

# Corporate Criminal Liability Expansion & The Failure To Prevent Fraud Offence

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In June 2023, [we released a briefing](#) discussing the proposed Failure To Prevent Fraud offence, as well as practical considerations for organisations. This has now become law.

Read on for an updated overview of this offence and other significant developments that impact the expansion of corporate criminal liability.

## The New Act: A Snapshot

The [Economic Crime and Corporate Transparency Act](#) (“The Act”) became law in October 2023. It is intended to “*deliver a suite of wider-ranging reforms to tackle economic crime and improve transparency over corporate entities.*”<sup>i</sup>

Some of the **key changes** include:

- Measures to tackle Strategic Lawsuits Against Public Participation (**SLAPPs**);
- reforms to **Companies House** to strengthen the business environment, support national security, combat economic crime, and deliver a more reliable companies register to underpin business activity;
- reforms to **limited partnerships** to tackle their misuse and modernise the governing law;
- the **expansion** of the “*identification doctrine*”;<sup>ii</sup>
- the creation of a **new Failure To Prevent Fraud offence**;
- enhancing law enforcement’s powers of **seizure and recovery** for crypto assets that are proceeds of crime or associated with illicit activity; and
- **strengthening** anti-money laundering powers.

The most **significant changes** that the new Act brings about for corporates is:

- 1) The **creation** of the “Failure to Prevent Fraud” (“FTPF”) offence ([S.199](#)), which holds large organisations criminally liable if they benefit from fraud committed by employees, agents, or associated persons.
- 2) An **extension** of the scope of the identification doctrine to include senior managers ([S.196](#)). This means that businesses can be held criminally liable for the actions of senior managers who commit various economic crimes.

## The Failure To Prevent Fraud (“FTPF”) Offence (S.199)

The offence’s **aims** include:

- **Protecting** victims (including businesses);

- holding organisations to account for **profiting** from fraud by their employees, agents, or other associated persons;
- encouraging **enhanced** fraud prevention procedures;
- driving both a “*major shift in corporate culture to help reduce fraud*”<sup>iii</sup> and a “*culture change towards improved fraud prevention procedures in organisations*.”<sup>iv</sup>

### Who Is Within The Scope of This Offence?

- The FTPF offence applies to **all large bodies corporate, partnerships and subsidiaries**; this includes large not-for-profit organisations such as charities, and incorporated public bodies.
- If an organisation meets **two out of the three** criteria set out below, that will bring them into the scope of the offence. The criteria is having *more than*:
  - 250 employees;
  - £36 million turnover; and/or
  - £18 million in total assets.
- It is important to note that where a parent company and its subsidiaries together meet two of the three criteria above, **the group of companies** will be in scope of the offence.
- The offence will have **extraterritorial reach**; companies operating abroad may find themselves liable if an employee or agent targets victims in the UK or commits fraud under UK law.
- There are **nine types of fraud and false accounting offences** that are currently within the scope of the overarching Failure to Prevent Fraud offence.
- The government will be publishing **guidance** on what counts as *reasonable* fraud prevention procedures. This is anticipated to be released early next year. It is only when the guidance is published that the offence will **come into force**.
- The new offence has a **lower evidential threshold**. An organisation will be liable where a specified fraud offence is committed by an employee or agent or other associated person for the organisation’s benefit.
- The prosecutor **does not** need to prove that senior leaders within the organisation ordered or knew about the fraud.

### A Two-Fold Defence

1) An organisation will **not be liable** for the FTPF offence if it can prove that **it had in place** reasonable fraud prevention procedures that would have been expected for such an organisation in all the circumstances.

2) An organisation will also not be liable for the FTPF offence where, in all the circumstances, **it is reasonable** for it to have **no** fraud prevention procedures in place.

Organisations will need to **carefully assess** the risks to their business and its operations and take a documented risk-based approach to determining whether fraud prevention procedures are needed or not.

### Penalties

If found guilty, organisations will receive a **criminal conviction** and a **fine**. The fine will be determined by the courts, taking into account all relevant circumstances.

## Broadening Of Corporate Criminal Liability (S.196)

The calls for changes to the identification doctrine, established in 1971, have finally made their way into law in 2023. The corporate terrain has changed dramatically, and the structures of companies are far more **complex and intricate**. The government's changes to the identification doctrine, which bring senior managers within the scope of who can be considered as the "*directing mind and will*"<sup>v</sup> of a company, will come as a relief to prosecutors who have found the doctrine to be an **obstacle** in successfully holding corporates to account.

As the Act made its way through Parliament, it was argued that the concept of the **directing mind and will** as a basis for corporate criminal liability, **is long outdated**. Lord Garnier pointed out that modern companies can operate in many different countries, "*with national, regional and global boards, and ... hundreds of thousands of employees engaging in multijurisdictional trade in goods and services. Locating the directing mind and will of these vast conglomerates is difficult, if not impossible, and the current law does not reflect the reality of modern business life.*"<sup>vi</sup>

### **What Has Changed?**

The Act has **updated** the identification doctrine to bring senior managers within its remit, therefore expanding corporate criminal liability to cover those with **senior management functions**.

A senior manager is defined as an individual who plays a significant role in either:

- making decisions about how the whole or substantial part of the organisation's activities are to be "*managed or organised*"<sup>vii</sup>, or;
- "*the actual managing or organising of the whole or a substantial part of those activities.*"<sup>viii</sup>

The focus will be on the **decision-making power and influence** of the senior executive who committed the economic crime, rather than their job title alone. There will be a practical test applied based on the **scope** of the decision-making by the senior executive.

The change means that organisations can be held criminally liable for the **actions** of senior managers who commit economic crimes. It is important to note that the list of relevant offences is extensive and captured in [Schedule 12](#) of the Act.

