounds for disqualification and potential weaknesses in the design and enforcement of a bespoke sanction. Moreover, it should confront uncertainty as to whether disqualification is an effective tool for preventing misconduct by the professional/executive class of managers at the helm of large companies. Increased emphasis on regulating the human rights obligations of companies makes it imperative that this question is addressed.

A. Introduction

In the few years since the introduction of the United Kingdom's (UK) Modern Slavery Act 2015 ('MSA'), it has attracted a number of laudatory adjectives: 'groundbreaking',[1] 'innovative',[2] 'international benchmark,[3] 'landmark',[4] 'world-leading'.[5] Constraints of space inhibit a full account of the background to enactment of the MSA,[6] but it is appropriate to note that it

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[1] *Independent review of the Modern Slavery Act: final report* (Crown, 2019), 14; C. Syder, 'One piece of the jigsaw', (2016) 166 NLJ 9.

[2] *Review*, ibid 30.

[3] C. Haughey, *The Modern Slavery Act Review* (2016), 3.

[4] Home Office, 'Historic law to end Modern Slavery passed' 26/03/2015; *Transparency in Supply Chains Consultation* (Crown, 2019), 2.

[5] *Review* (n.1), 7; *UK Government Response to the Independent Review of the Modern Slavery Act 2015*, (Crown, 2019) 2.

[6] G. Craig, 'The UK's Modern Slavery Legislation: An Early Assessment of Progress' (2017) 5 Social Inclusion 16; R. Broad and N. Turnbull, 'From Human Trafficking to Modern Slavery: The Development of Anti-Trafficking Policy in the UK' (2019) 25 Eur.J.Crim.Pol.Res. 119.

symbolizes the UK's response to an issue of growing concern, nationally and internationally.[7] It also reflects the UK's compliance with key international instruments on human trafficking, namely the United Nations Protocol,[8] the Council of Europe Convention,[9] and the European Directive on preventing and combating trafficking in human beings.[10]

As regards corporate entities and their management, these instruments do not only dictate criminal liability for commission of offences.[11] They also provide an indication of the types of additional sanctions that could be visited on corporate offenders. Certain sanctions centre on the corporate conduct/structures that give rise to the commission of the offence, for example by requiring that legal persons be held liable for any 'lack of supervision or control' that results in the commission of an offence.[12] However, the Protocol, Convention and Directive also encourage adoption of other sanctions, such as closure of establishments used for committing offences, and disqualifying offenders from holding directorships of corporate bodies.[13] The Directive nominates the strictest form of additional corporate sanction, 'judicial winding-up'.[14] A European Commission report assessing Member States' compliance with the Directive noted that the UK was among the few countries that had not introduced any of the optional sanctions provided by the Directive.[15] During Parliamentary debates on the Modern Slavery Bill, a proposal was tabled to adopt a clause based on the Directive, imposing criminal liability on persons whose lack of supervision or control had made possible the commission of a modern slavery offence; however the Government favoured driving 'a change in behaviour' over this 'potentially very broad criminal liability'.[16]

Four years after enactment of the MSA, an Independent Review ('Review') conducted at the behest of the UK Government raised the prospect of attaching a disqualification remedy to the transparency in supply chains obligations introduced by s.54 MSA. The Review recommended that 'failure to fulfil modern slavery statement reporting requirements or to

[7] Home Office, *Modern slavery: how the UK is leading the fight* (Crown, 2014), 2; European Commission, *The EU Strategy towards the Eradication of Trafficking in Human Beings 2012-2016*, 2; International Labour Office, *Global estimates of modern slavery: Forced labour and forced marriage* (2017), 5.

[8] Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, 15 November 2000 – ('Protocol')

[9] Council of Europe Convention on Action against Trafficking in Human Beings, CETS 197, 16 May 2005 – ('COE').

[10] Directive (EC) 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA [2011] OJ L 101, 15.4.2011.

[11] COE (n.9), Art 22(1); Directive, ibid Article 5.

[12] COE, ibid Article 22(2); Directive, ibid Article 5(2).

[13] Protocol (n.8), Article 31(2)(d)(ii); Directive, ibid Article 6(b).

[14] Directive, ibid Article 6(d).

[15] Report from the Commission to the European Parliament and the Council assessing the extent to which Member States have taken the necessary measures in order to comply with Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims in accordance with Article 23 (1), (COM(2016) 722, 2.12.2016), 2.1.5.

[16] House of Commons, *Consideration of [Modern Slavery] Bill as at 4 November 2014*, NC15 p.747; House of Commons Hansard Debates 4 November 2014, Column 691 (Karen Bradley).

act when instances of slavery are found should be an offence under the Company Directors Disqualification Act 1986' ('CDDA').[17] Two main grounds were given for this recommendation: it would 'embed modern slavery reporting into business culture',[18] and disqualification would strengthen the Government's response to non-compliance with s.54 MSA, as part of a 'gradual approach' including warnings and fines.[19]

Three distinctive points may be derived from the Review's recommendation. **(i)** Although it states that 'Government should make the necessary legislative provisions' to buttress sanctions for non-compliance,[20] it does not explicitly propose the introduction of provisions that create an entirely new ground for disqualification alongside existing grounds in the CDDA 1986 (ss.2-10). **(ii)** Nor does it indicate that the disqualification sanction was proposed with a view to conforming with the provisions of the Protocol or the Directive. Indeed, **(iii)** the Review apparently envisages a more burdensome form of disqualification than that laid down in the Protocol and Directive, for companies that fall within the scope of the MSA Part 6 reporting obligations. The Protocol recommends disqualification of persons *convicted of* trafficking offences,[21] and the Directive includes disqualification among the additional legal sanctions for offences committed by corporate entities.[22] Thus under these instruments, disqualification should flow directly from an individual or a company's commission of a trafficking-related offence. Despite the absence of equivalent statutory provisions in UK law, this consequence is illustrated in *R v Mohammed Rafiq*,[23] decided prior to the MSA coming into force. R, majority shareholder and managing director of a bed manufacturer, was disqualified in addition to his criminal conviction for conspiring to arrange/facilitate trafficking for exploitation. However, the Review goes further than this, proposing that disqualification should apply to breaches of supply chain obligations ('s.54-related failings'), without being contingent on the company/individual concerned having committed modern slavery offences. Thus, an individual's exposure to disqualification would not be attached to/triggered by corporate or personal criminal liability for committing a modern slavery offence.

Any expectations of imminent fruition of this reform were soon extinguished by the Government's response to the Review. The recommendation concerning disqualification was rejected because it 'might lead to an 'overly compliance driven approach' that hampered companies' unequivocal disclosure of modern slavery risks or occurrences.[24] Instead, the Government favoured an approach based on increased transparency around reporting, and

[17] *Review* (n.1), para [18], p.24, 42
[18] Ibid.
[19] Ibid, p.24, 43, 46.
[20] Ibid.
[21] Protocol (n.8), Article 31(2)(d)(ii).
[22] Directive (n.10), 6(b).
[23] [2016] EWCA Crim 1368.
[24] *UK Government Response to the Independent Review of the Modern Slavery Act 2015* (Crown, 2019), [34], [36].

gradual introduction of sanctions in line with 'growing business awareness and the Government's continuing efforts to encourage this'.[25] The response concluded by announcing a new consultation on transparency in supply chains, further to inform the Government's understanding of the impact and feasibility of many of the recommendations made in the Review report.[26] The consultation did not mention disqualification, but gathered views on various proposed reforms to the MSA reporting requirements, many of which will be implemented through legislative changes.[27]

This build-up of developments illuminates the following threads. Firstly, international instruments have promoted an association between criminal convictions for trafficking offences, and insolvency mechanisms such as winding-up and disqualification. Secondly, although these mechanisms have not been incorporated into the MSA, the notion of disqualification has recently been mooted in relation to the weakness of a specific provision of the MSA (s.54), concerning obligations that do not involve criminal liability, presenting the prospect of a novel and more onerous form of liability. Thirdly, insofar as the Review has merely proposed that a disqualification sanction could improve s.54 compliance culture and enforcement, and the Government has affirmed that disqualification is incompatible with its preferred course of action, the discussion on this point has remained in shallow waters. It is important that this question is not simply left open, given that this is an area in which the UK is conscious of setting standards that other jurisdictions may aspire to.[28] Indeed, the MSA has been influential in the development of modern slavery legislation in Australia.[29] Moreover, increased interest in establishing a legislative framework to govern corporate responsibility for human rights and environmental issues[30] suggests that consideration of the suitability of sanctions such as disqualification is likely to gain ground in the future.

This paper aims to demonstrate that this reform is workable in principle, although its potential success is two-dimensional. One dimension is the form in which the sanction would be introduced: as explored further below, the expectations underlying a disqualification sanction in this context would be best captured by a tailor-made mechanism. The other dimension is more ambiguous: the difficulty of reconciling the perception that shaming sanctions and disqualification are effective controls on the conduct of professional directors, with empirical evidence to the contrary. Despite the indeterminacy of the second dimension, the paper concludes in favour of adopting the sanction. The paper is accordingly organised as follows.

[25] Ibid [34], [36].
[26] Ibid, [88].
[27] Home Office, *Transparency in Supply Chains Consultation: Government Response* (Crown, 2020).
[28] Haughey (n.3), 3.
[29] Parliament of the Commonwealth of Australia, *Hidden in Plain Sight: an Inquiry into Establishing a Modern Slavery Act in Australia* (Commonwealth of Australia), [1.10]-[1.30].
[30] Investor Alliance for Human Rights, *The Investor Case for Mandatory Human Rights Due Diligence*; I. Petropaoli and others, *A UK Failure to Prevent Mechanism for Corporate Human Rights Harms* (BIICL, 2020); Joint Committee on Human Rights, *Human Rights and Business 2017: Promoting responsibility and ensuring accountability*, Sixth Report of Session 2016-2017, 5 April 2017, [186]-[194].

It begins by outlining the background of s.54 (Part B). It evaluates the compatibility between the disqualification regime and the aims of s.54, scrutinizing the extent to which existing grounds of disqualification can be invoked in response to failures to honour modern slavery reporting obligations (Part C). Based on these findings, Part D recommends the introduction of a tailor-made sanction for s.54-related defaults, using the experience of the disqualification sanction for breaches of competition law to outline the nature of the institutional architecture and regulatory interventions that would be required to make a s.54 disqualification regime workable. Part E considers the extent to which the recommended sanction would generate the right changes in directors' outlook and behaviour, in view of the divergence between assumptions regarding the impact disqualification can have on professional/executive directors and the arguments/empirical evidence to the contrary. It concludes that the divergence is not sufficiently dissuasive as to justify abandoning the recommendation in favour of the new sanction. This recommendation is accordingly reiterated in the concluding section (Part F).

B. Background to concerns regarding section 54

In similar vein to the MSA, s.54 is described as 'ground-breaking',[31]'landmark'.[32] It imposes an obligation on commercial organisations to prepare a slavery and human trafficking statement every financial year, stating what steps they have taken to ensure that slavery and human trafficking is not taking place in any of their supply chains, and in any part of their own business. This requirement applies to organisations that supply goods and services, and have a minimum total turnover of £36 million.[33] The provision designates six fields of information that 'may' be incorporated in a statement,[34] but avoids dictating what statements should contain or any steps that organisations should take.[35] The provision stipulates how statements should be approved (e.g. by a company's board of directors),[36] and publicised.[37] The Secretary of State is empowered to issue guidance about duties imposed by s.54,[38] and to bring civil proceedings against organisations that fail to comply with their disclosure duties, for an injunction or specific performance requiring them to comply with their statutory duty.[39]

Section 54 was expected to have far-reaching effects in shaping business conduct. It was envisaged that it would yield 'a cascading effect on [small and medium enterprises] that fall below the £36 million threshold, to encourage them to ensure that their supply chains are

[31] *Review* (n.1), 39.
[32] *Government response* (n.24), [17]; Home Office, *Transparency in Supply Chains Consultation* (Crown, 2019), 2, 3.
[33] MSA s.54; The Modern Slavery Act 2015 (Transparency in Supply Chains) Regulations 2015, S.I. 2015/1833.
[34] s.54(5).
[35] MSA Explanatory Notes, [250], [254].
[36] s.54(6).
[37] s.54(7)-(8).
[38] s.54(9).
[39] s.54(11).

also slavery-free'.[40] As counterparties to contracts or invitations to tender requiring them to comply with a larger company's anti-slavery strategy, smaller enterprises could provide warranties of compliance with the MSA, or allow audits of their records and facilities.[41] Emphasis has also been placed on financial/reputational risks that an organisation may incur from non-compliance with the MSA, or providing statements that no steps have been taken to ensure that modern slavery is absent from its supply chains/business.[42] Disclosure obligations should furthermore prompt larger companies to consider whether their own performance indicators or demands on suppliers/subcontractors heighten slavery risks, e.g. constrained time scales for orders, insufficient or late payments, inequitable prices; and accordingly strive to foster more beneficial relationships.[43] Although the provision was not designed to encompass public authorities, it strengthened arguments for the Government to use public procurement powers to tackle modern slavery risks, and adopt s.54 reporting requirements for public sector entities.[44]

