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# THE ECONOMIC CRIME AND CORPORATE TRANSPARENCY ACT RECEIVES ROYAL ASSENT – WHAT CAN WE EXPECT?

On 26 October 2023, the long-awaited Economic Crime and Corporate Transparency Act (ECCTA) received Royal Assent after a protracted period of parliamentary ping-pong.

We first wrote about this Act over the summer and described the Bill (as was) as the biggest shake up in corporate criminal law in 100 years, you can read about it [here](#). In this article, we will discuss the key changes introduced by the Act and what we can expect in terms of the impact for businesses.

## Key changes

The ECCTA contains key changes including:

1. Giving wider powers to Companies House to ensure accuracy and integrity of its register (including but not limited to the power to require identify verification for new and existing company directors, removing inaccurate material from the register failing which the company can be struck off; and information-sharing abilities with other enforcement agencies);
2. Enhanced powers granted to law enforcement agencies such as the National Crime Agency in relation to the seizure, freezing and recovery of cryptoassets;
3. Extension of the Serious Fraud Office's section 2A pre-investigation powers to compel documents and attendance at interviews to cover fraud offences (previously only available for bribery cases)
4. A new failure to prevent fraud offence; and
5. Statutory footing for attributing corporate liability (the identification principle).

We will take a closer look at the last two key changes.

## Failure to prevent fraud offence

Arguably the most contentious area in the entire Parliamentary process, the failure to prevent fraud offence went through many iterations prior to receiving Royal Assent.

Modelled after the failure to prevent bribery offence (Bribery Act 2010) and the failure to prevent the facilitation of tax evasion (Criminal Finances Act 2017), the failure to prevent fraud offence is a new strict liability offence which covers the core fraud offences found in the Fraud Act 2006 (such as fraud by false representation, omission or abuse of position) and the in the Theft Act 1968 (false accounting and false statements by company directors). It also includes aiding, abetting, counselling or procuring the commission of a fraud offence.

The offence will only apply to 'large organisations' where a person associated with it commits a relevant fraud offence intending to benefit (directly or indirectly) the organisation or any person or entity the associate provides services to on behalf of the organisation.

Similar to the failure to prevent bribery offence, the failure to prevent fraud offence will also apply extraterritorially.<sup>1</sup>

An associated person includes employees, agents and subsidiaries of the large organisation or any person who otherwise performs services for or on behalf of the large organisation (Section 199(7)). It also includes employees of a subsidiary of a large organisation. The assessment of whether a person is associated with an organisation will be

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<sup>1</sup> Section 196(3), ECCTA

based on the relevant circumstances and not merely by reference to the nature of the relationship between the person and the organisation.<sup>2</sup>

## What is a large organisation?

A relevant body is considered a 'large organisation' if two or more of the following conditions are satisfied in the financial year that precedes the year of the fraud offence:

- The turnover is more than £36 million;
- The balance sheet total is more than £18 million; and
- There are over 250 employees.

Parent companies, where they may not meet the above criteria can still be caught by the offence if two or more of the following conditions are satisfied by the group headed by it in the financial year that precedes the year of the fraud offence:

- The aggregate turnover is more than £36 million net (or £43.2 million gross);
- The aggregate balance sheet total is more than £18 million net (or £21.6 million gross); or
- The aggregate number of employees is more than 250.<sup>3</sup>

The scope of the offence was one of the primary areas of debate amongst the Houses during the parliamentary process. As we detailed in our previous article on this topic, the House of Lords supported the expansion of this offence to encompass a wider range of businesses, including small businesses. However, this was rejected by the House of Commons on the basis that it would put an additional compliance burden on SMEs.

Critics have questioned whether the scope of the final offence is too narrow, however others have referred to the identification principle reforms as the real hard hitter (discussed below). In any event the Act contains a provision allowing for the scope to be revisited.

## Reasonable prevention procedures

It will be a defence for the relevant body if it can show that the body had in place reasonable prevention procedures, or if they can show it was not reasonable to expect the body to have prevention procedures in place.<sup>4</sup>

The offence will not come into force until guidance has been published by the Ministry of Justice on what constitutes reasonable prevention procedures. It is likely that this will not be prescriptive.

We anticipate that the following six principles will feature namely, proportionate procedures and policies, top level commitment, risk assessment, due diligence, communication (including training) and monitoring and review – essentially adopting the same high-level approach as that taken in connection with the UK Bribery Act and the facilitation of tax evasion offence.

## Reforms to the identification principle

The expansion of corporate criminal liability for certain economic crimes perpetrated by senior executives is one of the reforms promised to fundamentally change the ability for prosecuting authorities to secure convictions for economic crimes.

Under Section 196, a senior manager acting within the actual or apparent scope of their authority commits a relevant offence, the organisation will also be found guilty of the offence. A 'senior manager' is an individual who plays a significant role in the making of decisions about how the whole or substantial part of the activities of the body corporate or partnership are to be managed or organised, or actually manages or organises the whole or a substantial part of those activities.<sup>5</sup>

Effectively, this means that if a senior manager committed a relevant offence, the corporate can also be prosecuted and convicted.

The extension of liability for corporates applies to a wider range of economic crimes that the failure to prevent fraud offence referred to above meaning that, in addition to fraud offences, it will apply to the substantive offences under the Bribery Act 2010, the money laundering offences under the Proceeds of Crime Act 2002, the market manipulation offences under the Financial Services Act 2012 and tax evasion amongst others<sup>6</sup>.

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<sup>2</sup> Section 199(8), ECCTA

<sup>3</sup> Section 202, ECCTA

<sup>4</sup> Section 199(4), ECCTA

<sup>5</sup> Section 196(4), ECCTA

<sup>6</sup> See schedule 12 of the Act for a full list of offences covered.

The enforcement track record for economic crime has historically stumbled due to the identification principle block, due to practical difficulty of establishing a directing mind and will in modern corporate organisations due to their large and often sprawling nature. This expansion of the traditional identification principle will, in theory, significantly strengthen the ability to prosecute both individuals and corporates.

## Conclusion and recommendations

In addition to reforming the identification principle and introducing a new failure to prevent fraud offence, the ECCTA also widens the powers given to various prosecuting bodies in relation to investigating and enforcement economic crime, including Companies House, the NCA and the SFO.

While the majority of the Act came into force upon the ECCTA receiving Royal Assent, the provisions in respect of attribution of liability for corporates will not come into force for another two months. The failure to prevent fraud offence will not come into force until the Guidance on reasonable procedures is published.

Following our enquiries made with the Fraud Policy Unit at the Home Office, it was confirmed that the Ministry of Justice expect to *'publish the guidance during 2024, following engagement with industry stakeholders. There will then be an implementation period before the offence comes into force, allowing organisations time to implement any changes necessary to ensure that reasonable prevention measures were in place.'* With the new law making it far easier to prosecute all companies for fraud before the end of the year businesses should assess their existing anti-fraud programs now to ensure that they are fit for purpose.

HFW has helped numerous companies prepare and implement compliance programs and is advising clients around this significant change in the law. We would be pleased to share our expertise with you and help your teams prepare for the coming into force of these new laws.

**We hope that you have found this legislative update helpful.**

If you would like to discuss any of the matters raised in this update please contact a member of our team:

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