COMPANY INCORPORATION REGIMES IN THE UK, THE US AND AUSTRALIA – IN SEARCH OF THE GOLDEN MEAN

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Abstract

The purpose of the law on incorporation has been heavily contested by academics. On one side of the debate are scholars who argue that company law should have an "enabling" role, in that it should empower business owners to arrange their affairs in a manner that best suits their purposes at the same time as minimising any interference from the state. On the other side of the debate are those who argue that company law should impose on the world of commerce strong regulatory measures to prevent such abuses. This conflict between the "enabling" and the "regulatory" role of company incorporation law is visible in many jurisdictions, with each of them achieving a different balance between the two approaches. Many scholarly studies have elaborated on how companies are incorporated and regulated. Some of them have been used in the current paper such as studies carried out by Bayern et al. (2017) and Reyes (2018). However, this paper examines the extent to which the incorporation regimes in the UK, the US, and Australia can be said to be "enabling" or "regulatory" in nature, through a detailed analysis of the law on company incorporation, ownership structure and the protection provided to the relevant stakeholders through the principles of separate legal personality.

Keywords: Company Incorporation, United Kingdom, United States, Australia

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1. INTRODUCTION

The purpose of the law on incorporation has been heavily contested by academics (Kahn-Freund, 1944; Sheikh, 1996; Hicks, 1997; Bayern, Burri, Grant, Häusermann, Möslein, & Williams, 2017). On one side of the debate are scholars motivated by the principle of the freedom of contact and a strong belief in the power of market forces. They argue that company law should have an "enabling" role, in that it should empower business owners to arrange their affairs in a manner which best suits their purposes, at the same time as minimising any interference from the state (Reyes, 2018). On the other side of the debate, are those concerned about the potential for abuses inherent in the concept of limited liability, as well as in the significant economic power of large corporations, who argue that company law should impose on the world of commerce strong regulatory measures to prevent such abuses (Reyes, 2018). This conflict between the "enabling" and the "regulatory" role of company law is visible in many jurisdictions, with each of them achieving a different balance between the two approaches. It is proposed in this paper that both functions of company law are equally important and that therefore the inclusion of each of them to an equal extent would constitute the "golden mean" as far as company incorporation regimes are concerned. Such a balanced approach would ensure that the barriers of entry into the business are sufficiently low to create an environment in which entrepreneurs are encouraged

to set up new businesses, but also where the regulatory framework post-incorporation provides them with sufficient security of their personal assets and the assets of their business, to help stimulate the growth of the economy (Koutsias, 2017). The United Kingdom, the United States, and Australia have been known historically to have different approaches to company incorporation, which are aligned with the economic goals of those countries. These jurisdictions are selected on the basis of the strength of their improved securities regulatory regimes and the success of their markets. A justification for this selection is that it is believed that the common law jurisdictions appear to be much more active enforcers than civil law jurisdictions (Coffee, 2007). This paper will adopt a moderate view in selecting useful legal provisions from these selected developed jurisdictions in order to find out the moderate approach for company incorporation. To achieve the objectives of the current study, the following methods are employed. First, the collection of all relevant primary and secondary materials. Second, the discovery of suitable case law to be used when it is needed throughout the analysis.

This paper examines the extent to which each of those regimes can be said to be "enabling" or "regulatory" in nature, through a detailed analysis of the law on company incorporation, ownership structure and the protection provided to the relevant stakeholders through the principles of separate legal personality. In particular, the incorporation regimes in each country are compared as to the extent to which they achieve each of those roles. For that purpose, the structure of this paper is as follows. Section 2 explains the UK regime in respect of company incorporation. Section 3 elaborates on the incorporation process in the US. Section 4 provides the regulatory framework for company incorporation. Section 5 comes up with a number of recommendations for the best practice. Section 6 presents a summary and conclusions.