The apparent weaknesses of s.54 have been extensively highlighted in policy and academic circles. For example, it is unclear how far the 'supply chain' accounted for should extend.[45] An investigation into companies' engagement with modern slavery responsibilities found that while companies generally assess the risks in their supply chains as being present in tier 2 and beyond, only 42 per cent took steps to communicate their expectations to this constituency of suppliers.[46] Since the MSA was not prescriptive about the contents of statements, the disclosure requirement did not preclude organisations from stating that they have taken no steps at all,[47] or from being selective in disclosing the steps they had taken.[48] There is no

[40] Chartered Institute of Procurement and Supply, 'UK SMEs overwhelmingly unaware of the Modern Slavery Act's impact on them, CIPS research finds' 29/03/2016.
[41] S. Edwards, 'Transparency and the Modern Slavery Act 2015' (2017) 28 Cons.Law 21, 22; B. Hartley, Slavery a modern issue' 2016 Cons.Law 17, 19.
[42] *Transparency in Supply Chains etc: a practical guide* (Home Office, 2018), [2.8]; J. Wood, 'Soft law, hard sanctions' 2016 I.H.L 55; K. Nihill, 'Fighting Modern Slavery' 2017 C.L.&J 690; Chartered Institute of Building, *The Dark Side of Construction* (2015), 12; S. Grene, 'Exploited workers pose risk to investors' Financial Times (08/05/16).
[43] *Transparency in Supply Chains practical guide*, ibid p.30, 36; Hartley, (n.41); Syder, (n.1).
[44] Joint Committee on Human Rights, *Human Rights and Business 2017: Promoting responsibility and ensuring accountability*, Sixth Report of Session 2016-2017, 5 April 2017, [105]; Independent Anti-Slavery Commissioner, 'Government must use the power of public procurement to tackle slavery', 18/06/2018; *Review* (n.1), pp.15, 43-44, 47. Requirements to be extended to public sector entities following consultation: Home Office, *Transparency in Supply Chains Consultation: Government Response* (Crown, 2020), 16-18.
[45] T. Iqbal, 'The efficacy of the disclosure requirement under s.54 of the Modern Slavery Act' 2018 Comp.Law. 3, 7; *Review*, ibid p.41; S. Wen, 'The Cogs and Wheels of Reflexive Law – Business Disclosure Under the Modern Slavery Act' (2016) 43 J.L.&Soc'y 327, 352.
[46] Ethical Trading Initiative, Hult Business School, *Corporate Leadership on Modern Slavery* (2016), 31.
[47] C. Barclay and S. Foster, 'The Modern Slavery Act 2015: good intentions and sending out the right message' 2017 Cov.L.J 1, 8; *Review* (n.1), p.41; House of Commons Environmental Audit Committee, *Fixing Fashion: Consumption and Sustainability* (Sixteenth Report of Session 2017-19, HC 1952), [60].
[48] Iqbal (n.45), 6

method of assuring the accuracy of information provided in statements,[49] and no meaningful penalty for failure to comply with s.54.[50]

In this vein, the Review noted the businesses and civil society consensus that the weaknesses of s.54 were 'core reasons for poor quality statements and the estimated lack of compliance from over a third of eligible firms'.[51] This is reflected in the body of information that had built up around compliance rates by the end of 2018, including Home Office findings that 60 per cent of companies subject to s.54 had published statements, some of which were poor in quality or failed to meet basic legal requirements.[52] A Parliamentary report noted findings that statements gave no information on their risk assessment processes, did not identify key risks by country/supply chain/business area, and were suspiciously uniform in their wording.[53] A report by the Independent Anti-Slavery Commissioner and University of Nottingham on compliance levels of companies in high risk sectors such as agriculture, food processing/packaging, mining and hotels, found that 50-59 per cent had produced statements.[54] With respect to the agricultural sector, only 38 per cent of the published statements satisfied the requirements of the law, and the quality of the contents was low.[55] Ergon Associates also reported its analysis of developments in the position of the 150 companies whose statements it had examined in 2017, across sectors including retail, construction, banking/financial service and transportation. It found that 54 per cent of these companies had produced updated statements between 2017-2018.[56] While 58 per cent of the new statements reflected substantial changes, 30 per cent made minimal changes, and 12 per cent of the statements were identical to those produced the previous year.[57] Hence, revelation of recent initiatives, or of the outcomes of previous risk assessments, was extremely limited.[58] This is reinforced by the finding that the updated statements did not show any enhancement or diminishment in their contents or quality, contrary to official guidance that organisations 'will need to build on what they are doing year on year', to satisfy a range of readers that progress has been made in addressing risks/instances of modern slavery.[59] 28 per cent of companies had not conformed to MSA requirements for organisations to display links to their modern slavery statements in a prominent place on their website homepage,[60] a percentage that was consistent with four analyses published since

[49] Iqbal, ibid 6-7;
[50] Barclay and Foster, (n.47); Iqbal (n.45), 6; Wen (n.45), 355; Craig (n.6), 22.
[51] *Review* (n.1), p.39.
[52] Home Office, 'Home Office tells business: open up on modern slavery or face further action' 18/10/2018.
[53] Joint Committee on Human Rights (n.44), [92]-[93].
[54] Independent Anti-Slavery Commissioner, University of Nottingham Rights Lab, *Agriculture and Modern Slavery Act Reporting: Poor Performance Despite High Risks* (2018), pp.4, 10.
[55] Ibid.
[56] Ergon Associates, *Modern slavery reporting: Is there evidence of progress?* (2018), 4.
[57] Ibid.
[58] Ibid.
[59] Ibid 10; *Transparency in Supply Chains practical guide* (n.41), [1.5], [5.5].
[60] MSA s.54(7).

2016.[61] Thus, the process of 'continuous improvement'[62] whereby the spirit of transparency promoted by s.54 would 'create a race to the top', 'increasing competition to drive up standards',[63] has been slow to develop.

Widespread recognition of deficiencies in the substance and observance of s.54 seems inevitable, when considered in light of the deep-seated issues ascribed to disclosure regimes generally and this legislation specifically. Disclosure regulation that relies on consumer/citizen choices is subject to weaknesses in the way such users assess implications/risks attached to the information disclosed, or the possibility that the users may not react to the information as expected.[64] It is therefore suggested that the case for this type of regulation strategy

> is liable to be strongest where: the hazard involved is not potentially catastrophic ….; risks can be assessed accurately by affected parties; consumers … or other affected parties can be relied upon to give proper consideration to the information given; and the accuracy and utility of information can be monitored and ensured through enforcement at acceptable cost.[65]

Scholars have expressed doubts about the effectiveness of transparency requirements and supply chain disclosure regimes in improving the behaviour of corporate actors.[66] Further analyses highlight the 'top-down decision making' that informed the policymaking process leading to the enactment of the MSA,[67] and the highly influential role played by industry actors in the eventual adoption of the 'light-touch' regulation[68] projected by s.54.

The foregoing account is far from exhaustive, but it sheds some light on the context in which the disqualification sanction has been proposed and discounted as a means of enhancing the effectiveness of s.54. It also demonstrates the range of problems associated with s.54 compliance. It is notable that some of the weaknesses have been addressed following the Government consultation exercise held after the Review. Reforms include the establishment of a Government-run registry for modern slavery statements and a single reporting

[61] Ergon (n.56), 7.
[62] Joint Committee on Human Rights, *Human Rights and Business 2017: Promoting responsibility and ensuring accountability: Government Response to the Committee's Sixth Report of Session 2016–17* (HC 2018-686), p.7.
[63] *Transparency in Supply Chains practical guide* (n.42), [2.5].
[64] R. Baldwin, M. Cave, M. Lodge, *Understanding Regulation: Theory, Strategy and Practice* (2nd edn, OUP 2012), 120; S. Leong and J. Hazelton, 'Under what conditions is mandatory disclosure most likely to cause organisational change?' (2019) 32 Account.Audit.Account.J. 811, 830.
[65] Baldwin, Cave, Lodge, ibid 120-121.
[66] D. Hess, 'The Transparency Trap: Non-Financial Disclosure and the Responsibility of Business to Protect Human Rights' (2019) 56 Am.Bus.Law.J. 5; A. Chilton and G. Sarfaty, 'The Limitations of Supply Chain Disclosure Regimes' (2017) 53 Stan.J.Int'l L 1.
[67] Broad and Turnbull (n.6), 130.
[68] G. LeBaron and A. Ruhmkorf, 'The domestic politics of corporate accountability legislation: struggles over the 2015 UK Modern Slavery Act' 2017 Socio-Econ.Rev. 1, 20, 26

deadline,[69] as well as making it mandatory for statements to cover certain areas.[70] Nevertheless, the difficulties outlined above help us to understand the Independent Review's concern that s.54 should be complemented by a stronger form of State intervention. The merit of this view may be seen in the results of empirical research into the impact of the Australian Modern Slavery Act 2018. 100 per cent of the companies responding to survey questions on factors likely to influence decisions to report on supply chain risks, identified 'legal requirement (penalty for not reporting)' as the most likely factor, compared to the need to keep up with competitors, customer/civil society expectations, or reputational damage/adverse publicity.[71] This suggested a discrepancy between the government's reasoning about compliance, and the drivers which reporting bodies perceived to be significant.[72] However, anticipation that a legal requirement/penalty would have the most powerful effect does not draw us immediately to the conclusion that directors' disqualification is the most appropriate sanction for this purpose. Hence, the next section considers the scope and limitations of directors' disqualification in relation to s.54 MSA.

C. Evaluating the compatibility between directors' disqualification and s.54 MSA interests

It is vital to acknowledge that it is far from obvious that the Review's recommendation in favour of a disqualification sanction would necessitate legislative/other reform activity. As seen in Part A, while the Review's recommendation and Government response pull in opposing directions, there is no evidence that the proposal for, or rejection of, the disqualification sanction emerged from a full evaluation of its scope and (de)merits. The Review did not specify which attributes of disqualification were particularly suited to the aims of entrenching reporting in the business culture and improving redress for non-compliance. The Government decided against incorporating disqualification into the MSA framework on the basis that it represented a compliance-oriented mechanism which was at odds with an approach premised on improving transparency through appropriate inducements/support. It is therefore possible that the Review recommended that s.54-related failings should constitute grounds for disqualification with the belief that such failings could count among the factors which the court/Secretary of State takes into account in determining unfitness to be a director, or in exercising discretion in relation to disqualification orders/undertakings.[73] A list of these factors is provided in Schedule 1 of the Company Directors Disqualification Act 1986 ('CDDA'), as amended by the Small Business, Enterprise and Employment Act 2015 ('SBEEA').[74] Disqualification cases pre-dating the 2015 amendments emphasize that the

[69] Home Office, *Transparency in Supply Chains Consultation: Government Response* (Crown, 2020), p.14; https://modern-slavery-statement-registry.service.gov.uk/.
[70] Home Office, *Transparency in Supply Chains Consultation: Government Response* (Crown, 2020), pp.8-9.
[71] J. Nolan and J. Ford, 'Regulating Transparency and Disclosures on Modern Slavery in Global Supply Chains' [2019] U.N.S.W.L. Research Series 57, 14.
[72] Ibid 15.
[73] CDDA, s.12C and Schedule 1.
[74] s.106.

Schedule 1 list is not regarded as exhaustive,[75] to the extent that unfitness may be 'demonstrated by conduct which does not involve a breach of any statutory or common law duty'.[76] There is no indication that the new Schedule 1 represents a closed list.[77] This notwithstanding, the formulation of an express (rather than implicit) disqualification sanction for s.54-related failings could be justified in light of criticisms that have been levelled at the Schedule 1 standards of unfitness and the associated body of precedent in the past, i.e. that they had rendered this area of law 'complex, obscure and inaccessible to directors'.[78] Similarly, if an implicit disqualification sanction were to have little/no discernible impact, it is predictable that this would be attributed (at least partially) attributable to the absence of formal legislative measures.

Furthermore, a disqualification sanction is unlikely to constitute the sole legal response to acts/omissions connected to s.54 compliance; and its usefulness could be positively/adversely affected by the nature and effectiveness of the sanctions which it is combined with. This may be gleaned from the contrasting approaches to regulatory strategy shown by the Review and the Government. The Review's recommendation signals that the s.54 model of private governance and corporate self-regulation[79] should be an element of an appropriate mixture of private and public governance strategies.[80] The idea of attaching personal liability to directors recognises that companies themselves do not always respond to sanctions with increased compliance.[81] On the other hand, the Government's resistance fits with the concept of the regulatory sanctions pyramid, in which regulation commences with a dialogue-based approach and escalates to 'somewhat punitive approaches only reluctantly and only when dialogue fails'.[82] Coercive methods are more legitimate when they follow attempts at dialogue-oriented forms of control.[83] The common ground between both views is that they accept (albeit indirectly) that a disqualification sanction would not offer a comprehensive solution to issues surrounding s.54 compliance. A similar observation has been made in relation to sanctions for breaching competition law, that 'director disqualification is not a miracle cure' and does not eliminate the necessity for other forms of

[75] *Re Amaron Ltd* [1998] BCC 264, 268; *Re Bath Glass Ltd* (1998) 4 BCC 130, 132-133; *Re Landhurst Leasing plc* [1999] 1 BCLC 286, 344; *Re Barings plc (No. 5)* [1999] 1 BCLC 433, 483.
[76] *Barings plc (No. 5)*, ibid 486.
[77] SBEEA, Explanatory Notes [686]-[689].
[78] A. Hicks, 'Disqualifying the unqualified – a quixotic crusade?' (1999) Amicus Curiae 22, 23; *Transparency & Trust: Enhancing the Transparency of UK Company Ownership and Increasing Trust in UK Business: Government Response* (DBIS, 2014), [220].
[79] N. Phillips, 'Private Governance and the Problem of Trafficking and Slavery in Global Supply Chains', Chapter 1 in L. Waite, G. Craig, H. Lewis, K. Skrivankova (eds), *Vulnerability, Exploitation and Migrants: Insecure Work in a Globalised Economy* (Palgrave Macmillan, 2015), 17.
[80] Phillips, ibid 24.
[81] R. Baldwin, 'The New Punitive Regulation' (2004) 67 M.L.R. 351, 370.
[82] J. Braithwaite, 'The Essence of Responsive Regulation' (2011) 44 U.B.C.L.Rev. 475, 482.
[83] Braithwaite, ibid 486.

enforcement which it may complement, such as corporate fines and criminalization.[84] Nevertheless, this does not diminish the importance of exploring its ability to play a meaningful role in this context.

