

# Clients & Friends Memo

## UK Government Outlines Details of New Failure to Prevent Fraud Offence

26 April 2023

### Overview

On 11 April 2023, the UK Government [announced](#) that it has introduced a new “failure to prevent fraud” offence by way of an amendment to its draft Economic Crime and Corporate Transparency Bill (the “Economic Crime Bill”). Under the proposed new offence, an organisation could be held liable for fraud committed, for the organisation’s benefit, by an employee or agent, if the organisation did not have reasonable procedures in place to prevent the fraud from occurring. Before the offence comes into force, the Government will publish related guidance, which, amongst other things, is expected to set out what is considered to amount to “reasonable procedures”. The Economic Crime Bill is expected to receive Royal Assent in summer 2023.

The introduction of this new offence comprises one of the most significant developments to the economic crime legislative framework since the introduction of the UK Bribery Act 2010 (the “UKBA 2010”) over a decade ago, which introduced a failure to prevent bribery offence. Indeed, so-called “failure to prevent” offences have become the preferred model for prosecutors to hold organisations accountable for criminal conduct that would otherwise require attribution to the directing mind and will of a company, which has proved to be challenging, particularly in large or complex organisations.

### Background

The Economic Crime Bill forms part of the UK’s focus on fighting economic crime, and follows the introduction of the Economic Crime (Transparency and Enforcement) Act 2022 (the “Economic Crime Act 2022”), which received Royal Assent in March 2022. The Economic Crime Act 2022 was fast-tracked through Parliament last year in order to enhance the UK’s sanctions regime against Moscow following its invasion of Ukraine. It focuses on the creation of an overseas entities register, enhances the Unexplained Wealth Orders regime, and amends existing legislation on UK sanctions, which we discussed in a [previous](#) article. Given the speed at which the Economic Crime Act 2022 passed through Parliament, the Government made clear that it intended to introduce a further economic crime bill later in the year.

In a [report](#) published in June 2022, the Law Commission concluded that there was a need for reform of UK law on corporate criminal liability. The report was fuelled by high-profile prosecutions in which senior company officers failed to be considered the directing mind and will of their respective organisations. When the Economic Crime Bill was first introduced to Parliament in September 2022, there was much speculation about whether a new “failure to prevent” offence would be included and add to the existing failure to prevent offences under the UKBA 2010 (failure to prevent bribery) and the Criminal Finances Act 2017 (failure to prevent the facilitation of tax evasion). Reforming the identification doctrine was debated as a separate amendment, although ultimately such an amendment failed to be agreed upon. As a result, under the proposed new offence, prosecutors can hold organisations accountable without having to overcome the often challenging hurdle of proving that the directing mind and will of the organisation was involved in the wrongdoing.

In addition to introducing the new failure to prevent fraud offence, the Economic Crime Bill grants additional powers to seize and recover suspected criminal cryptoassets, proposes reforms to give businesses more confidence to share information to tackle money laundering and other economic crime, provides further intelligence gathering powers to law enforcement, and expands the Serious Fraud Office's section 2A powers, which currently apply to the pre-investigation stage of only certain cases. It also enhances the role of Companies House by making it a custodian of more reliable data concerning companies and other UK registered entities, and makes Companies House a more active gatekeeper over company creation, including powers to check, remove or decline information submitted to, or already on, its register.

### **Failure to prevent fraud**

#### *Fraudulent conduct*

The proposed new failure to prevent fraud offence encompasses the following offences:

- fraud by false representation (section 2, Fraud Act 2006);
- fraud by failing to disclose information (section 3, Fraud Act 2006);
- fraud by abuse of position (section 4, Fraud Act 2006);
- obtaining services dishonestly (section 11, Fraud Act 2006);
- participation in a fraudulent business (section 9, Fraud Act 2006);
- false statements by company directors (Section 19, Theft Act 1968);
- false accounting (section 17, Theft Act 1968);
- fraudulent trading (section 993, Companies Act 2006); and
- cheating the public revenue (common law).

In order to prove liability, the prosecution must show that (a) an employee or agent committed the fraud; and (b) the fraud was intended to benefit the organisation. If convicted of the offence, an organisation would be liable to pay an unlimited fine.

