dwf

Have you prepared for the recent changes to economic crime legislation?

Have you prepared for the recent changes to economic crime legislation?

Fraud is the most common criminal offence in the UK, accounting for over 40% of crime in England and Wales and the figures are growing. Indeed, economic crime as a whole is on the increase.

The Economic Crime and Corporate Transparency Act 2023 ("ECCTA") was passed in October 2023 as part of the Government's fight to reduce economic crime.

ECCTA introduced a new offence of failure to prevent fraud ("FTPF") whilst also expanding the identification principle, which attributes economic crime criminal liability to companies.

These ECCTA changes are significant. They add to the growing list of factors that a company has to consider in the context of economic crime and there is an increase in the risk of prosecution as a result of their introduction. Enforcement authorities see these changes as adding to their armoury.

Company officers need to take steps now to ensure that the companies they represent take reasonable steps to ensure that they comply with the law and are insulated from prosecution because of the acts of others within the organisation.

We look here at the basic attributes of these changes and give some guidance on how they can be accommodated whilst minimising the risk of prosecution for a company with all negative associated connotations from that.

A. The Failure to Prevent Fraud offence

The FTPF offence is the third such offence on the statute list. It will be similar in form and function to existing 'failure to prevent' offences, the other two being the failure to prevent bribery offence found in Section 7 of the UK Bribery Act 2010 ("UKBA") and the failure to prevent facilitation of UK tax evasion offence found in Sections 45 and 46 of the Criminal Finances Act 2017.

A Corporate will be guilty of the FTPF offence where:

- ✓ an employee, agent or another person who perform services for or on its behalf commits a specified fraud offence; and
- ✓ the fraud is intended to benefit (whether directly or indirectly) the corporate.

What is the penalty for this offence?

The offence is penalised by an unlimited fine, mirroring the approach taken in the existing failure to prevent offence

Who does the FTPF offence apply to?

The new offence will capture only large companies which meet at least two of the following three criteria:

- ✓ more than 250 employees
- ✓ more than £36 million turnover
- ✓ more than £18 million in total assets.

Defence to the FTPF offence

Companies will have a defence if they have "reasonable procedures" in place to prevent fraud.

In some cases an organisation might argue its risk of fraud is such that it might be reasonable for that organisation to have no procedures in place to prevent fraud but in all cases companies will need to take steps to assess if they have "reasonable procedures" in place to prevent fraud.

What are reasonable procedures?

The Government is expected to publish guidance (the Guidance) on 'reasonable procedures' imminently. The Guidance will set out suggested steps that a company should take to ensure that they have reasonable procedures in place to prevent fraud and to be able to rely on those procedures to show that it has as a defence should an associated person seek to commit fraud for the benefit of the company.

The anticipated impact of the offence

Law enforcement agencies such as the Serious Fraud Office (SFO) have long sought the introduction of this offence, another example where the onus is being put firmly on companies to take responsibility for reducing economic crime.

Indeed Nicholas Ephgrave, the Director of the SFO recently said "I want to be the first organisation to take a prosecution forward based on the duty to prevent fraud."

These failure to prevent offences are seen as the future in economic crime enforcement although past approaches to enforcing these offences have been mixed. The failure to prevent bribery offence has for example, been utilised, in particular by the SFO, to hold companies to account, largely through the use of deferred prosecution agreements. On the otherhand no company has been charged with a failure to prevent the facilitation of tax evasion offence by HMRC, and this despite the offence coming into force some six years ago.

The implementation of the FTPF offence is designed to bring about cultural change even if there are to be only a small number of prosecutions a year. It has received a lot of publicity and the investigations and prosecutions into corporates under this FTPF offence are likely to be high profile in nature, reputationally damaging with serious consequences for those companies who are found to have broken the law.

What should companies be doing to prepare?

Companies can take steps now rather than wait for the Guidance to be published.

They should review their systems and controls to ensure they have reasonable anti-fraud procedures in place having conducted a fraud risk assessment to identify the fraud risk that the company faces. Companies can then review the Guidance and augment the steps that have been taken once it is published.

Companies should also reconsider their economic crime risk assessments as part of their wider governance obligations, as part of their ESG agenda. Such changes will help drive cultural change to prevent fraud, and other economic crime from being committed for the benefit of the company and as part of a wider focus on good corporate governance.