C.(i) *The affinity between the disqualification framework and the aim of addressing s.54 MSA failings*

C.(i)(a) Introduction to the disqualification regime, policy and purpose

Disqualification sanctions are governed by the Company Directors Disqualification Act 1986 ('CDDA'). A disqualification order prohibits a person from acting as a company director, being a receiver or insolvency practitioner, or from being involved in promotion, formation, or management of companies, without leave of the court, for a period ranging from 2-15 years.[85] Alternatively, in certain circumstances, a disqualification undertaking may be agreed with the Secretary of State, whereby a person undertakes not to act as a director, receiver, insolvency practitioner, or be concerned with promotion, formation, or management of companies, without leave of the court.[86] Where a person's conduct as director of a now-insolvent company has caused loss to one/more creditors, disqualification may be accompanied by a compensation order requiring payment of a specified amount for the benefit of certain creditors or classes of creditors.[87] The Act was introduced following the Cork Committee's recommendations that, '[t]o provide proper safeguards to the general public, the law must … provide that those whose conduct has shown them to be unfitted to manage the affairs of a company with limited liability shall, for a specified period, be prohibited from doing so.'[88] It is now accepted that disqualification may be pursued in cases where a director's failings are not directly related to the benefits of trading with limited liability.[89] Cases applying CDDA provisions have highlighted three facets underlying the disqualification regime. Firstly, it protects the public interest by imposing restrictions on individual directors.[90] Secondly, it deters future misconduct.[91] Thirdly, it seeks to raise standards of responsible conduct in the management of companies.[92]

Disqualification sanctions are based on several provisions of the CDDA, which may be condensed into four broad categories. The first main ground of disqualification covers persons who have been convicted of or found liable for an offence (including civil liability for

[84] A. Khan, 'Rethinking Sanctions for Breaching Competition Law: is Director Disqualification the Answer?' (2012) 35 W.Comp. 77, 99.
[85] CDDA, s.1
[86] CDDA, s.1A.
[87] CDDA, ss.15A-15C.
[88] *Report of the Review Committee on Insolvency Law and Practice* (Cmnd 8558) 1982, para 1808.
[89] *Re Polly Peck International plc (No 2)* [1994] 1 BCLC 574, 579-580.
[90] *Re Grayan Building Services Ltd* [1995] Ch. 241, 253; *Re Landhurst Leasing plc* [1999] 1 BCLC 286, 344-345; *Re Blackspur Group plc* [1998] 1 BCLC 676, 680.
[91] *Re Grayan* ibid; *Re Blackspur* ibid; *Re JA Chapman & Co Ltd* [2003] 2 BCLC 206, [80].
[92] *Re Swift 736 Ltd* [1993] BCLC 896, 899-900; *Grayan*, ibid 257; *Blackspur* ibid; *JA Chapman* ibid.

fraudulent/wrongful trading).[93] The second is disqualification for persistent default in making the required returns to the Registrar of Companies.[94] The third ground applies where a person's conduct makes him unfit to be a director of a company, or a person is found to have exercised a certain level of control over an unfit director.[95] Fourthly, the CDDA provides for disqualification orders to be made for breaching the regulatory framework governing competition law.[96] In certain instances, disqualification is mandatory,[97] whereas under a majority of the CDDA grounds granting of disqualification orders is subject to the court's discretion.[98] Contravention of a disqualification order is a criminal offence leading to imprisonment, and triggers personal liability for the material debts of a company.[99] While the Review referred more than once to the creation of a disqualification 'offence',[100] the courts have emphasised that disqualification proceedings, while regulatory in nature, are closer to criminal proceedings than civil litigation enforcing private rights.[101]

There are two key theoretical approaches associated with the disqualification regime. One is the 'rights' (punitive) approach whereby company law facilitates directors' taking of entrepreneurial risks, subject to external intervention in circumstances where culpable behaviour is displayed which warrants removal of their power to direct the company, carries stigma and reflects intention, recklessness or gross negligence on the directors' part.[102] Thus, disqualification tends to emphasise culpability and the retributive role of justice.[103] The other is the 'privilege' (protective) approach, which entails viewing companies as a vehicle for promoting the public interest, with the effect that disqualification will be aimed at protecting the public rather than sanctioning a director.[104] Therefore, there are no elements of punishment or reproach attached to the imposition of the disqualification.[105] This privilege/protective approach fits with the view that disqualification plays a three-fold role in protecting the public – 'by keeping unfit directors "off the road"; deterring unfit directors from repeating their misconduct; and by encouraging other directors to act properly so as to raise standards of corporate governance'.[106] A director may accordingly be disqualified for what is regarded as mere incompetence.[107] However, even under this approach a director's misconduct or moral iniquities may still be considered, the key difference being that any

[93] CDDA, ss.2, 4, 5, 10.
[94] CDDA, s.3.
[95] CDDA, ss.6, 8, 8ZA.
[96] CDDA, ss.9A-9C.
[97] CDDA, s.6 and s.9A.
[98] CDDA, s.2, s.3, s.4, s.5, s.5A, s.8, s.8ZA, s.10.
[99] CDDA, ss.13, 15.
[100] (n.1), pp.15, 24, 42, 46.
[101] *R v Secretary of State, ex parte McCormick* [1998] All ER (D) 30; *Re Astra Holdings plc* [1998] 2 BCLC 44, 50.
[102] V. Finch and D. Milman, *Corporate Insolvency Law: Perspectives and Principles* (3rd edn, CUP 2017), 619.
[103] Ibid, 620.
[104] Ibid, 618-619.
[105] Ibid, 619.
[106] Ibid, 623.
[107] Ibid, 622.

weight attached to them would not be for the purpose of punishment or retribution.[108] Finch and Milman note that there is no perceptible judicial inclination towards either a rights or privilege approach.[109] Individual judges have alternated between both views in different decisions, or intermixed the vocabulary of both approaches in particular judgments.[110] They propose that a single approach be adopted, based on the privilege/protective view rather than the rights/punitive view.[111] This would prevent punitive objectives being pursued in instances where directors' conduct may not be categorized as criminal.[112] It would allow any moral delinquency to be taken into consideration.[113] The privilege/protective approach would accordingly provide a means of steering the disqualification regime towards coherence, particularly in cases governing the question whether a director is unfit.[114] Moreover, it would underscore the importance of protecting the public interest.[115]

C.(i)(b) The nature of the affinity between the disqualification regime and the promotion of s.54 interests

It is not difficult to perceive the respects in which an affinity may be established between the disqualification regime, and the aim of addressing s.54 MSA failings (i.e. failures to fulfil reporting obligations or to act on instances of modern slavery). As a starting point, expanding the disqualification sanction to address the modern slavery concerns represented by s.54 would be consistent with the broader public interest conception of disqualification reflected by the privilege/protective view. In particular, it would enable the disqualification sanction to be invoked in situations where directors had behaved immorally or dishonestly in failing to honour s.54 reporting requirements or act on discoveries of modern slavery, or where these s.54 failings have arisen from incompetence. Moreover, a disqualification sanction for failings related to modern slavery reporting obligations would be congruent with the modern usage of the disqualification mechanism to pursue diverse policy objectives, some of which are 'quite remote' from the creditor protection issues that arise in insolvency.[116] Examples of this privilege/protective approach may be found in the use of disqualification sanctions to address breaches of competition law,[117] and to reinforce the immigration rules by preventing companies which employ workers illegally from gaining an unfair advantage over law-abiding companies, and exploiting migrant workers.[118] This indicates a shift from the narrower scope

[108] Ibid, 627.
[109] Ibid, 626.
[110] Ibid.
[111] Ibid.
[112] Ibid.
[113] Finch and Milman, ibid 627.
[114] Ibid.
[115] Ibid.
[116] P. Davies, *Introduction to Company Law* (3rd edn, Clarendon 2020), 245.
[117] Davies, ibid; CDDA, s.9A.
[118] *Secretary of State v Rahman* [2020] EWHC 2213, [56]; Davies, ibid.

of the matters previously dealt with under the CDDA, 'concerned mostly with fairness under the insolvency law and the obligations of a businessman to his creditors rather than general questions of corporate government'.[119]

Furthermore, key principles of disqualification jurisprudence are particularly apposite to directors of companies sufficiently large to fall within the scope of s.54. For example, every individual director has a duty to inform himself about a company's affairs and participate in supervising and controlling them, together with his co-directors.[120] Although the board and individual directors may delegate particular functions, they 'remain responsible for the delegated function or functions and will retain a residual duty of supervision and control'.[121] Greater responsibilities are attached to individuals holding higher positions in an organisation, including the responsibility to be responsive to warning signs of failures in the system operating under their diligent supervision.[122] Disqualification can catch conduct that is dishonest (including conduct evincing a lack of probity or integrity) and conduct which is purely incompetent.[123] In large institutions, fault at board-level is more likely to take the form of incompetence than dishonesty or lack of probity.[124]

These principles may be carried into the MSA setting, where the s.54 statement is to be signed by a director, but should be approved by the board of directors.[125] This requirement is seen as placing the issue of modern slavery 'firmly on the boardroom agenda'.[126] Research conducted one year after the introduction of the MSA found that senior executives' engagement in addressing modern slavery risks had doubled.[127] All companies involved saw senior leadership's engagement as crucial to mobilising effective responses and overcoming key challenges.[128] Less favourably however, the study recorded a growth in the number of companies which admitted to having 'no real idea whether or not modern slavery exists at various levels of their supply chain'.[129] 77 per cent believed that there was a likelihood of modern slavery occurring in their supply chains.[130] In similar vein, a 2019 study of compliance in the hotel sector found that out of 71 transparency statements which met minimum

[119] Rt Hon Lord Hoffmann, 'The fourth annual Leonard Sainer lecture' (1997) 18 Comp.Law. 194, 197.
[120] *Re Westmid Packing Services Ltd* [1998] 2 BCLC 646, 653.
[121] *Re Barings plc (No. 5)* [1999] 1 BCLC 433, 487.
[122] *Re Barings plc* [1998] BCC 583, 586.
[123] *Barings plc (No. 5)* (n.121), 483
[124] J. Loughrey, 'Smoke and mirrors? Disqualification, accountability and market trust' (2015) 9 L.F.M.R. 50, 56.
[125] MSA, s.54(6).
[126] Home Office, *Transparency in Supply Chains Consultation* (Crown, 2019), 3; Ethical Trading Initiative, Hult Business School, *Corporate Leadership on Modern Slavery* (2016), 13.
[127] Ethical Trading Initiative, ibid.
[128] Ibid 55.
[129] Ibid 21.
[130] Ibid 22.

requirements, 29 were signed by a director, 36 were approved by the board, and 46 were displayed through a prominent link on the company's website home page.[131]

This shows that there is scope for a sanction targeting faults in management that could result in s.54 compliance failings. The law could respond to such shortcomings by imposing sanctions on companies, such as the financial penalties proposed by the Independent Review and other parties.[132] However, the concept of financial penalties is subject to criticism. Fines may be seen as a way of pricing misconduct, rather than sanctioning it.[133] They are also perceived to create an 'overspill problem' whereby the costs fall on innocent parties including employees and consumers.[134] It has been found that anticipation of public disgrace can provide a stronger motivating force to comply with the law than the risk of imprisonment or other sanctions,[135] making public stigma a potent sanction.[136] Stigma is more difficult to attach to companies than to individuals within the companies,[137] but the burden of stigma is heavier on middle class or affluent individuals,[138] such as directors of companies which fall within the scope of s.54. This would require more than the imposition of financial penalties on directors, given that companies' indemnity/insurance arrangements may cocoon them from personal liability, *or* the harm suffered by victims and any benefits derived from it may not be quantifiable in purely financial terms.[139] On the other hand, a shaming sanction is easier to employ to relation to a failure to oversee,[140] highlighting the potential usefulness of disqualification as a driving factor for compliance with s.54.

