

SLAUGHTER AND MAY /

THE ECONOMIC CRIME AND CORPORATE TRANSPARENCY ACT – WHAT YOU NEED TO KNOW



GOVERNANCE & SUSTAINABILITY
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The Economic Crime and Corporate Transparency Act became law late last year. The Act introduces a host of changes, including to the regimes governing Companies House, limited partnerships and cryptoassets. It also delivers significant reform of UK corporate criminal liability. Some of the Act's provisions are already in force whilst others will take effect over the course of 2024.



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CORPORATE CRIMINAL LIABILITY REFORM

The most important changes from a corporate criminal liability perspective are: an expanded identification principle – the test for attributing liability to a corporate for crimes with a mental element; and a new offence of failure to prevent fraud. These reforms create a powerful package, which should make it easier for corporates to be prosecuted for economic crimes in the UK.

New Identification Principle

Previously, a corporate could only be guilty of offences with a mental element where the offence was committed by someone considered to be the company's 'directing mind and will'. This was generally regarded as those at statutory board level.

The Act introduced a new test such that a corporate will now be liable if one of its 'senior managers', acting within the actual or apparent scope of their authority, commits an economic crime. This effectively lowers the threshold for the type of employee who can trigger criminal liability for a business.

The definition of 'senior manager' is loose and there is a lack of clarity around who will constitute a senior manager for these purposes. Assessment of whether an individual meets this test will need to focus on the extent of their decision-making power over the business in the context of the alleged offence.

This change is already in force, having come into effect on 26 December 2023. At present it only applies to economic crimes including, bribery, money laundering, sanctions offences and fraud. However, we may see a further expansion of the principle sometime in 2024 via a new Criminal Justice Bill. The Bill, which is currently before Parliament, proposes to expand the new senior manager test to all criminal offences, not just economic crimes. If this proposal becomes law, it will raise complex questions about the scope of senior managers' duties and whether certain offences such as sexual offences, if committed by a senior manager at work, could lead to corporate prosecution.

Failure to prevent fraud

Under the new 'failure to prevent' offence an organisation will be liable where a person associated with it (such as an employee, agent or subsidiary) commits a fraud with the intention of benefiting the organisation, or those to whom it provides services (eg. its customers or clients). It will not be necessary to show that the organisation's leaders authorised, knew about, or even suspected the fraud. Importantly, an organisation will have a defence if it can prove it had reasonable procedures in place to prevent the fraud. These concepts of associated person and a reasonable (or adequate) procedures defence may be broadly familiar from the UK's Bribery Act 2010, but corporates should be aware that the new offence has some subtle differences in these concepts, as well as a different territorial scope.

The offence applies to 'large organisations' only (defined in line with the Companies Act 2006). This captures corporates that are themselves a large organisation and subsidiaries of a large organisation (even where the subsidiary alone does not meet the threshold). The result is that the vast majority of our clients will be in-scope of the new offence.

The offence is expected to come into force in mid-2024 after the Government issues guidance on the reasonable procedures defence.

EXPANDED POWERS FOR THE SFO

The SFO already has the power to compel information at the pre-investigation stage, but only in cases of suspected international bribery and corruption. Under the Act, this pre-investigation power is expanded to all SFO cases – capturing fraud and domestic bribery and corruption cases. This will likely result in an increase in the number of companies receiving pre-investigation compulsory notices from the SFO.

COMPANIES HOUSE

A large portion of the Act deals with reforms to Companies House, taking it from a passive repository of information to a more assertive regulator. The Act gives enhanced powers to the Registrar to query or remove information from the register, and introduces, amongst other things, new identity verification requirements and changes to company record keeping requirements. Implementation of many of these changes requires secondary legislation - which is expected over the next 12-24 months. Companies will need to do a significant amount of housekeeping and ensure their internal processes are ready for this new regime.

OTHER REFORMS

The Act also introduces a host of other significant changes including:

- **Information sharing provisions for regulated firms:** which will better enable firms to share customer information with each other for the purposes of preventing, investigating and detecting economic crime.
- **Cryptoassets:** new powers for enforcement agencies to freeze and seize cryptoassets which are the proceeds of crime or associated with illicit activity.
- **Reforms to limited partnerships:** including changes to the process for registration and additional transparency obligations.

The Act introduces sweeping reforms, only some of which are discussed here. The changes to the corporate criminal liability regime are particularly significant. The new director of the SFO, who has already made an assertive start to his tenure, may well feel pressure to use these new tools sooner rather than later. However, it remains to be seen whether these will be enough to turn the tide on the SFO's recent difficult history and make it a more formidable prosecutor of corporate crime.



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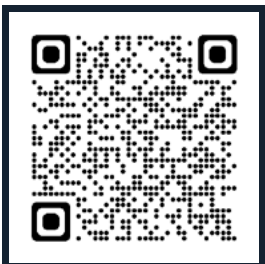
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