B. Expansion of the identification principle

ECCTA has also expanded the identification principle, making it easier to attribute criminal liability to a company for economic crime offences. This change has a broarder reach than the FTPF offence, as it covers all companies.

Commentators have said that this is the most significant change in economic crime legislation in the last 50 years. It certainly makes it easier for enforcement authorities to prosecute companies for economic crime. This change came into effect on 26 December 2023 and so companies and their senior managers are at a greater risk of prosecution for economic crime now than they were just a few months ago.

The identification principle is the test applied to establish if a company is liable for a criminal offence. Traditionally, you had to show that the "directing mind and will" of the company had committed the offence for the company to be successfully prosecuted.

The identification principle has been criticised as being unduly narrow by limiting the class of people who could constitute a directing mind and will. That test did not reflect the reality of decision-making in large modern organisations and impacted disproportionately on smaller companies. Large organisation have decision making that is often dispersed across multiple directing minds who have significant control across different area of a business and senior people in a large company were not considered sufficiently controlling enough to hold the corporate liable.

In the context of economic crime, it had therefore become increasingly difficult to identify who was the "directing mind and will" of a company where companies have grown in size and feature more complex structures.

ECCTA extends the identification principle by imposing a lower test for attributing corporate criminal liability for economic crime with the introduction of a "senior managers" test. In other words, senior managers acting within their authority and committing relevant economic crime offences will now place criminal liability on the company for economic crimes.

Who is a "senior manager"?

The new senior managers' test focuses on roles, responsibilities, and the level of managerial influence a person undertakes rather than on the job title they hold.

It applies to individuals who play a significant role in decision-making for the whole or a substantial part of the activities of the company.

As of 26 December 2023, any senior manager can pin the company with corporate criminal liability for substantive economic crime offences such as fraud, bribery and corruption, tax evasion and money laundering.

Anticipated impact of the new test

It is likely to lead to prosecutions of companies and senior level employees, with the possibility of unlimited fines for convicted companies. Importantly, it is not limited to large companies and so the risk of prosecution is heightened for all companies.

This is the way that the wind is blowing and if the new Criminal Justice Bill is passed then there will be a further expansion of this test to include all criminal offences.

To avoid such liability, companies need to review who are their senior managers and who could attribute economic crime liability on the company by their actions.

How could these legislative changes impact your business?

Large companies will need to establish reasonable systems to prevent fraud to avoid liability under the FTPF offence. They should do so as soon as possible taking preparatory steps by conducting a fraud risk assessment and updating their policies and procedures prior to the Guidance on reasonable procedures being published before implementing other actions where deemed necessary following a review of the Guidance.

This is because all companies need to identify their senior managers now and so it is not just their fraud risk assessment that needs to be reviewed, but all economic crime policies and procedures. Allied to that is the need to update economic crime policies and procedures to address the roles and responsibilities of senior managers and limit exposure as a result. These steps must be taken now and not after the Guidance is published.

On a practical level, these changes are likely to lead to more criminal investigations for economic crime and in turn, prosecutions. Companies and their officers are now at greater risk of economic crime prosecution because of these ECCTA changes.They will drive some cultural change, especially by companies who wish to ensure that they do not fall foul of the new legislation and who wish to uphold and demonstrate good corporate governance.

All of the above is very real and so if you would like advice or assistance on starting the process of compliance with ECCTA, then please do contact our team.

Euros Jones
Partner, Corporate Crime and Investigations
Euros.Jones@dwf.law
M: +44 7873 624305

Kelly Wilson
Senior Associate, Corporate Crime and Investigations
Kelly.Wilson@dwf.law
M: +44 7708 487763

James Peacham
Associate, Corporate Crime and Investigations
James.Peacham@dwf.law
M: +44 7873 625744

Kurun.Bhandari
Sustainable Business & ESG Consultant
Kurun.Bhandari@dwf.law
M: +44 7542 615061

More about DWF Corporate Crime

At DWF, we bring together a multi-disciplined blend of knowledge and expertise across the regulatory spectrum that puts us in a leading position in the market and enables us to deliver an end-to-end service to meet all of our clients' needs.

Our corporate crime team combines lawyers, forensic accountants, regulatory consultants and technology solutions to provide holistic advice to individuals and corporations in mitigating risk and defending investigations.

Members of our team have been at the forefront of the most significant and high profile investigations in recent years and are recognised as leading experts in the field.

View our website credentials here