Some might argue against the introduction of any further remedy at all, whether it be of a financial or a shaming nature. This could be on the basis that compliance with statutory requirements and awareness of risks will improve with time, as the MSA becomes more established, and reforms such as compulsory reporting on certain areas, the introduction of a single reporting deadline, and the setting up of an online registry for statements, take hold.[141] It is hard to believe that this gradual evolution would produce a wholesale change in the data showing that some companies fall short of compliance with the formal requirements of s.54, and/or fail to respond adequately to risks or manifestations of modern slavery in their

[131] Walk Free Initiative and others, *Beyond Compliance in the Hotel Sector: a Review of Modern Slavery Act Statements* (2019), 17.
[132] *Review* (n.1), 43; *Transparency in Supply Chains Consultation* (n.126), 10; House of Commons Environmental Audit Committee, *Fixing Fashion: Consumption and Sustainability* (Sixteenth Report of Session 2017-19, HC 1952), [63].
[133] D. Kahan, 'What Do Alternative Sanctions Mean?' (1996) 63 Univ.of Chic.L.R. 591, 621-622.
[134] J. Coffee, '"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment' (1981) 79 Mich.L.Rev. 386, 401-402.
[135] Kahan (n.133), 638.
[136] Coffee (n.134), 424-429.
[137] Coffee, ibid 424-429.
[138] Kahan (n.133), 644.
[139] D. Skeel, 'Shaming in Corporate Law' [2001] 149 U.Pa.L.Rev. 1811, 1854.
[140] Ibid, 1854.
[141] Home Office, *Transparency in Supply Chains Consultation: Government Response* (Crown, 2020), Annex D.

supply chains. Moreover, the popular consciousness of the anti-modern slavery agenda and the high profile of the MSA and s.54, engenders an expectation that the law should provide a means of highlighting and redressing any (mis)conduct that has caused or contributed to deficits in fulfilling reporting obligations, or in addressing instances of modern slavery. It is also conceivable that compliance levels may improve in the short to medium term, but begin to fluctuate in the long term, as consumer/investor/civic society scrutiny is diverted by newer challenges, lessening pressure on companies to remain proactive in their management of risks and compliance with reporting obligations.

Therefore, the fine-tuning of disclosure obligations would not be a reliable means of ensuring the future effectiveness of s.54. As concluded above, nor would financial penalties provide the most fitting solution. However, disqualification's suitability as a shaming sanction does not mean that a remedy for s.54-related failings would slot into the existing disqualification framework with ease. The next two subsections highlight the limited usefulness of the grounds of disqualification that are currently used.

C.(ii) *Practical disparities between the proposed sanction and key provisions of the existing regime*

C.(ii)(a) Incompatibility between the proposed sanction and the grounds of disqualification which do not involve unfitness

It is not clear whether the Review envisaged the proposed disqualification sanction for s.54-related omissions being designed along the lines of the competition law offence, as a tailor-made remedy (the implications of which are considered in Part D). As regards the existing grounds, some are more evidently inapplicable than others. For example, under s.2 CDDA a disqualification order may be made against a person who has been convicted of an indictable offence in connection with the promotion, formation or management of a company. In this sense, the disqualification sanction is 'only triggered in the aftermath of a conviction for a relevant indictable offence', and only conduct or defaults that result in prosecution would lead to the imposition of a disqualification sanction under s.2.[142] At present, there are no criminal consequences attached to s.54 MSA. Therefore, failures to comply with s.54 reporting obligations or to act on discoveries of modern slavery would not, of themselves, fall within the category of disqualification for conviction/liability for an offence. Even if this were the case, there is no guarantee that criminalising s.54 omissions would improve the likelihood of disqualification under s.2 CDDA. A study examining the use and effectiveness of the CDDA powers against directors who had been convicted of health and safety offences, found a low level of awareness and implementation of the CDDA provisions.[143] There were 10 occasions

[142] A. Neal and F. Wright, *A Survey of the use and effectiveness of the Company Directors Disqualification Act 1986 as a legal sanction against directors convicted of health and safety offences* (Health and Safety Executive RR597, 2007), [9.4].
[143] Ibid, [6.9].

on which directors had been disqualified between 1986-2005, as compared with 'a total of 111 company directors … prosecuted 'with regards to health and safety issues between 1994-2004, of whom 86 were convicted and 11 were jailed,[144] and a total of 1,500 directors disqualified between 2003-2004 alone.[145]

In similar vein, ss.4 and 5 CDDA involve disqualification if the person has been guilty of fraud or the criminal offence of fraudulent trading; or disqualification following summary conviction if the person has been subject to at least three default orders or convictions during the previous three years. Hence, disqualification would not be premised on s.54-related omissions. Likewise, under s.10 CDDA the power to disqualify arises after a court has imposed civil liability for fraudulent or wrongful trading, and thus proceedings would not be prompted by s.54-related omissions. Section 3 governs disqualification for persistent defaults in relation to filing returns, however this relates to compliance with provisions of the Companies Acts and the Insolvency Act.[146] Furthermore, the term 'persistently' has been interpreted as connoting 'some degree of continuance or repetition' in committing the same default or a series of defaults.[147] 'Persistent default' may be conclusively proved by demonstrating that the person had been adjudged guilty or three or more defaults in relation to the relevant provisions, during the preceding five years.[148] Thus it would not apply to a single omission[149] such as a lapse in s.54 MSA reporting obligations. The court's power to impose a disqualification order in any of these instances, is discretionary rather than mandatory.

C.(ii)(b) Is the machinery established under the CDDA for matters involving unfitness, sufficiently flexible to capture s.54-related omissions?

Compared to the rather limited scope of the disqualification grounds considered under the previous sub-heading, s.6 and s.8 are framed in sufficiently broad terms to suggest that they might be able to accommodate s.54-related omissions. For this reason, and also because the greatest number of applications is brought under s.6,[150] it is worth examining the role that these provisions could play. Both s.6 and s.8 govern the court's power to make disqualification orders where it is satisfied that the defendant's conduct makes him unfit to be concerned in the management of a company. The court is obliged to disqualify a director who has been found to be unfit under s.6 whereas under s.8 it has a discretion whether to disqualify.[151] Both provisions set the maximum period of disqualification that is achievable under the CDDA (15

[144] Ibid, [6.10].
[145] Ibid, [7.2].
[146] CDDA, s.3(4).
[147] *Re Arctic Engineering Ltd (No. 2)* [1986] 2 All ER 346, 351.
[148] CDDA, s.3(2).
[149] *Re ECM (Europe) Electronics Ltd* [1992] BCLC 814, 818.
[150] Rt Hon Lord Hoffmann, 'The fourth annual Leonard Sainer lecture' (1997) 18 Comp.Law. 194, 196; A. Keay and P. Walton, *Insolvency Law: Corporate & Personal* (5th edn, LexisNexis 2020) [47.3]; K. Van Zwieten, *Good on Principles of Corporate Insolvency Law* (5th edn, Sweet & Maxwell 2018) [14-59].
[151] CDDA, s.6(1) and s.8(2).

years); however only s.6 sets a minimum period of two years.[152] The courts have concluded that these differences do not affect the principles which guide their approach to establishing unfitness in s.8 applications, making disqualification orders, and setting the length of the disqualification period.[153] Hence, the approach and principles established in cases governing s.6 may be followed in s.8 cases. Another uniting characteristic is that the non-exhaustive list of matters to be taken into account when determining unfitness[154] applies to both provisions. A failure to fulfil modern slavery reporting obligations or act on discoveries of modern slavery could be encompassed within some of these matters. These include the extent to which a person was responsible for a company's material breach of legislative/other requirements, any material breach of legislative/other obligation that a director is subject to, and the nature and extent of any (potential) loss or harm caused by the defendant's conduct.[155]

Insolvency Service information and judicial authorities show that both provisions have been used to pursue disqualification sanctions for breaches of immigration legislation. From a privilege/protective point of view, such breaches may be regarded as broadly comparable to modern slavery defaults. In particular, contraventions of immigration legislation are seen as exposing workers to exploitation through the risk of being underpaid and lacking access to the same protection as lawful employees, and preventing those who are entitled to work in the UK from securing employment on legitimate terms, and undermining the company's competitors by conferring an 'unfair and improper commercial advantage'.[156] The allegations that are made in insolvent disqualifications under s.6 include 'Technical matters', a category which covers the employment of illegal workers.[157] In *Re Nurrettinoglu*, an application under s.8 CDDA, Mullen J canvassed a number of cases decided between 2016-2019, 'where the misconduct relied upon has been a breach of immigration legislation'.[158] He concluded that the correct approach would be to determine **(i)** whether the company's business operated using illegal workers, **(ii)** whether the director bore personal responsibility for that through his acts/omissions, and **(iii)** whether the court's discretion should be exercised in favour of disqualifying the director.[159] Exercising this discretion in favour of disqualifying the defendant, he noted various factors that would chime with the aim of using the disqualification sanction to reinforce compliance with modern slavery reporting obligations. This included the 'heavy burden' that the immigration legislation imposes on employers, and the extent to which a director's failure to establish an employee's right to work creates the risk of 'serious loss' to the company and damages the immigration system's integrity.[160] He went further to emphasize the privilege attached to using a company to trade with the benefit of limited

[152] CDDA ss.6(4) and 8(4).
[153] *Secretary of State v Hollier* [2006] All ER (D) 232, [48]-[50].
[154] CDDA, s.12C and Schedule 1.
[155] CDDA, Schedule 1 paragraphs 1, 4 and 6.
[156] *Re Nurrettinoglou* [2019] EWHC 1764), [42].
[157] Insolvency Service, *Guide to Insolvency Service Enforcement Outcomes* (2021), [2.3].
[158] (n.156), [40], [41]-[44].
[159] Ibid, [44].
[160] Ibid, [49].

liability, and the court's role in upholding and enforcing the duties associated with that privilege – in keeping with the statutory regime's objective to protect the public and improve standards of corporate governance.[161] This emerging body of precedent therefore provides a helpful three-stage approach that can be adapted to situations centred on breaches of s.54 MSA reporting obligations. It also demonstrates that the scope of the unfitness regime represented by s.6 and s.8 CDDA is sufficiently expansive to accommodate the type of breaches that are assuming a growing significance, when it comes to the recognition of their commercial impact and societal consequences. This is promising, given that the substance of s.6 and s8, and aspects of their implementation so far, can give rise to reservations about the extent to which they can play a meaningful part in addressing failings related to s.54 MSA.

For example, a key limitation of s.6 is that it applies to directors of companies which have become insolvent. Thus, it would not be applicable to situations involving s.54-related omissions concerning solvent companies. The financial size of the companies governed by s.54 MSA (minimum total turnover of £36 million) suggests that it would be in rare circumstances that disqualification proceedings are initiated under s.6 CDDA. Section 6 is the dominant route for disqualification, as it embodies a substantial number of the disqualifications based on unfitness, compared to s.8 (948 directors disqualified under s.6 in 2020/21 compared to 10 disqualifications under s.8).[162] Hence, s.54-related omissions involving solvent companies would be absent from the sort of detailed information and analyses concerning the use of the disqualification regime and unfitness in particular, that are compiled from the usage of s.6.[163] Even if s.54-related omissions were to arise in the context of a s.6 application, they might not form the sole basis of the claim. Recent enforcement statistics show that the most common allegation in s.6 director disqualification cases since 2011 has been 'unfair treatment of the Crown', 'associated with over half of director disqualifications in 2021'.[164] The number of total allegations exceeds the number of cases being pursued: e.g. 1,034 allegations were received for the 948 disqualifications imposed under s.6 CDDA in 2020/21.[165] It is therefore conceivable that proceedings to disqualify an unfit director under s.6 could include allegations other than s.54-related omissions, such as failure to properly maintain and preserve accounting records, persistent breaches of regulations requiring accounts or returns to be filed, criminal acts, and transactions to the detriment of creditors.[166] This may raise questions regarding the extent to which the ability to disqualify directors under this provision will aid in shining a light on the use of the directors' disqualification regime to pursue s.54-related failures, a problem which is considered in more detail below. The allegations put forward in s.8 are not presently

[161] Ibid, [50].
[162] Insolvency Service, *Commentary – Insolvency Service Enforcement Outcomes 2020/21* (2021), [3.1]
[163] See e.g. *Commentary – Insolvency Service Enforcement Outcomes*, ibid [3.4], *Guide to Insolvency Service Enforcement Outcomes* (n.157), [2.2] and [2.3].
[164] *Commentary – Insolvency Service Enforcement Outcomes 2020/21*, ibid [3.4].
[165] *Commentary – Insolvency Service Enforcement Outcomes 2020/21*, ibid [3.4].
[166] *Guide to Insolvency Service Enforcement Outcomes* (n.157), [2.3].

recorded in a consistent way, however they tend to revolve around 'fraud or unfair treatment of customers'.[167]

Section 8 has substantive features that are more favourable towards its potential use as a tool for addressing defaults in modern slavery reporting obligations. For example, disqualification may be ordered under this provision without the need for the company to have become insolvent. The court in *Re Samuel Sherman plc* noted that whereas s.6 is restricted to insolvency, '[t]he circumstances which might lead to applications under section 8 are far more at large'.[168] Section 8 entitles the Secretary of State to bring an application for a disqualification order where it appears 'expedient in the public interest that a disqualification order should be made'.[169] This hurdle should not be difficult to surmount in relation to failures involving modern slavery reporting obligations.

