

What to expect from the new failure to prevent fraud offence

Corporate Crime analysis: On 11 April 2023, the government published long awaited details of the new failure to prevent fraud offence, which has been introduced by way of amendment to the Economic Crime and Corporate Transparency Bill. Nicola Sewell, director and Farheen Ishtiaq-Stansfeld, senior associate in Fieldfisher's Commercial Crime team consider the key aspects of the new offence and its impact on businesses.

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What is the scope of this new failure to prevent fraud offence?

There has been a lot of debate in recent months on the potential scope of a new corporate 'failure to prevent' offence to be introduced in the Economic Crime and Corporate Transparency Bill (the Bill). To date, 'failure to prevent' offences only exist in relation to an organisation's failure to prevent (or have in place reasonable policies and procedures designed to prevent) their associated persons (eg employees or agents) from paying bribes ([Bribery Act 2010 \(BA 2010\)](#)) or facilitating tax evasion ([Criminal Finances Act 2017 \(CFA 2017\)](#)).

There was initially a suggestion that this new offence would cover fraud, false accounting and money laundering. However, on 11 April 2023, the government confirmed that the new offence would be limited to fraud and false accounting, leaving money laundering to continue to be governed by the existing regulatory regime (which does not currently include a 'failure to prevent' offence). The new offence will include all types of fraud and false accounting offences relevant to corporations, including fraud by false representation, fraudulent trading and cheating the public revenue.

This will be a strict liability offence and the corporation does not have to be aware of the fraud in order to be liable. However, for the offence to be engaged the fraud must have been committed for the corporation's benefit, consistent with the existing failure to prevent bribery offence but not for the offence of failure to prevent facilitation of tax evasion.

Which organisations will be in scope and what penalties could be imposed if they are found in breach?

Notably, the new offence applies only to large corporates and partnerships, large not-for-profit organisations such as charities, and incorporated public bodies across all sectors. In order to ensure proportionality (and avoid too much of a burden on SMEs), the offence therefore only applies to organisations meeting two out of three defined criteria. These are:

- more than 250 employees
- more than £36m turnover, and
- more than £18m in total assets

It should be noted that the new offence will also have extra-territorial reach: if an employee is responsible for conduct which would be a fraud under UK law, or targets UK victims, the corporation could still be prosecuted even where that conduct does not take place in the UK, or if the entity concerned is not based in the UK. This is similar to one of the failure to prevent offences under the [CFA 2017](#), which holds corporates liable for failure to prevent the facilitation of UK tax evasion wherever that corporate is based.

Similar to [BA 2010](#), organisations can be liable on conviction to unlimited fines for failing to prevent fraud. The only way to avoid prosecution will be to have in place reasonable fraud prevention procedures (although if the risk is extremely low it may be reasonable not to have any such procedures in place).

Why is it being introduced now?

The government has been considering introducing a strict liability corporate 'failure to prevent' economic crime offence for some time (the proposal having been first raised as long ago as 2013). There was initially a government consultation in 2017 regarding reforms to corporate liability for economic crime, the outcome of which (published in November 2020) was that the government needed further evidence to consider the position more carefully. It then tasked the Law Commission with considering how the law on corporate criminal liability could be reformed. A consultation ran during summer 2021, with a number of potential options for reform set out by the Law Commission in June 2022 including 'failure to prevent'. This has therefore been coming for some time.

The 'failure to prevent' offence under [BA 2010, s 7](#) has so far been the most utilised for enforcement against companies, contributing to the increasing prominence of deferred prosecution agreements in the enforcement landscape, which itself has been driven by the inevitable rise in self-reporting following the introduction of the failure to prevent model. As fraud is one of the most prevalent crimes in the UK, making up as it does almost 41% of all crime; the new offence will be the new offence of choice for prosecutors for the purposes of taking action against corporates. Given the 'proof of concept' that has been demonstrated through the use of the failure to prevent bribery, it is no surprise that this is the route the government has ultimately chosen for reforming corporate criminal law at this stage, although calls will remain for an overhaul of corporate criminal liability more generally. The new offence will strengthen the existing anti-economic crime regime and hold organisations accountable for the actions of their employees and agents in a significantly broader set of circumstances. With the onus on organisations to ensure that they have reasonable prevention procedures in place, the offence will also force a cultural shift in compliance for many organisations, including most obviously those for whom exposure to fraud is significant.

What practical impact will this have on businesses and those that advise them?

While the new offence will not, at least initially, apply to small and medium enterprises, it will force larger organisations to revisit their compliance processes to ensure that they not only provide them with a statutory defence to such an offence, but also improve their compliance culture. Those companies not yet caught by the offence should not, however, be complacent. As we saw with [BA 2010](#), to the extent they are not already, part of larger companies' compliance risk mitigation measures will inevitably be the use of contractual obligations upon companies in their supply chain, to compel those companies to warrant that they have reasonable measures to prevent fraud in place and/or equivalent measures to the contracting company, along with attendant audit rights. Those who enter into such contractual obligations without having the compliance procedures to back them up will expose themselves and their shareholders to significant risk.

Following the introduction of [BA 2010](#) and [CFA 2017](#) many organisations will already have in place adequate and/or proportionate procedures to prevent economic crime. Those organisations therefore may need to do relatively little to adapt their processes to the new offence, assuming a risk assessment does not identify significant additional and previously unaddressed risks.

On the other hand, those that meet the criteria to be caught by the offence and do not have existing processes in place, or where those processes have a narrower scope, should take this opportunity to undertake risk assessments and ensure that their compliance processes are fit for purpose and workable in practice. Given the difficulties in securing convictions against individuals, prosecutors are keen on establishing corporate liability (particularly where there is strict liability that has to be rebutted) and as fraud cases are easier to evidence than bribery cases, this new offence will signal a significant turning of the tide in enforcement action against companies.

When do you anticipate this offence will come into force?

Those larger organisations that do not currently have adequate preventative measures in place can take comfort in knowing that the offence will only come into force after the Bill receives Royal Assent and the

government has published its guidance on what it considers are reasonable fraud prevention procedures. While it is unclear to what extent the process of drafting that guidance is already underway, now is a good time for companies to carry out risk assessments to guard against complacency and ensure they are prepared for this game-changing offence.

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