2. EFFICIENCY AND COST-EFFECTIVENESS: THE UK REGIME

At least prior to the Brexit referendum, the UK has been known for its steady but strong economic growth with a highly developed and market-oriented financial hub in London. Companies in the UK are created under the framework of the Companies Act of 2006 and the corresponding case law, through the issue of a certificate of incorporation (Companies Act, s. 15, 2006) by the Registrar of Companies (the Companies House) (Companies Act, s. 1060, 2006). Companies can be either unlimited (Companies Act, s. 3(4), 2006) or limited by shares (Companies Act, s. 3(2), 2006) or by a guarantee (Companies Act, s. 3(3), 2006). Equally, a company can be either public (Companies Act, s. 4(2), 2006) or private (Companies Act, s. 4(1), 2006), with the public companies having their shares traded on a stock exchange (Companies Act, s. 755, 2006) and the shares of the private companies being held by private members. The incorporation procedures in the UK were deliberately modernised in 2006 (Companies Act, 2006) in order to achieve a "simple, efficient, and cost-effective framework for British business in the twenty-first century", with a particular focus on small businesses (Companies Act, 2006). Registration is handled by the Companies House online or via post through a fairly straightforward application consisting of a) a statement of capital (Companies Act, s. 9(4)(a), 2006) or guarantee (Companies Act, s. 9(4)(b), 2006); b) a statement of the proposed officers (Companies Act, s. 9(4)(c), 2006); c) a statement of the proposed registered address (Companies Act, s. 9(5)(a), 2006); and d) a copy of the proposed articles of association (Companies Act, s. 9(5)(b), 2006; Companies Act, s. 19(1), 2006). The lowest amount of capital required to set up a private limited company is £1 and the registration costs £12 when filed online, and £40 when filed by post (GOV.UK., n.d.). It can also be filed personally at the Companies House and registered on the same day for a fee of £100. The registration is confirmed within 24 hours when filed online and within 8-10 days when filed via post. Public limited companies must hold a minimum capital of £50,000 (GOV.UK., n.d.), which ensures that the size and performance of the company are sufficient to attract potential investors at the stock exchange. Therefore, the costs of creating a company are sufficiently low that they do not constitute a barrier to starting a business for anyone. Equally, the taxation levels imposed on UK companies are relatively low, with all companies regardless of their profits being taxed at 19% (GOV.UK., 2020). This rate has been applied consistently since 2017 (after a change from 20% in the previous years) to all companies except for unit trusts and open-ended investment companies (GOV.UK., 2020).

The straightforward incorporation procedures and the low taxation rates imposed on companies in the UK are particularly welcoming to both small and large businesses. The UK regime clearly performs an "enabling" role in that, it allows entrepreneurs to easily set up and run businesses with minimal legal support, which was the original vision behind the Companies Act (2006). This is further confirmed by the case law related to the basic framework of a limited company in the UK. As established in the landmark case of *Salomon v. Salomon & Co Ltd* (1896), limited companies in the UK have a separate legal personality from their shareholders, which is highly respected by the UK courts, apart from exceptional circumstances. Such exceptions are necessary in order to fulfil the "regulatory" role of the UK's regime, i.e., to prevent potential abuses of limited liability. For instance, the UK courts are prepared to "lift" the corporate veil of a company in cases where the company was used to conduct fraudulent trading (Insolvency Act, s. 213, 1986; *Dimbleby and Sons Ltd v. National Union of Journalists,* 1984) or more broadly used as a facade to commit fraud (*Jones v. Lipman,* 1962; *Gilford Motor Co Ltd v. Horne,* 1933; *Trustor AB v. Smallbone*, 2001), in a state of national emergency (*Daimler v. Continental Tyre,* 1916) or in the interests of justice (*Adams v. Cape Industries plc,* 1990; *Prest v. Petrodel Resources Ltd,* 2013; *Chandler v. Cape Plc,* 2012). While provisions on lifting the corporate veil are necessary in order to prevent abuses of power by the company's shareholders, the major limitation in this respect is the lack of a statutory footing or clear common law principles regulating this area, which might discourage both entrepreneurs and investors due to potential security issues (Alexander, 2016; Michoud, 2019;

Spotorno, 2018; Mujih, 2017). This statutory gap in the legal framework hinders both the regulatory and the enabling role of the UK corporation law regime because it is inefficient at discouraging abuses of the company structure by shareholders and ineffective at clearly communicating to the shareholders their legal duties related to running a company.