If a senior manager of an organisation acting within the actual or apparent scope of their authority commits a relevant offence, "*the organisation is also guilty of the offence.*"<sup>ix</sup> If the senior manager commits a relevant offence but that offence **does not** take place in the UK, and is **not an offence** in the jurisdiction in which it takes place, the organisation will not be criminally liable.

## Key Questions For Legal & Compliance:

These significant changes to the corporate criminal liability landscape, will require organisations that fall within the scope of these offences to undertake a **review of their structures** and their

**existing compliance programmes.** Furthermore, the government guidance on **reasonable fraud prevention procedures** will be published next year.

Below are a series of questions to consider in preparation:

#### Failure To Prevent Fraud Offence:

- Does your organisation fall within the **scope** of the offence?
- What do “*reasonable fraud prevention procedures*” **mean** for your organisation?
- Do your current policies and procedures make **specific reference** to fraud prevention, detection, and how to respond, as relevant to your operations?
- Have you undertaken a **fraud risk assessment**? If so, do you have a clear **plan of action** for fraud detection and prevention?
- How should your **internal communications** be reframed in light of the new incoming obligations?
- Do your **internal controls** reflect the elements of the fraud offences within the scope of the proposed offence?
- What, if any, changes are required to your **internal reporting and whistleblowing mechanisms**?
- Will additional **resources** be required to comply with the new law?
- What additional **training** is required? Will the approach to training be general, targeted or both?
- Do you have the capabilities and resources to properly **manage and mitigate** fraud risks?
- How will you record and measure the **effectiveness** of your fraud prevention procedures?

- Do you need to implement **new or specific** fraud policies?

#### Senior Managers And The Attribution Of Corporate Criminal Liability:

- Can you **identify** the “*senior managers*” in your organisation, and ensure that suitable **training and controls** are in place and continuously reviewed?
- Are your **decision-making processes** clear and reflective of your company structure?
- Have you considered who the **key “influencers”** within the company are?
- What is their **impact** on decision-making in relation to the company’s activities?
- Do the influencers also fall within the **definition** of senior managers?
- How will you provide **training** on economic offences to senior managers?
- Have you reviewed your **governance structures** (including organisational roles and levels of responsibilities), and ensured clarity within those structures?
- Have you **educated** your senior executive teams about the impact of these changes on both the organization and its executives?
- Have you undertaken a **risk assessment** to ensure that issues that may lead to external investigations are promptly addressed, and risks mitigated?

### What Will This Cost Organisations?

Organisations now face a significant task in ensuring that they have the requisite **policies and procedures** in place to comply with the new FTPF offence and changes to the identification

doctrine. There will be heightened **financial and resource implications** for in-house legal and compliance teams.

When the FTFP offence guidance is released, it is likely to be **similar to guidance published** on the failure to prevent bribery and failure to prevent facilitation of tax evasion offences. It is **likely to focus** on a risk-based approach, proportionate policies and procedures, demonstrable commitment from senior leaders undertaking risk assessments, and ongoing monitoring and review.

Compliance teams will **not** need to start from ground zero as their **existing compliance programmes** will be a good base on which to build on. They will need to ensure that their programmes are **tailored** sufficiently to the prevention of fraud and encompasses the range of relevant fraud offences.

Whilst the FTFP offence only brings large organisations within its scope, there is a provision in the Act for the **scope to be expanded** to bring SMEs within it. Therefore, SMEs should consider putting in place reasonable fraud prevention procedures as good practice.

Get in touch with Parametric Global Consulting, and we will be happy to help and support your organisation in preparing for the changes brought about by the Economic Crime and Corporate Transparency Act.

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## References

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<sup>i</sup> Factsheet: Economic Crime and Corporate Transparency Bill overarching:  
<https://www.gov.uk/government/publications/economic-crime-and-corporate-transparency-bill-2022-factsheets/fact-sheet-economic-crime-and-corporate-transparency-bill-overarching>

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ii Factsheet: identification principle for economic crime offences:

<https://www.gov.uk/government/publications/economic-crime-and-corporate-transparency-bill-2022-factsheets/factsheet-identification-principle-for-economic-crime-offences>

iii Factsheet: failure to prevent fraud offence:

<https://www.gov.uk/government/publications/economic-crime-and-corporate-transparency-bill-2022-factsheets/factsheet-failure-to-prevent-fraud-offence>

iv Ibid

v Factsheet: identification principle for economic crime offences:

<https://www.gov.uk/government/publications/economic-crime-and-corporate-transparency-bill-2022-factsheets/factsheet-identification-principle-for-economic-crime-offences>

vi Economic Crime and Corporate Transparency Bill – Second Reading (Lords):

<https://hansard.parliament.uk/lords/2023-02-08/debates/4DBBC159-6DB9-46AC-8E9E-45A3C2FC3E3D/EconomicCrimeAndCorporateTransparencyBill>

vii Economic Crime and Corporate Transparency Act 2023 S.196(4):

[https://www.legislation.gov.uk/ukpga/2023/56/pdfs/ukpga\\_20230056\\_en.pdf#M3.8.newlink.jGovNC7Rpt](https://www.legislation.gov.uk/ukpga/2023/56/pdfs/ukpga_20230056_en.pdf#M3.8.newlink.jGovNC7Rpt)

viii Ibid

ix Economic Crime and Corporate Transparency Act 2023 S.196(1):

[https://www.legislation.gov.uk/ukpga/2023/56/pdfs/ukpga\\_20230056\\_en.pdf#M3.8.newlink.jGovNC7Rpt](https://www.legislation.gov.uk/ukpga/2023/56/pdfs/ukpga_20230056_en.pdf#M3.8.newlink.jGovNC7Rpt)