On the other hand, established case law concerning the courts' approach to granting disqualification orders under s.6 and s.8 shows that they lean more strongly towards the rights/punitive approach rather than the privilege/protective approach.[170] This creates doubts concerning their preparedness to impose disqualification sanctions on directors who fall short of their modern slavery reporting obligations or fail to act on discoveries of modern slavery. They consider whether the conduct in question, 'viewed cumulatively and taking into account any extenuating circumstances, [falls] below the standards … appropriate for persons fit to be directors of companies'.[171] Furthermore, they assess the director's competence against the background of his management role in the company and his duties and responsibilities in that role.[172] Where the Secretary of State's case is based entirely on allegations of incompetence (rather than dishonesty), the Secretary of State bears the onus of establishing that the conduct 'demonstrates incompetence of a high degree'.[173] A leading judge has noted that directors are rarely disqualified 'simply for incompetence'.[174] The courts have tended to underscore conduct which does not constitute 'actual fraud' but represents 'some breach of accepted commercial morality'.[175] He notes that they have 'never completely accepted the philosophy' that 'incompetent directors ought to be put off the road for a while … simply for the protection of members of the public'.[176] The reasons for this include the courts' cognisance of the severity of the disqualification sanction, particularly in terms of hindering the director from earning a living.[177] The mandatory nature of s.6 reduces the courts' willingness to impose

[167] *Guide to Insolvency Service Enforcement Outcomes*, ibid [2.2].
[168] [1991] 1 WLR 1070, 1085.
[169] CDDA, s.8(1).
[170] V. Finch and D. Milman, *Corporate Insolvency Law: Perspectives and Principles* (3rd edn, CUP 2017), 629-630.
[171] *Re Barings plc (No. 5)* (n.121), 434; *Secretary of State v Hollier* (n.153), [52].
[172] *Barings plc (No. 5)*, ibid 484.
[173] *Re Barings plc (No. 5)* ibid, 483; *Secretary of State v Hollier* (n.153), [83].
[174] Rt Hon Lord Hoffmann, 'The fourth annual Leonard Sainer lecture' (1997) 18 Comp.Law. 194, 197.
[175] Ibid.
[176] Ibid.
[177] Ibid.

the sanction at all.[178] They regard the dividing line between 'success leading to wealth and a knighthood and failure leading to disqualification or even imprisonment' as being very thin.[179] Therefore, insofar as a director's failings in relation to s.54 MSA may be expected to stem from his negligence/incompetence rather than dishonesty, the circumstances of a potential case would need to be sufficiently strong to persuade the Secretary of State to bring proceedings for unfitness based on incompetence, let alone for the application to be successful. Yet it is hard to conceive that many cases concerning a professional director's defaults in the context of a company governed by s.54 MSA, would be founded on fraud, dishonesty or a breach of commercial morality. If the use of s.6 and s.8 CDDA for modern slavery reporting defaults does not lead to a greater number of disqualification applications or orders, the sanctions' impact may appear to fall short of the Review's aims to improve the corporate culture and enforcement associated with s.54 compliance. It is however fair to say that the success of the disqualification sanction is not measured solely in terms of the number of applications brought, or orders granted, but could also be assessed with reference to other relevant policies – such as deterring similar conduct and promoting responsible behaviour.[180] It would thus be superficial to treat the number of successful applications/outcomes as the sole measure of the sanction's effectiveness.

It remains arguable though that expectations may be set too high, of the potential usefulness of the s.6 and s.8 unfitness regime, based on the experience of the contraventions of immigration legislation. The use of the disqualification sanction to respond to these breaches of the Immigration, Asylum and Nationality Act 2006 may be stark in *Re Nurrettinoglou* and the related cases mentioned above. By contrast, where cases under s.6 and s.8 CDDA involve multiple allegations and the imposition of the disqualification sanction does not turn on the s.54-related omissions alone, it may be difficult to ascertain to what extent this allegation has contributed to the outcome. Neal and Wright's study of the effectiveness of the disqualification sanction in the context of health and safety offences noted that there were cases in which it was unclear whether the disqualification order was centred on the conviction for a health and safety offence, or 'whether other matters arising at the same time (e.g. involving a corporate insolvency) … provided the principal motivation for the order made'.[181]

Another reason is the courts' tendency to shift between a rights approach and a privilege approach in determining unfitness, as observed by Finch and Milman, and as evident from a comparison between the courts' outlook on disqualification for incompetence and their outlook on the immigration legislation cases. It may be entrusting too much to the trends in

[178] Ibid.
[179] Ibid.
[180] A. Hicks, 'Director disqualification: can it deliver?' 2001 J.B.L. 433, 434; R. Williams, 'Disqualifying Directors: a Remedy Worse than the Disease?' (2007) 7 J.C.L.S. 213, 225-236
[181] A. Neal and F. Wright, *A Survey of the use and effectiveness of the Company Directors Disqualification Act 1986 as a legal sanction against directors convicted of health and safety offences* (Health and Safety Executive RR597, 2007), [12.4].

the application of s.6 and s.8 CDDA, or the inclination of particular judges (which as highlighted by Finch and Milman, may alternate between rights/punitive and privilege/protective approaches, or combine the two), to accept the view that the framework for unfitness currently governed by s.6 and s.8 provides the most effective means of improving compliance and enforcement of s.54 MSA.

Therefore, this paper maintains the argument in favour of a bespoke disqualification sanction for s.54-related defaults. This would have considerable benefits. One is that it would avoid the risk that any limitations in the substance or implementation of s.6 and s.8 CDDA might constrain the effectiveness of a disqualification sanction that can be invoked for failures in modern slavery reporting obligations. The other is that a standalone/customised sanction would be capable of setting a clearer tone regarding its aims (from a rights/punitive or privilege/protective point of view). Furthermore, it would be easier to determine if the sanction is developing in line with those aims, when it is viewed in isolation and not within the context of s.6 or s.8. The track record of the disqualification sanction for breaches of competition law provides a helpful basis for reflection on this possibility, as considered within the recommendation for a bespoke sanction explored in Part D.

D. The Recommendation – a bespoke sanction for s.54-related omissions

D.(i) *Introduction*

In light of the findings in Part C(ii), this section considers whether a tailor-made disqualification sanction would provide an effective tool for supporting s.54 compliance and enforcement. It does so by drawing, to some extent, on the experience of the introduction and implementation of the disqualification sanction for breaches of competition law. Valuable analogies may be drawn between this established sanction, and the expectations that may be attached to a disqualification sanction designed to target s.54-related omissions. Firstly, in similar vein to the public interest that underlies the prevention and elimination of modern slavery, when viewed from the perspective of the privilege/protective approach, the competition law sanction was introduced to uphold the public interest in barring directors who have committed grave breaches of competition law from future management. It also symbolizes the wider role of the disqualification regime, to meet policy objectives that go beyond addressing abuses of the limited liability that comes with trading through a company. Secondly, the competition law sanction is based on a test of unfitness. In this sense, it makes it possible for notions of unfitness to develop, that are centred on infringements of competition law, rather than on the variety of allegations that arise under s.6 and s.8 CDDA. Thirdly, as considered below, it shows how managers' awareness of the existence of a bespoke sanction can provide a motivating force for them to comply with their obligations. On the other hand, some of the difficulties surrounding its enforcement by a sectoral regulator draw one to the conclusion that the power to bring proceedings should rest with the Secretary of State.

D.(ii) *The CDDA disqualification framework for competition law infringements: background, substance and evolution of the unfitness concept*

The introduction and development of the disqualification sanction for infringements of competition law raises important considerations from various angles. In terms of substance, it shows the form which a new disqualification sanction that is driven by a particular public-protection objective, may take. Beyond the substance of the statutory provisions, the regulators' efforts to flesh out the competition law sanction, and to implement it, demonstrate key factors which have bolstered or constrained the effectiveness of the sanction since its inception. More specifically, it shows how new statutory provisions aimed at a particular evil may require support by way of guidelines reinforcing their implications. Finally, it shows how the regulated community's immediate recognition of a new sanction may outweigh any slowness and inconspicuousness in its enforcement.

The competition law sanction was introduced into the CDDA through the Enterprise Act 2002,[182] following a Government White Paper which highlighted the public interest in ensuring that 'directors who have engaged in serious breaches of competition law should be exposed to the possibility of disqualification on that ground alone'.[183] This was also premised on the view that the disqualification regime 'operates in the public interest to prevent abuses of limited liability status'.[184] Consequently, the competition law disqualification sanction was conceived to play a protective role.

The competition law sanction is set out in ss.9A-9E CDDA. It provides for the maximum period of disqualification, 15 years.[185] This falls into 'the top bracket of disqualification for periods over 10 years … reserved for particularly serious cases'.[186] The court's power to grant disqualification orders is mandatory in that it *must* grant a disqualification order if two conditions are satisfied. These are that the individual is director of a company which has committed a breach of competition law, *and* the individual's 'conduct as a director makes him unfit to be concerned in the management of a company'.[187] The second statutory condition therefore makes it essential that unfitness should be established before the director may be disqualified. Section 9A(6) indicates three ways in which unfitness may be determined. These are: whether the director's conduct contributed to the breach of competition law, or it did not contribute to the breach but he had reasonable grounds to suspect that the company's conduct constituted a breach and took no steps to prevent it, or the director did not know but ought to have known that the company's conduct constituted a breach. Hence, it provides a standpoint from which the director's conduct may be assessed.

[182] s.204.
[183] Department of Trade & Industry, *A World Class Competition Regime* (CM5233, 2001), [8.24].
[184] Ibid.
[185] CDDA, s.9A(9).
[186] *Re Sevenoaks Stationers (Retail) Ltd* [1991] Ch. 164, 174.
[187] CDDA, s.9A(1)-(3).

In addition to this breakdown in s.9A(6), the disqualification mechanism has benefited from guidance published by sectoral regulators (initially the Office for Fair Trading 'OFT' and more recently its successor the Competition and Markets Authority 'CMA'), elaborating on the approach to be followed in exercising their discretion to seek disqualification. However, the CMA guidance is more streamlined than the OFT guidance which it replaced. The OFT guidance incorporated specific indicators of the types of behaviour that could demonstrate a director's unfitness in the context of competition law infringements. These examples of evidence which could be called upon to support allegations concerning a director's conduct under s.9A(6) CDDA, included the director's role in planning/approving the infringement or ordering/encouraging others to engage in the infringement, retaliating against non-participants or reluctant participants, or approving expenditure to finance the infringement.[188] Likewise, determining what a director ought to have known regarding the infringement required an examination of his role in the company, his relationship to those responsible for the infringement, the objective/subjective levels of knowledge/skill/experience which could be attributed to that director, and information relating to the infringement which was available to the director.[189] Furthermore, aggravating and mitigating factors included evidence that records were destroyed to conceal the infringement, or that there was genuine uncertainty whether an activity constituted an infringement, or that the director's involvement in the infringement came about through 'severe internal pressure'.[190]

The OFT shifted from this detailed guidance, following a consultation exercise, deciding to amend the document to remove references to specific types of behaviour as indicators of a director's unfitness.[191] The amended guidance would state that the OFT would consider the suitability of a disqualification order in all cases, and it would be likely to apply for one if sufficient evidence was found in relation to any of the three categories of behaviour in s.9A(6) CDDA.[192] This was based on the belief that it would be more germane to evaluate the gravity of the conduct and the likelihood of success, than to catalogue indicia of behaviour.[193] In this vein, the CMA has departed from the five-step approach in the previous guidance, in favour of streamlined 'principles and factors' that may be taken into account in deciding whether to pursue a disqualification order.[194] However, the 'specified badges of misconduct'[195] and aggravating/mitigating elements have not been abandoned altogether. The principles and factors in the current guidance are regarded as reflecting 'the considerations that are set out

[188] OFT, *Director disqualification orders in competition cases* OFT510 (Crown, 2010), [4.19]-[4.21].
[189] Ibid, [4.22].
[190] Ibid, [4.25]-[4.26].
[191] OFT, *Director disqualification orders in competition cases* OFT1244 (Crown, 2010), Chapter 6.
[192] Ibid, [6.16].
[193] Ibid, [6.19].
[194] CMA, *Revised guidance on competition disqualification orders: consultation document* CMA93 (Crown, 2018), [1.9].
[195] B. Cain, 'Directors' disqualification' (2010) 34 C.S.R. 8, 57.

in the five-step process along with many other factors'.[196] The key aim was to prevent the five-step approach from being interpreted in an unduly restrictive manner, and to avoid situations where certain steps were accorded more weight than they deserved.[197]

It may be observed that two elements eased the transition from the detailed guidance to a more condensed version. One element is that by 2010, the competition law disqualification sanction regime had already made an impact on the awareness/conduct of companies and their management. A 2007 study found that professionals regarded criminal penalties, directors' disqualification, and corporate fines as strong motivating factors for compliance with competition law.[198] Furthermore, the regime was fairly established by the time the OFT/CMA's movement in this direction began in 2009.[199] This was more than a decade after the enactment of the Competition Act 1998 – a statute which is recognised as the stimulus for the thorough competition law compliance programmes instituted by companies.[200] It was also seven years after introduction of the competition disqualification sanction through the Enterprise Act 2002. Against this backdrop, it is arguable that consciousness of the sanction had become sufficiently ingrained, that a shift towards concise guidance would not have the effect of diminishing the concept of unfitness.