Lack of clarity – at least to an extent – can also be considered as a feature of the UK law related to the constitution of a company, which is contained within its Articles of association (Companies Act, s. 17, 2006). The Articles prescribe the regulations for the company (Companies Act, s. 18(1), 2006), which enables its members, directors, and investors to understand how the company must operate in order to be legally compliant, as well as to foresee any potential problems and position themselves accordingly. Most companies in the UK adopt the *Model articles of association* (GOV.UK., 2018a), which makes it easier for entrepreneurs who are less experienced or require a more cost-effective approach to get a company up and running quickly without obtaining legal advice. The Model articles specify the extent of liability of the company's members (GOV.UK., 2018e) and prescribe rules related to the appointment of directors (GOV.UK., 2018b), their powers and responsibilities (GOV.UK., 2018d) as well as decision-making procedures (GOV.UK., 2018c). Decision-making powers of the shareholders (GOV.UK., 2018g), as well as procedures related to shares and the distribution of dividends (GOV.UK., 2018f), are also covered by the Model articles, providing for a comprehensive and clear company constitution which business owners can adopt with no additional costs. However, the law related to the amendment of the Articles of association – whether the Model articles or tailored articles – is made overly complex by several decisions of the UK courts. In theory, s. 21 of the Companies Act of 2006 prescribes that a company may amend its Articles by a special resolution, i.e., a resolution approved by at least 75% of the members (Companies Act, s. 283(1), 2006). In practice, however, amendment of Articles can be prevented in case of private limited companies through the inclusion in the Articles of a so-called "*Bushell v. Faith* clause" (1970) which provides for a weighted voting procedure granting a particular director increased voting rights in case of a vote for their removal from the office, that effectively prevents such a removal. Despite the confusion, they introduce to the rules on the amendment of the Articles, *Bushell v. Faith* (1970) clauses are a useful mechanism for small private companies to ensure the stability of directorship (Prentice, 1969; Collier, 1970). In addition, such clauses are not automatically included in the Model articles, but they are formulated in a sufficiently simple manner that they could be included in the Articles without significant legal costs. Therefore, such clauses ensure both the "enabling" and the "regulatory" role of the UK's regime on company incorporation.

3. FREEDOM AND COMPLEXITY: THE US REGIME

In many respects, the US economy is considered as the largest economy worldwide due to its highly advanced state of technology and its blend of various types of economic systems. In order to fuel this economy by setting up a new business perspective, business owners can choose from a variety of company structures, including a C corporation, an S corporation, and a limited liability company (LLC). The incorporation rules are reasonably straightforward in relation to all of those forms of business, but the availability of several types of corporate structures might be confusing to prospective entrepreneurs due to the various requirements applicable to them. Like the UK's limited liability companies, all of the above structures have a separate legal personality – as evidenced by the decision in *Bank of the United States v. Deveaux* (*Bank of the United States v. Deveaux,* 1809; *Santa Clara County v. Southern Pacific Railroad Co,* 1886; *Citizens United v. Federal Election Commission,* 2010) – and can appoint a board of directors. But the similarities end there. For instance, C corporations offer to their shareholders a high level of protection from personal liability, but they are subject to extensive reporting and record-keeping rules (Denis & Sarin, 2002). While in C corporations, earnings and losses get taxed at the company level, in S corporations they are passed to the owners who report them on their own tax returns (Denis & Sarin, 2002). In the case of LLCs, the profits and losses can also be passed to the owners of the company, who are considered self-employed and, therefore, subject to tax contributions to social security and Medicare, the US's national health insurance program (Finnerty, 2002). The availability of various structures and the differences in relation to accounting require one to obtain legal and/or financial advice prior to incorporating, which might significantly raise the cost of incorporation, constituting a barrier for an "enabling" incorporation regime. The incorporation process is further complicated by the fact that prospective business owners can incorporate their company or corporation in any of the 50 US states, regardless of the state in which they are residing (Finnerty, 2002). One could argue that this variety of options is "enabling" for prospective business owners because it allows them to identify a corporate structure which is most suitable to their needs. However, in reality the multitude of options might also lead to confusion and inability to proceed with incorporation without spending a substantial amount of money on legal, financial and taxation advice.