Given that, in order to trigger the offence, the underlying fraud has to benefit the organisation; where a fraud has been committed by an employee or agent and the organisation has either not benefitted from such conduct or has in fact been a victim of the fraud, the offence will not apply.

#### *In-scope organisations*

Perhaps the most controversial aspect of the failure to prevent fraud offence is that, at present, it will apply only to "large" bodies corporate and partnerships. That means that as well as businesses and incorporated public bodies, large not-for-profit organisations, such as charities, will be caught by the legislation.

In order to be considered a "large" organisation, an organisation must meet two of the following three conditions. It must have more than:

- 250 employees;
- £36 million in turnover; and/or
- £18 million in total assets.

It is not envisaged that the offence will apply to small- and medium-sized enterprises in order to avoid placing a disproportionate administrative burden on such organisations, notably in relation to implementing relevant policies and procedures.

*Territorial effect*

The new offence applies to employees who commit fraud “under UK law” or target UK victims, even if the organisation and the employee(s) themselves are based overseas. Under the UKBA 2010, a foreign company which carries on “a part of a business” in the UK can be prosecuted for failing to prevent bribery by any of its employees, agents or other representatives, even if the bribery takes place outside the UK and involved non-UK persons, thereby having wide territorial effect. It remains to be seen whether similar territorial reach will apply to the failure to prevent fraud offence. The Government is likely to provide clarity as to the territorial scope of this new offence in its guidance.

*“Reasonable procedures”*

An organisation can raise a defence by showing that it had “reasonable procedures” in place to prevent the fraud from occurring. That is the same defence that can be raised in respect of the failing to prevent tax evasion offences; however, it differs to the defence for failing to prevent bribery which requires “adequate procedures”. The Government notes that there may be circumstances in which it is reasonable for an organisation to have no fraud prevention procedures in place; for example, where there is a very low risk of fraud. In practice, the number of large organisations able to successfully demonstrate such circumstances is likely to be limited.

A core principle of the failure to prevent bribery offence is proportionality. It is expected that the same will be true of the new failure to prevent fraud offence, such that determining whether an organisation has in place reasonable procedures is likely to depend upon whether its procedures are proportionate to the risks that it faces.

**Conclusion**

In its [impact assessment](#), the Government stated that the primary aim of the offence will be to foster change in the behaviour and culture within organisations, and it does not expect to see an increase in the number of cases being brought before the courts. The Government has made it clear that it does not wish for this new offence to place disproportionate burdens on organisations. That is evidenced by the fact that the Government has decided to impose “reasonable procedures” as opposed to “adequate procedures”, as referenced in its impact assessment, and the fact that the Government has been keen to ensure that there is no overlap between this new offence and existing financial crime offences, particularly those relating to anti-money laundering regulations.

Given that large organisations are likely to already have anti-fraud measures embedded into their existing compliance frameworks, the proposed new failure to prevent fraud offence is unlikely to impact corporate fraud compliance programmes in the same way that the introduction of the failure to prevent offence under the UKBA 2010 did. Nevertheless, the introduction of this new offence certainly will encourage organisations to review those existing measures.

\* \* \*

If you have any questions, please feel free to contact any of the following Cadwalader attorneys.

Mark Beardsworth	+44 (0) 20 7170 8570	<a href="mailto:mark.beardsworth@cwt.com">mark.beardsworth@cwt.com</a>
Kevin Roberts	+44 (0) 20 7170 8590	<a href="mailto:kevin.roberts@cwt.com">kevin.roberts@cwt.com</a>
Alix Prentice	+44 (0) 20 7170 8710	<a href="mailto:alix.prentice@cwt.com">alix.prentice@cwt.com</a>
Duncan Grieve	+44 (0) 20 7170 8579	<a href="mailto:duncan.grieve@cwt.com">duncan.grieve@cwt.com</a>
Charlotte Glaser	+44 (0) 20 7170 8628	<a href="mailto:charlotte.glaser@cwt.com">charlotte.glaser@cwt.com</a>
Sharon Takhar	+44 (0) 20 7170 8738	<a href="mailto:sharon.takhar@cwt.com">sharon.takhar@cwt.com</a>