D.(iii) *The impact of the competition law disqualification sanction as an enforcement tool*

Despite the introduction of the competition disqualification sanction through the Enterprise Act 2002 and the impact highlighted under the previous sub-heading, the OFT acknowledged in its 2010 consultation that lack of evidence was among the reasons it had not yet exercised its powers.[201] This might not be unusual: Baldwin notes that tough rhetoric may be slow to transform into tangible enforcement, as 'regulators tend to wait for solid cases before they make first use of new powers'.[202] Notwithstanding the lack of enforcement activity following the introduction of the competition disqualification sanction, companies saw its existence as the second strongest factor (out of five) in motivating compliance.[203] Furthermore, companies and lawyers perceived that greater use of disqualification would increase its deterrent effect.[204]

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[196] CMA93 (n.194), [3.11].
[197] CMA93, ibid [3.3]-[3.4].
[198] Deloitte, *The deterrent effect of competition enforcement by the OFT* OFT962 (Crown, 2007), 1.23 footnote 3.
[199] OFT, *Competition disqualification orders: proposed changes to the OFT's Guidance* OFT1111con (Crown, 2009).
[200] B. Rodger, 'Competition Law Compliance Programmes: A Study of Motivations and Practice' (2005) 28 W.Comp. 349, 358.
[201] OFT1244 (n.191), [2.6].
[202] R. Baldwin, 'The New Punitive Regulation' (2004) 67 M.L.R. 351, 359.
[203] Deloitte, *The deterrent effect of competition enforcement by the OFT* OFT962 (Crown, 2007), [1.23] footnote 3.
[204] Ibid, [5.117].

The first disqualification for an infringement of competition law was finally secured in 2016,[205] followed by seven more between 2018-2019.[206] These were all in the form of disqualification undertakings[207] rather than disqualification orders.[208] Entering a disqualification undertaking enables directors to benefit from a shorter period of disqualification.[209] This seems largely consistent with the trend in the general disqualification regime, towards achieving disqualification through undertakings (75-85 per cent) rather than through imposition of a court order.[210] Indeed, Van Zwieten notes that '[s]tatutory undertakings have largely displaced disqualification orders'.[211] The reduced 'public visibility' of such a significant proportion of disqualification proceedings,[212] is bound to undermine the value of increased competition activity, and could presage a similar fate for a s.54 MSA disqualification sanction. Moreover, since there is no indication that the competition disqualification undertakings were obtained against directors of sizeable companies, it is uncertain whether a disqualification sanction would be sufficiently powerful against directors of enterprises within the mould of those governed by s.54 MSA. These considerations are relevant in envisaging what shape a disqualification sanction aimed at the type of professional executives who are currently subject to s.54 MSA reporting obligations, should take.

D.(iv) *Proposed features of the disqualification sanction for s.54-related omissions*

The experience of the competition law sanction outlined in parts D(i)-D(iii) provide a helpful departure point for deliberating on the nature of the institutional architecture and regulatory interventions that are required to make a disqualification regime workable. In terms of outlook, it is strongly arguable that failures to fulfil modern slavery reporting obligations should not be regarded as any less serious than committing a breach of competition law. This would have a bearing on the substance of the s.54 disqualification sanction, in that it could adopt some features of the competition law sanction. For example, mirroring s.9A(9) CDDA, the maximum disqualification period would be 15 years (the highest that can be imposed under the Act), to reflect the severity with which such conduct is viewed. Similarly to the competition law sanction, the court would be obliged (rather than entitled) to impose a disqualification order, in cases where the conditions for liability have been fulfilled, i.e. its power is mandatory rather than discretionary. In this regard, one may recall Lord Hoffmann's remark (noted in Part C(ii)(b)) that the mandatory nature of s.6 CDDA had the effect of discouraging the courts from imposing the sanction. However, this may provide an important protection for a director facing the prospect of the maximum disqualification period, in circumstances where the allegations against him are not borne out by the evidence. It will also

[205] CMA, 'CMA secures director disqualification for competition law breach' (01/12/16).
[206] CMA, 'Director disqualification: an increasing risk' (22/05/19).
[207] CDDA, s.9B.
[208] CDDA, s.9A.
[209] CMA, *Guidance on Competition Disqualification Orders* CMA102 (Crown, 2019), [3.7].
[210] I. Fletcher, 'Out of sight, out of mind? The progressive dematerialisation of our insolvency procedures' (2017) 30 Insolv.Int. 81, 82.
[211] *Goode on Principles of Corporate Insolvency Law* (5th edn, Sweet & Maxwell 2020) [14-73].
[212] Fletcher (n.210), 82.

spur the Secretary of State to prepare and present s.54 disqualification cases in a way that seeks to overcome this judicial reticence.

Furthermore, the conditions to be fulfilled under the statutory provision should not be less onerous than those to be fulfilled for the competition law sanction. It should be noted that s.6 and s.9A are the only mechanisms under the CDDA where the court's power to disqualify is mandatory as opposed to discretionary. They both require unfitness to be established, and they both prescribe the maximum 15-year period of disqualification that can be imposed under the CDDA.[213] It is consequently difficult to perceive how more onerous conditions could be laid down for the s.54 MSA disqualification sanction. The essence of the sanction would therefore be that the court must make a disqualification order against a defendant if, in his capacity as the director of a company governed by s.54 MSA, he failed to honour the obligations to fulfil the reporting requirements under the MSA or to act on discoveries of modern slavery in the supply chain. This would be the first condition. The second condition would be that the court considers that his conduct as a director makes him unfit to be concerned in the management of a company. The two conditions would be supplemented by a provision equivalent to s.9A(6) CDDA, enabling the court to examine unfitness from three angles. These are: whether the director actively engaged in the non-compliance, or whether he had reasonable grounds to suspect that there was a default but took no steps to act on it, or if the director was unaware of the default but should have known of it. As the application of these recommended provisions unfolds over time, they would paint a picture of how unfitness could manifest itself in relation to modern slavery reporting obligations.

The granular nature of the OFT's guidance for assessing a director's unfitness in relation to the competition law disqualification sanction (canvassed under part D(ii) above), could assist here. It could inform the early life of the disqualification sanction for s.54-related omissions by providing some depiction of the types of conduct which could attest to a director's unfitness, for example by providing a breakdown of the kind of behaviour that would demonstrate unfitness and of specific aggravating/mitigating factors. These parameters would provide a helpful guide for directors and the courts, pending the development of judicial precedent in this area. Indeed, although the OFT/CMA consultations (discussed in part D(ii)) expressed a desire to depart from detailed guidance,[214] it is worth noting that respondents to the consultations urged that any guidance should elucidate the types of behaviour which would fall into some categories of s.9A(6) CDDA, and advise directors of steps they could take to avoid the risk of being subject to an application for a disqualification order.[215] Alternatively, 'given the impact … on a director's livelihood that a disqualification order would have', the guidance could preserve the substance of the behavioural examples and

[213] CDDA, s.6(4) and s.9A(9).
[214] OFT1111con (n.199), Chapter 4; CMA93 (n.194), Chapter 3.
[215] OFT1244 (n.191), [6.13]

aggravating/mitigating factors, or clearly articulate a test to govern applications.[216] This shows a strong appetite on the part of directors, businesses and professional advisers/associations – the intended audience for the guidance and consultations[217]– for more particularity regarding the circumstances in which a director could be pursued under s.9A CDDA. This constituency is unlikely to share the CMA's willingness to wait for judicial precedent interpreting s.9A to develop, to shed light on instances in which a disqualification order may be granted.[218] This constituency may also encompass some of the directors of companies that are governed by s.54 MSA, and thus the same arguments may be raised to highlight the need for generous guidance when it comes to a disqualification sanction for defaults in modern slavery reporting obligations. The OFT guidance is capable of being adapted to the s.54 MSA disqualification sanction, subject to regular reviews and updates to enhance its usefulness as the implementation of the sanction progresses. Drafting and publication of the guidance is best done by the authority who will have the power to enforce the sanction, who will be the Secretary of State – as explained towards the end of this section.

A sanction designed for s.54-related omissions will also make it possible to provide tailor-made rules governing the provision of undertakings. Undertakings under the general disqualification regime are governed by s.1A CDDA, and those for the competition law sanction are governed by s.9B CDDA. The undertakings regime has been criticised on the grounds that it may undermine the public interest by allowing directors' derelictions to be dealt with behind closed doors, without the scrutiny of the courts or the public.[219] The lower costs of the undertaking procedure compared to those of a court trial, may induce the parties to settle on an undertaking on terms that are not commensurate with the conduct involved.[220] In particular, disqualification periods could be reduced, with a corresponding diminution in the deterrent effect of the disqualification sanction, and the sanction's ability to control unfit behaviour.[221] The pressure to agree a disqualification undertaking rather than ventilate the issues in court at considerable financial expense, can lead to a 'plea bargaining culture' that is unfair on defendants.[222] This unfairness may be exacerbated by an imbalance whereby 'directors with limited resources and no desire for litigation against the Secretary of State will be persuaded to agree a disqualification undertaking with little or no professional advice' while 'rogues with deep pockets' continue unimpeded.[223] In tilting towards the interests of the more affluent directors governed by s.54 MSA, this imbalance would thwart the aims of a s.54-related disqualification sanction.

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[216] CMA, *Revised guidance on competition disqualification orders: Response to Consultation* CMA103 (Crown, 2019), [2.4].
[217] OFT510 (n.188), 1.2; CMA93 (n.194), 1.8.
[218] CMA103 (n.216), [2.7].
[219] S. Griffin, 'The Disqualification of Company Directors in the Management of Insolvent Companies', Chapter 9 in J. de Lacy (ed), *The Reform of United Kingdom Company Law* (Cavendish, 2002) 216.
[220] Ibid.
[221] V. Finch and D. Milman, Corporate Insolvency Law: Perspectives and Principles (3rd edn, CUP 2017), 628.
[222] Ibid, 642.
[223] Ibid.

An undertakings framework for s.54-related omissions, independent of the main CDDA undertakings regime, would make it easier for the State to calibrate the approach to accepting undertakings for such breaches as time goes on. In this way, it could pay closer attention to avoiding the risks highlighted in the criticisms above. An independent framework also creates scope for establishing rules that are unique to undertakings for that particular sanction. For example, Griffin has recommended that the advantages and weaknesses of the undertaking procedure could be reconciled by limiting the availability of undertakings to cases which merit a disqualification penalty of up to five years – i.e. those involving less serious examples of unfit conduct.[224] In relation to undertakings for defaults in modern slavery reporting obligations, this recommendation could be adopted to demonstrate that the expedience of the procedure has not overshadowed the public interest in holding directors to account. Policy changes/innovations of this nature, in implementing an independent undertakings regime, would not have any ripple effects on the general CDDA undertakings regime. By the same token, the independent undertakings regime for s.54 MSA disqualifications would not be clouded by any other elements/policies that would arise in the sort of undertakings for unfit conduct that would normally be linked to s.6 and s.8 CDDA.

Furthermore, an undertakings framework for s.54-related omissions, independent of the main CDDA undertakings regime, would enable interested parties to monitor and discern patterns in the granting of undertakings more straightforwardly, compared to endeavouring to extract them from the register of undertakings granted under that main regime, or to interpret them within that context. The register for the main regime is considered opaque, more so since the particulars it contains are given at the discretion of the Secretary of State.[225] In the same way that a desire has been shown to bring about a greater degree of comparability between modern slavery statements submitted under s.54 by introducing a single reporting deadline and a central repository[226] this would make information on the number and nature of s.54 disqualification undertakings more accessible to stakeholders. As noted under sub-heading C(ii)(b), it would be difficult to track the effectiveness of sanctions for modern slavery reporting obligations, if they are absorbed in the statistics for disqualifications under s.6 and s.8 CDDA. The same observation may be applied to support the argument for disqualifications undertakings in relation to s.54-related defaults being granted under an independent statutory provision. This would be in line with the objective of transparency that is pursued by s.54 MSA and disclosure regimes generally, and it would uphold the public interest in seeing the disqualification regime at work through tackling misconduct in individual cases, deterring misconduct generally, and promoting high standards of management.

[224] Griffin (n.219), 217.
[225] Griffin, ibid 216.
[226] Home Office, *Transparency in Supply Chains Consultation: Government Response* (Crown, 2020), Annex D.