The situation is equally complex with regards to "lifting" or "piercing" the corporate veil by the US courts because the rules differ depending on the law of each state. The US courts might pierce the veil if a corporation or a company was used to evade obligations (*Barcelona Traction, Light, and Power Co, Ltd,* 1970), due to defective incorporation (e.g., failure to file Articles of incorporation (Model Business Corporation Act, 2002), if corporate formalities were not observed or the corporation/company had not been adequately capitalized to meet its future obligations (*Kinney Shoe Corp v. Polan,* 1991), and in order to ensure justice in tort cases (*Berkey v. Third Avenue Railway,* 1927; *United States v. Bestfoods,* 1998). However, beyond that, the decisions of the US courts in various states with regards to piercing the veil may differ significantly (Berle, 1947), although those decisions cannot be said to be completely unprincipled. In many cases, the US courts have

relied on the common law theories of agency and/or instrumentality/alter ego to determine whether the veil should be pierced. The instrumentality/alter ego doctrine proposes that corporate veil can be pierced where the factual circumstances indicate that a company is a mere instrumentality, i.e., an alter ego of an individual (*People v. Clauson,* 1964; *Giblin v. Murphy,* 1983; *United States v. Elgin, Joliet & Eastern Railway Co.,* 1936; *United States v. South Buffalo Ry. Co.,* 1948; *United States v. Milwaukee Refrigeration Transit Co.,* 1905), whereas the agency theory states that the veil should be lifted where the interference of the parent company in the affairs of the subsidiary is so intrusive that the subsidiary can be considered as an agent of the parent company (*Berkey v. Third Avenue Railway Company,* 1926). Nevertheless, the above theories are common law theories established through precedent and not put on a statutory footing. This means that the rules on lifting the veil are not easily accessible to business owners, therefore increasing their compliance costs due to the need to hire legal assistance in order to understand the application of those rules to their company or corporation. Those difficulties constitute evidence of the "regulatory" function of the US's incorporation regime which, due to the complexities related to the operation of the country's federal system, significantly impacts the ability of that regime to enable entrepreneurs to become successful business owners.

Finally, the US's federal system further complicates the preparation of the Articles of incorporation (the equivalent of the Articles of association in the UK) for a company or a corporation. The differences in corporate laws applicable to each state make it impossible to provide Model articles, which necessitates the use of legal support by prospective business owners in drafting the articles. In extreme cases, the lack of professional support in drafting the Articles might lead to defective incorporation, *de facto* incorporation, or incorporation by estoppel, which can only be ascertained by the courts (Rieke, 1979). This can further increase the costs related to incorporation and subsequent running of the company or corporation. In addition, the costs of forming a legal entity in the form of a company or a corporation are significantly higher than in the UK, ranging from $50 to $300 depending on the state for the filing fee only, excluding any legal or financial advice (Harbor Compliance, 2020). However, those restrictive rules are not introduced due to the need of the US regime to perform its "regulatory" role. Rather, they are the effect of the internal complexity enshrined in the US's federal system and the lack of effort on the part of the national government and local governments to simplify the setting up of companies and corporations by prospective business owners. This hinders the "enabling" function of the US's regime unnecessarily, that is without at the same time increasing its "regulatory" function by improving the security of business transactions. As such, the ability of the US regime to represent a fair balance between having an "enabling" and "regulatory" function is clearly hindered by its complexity and the lack of government support in overcoming the difficulties related to the legal and financial barriers applicable to entrepreneurs.

4. BUSINESS FOCUS AND CENTRALISATION: THE AUSTRALIAN REGIME

Australia continues to have a highly developed market economy characterised by strong regulatory institutions and the ability to respond to global changes. Similar to the UK's regulatory framework for incorporation, the key provisions of the framework in Australia are embedded in a single Act – the Corporations Act 2001. At least in some respects, the Act is even more comprehensive than the Companies Act 2006 in the UK. It is also significantly more business-friendly due to its easy writing style and the inclusion of less formal explanations, such as those in Part 1.5 which contains a "Small business guide" explaining the basic rules on company registration (Corporations Act, Part 1.5, s. 1., 2001), available business structures (Corporations Act, Part 1.5, s. 2, 2001), operation of shares (Corporations Act, Part 1.5, s. 6, 2001), funding of the company's operations (Corporations Act, Part 1.5, s. 8, 2001) and obligations of the directors (Corporations Act, Part 1.5, s. 5, 2001) and the company (Corporations Act, Part 1.5, s. 4, 2001) after incorporation. Despite this, the initial selection of the company structure appears to be more complicated than in either the UK or the US. Prospective business owners may choose from proprietary companies (an equivalent of private companies in the UK) and public companies (Corporations Act, Part 1.5, s. 112(1), 2001). The former can be further divided into companies limited by shares or unlimited with share capital, whereas the latter might be incorporated as public companies limited by shares, limited by guarantee, unlimited with share capital or no liability companies (Corporations Act, Part 1.5, s. 112(1), 2001). Proprietary companies are companies with up to 50 non-employee shareholders – a restriction that does not apply to public companies (Corporations Act, Part 1.5, s. 113(1), 2001). The difficulty with selecting an appropriate legal structure is likely to force Australian entrepreneurs to seek legal advice, which generates significant additional incorporation costs that can be added to the already extensive list of fees paid to the Australian Securities and Investments Commission (ASIC) (2020) upon registration. In particular, the fees for registering a company exceed $500, with $495 charged for the cost of registration, $50 for reserving a company name, and $36 for registering a business name ("Difference Between", 2020). Those high set up costs, which are much greater than in the case of both the UK and the US, serve as a deterrent to potential entrepreneurs, particularly given the likely need to hire legal counsel in order to select the business structure in the first place. Such costs inevitably have a negative impact on the "enabling"' role of the Australian incorporation regime.

On the other hand, Australia's incorporation system is centrally governed by the ASIC and applies uniform corporation taxes across the country despite it being a federal state, which demonstrates the country's commitment to nurturing its "enabling" role while at the same time ensuring a certain level of security in order to fulfil its "regulatory" function. In that sense, the Australian regime performs much better than the US regime

despite both being federal states. Equally, the federal tax imposed on companies is uniform across all states and, as of the tax year 2020/21, it is maintained at a reasonably low rate of 26% for small businesses and a slightly higher rate of 30% for businesses with an aggregated turnover higher than $50 million (PwC, 2020). This level of taxation is comparable to the one applied in the UK regime and it is sufficiently low that it does not impose a significant burden on companies, particularly small companies, therefore encouraging entrepreneurs to set up and grow businesses. As in the UK and the US, the shareholders of Australian companies benefit from limited liability in most cases, apart from certain exceptions. While in the UK and the US such exceptions are mostly derived from court decisions, in Australia at least some of them have been codified in order to facilitate access to such information by business owners and company directors. For instance, Part 9.4B of the Corporations Act 2001 prescribes that penalties might be payable by company directors if they commit certain offences as part of their duties, e.g., by providing false information (Corporations Act, s. 1308, 2001). Moreover, other statutes impose on company directors' civil and/or criminal liability for actions related to taxation (Income Tax Assessment Act, Pt. 6, Div. 9., 1936), health and safety (Occupational Health and Safety Act, s. 26(1), 2000; Occupational Health, Safety and Welfare Act, s. 61, 1986; Occupational Health and Safety Act, s. 144(1), 2004; Workplace Health and Safety Act, ss. 53(1), 167(2), 1995), trade practices (Trade Practices Act, s. 75B(1), 1974) and environmental protection (Environment Protection and Biodiversity Conservation Act, Pt. 17, Div. 18, 1999; Hazardous Waste (Regulation of Exports and Imports) Act, s. 40B, 1989; Environment Protection Act, s. 147, 1997; Protection of the Environment Operations Act, s. 169(1), 1997; Waste Management and Pollution Control Act, s. 91(1), 1998; Environmental Protection Act, s. 183(2); 1994; Environmental Management and Pollution Control Act, s. 60, 1994). In terms of circumstances which are not regulated by statute, the courts in Australia have in the past agreed to pierce the veil for various reasons in cases involving closely held companies, i.e., companies with one or two individuals who are both shareholders and directors (Freedman, 2000). This was justified by the courts by arguing that in closely held companies shareholders typically do not require limited liability in order to encourage them to invest in the company (Freedman, 2000). However, this eagerness to pierce the veil might be discouraging for entrepreneurs, especially that many modern start-up companies begin with one or two individuals only. Therefore, the purpose of this rule appears to be mainly "regulatory".