A key distinction between the proposed sanction and the existing competition law sanction is that the power to bring proceedings under the new sanction would rest with the Secretary of State rather than a sectoral regulator. In contrast to sectoral regulators such as the CMA, whose enforcement activity was considered in part D(iii), the Secretary of State has greater resources and expertise in relation to disqualification matters. Assigning enforcement power to a separate regulator may result in a lacklustre approach, if the regulator lacks the financial and professional capacity to police the regime. It may also result in a patchy approach to the bringing of proceedings, if the use of the disqualification sanction is subject to the regulator's policy priorities at any given time, or subject to ebbs and flows in the scale of its enforcement activity. For example, the heightened enforcement activity surrounding disqualification for breaches of competition law was accompanied by the CMA's affirmation that it is 'ramping up' the use of its disqualification powers 'and as a result, the risk of director disqualification to those who break the law has never been higher'.[227]

Consequently, the overall recommendation is for a new disqualification sanction modelled on the competition law sanction in that it prescribes a maximum disqualification period of 15 years, makes disqualification mandatory where the director's conduct shows him to be unfit and is supplemented by guidance regarding the type of conduct that would show a director to be unfit. In this instance though, the guidance would be more expansive (along the lines of the original OFT guidance, compared to the current CMA guidance), at least for the early life of the sanction. The sanction would include an undertakings regime that can be monitored and modified without considerable effort. The main difference is that the Secretary of State would have the power to enforce the sanction. In the respects considered under this sub-heading, a new set of provisions governing the s.54 disqualification sanction would be superior to integrating the sanction into the existing unfitness regime under s.6 and s.8 CDDA. Nevertheless, the potential success of this recommended sanction also turns on the question whether the disqualification regime genuinely acts as a check on the conduct of executive managers, as considered in the next section.

E. Would the Recommendation generate the right changes in directors' outlook and behaviour?

This section contrasts the extent to which the disqualification remedy, and the concept of shaming, are seen as effective tools against professional directors. In this sense, it elaborates on one of the points identified in parts D(ii) and D(iii) concerning the competition law sanction, that professionals and companies regarded the existence of the sanction as a strong motivating factor for compliance, despite its limited enforcement. It is shown here though that these views do not translate into an argument of general application, that the threat of humiliation or disqualification acts as a check on the conduct of professional directors.

[227] CMA, 'Director disqualification: an increasing risk' (22/05/19).

Furthermore, this section expounds on how the court's power to grant a reprieve to disqualified directors, which has developed in a manner that is less stringent for professional directors, can subvert the benefits of a disqualification sanction introduced to capture this category of directors (i.e. those managing companies governed by s.54 MSA). These factors cast a shadow on the recommended sanction's ability to make an impact. However, this section and the paper as a whole still conclude in favour of adopting the recommended sanction.

The majority of directors involved in disqualification proceedings are small business operators – self-employed directors/proprietors of private companies.[228] The disqualification regime is seen as broadly targeting this category of directors,[229] and thus its effectiveness is largely measured against their experience. Empirical research has established the limited impact of the disqualification sanction in relation to small business operators, demonstrating that it does not affect the manner in which they run their businesses or discharge their obligations, and that they are unaware of the full implications of breaching a disqualification order or consider the consequences of such a breach being detected to be remote.[230] Consequently, the CDDA is seen as providing little deterrent for rogue directors,[231] and minimal influence on legitimate directors confronted with the potential collapse of their business.[232] Importantly, it does little further damage to 'their already dented business reputation'.[233]

On the other hand, disqualification is regarded as a meaningful sanction 'against the more substantial or professional individual', such as a formally qualified director of a major private/public company who depends on employment in the capacity of a professional executive and has 'a real reputation to lose'.[234] Compared to the ease with which directors of small companies are able to re-establish themselves,[235] disqualification of a professional manager would have the serious effect of rendering him unable to secure future employment at managerial level in a sizeable company of the type he is familiar with.[236] Scholars accordingly consider that a more concerted effort to achieve disqualifications against this group would yield discernible benefits in terms of protecting the public interest and bolstering high standards of management.[237] This view may be supported through case law on disqualification, and the concept of sanctions that have adverse publicity/shaming effects.

[228] A. Hicks, *Disqualification of Directors: No Hiding Place for the Unfit?* (ACCA, Research Report 59, 1998), 8.
[229] A. Hicks, 'Director disqualification: can it deliver?' 2001 J.B.L. 433, 446.
[230] Hicks, *No Hiding Place* (n.228), 10.
[231] Hicks, '[C]an it deliver?' (n.229), 441.
[232] Hicks, ibid.
[233] ibid, 436; J. Loughrey, 'Smoke and mirrors? Disqualification, accountability and market trust' (2015) 9 L.F.M.R. 50, 56.
[234] A. Hicks, 'Director disqualification – the National Audit Office follows up' (1999) 15 I.L.&P. 112; Hicks, '[C]an it deliver?' (n.229), 436, 442, 446.
[235] Hicks, '[C]an it deliver?' ibid, 436.
[236] Ibid, 442.
[237] Ibid; Loughrey (n.233), 56.

Decided cases reflect the courts' awareness that disqualification has significant consequences for a director's business reputation as well as his freedom and ability to pursue a career.[238] Disqualification carries the stigma associated with a breach of commercial morality.[239] It strips an entrepreneur of an attractive attribute, public recognition of his fitness to function as director of a limited company.[240] Even the existence of pending proceedings against a professional company director would have a 'considerable impact' on his reputation and ability to pursue his profession in the meantime.[241] Seen in this light, it is a shaming penalty – imposed on behalf of the community to censure the wrongdoer and his conduct as being 'contrary to shared moral norms', separating the wrongdoer from adherents to those norms.[242]

These factors, identified in relation to disqualification of professional directors, may be allied with the concept of shaming. In the same way that disqualification protects the public interest by imposing restrictions on unfit directors,[243] 'shaming penalties assure citizens that society regards compliance as a virtue' by throwing the spotlight on the disgraceful effects of wrongdoing.[244] Just as disqualification plays a part in deterring improper conduct,[245] a shaming sanction capitalizes on the acute sensitivity of the reputations of board members of prominent companies,[246] and the high value that a director may attach to his reputation.[247] Consequently, shaming is seen as being more effective against middle class or affluent individuals, for whom the burden of stigma is likely to be heaviest.[248] Shaming may reduce the wrongdoer's chances of promotion within the company,[249] make other companies reluctant to hire the wrongdoer.[250] Losing respect in the eyes of their peers and the public can damage their self-esteem severely.[251] Reputational threats and damage to career prospects as well as significant personal relationships, are thus portrayed as being more capable of suppressing misconduct than potential criminal sanctions.[252]

However, it is important to look beyond this to examine whether the prospect of disqualification and the shame attendant on the sanction exert a demonstrable influence on

[238] *Secretary of State v Hollier* [2006] All ER (D) 232, [83].
[239] *Re ECM (Europe) Electronics Ltd* [1992] BCLC 814, 822; A. Hicks, *No Hiding Place* (n.228), 116.
[240] *R v Holmes* [1991] BCC 394, 396.
[241] *EDC v United Kingdom* [1998] BCC 370, [61].
[242] D. Kahan, 'What Do Alternative Sanctions Mean?' (1996) 63 Univ.of Chic.L.R. 591, 634, 636.
[243] Hicks, '[C]an it deliver?' (n.229), 439.
[244] Kahan, (n.242) 639.
[245] Hicks, '[C]an it deliver?' (n.229), 440.
[246] D. Skeel, 'Shaming in Corporate Law' [2001] 149 U.Pa.L.Rev. 1811, 1859.
[247] Skeel, ibid 1860.
[248] Kahan, (n.242) 644.
[249] J. Coffee, '"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment' (1981) 79 Mich.L.Rev. 386, 424-433.
[250] Skeel, (n.246) 1834.
[251] Kahan (n.242), 638; Coffee (n.249), 433.
[252] S. Simpson, *Corporate Crime, Law and Social Control* (CUP, 2002), 142.

the actions of professional directors. This becomes doubtful when it is seen how the elements highlighted above may be counterbalanced by conflicting considerations. These considerations are (a) that managers in their position may instead be immune to the shaming proposition, (b) the lack of support from empirical evidence concerning the impact of shaming/disqualification on directors of companies sufficiently large to fall within the scope of s.54 MSA, and (c) the ability of directors to secure a release from a disqualification order.

As regards **(a)** for example, Skeel warns that shaming sanctions 'can have dramatically different consequences for different offenders',[253] highlighting that a wrongdoer's highly valued skills may continue to attract business notwithstanding his damaged reputation, thus curbing the impact of shaming sanctions.[254] He applies this observation to 'high-tech managers' in the same way that 'newer, high-tech firms' may prove less susceptible to shaming than traditional companies.[255] Consequently, the Review's belief that a disqualification sanction would enhance corporate culture and enforcement of s.54 responsibilities might not apply universally. On point **(b)**, Simpson notes that assessments of corporate crime control policies tend to lack an empirical base: 'Deterrence is only presumed to work', based on the belief that managers' fear of sanctions will make them more inclined to comply with the law.[256] An empirical assessment of the role of deterrence and compliance strategies in managerial decision-making that she administered through a survey of MBA students and executives, concluded that managers feared formal legal threats but tended not to adjust their behaviour in accordance with these.[257]

This is echoed by the outcome of Baldwin's 2002 survey[258] of senior staff of leading companies (FTSE 250, and therefore within the sphere[259] of the criteria for s.54 MSA regulation). It found that directors' fears for their own standing did not feature prominently among the key drivers of action to control punitive risks. The foremost driver was concern for corporate reputation (90 per cent) followed by fear of corporate criminal liability and penalties (56 per cent), fear of the competitive or market effects of criminal prosecution/convictions (40 per cent).[260] Fear of personal criminal liability and personal reputation stood at 36 per cent and 8 per cent respectively among the range of drivers.[261] Baldwin aptly observes that '[t]his finding raises serious questions about assumptions that punitive approaches really do encourage good citizenship through focusing on individuals'.[262] It also illuminates the danger of treating corporate and individual pressures as though only one or the other operates with respect to

[253] Skeel, (n.246) 1818.
[254] Skeel, ibid 1818, 1834.
[255] Skeel, ibid 1835, 1840-1841.
[256] Simpson (n.252), 116.
[257] Simpson, ibid 151.
[258] R. Baldwin, 'The New Punitive Regulation' (2004) 67 M.L.R. 351.
[259] PwC, *FTSE 250: Realising ambitions for growth* (2011), 3.
[260] Baldwin (n.258), 368.
[261] Ibid.
[262] Ibid.

a professional director at any given time, or of predicating expectations of directors' behaviour on the basis that they will act rationally in response to deterrence mechanisms.[263] These outcomes of the investigations by Simpson and Baldwin therefore call into question whether a disqualification sanction for s.54-related defaults would exert a convincing restraining effect on the actions of professional directors.

Point **(c)** provides additional grounds for moderating our expectations of disqualification's ability to strengthen the compliance culture and enforcement of s.54 MSA. Section 17 CDDA enables a disqualified director to apply for the court's leave to act as a director of a particular company or companies. This echoes the notion that under a rights/punitive approach, a director has procedural rights, even if he is not entitled to maintain his access to limited liability.[264] The application may be heard immediately following the judgment granting the disqualification order.[265] Indeed, the Court of Appeal has indicated that the 'interests of justice overall are more likely to be served' if the application for leave is heard immediately after disqualification is imposed, unless the circumstances of the particular case render it impossible.[266] In this way, duplication and wasted resources that would result from separate proceedings can also be avoided.[267] The courts have an unfettered discretion to grant leave.[268] They assess whether there is a need (on the director's part and/or of the company concerned) to make the order, and whether the public will be adequately protected if leave is granted.[269] A small risk to the public from granting leave may be acceptable if 'a substantial and pressing need' can be demonstrated, on the company's part, or that of the applicant to be able to earn a living.[270] Equally, it is less important to establish need, if there is no risk of the defects in management recurring.[271]

The balancing exercise between the 'need' and 'public protection' factors can work in favour of professional directors. The courts have been receptive to evidence establishing a company's need for their involvement in management, e.g. that the director plays a key strategic role within an organisation, and is essential to its culture and cohesion.[272] That he has expertise and/or contacts in a specialised industry.[273] Furthermore, having spent his entire career in the sector, he is difficult to replace by virtue of loyalty or confidence he has gained among colleagues, suppliers and customers,[274] departmental closures/redundancies that may be

[263] Ibid, 368-369.
[264] Finch & Milman (n.221), 627.
[265] *Re Barings plc (No. 3)* [1999] 1 All ER 1017, 1019; *Re Britannia Homes Centres Ltd* [2001] 2 BCLC 63, 66.
[266] *Re TLL Realisations Ltd* [2000] 2 BCLC 223, 235, 236.
[267] Ibid, 235.
[268] *Re Dawes and Henderson (Agencies) Ltd* [1999] 2 BCLC 317, 326.
[269] *Re Gibson Davies Ltd* [1995] BCC 11, 14; *Re Tech Textiles Ltd* [1998] 1 BCLC 259, 267.
[270] *Dawes* (n.268), 325.
[271] *Barings (No. 3)* (n.265), 1022.
[272] *Re Fourfront Group Ltd* [2019] EWHC 3318, [45]; *Re Joseph Meng Loong Lee* [2019] Scot (D) 7/4, [17]
[273] *Re Tech Textiles Ltd* (n.269), 270-271.
[274] *Fourfront* (n.272), [45]; *Tech Textiles*, ibid 270-271; *Re Servacomm Redhall Ltd* [2006] 1 BCLC 1, [24].

triggered by his departure,[275] or potential adverse effects on users of the company's services.[276] Similarly, in terms of the director's personal need, courts have been cognisant of difficulties he would face in finding employment in the same field, e.g. because of advanced career level/age, and/or restrictive covenants in his service agreement which preclude him from working in competition with his previous employer;[277] as well as the prospect that an individual's inability to fill the role of director could prevent him from securing employment.[278]