In general, in cases involving the piercing of the veil where no statutory provisions are available, the Australian courts resort to relying on the following theories: the organic theory and the agency principle. The former proposes that the actions of a director must be perceived as actions of the company which cannot act or think independently (*Tesco Supermarkets Ltd v. Nattrass,* 1971; *H L Bolton (Engineering) Co Ltd v. T J Graham & Sons Ltd*, 1957), whereas the latter proposes that directors act as agents of the company (*Meridian Global Funds Management Asia Ltd v. Securities Commission,* 1995). Due to the existence of the above "tools" for ascertaining whether a veil should be pierced and because of the codification in this area, the Australian approach to veil piercing appears to be more clear than the approaches of the US or the UK courts, even though the above theories were never uniformly adopted by all Australian courts (*Standard Chartered Bank v. Pakistan National Shipping Co,* 2002). The standardisation and clarification of the law in this area make business owners and company directors much more likely to be able to easily familiarise themselves with their legal duties and ensure legal compliance of their own actions as well as the actions of their companies. At least in relation to the codified part of the law, duties related to compliance can be understood by business owners and company directors without seeking external legal advice, which lowers the cost of running a company. Therefore, in relation to the piercing of the corporate veil, the Australian system marries together the "regulatory" and "enabling" roles in a much more effective way than the US or the UK regimes. In that sense, despite the high set up costs for business owners, compliance with the law following incorporation appears to be reasonably straightforward in the Australian regime, at least with regards to maintaining the separate legal personality of the company.

5. DISCUSSION

The search for "the golden mean" when it comes to company incorporation regimes could be seen as a futile enterprise, given that each regime is dependent on the economic situation of the country by which it is promoted and, therefore, necessarily reflects the challenges involved in that particular situation. However, such a search should not be abandoned because of the value brought by the successful identification of "best practices" in this area. The incorporation regimes in the UK, the US, and Australia were evaluated earlier in this paper as to the extent to which they perform "enabling" and "regulatory" roles. It is not the purpose of this paper to identify the best of the three regimes, but rather to point out those practices in each regime which most successfully strike a balance between those two functions. In line with this, the UK regime appears to provide the most cost-effective solution for incorporating companies. The low amount of capital required to set up a private limited company in the UK (£1), the minimal registration costs (£12), the availability of online registration and the confirmation of registration within 24 hours allow prospective business owners to set up a company quickly and efficiently. Moreover, the simple company structures and the availability of well-constructed, comprehensive Model articles of Association that are automatically incorporated into a company's constitution make it easy for any entrepreneur to set up a company in the UK, even without legal training. This significantly lowers the start-up costs for prospective entrepreneurs. However, one could question whether this is indeed the preferable approach, given that it might encourage entrepreneurs to commit to running a company without being fully aware of how they should do it in order to achieve legal compliance.

This could easily occur since entrepreneurs setting up a company in the UK are not sufficiently prompted to reflect on the consequences of the Model articles that they are adopting for their company. Instead of being asked in the application process to confirm that they do not wish to submit their own Articles of association, perhaps they should be required to analyse each part of the Model articles along with explanations and examples of how such Articles operate in practice so that they understand better what they are committing to when accepting the Model articles.

The UK regime clearly allows entrepreneurs for prompt and cost-effective incorporation, which could be described as a feature of an "enabling" regime. However, the same regime imposes on companies a complex network of mostly unclear regulations with regards to the circumstances in which the courts agree to impose liability for the company's actions on shareholders or directors. In this respect, the regime appears to be rather "regulatory" in nature. A better balance between the "enabling" and the "regulatory" role with regards to lifting the corporate veil is certainly achieved by the Australian regime, where at least some of the laws in this area are codified in the Corporations Act 2001 and a range of other Acts. The reliance of the Australian regime on the organic theory and the agency principle in veil lifting cases which were not codified ensures that even where legal advice is required in order to identify and comply with one's duties as a shareholder, such advice is more straightforward and, therefore, less costly due to the presence of a principled approach of the courts to veil piercing. Equally, the Australian regime can be praised for the simplicity of its regulations which are small business-friendly, such as the "Small business guide" incorporated into the Corporations Act 2001 that explains in simple terms the key rules on incorporation and running of a company. The adoption of such regulatory initiatives aimed at facilitating cost-effective legal compliance for small businesses would constitute a significant advancement of many company law regimes around the world. The presence of ASIC, the centrally governed system for managing the incorporation of companies in Australia, as well as its uniform taxation levels throughout all states, can also be praised as effective solutions for countries with a federal system, given that they facilitate setting up of businesses uniformly across the entire country. The easiness with which entrepreneurs in Australia can set up companies through ASIC is certainly a feature of an "enabling" incorporation regime.

The advantage of the US incorporation regime is that it offers immense flexibility in terms of choosing the place of incorporation, given that entrepreneurs can incorporate their company or corporation in all 50 states. Similar flexibility is also afforded when selecting the company structure. Another advantage of the US regime is that it allows business owners to set up both C corporations and S corporations, which enable them to select how to pay their taxes. By using S corporations sole traders can continue paying their taxes as if they were self-employed, while at the same time protecting their personal assets. In the UK and Australia, sole traders wishing to achieve a similar effect can set up a standard private/proprietary limited liability company and withdraw the money through a dividend, but they will be subjected to both the corporation tax and the dividend tax as well as other restrictions. As such, the existence of a corporation dedicated to sole traders is a strong feature of the US system, which encourages freelancers and entrepreneurs to set up businesses. It is, therefore, clearly a feature of an "enabling" incorporation regime. On the other hand, the variety of company structures in the UK might also lead to confusion and inability to proceed with incorporation without spending a substantial amount of money on legal, financial, and taxation advice. Therefore, the balance between the "enabling" and "regulatory"' functions, in this case, is very delicate. In addition, the fact that the filing costs in the US vary between different states, ranging from $50 to $300, significantly hinders the "enabling" role of the country's incorporation regime, because it creates unnecessary confusion amongst prospective business owners. Entrepreneurs might also be encouraged to incorporate in states different from their state of residence purely because of the lower filing fee, and without being fully aware of the laws applicable in that state. In the future, such opportunistic incorporations might present to business owners challenges related to compliance, which could be prevented by introducing further standardisation across the states.

6. CONCLUSION

This paper examined the law on company incorporation in the UK, the US, and Australia in order to assess the extent to which the incorporation regimes in those countries can be said to be "enabling" or "regulatory" in nature. The "enabling" role of an incorporation regime is fulfilled where business owners are allowed to arrange their affairs in a manner that best suits their purposes while minimising any interference from the state, whereas the "regulatory" role is completed where the law imposes on the world of commerce strong regulatory measures to prevent abuses of corporate structures, for instance through fraud or tax evasion.

The importance of this study derives from the strong correlation between the healthy business environment and the country's economy. Having developed laws for company incorporation is significant for the development of the private sector and the entire country as well. The market must be attractive so that the business owners can have confidence and trade safely. However, it was not the purpose of this paper to identify the best of the three regimes, but rather to point out those practices in each regime which most successfully strike a balance between those two functions. In line with this, the incorporation regime in the UK was found to provide the most cost-effective and quick solution for incorporating companies due to its low filing fees as well as the availability of 24-hour online registration and the Model articles of Association which are automatically adopted by new companies unless amendments are submitted. On the other hand, the Australian regime can be praised for its codification of the law on lifting the corporate veil as well as its reliance on doctrines in veil lifting cases relating to circumstances for which there are

no codified laws. Equally, the key rules on company incorporation in Australia are straightforward and small business-friendly – an effect that is achieved through the incorporation of the "Small business guide" into the Corporations Act 2001. The presence of ASIC, the centrally governed system for managing the incorporation of companies in Australia, as well as its uniform taxation levels throughout all states, can also be praised as effective solutions for countries with a federal system, given that they facilitate setting up of businesses uniformly across the entire country. Finally, the US incorporation regime offers immense flexibility in terms of choosing the place of incorporation, given that entrepreneurs can incorporate their company or corporation in all 50 states. This flexibility can be seen both as asset and liability, depending on the context. Nevertheless, the existence of an S corporation – a company vehicle dedicated to sole traders – is a strong feature of the US system, which encourages freelancers and entrepreneurs to set up businesses.

The above features of the UK, the US, and the Australian incorporation regimes are examples of achieving the right balance between the "enabling" and "regulatory" roles. Such a balance is the proverbial "golden mean" which is attained when entrepreneurs are both encouraged to set up and run businesses quickly, effectively and in a manner which best suits them, while at the same time being prevented from committing abuses of corporate structures, for instance through fraud or tax evasion. Laws dealing with these issues may be a suitable field for profound examination in order to provide considerable benefits and comprehensive protection for business owners, investors, and the market in general. Such an examination may be the subject of further research.

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