As regards the 'public protection' factor, precedent also leans against the view that the seriousness of the conduct which led to a professional director's disqualification would be sufficiently grave as to warrant withholding leave. Courts considering the seriousness of conduct which led to the applicant's disqualification, examine whether it is attributable to inadequate management, to impropriety, or a proclivity to prejudice creditors by defaulting on debts or extracting excessive remuneration.[279] Loughrey notes that 'dishonesty and lack of commercial probity are rarely detected at board level in large institutions, possibly because their more sophisticated risk and governance systems prevent them occurring'.[280] The financial crisis demonstrated that '[f]ault in these institutions, at board level… is more likely to comprise incompetence'.[281] Where the factual background to the disqualification shows no dishonesty/impropriety, an order that restores the director to a position where he is subject to duties and responsibilities associated with that status is not seen as carrying a significant danger to the public.[282] Even where the director's misconduct is regarded as relatively serious, s.17 leave has been granted to a professional director on the basis that it was unlikely to be repeated.[283] Furthermore, well-resourced companies and directors will be in a better position to adduce evidence of safeguards that can be provided to protect the public by making it unlikely that the conduct will recur. Such safeguards include appointing responsible non-executive directors or introducing appropriate policies/procedures and controls.[284]

Re Barings plc (No. 3)[285] suitably illustrates many of these points. It centred on a s.17 application brought by a director (N). N had not been found liable for dishonesty or impropriety, but for failure to give 'a number of highly significant events' arising from activities of a rogue trader within the banking institution 'the attention that they had merited and that his senior position… and the responsibilities of that position, required him to have given

[275] *Fourfront* ibid, [45].
[276] *Joseph Meng Loong Lee* (n.271), [26].
[277] *Servacomm* (n.274), [23]
[278] Ibid, [25]; *Joseph Meng Loong Lee* (n.272), [26].
[279] *Dawes* (n.268), 326.
[280] (n.233), 56.
[281] Ibid.
[282] *Dawes* (n.268), 328.
[283] *Joseph Meng Loong Lee* (n.272), [25]; *Barings plc (No. 3)* (n.265), 1024.
[284] *Tech Textiles* (n.269), 268; *Fourfront* (n.272), [49].
[285] (n.265).

them'.[286] The court accepted that if N were unsuccessful in obtaining s.17 leave, he would be obliged to surrender his directorships of companies that valued his advice and expertise, but he would still be able to counsel those companies through the consultancy business he had established in his own name following the termination of his employment with the banking institution.[287] Hence, he was not dependent on s.17 leave to sustain his livelihood, and the companies did not need him to be a board member to benefit from his advice. The court concluded that this was not sufficient reason for withholding s.17 leave. The companies' clear desire for easy access to N's advice could be fulfilled most sensibly by installing him as non-executive director on their boards, and there was no public interest which required that leave should be denied.[288] Thus, leave was granted although no need had been established on the part of the applicant or the companies. The court was satisfied that there was no 'sound reason of policy or practice' why N should not be permitted to continue to sit on the boards of those companies, subject to safeguards such as the stipulation that N remain a non-executive director, not enter into any contract of employment, and the directorship should be unpaid.[289]

In these respects, professional directors find themselves in an advantageous position in obtaining leave. They are well able to substantiate claims regarding need (their own and that of companies), and to show that the public interest is protected since the conduct that led to their disqualification was not dishonest/improper and is unlikely to recur. Moreover, despite 'need' being absent where they can achieve the same ends through an alternative career route, this does not prevent them from obtaining s.17 permission. This upholds the privilege/protective approach, where 'public interest considerations may prevail over issues of culpability'.[290] It presents a sharp contrast with the position of owner-manager/self-employed directors, where it has been held that the court would only consider allowing a disqualified director to be effective sole proprietor of another company 'in the most extreme and unusual cases', taking account of the fact that the applicant could carry on the business in question as sole trader or in a partnership.[291] This too is justifiable from a privilege/protective point of view, in that 'it matters little whether disqualification affects a director's personal employment prospects adversely: the public interest is the dominant consideration'.[292] The treatment of owner-manager/self-employed directors is differentiated from the *Barings* judgment on the ground that the *Barings* proceedings 'were a long way removed' from the situation at hand: N had sought to act as director of companies in which he did not hold any significant financial interest, and the existing directors and shareholders

[286] Ibid, 1020.
[287] Ibid, 1023.
[288] Ibid, 1023.
[289] Ibid, 1024.
[290] Finch & Milman (n.221), 620.
[291] *Britannia* (n.265), 77-78; *Secretary of State v Barnett* [1998] 2 BCLC 64, 72.
[292] Finch & Milman (n.221), 624

were keen for him to continue in management.[293] The antithesis of this situation would be endeavouring to make the (artificial) distinction between the need of a disqualified director who is sole owner and manager of the company, and the needs of the company. Furthermore, empirical research has found that a significant majority of owner-manager/self-employed directors have little trouble obtaining employment after disqualification.[294] There is no indication from decided cases that the courts' more benign approach to s.17 cases involving professional directors has been subject to exploitation. This may be partly because not many such directors have been disqualified under the CDDA regime in the past, since it has predominantly caught owner-managers.[295] However, if there is a growth in the number of avenues by which professional directors are pursued, i.e. in addition to the existing grounds considered in Part C, it will be important to guard against the possibility that a greater number of disqualified professional directors may benefit from the courts' approach to s.17 relief. This could result in the emergence of a two-tiered approach that favours professional directors over owner-managers, which would be counter-productive to any reforms aimed at introducing a new sanction such as the one considered in this paper. Indeed, notwithstanding the recent rise in disqualification for competition law infringements, one of the cases highlighted in this Part D concerning the relative ease of establishing need and public protection in relation to a professional director, represents the first successful s.17 order to be granted for a competition law disqualification.[296] Griffin's recommendation that 'the power to grant leave … under s.17 should be abrogated' in cases involving disqualification periods longer than five years, i.e. more serious examples of misconduct[297] could go some way towards mitigating this imbalance by restricting access to s.17 for owner-managers and professional directors alike.

It may accordingly be concluded that conceptions of the deterrent effect of shaming sanctions in general and disqualification in particular, are not borne out by empirical evidence on the attitudes of professional managers. Moreover, the value of a disqualification sanction as a tool of deterrence and enforcement may in fact be dampened by directors' ability to obtain leave under s.17, and the judicial approach to these applications that has made their requirements easier for professional directors to surmount. Thus, the contrary considerations **(a)**, **(b)** and **(c)** considered in this section give pause regarding the question whether a new sanction would produce the right changes in directors' outlook and behaviour. This paper nevertheless maintains the argument that the moral significance and high public profile of modern slavery concerns, would at least generate a shift in directors' outlook and behaviour, compared to the context in which the empirical studies were conducted. A parallel may be drawn here with the 'fear factor' identified in relation to the prospective 'offence of corporate killing', highlighted

[293] *Britannia* (n.265), 71.
[294] Hicks, *No Hiding Place* (n.228), 11, 13.
[295] Loughrey (n.233), 56-57; Rt Hon Lord Hoffmann, 'The fourth annual Leonard Sainer lecture' (1997) 18 Comp.Law. 194, 196.
[296] *Re Fourfront Group Ltd* – text accompanying n.272, n.274, n.275, n.284.
[297] Griffin (n.219), 213.

in stakeholder interviews conducted by Neal and Wright for their 2007 study.[298] These interviews revealed a firm belief that 'the mere threat of such a serious … sanction being invoked in relation to individual directors would … cause relevant individuals to act more cautiously (and upon legal advice) while discharging their boardroom functions than has hitherto been the case'.[299] The 'fear factor' appeared to have led to a surge in training resources aimed at enabling directors to understand the new duties they would be subject to under the new statutory offence for 'corporate killing'.[300] In this sense, the opprobrium attached to a sanction involving death (e.g. criminal liability for 'corporate killing') or linked to forms of exploitation that are widely recognised as heinous (e.g. defaults related to modern slavery reporting obligations) may have a more potent effect on directors than more conventional causes of personal liability – e.g. self-dealing, poor financial stewardship. Furthermore, the introduction of the recommended sanction may provide a basis for testing whether the strong motivating force to comply with the competition law disqualification sanction (noted in parts D(ii) and D(iii)) is equally observable with respect to another bespoke disqualification sanction such as the sanction for s.54-related omissions.

F. Conclusions

Ethical trading organisations have argued that transformative change will only come about 'when the long arm of the law starts to tap on the shoulders of senior executives whose companies are found to be non-compliant in their Modern Slavery Act statements and supply chain human rights obligations', noting (quite properly) that there is 'no one simple solution'.[301] This call seems timely, coming as it does against the backdrop of longstanding awareness of the disqualification regime's inability to reach professional directors. Two decades ago, a leading judge noted that the CDDA was more concerned with owner-managers than with enterprises where the division between (professional) managers and shareholders is more pronounced.[302] Likewise, Hicks observed that the unfit conduct of directors of larger companies undoubtedly 'has the potential to cause the greatest damage within the commercial world and their disqualification is likely to have the greater regulatory benefit.'[303] More recently, Loughrey has argued that the disqualification regime's ability to restore trust in the financial services sector is severely constrained, if it 'is not concerned with failures in corporate governance in dispersed share ownership companies'.[304]

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[298] A. Neal and F. Wright, *A Survey of the use and effectiveness of the Company Directors Disqualification Act 1986 as a legal sanction against directors convicted of health and safety offences* (Health and Safety Executive RR597, 2007), [11.4].
[299] Ibid.
[300] Ibid.
[301] Ethical Corporation, ''We know most global companies have modern slavery in their supply chains' (06/08/2019).
[302] Rt Hon Lord Hoffmann (n.295), 196.
[303] A. Hicks, 'Disqualifying the unqualified – a quixotic crusade?' (1999) Amicus Curiae 22, 23.
[304] (n.233), 56.

The disqualification sanction proposed by the Review, which is unique in that it is directed squarely at professional managers, would (if introduced) signify a very real test of the disqualification regime's ability to meet the challenge of these expectations. A considerable amount of thought would therefore have to go into designing and implementing it. For example, as seen in Part C, the compatibility that is identifiable between the aims of s.54 and the disqualification regime does not mean that a disqualification remedy for defaults in modern slavery reporting obligations could be integrated into the existing grounds of disqualification without difficulty. This includes the shortcomings of the unfitness regime governed by s.6 and s.8 CDDA, which *prima facie* provide an attractive route by virtue of their flexibility and well-established jurisprudence. This paper has therefore sustained the argument in favour of a tailor-made disqualification sanction, introduced through a new set of provisions, by drawing on the experience of the disqualification sanction for infringements of competition law. This has shown that the mere introduction of a legislative remedy does not guarantee immediate results, and it may be affected by issues concerning the approach to enforcing it. However, its importance may be boosted by its perceived deterrent effect. Part D has endeavoured to recommend a workable sanction, amplifying the merits associated with the competition law mechanism and defusing the drawbacks noted in relation to the competition law mechanism or to the main CDDA regime. In considering whether the recommended sanction would generate the right changes in directors' outlook and behaviour, Part E has recognised the extent to which expectations of the effectiveness of the disqualification sanction may be tempered by arguments and empirical evidence which suggest that the significance of shaming/disqualification penalties may be over-estimated; complemented by the role of s.17 CDDA in providing an avenue for restoring disqualified professional directors to a management position. Careful framing of the legislation for the new sanction, and a vigilant approach on the part of the Secretary of State and the courts to matters involving directors in these cases, could help to control any potential negative effects that professional directors' recourse to s.17 may have on the recommended sanction. Furthermore, as noted at the end of Part E, the potential deterrent effect of the recommended sanction cannot be discounted altogether, taking account of the high esteem that professionals attached to the competition law sanction as a reason for complying with their obligations, and the analogy with the 'corporate killing' offence. It is notable that the deterrent effect of the competition law sanction appeared to prevail even when enforcement activity was very low. In like manner, the effects of the recommended sanction may turn out to be predominantly deterrent rather than manifest through the imposition of disqualification orders/undertakings. It is accepted that this would lead to circular reasoning: the lack of enforcement would be attributed to the deterrent function of the sanction – even if this remained unproved. On the other hand, the idea that the disqualification regime's effectiveness should be measured with reference to enforcement statistics has never been fully accepted.[305] Hence in reality, the effectiveness of the recommended sanction may have

[305] A. Hicks, 'Director disqualification: can it deliver?' 2001 J.B.L. 433, 434; R. Williams, 'Disqualifying Directors: a Remedy Worse than the Disease?' (2007) 7 J.C.L.S. 213, 225-236

to be seen as carrying the probability that there would be few/no cases to illustrate its cogency. The opportunity is still worth accepting, over the challenges considered in this paper, given the reciprocal advantages to be gained. For the s.54 MSA framework, a disqualification sanction could provide the 'bite' that is evidently needed to bolster compliance and enforcement. For the disqualification regime, the sanction offers a practical test of its true capacity and limitations as a weapon against professional managers, and deeper insight into the implications of using insolvency law mechanisms to address human rights concerns.