Editorial: Tackling economic crime: major reform of corporate criminal liability in the UK

The fight against economic crime

The UK Government has taken another step in its attempts to combat economic crime in the UK with the passing of the Economic Crime and Corporate Transparency Act 2023 (the “Act”).

The Act was introduced to Parliament as a Bill in September 2022 and follows on from the Economic Crime (Transparency and Enforcement) Act as passed on 15 March 2022 in aiming to reform the tackling of economic crime and improve transparency in respect of corporate entities.

The Act introduces a series of far-reaching tools with the most significant aspects being the introduction of a “failure to prevent fraud” offence and the wholesale reform of the common law “directing mind and will” test for corporate criminal liability with a new statutory “senior manager” test.

The expansion of corporate criminal liability

The “senior manager” test

At present, under the common law, organisations can only be held criminally liable if there has been a “directing mind and will” of the company involved. What amounts to a “directing mind and will” was considered by the High Court in 2018 with it being held that individual directors need to be the ultimate decision-maker to be caught.

In practice, the application of the identification principle makes it difficult to target larger organisations where more complex decision-making processes typically exist meaning prosecutions disproportionately involved smaller companies.

Lord Justice Davis in giving his judgment recognised the practical difficulties in the way the law had developed:

It is always open to Parliament to draft statutory offences with the position of corporations in mind. For example, some statutes may impose strict liability: as, for instance in Health and Safety legislation or various regulatory offences. Another statutory technique is to provide for the existence of a criminal offence in specified circumstances but to make available a statutory defence, often with the burden of proof on the company (as in the Nattrass case). A variant of that statutory technique is to impose general criminal responsibility on a corporation for the specified criminal offence but with a defence available to a corporation that it had adequate preventative procedures in place: as in s. 7 of the Bribery Act 2010.

It now appears that the UK Government has taken note of the deficiencies in this area in widening the scope under the senior manager test.

Who does the definition cover?

The senior manager test imposes criminal liability on organisations if an individual “acting within the actual or apparent scope of their authority” commits a relevant crime.

The definition of a senior manager covers an individual, regardless of title, who plays a significant role in:
“the making of decisions about how the whole or a substantial part of the activities of the body corporate or (as the case may be) partnership are to be managed or organised; or

the actual managing or organising of the whole or a substantial part of those activities.” [1]

The scope of the offence
Schedule 12 of the Act contains a list of the offences that will fall within the scope of the senior manager test. This includes offences such as false accounting, fraud, bribery, money laundering and certain tax evasion offences, which represent a significant broadening of the scope from existing offences and are principally economic in their nature.

The offence under the Act will apply to senior managers of a body corporate or partnership. The definition of a body corporate includes those incorporated outside of the UK and it can therefore be taken that offences will be capable of being committed by senior managers who are UK nationals or are foreign nationals who commit an offence in the UK or foreign nationals who are located in the UK at the time of the offence.

There are limitations to the scope of the offence in that, if an offence is committed outside of the UK a body corporate or partnership will not be liable unless they would be guilty of an offence were the acts to be committed by the body corporate or partnership itself.

The “failure to prevent fraud” offence
A key aspect of the Act, and one that has attracted significant debate, is the “failure to prevent fraud” offence, intended to expand corporate criminal liability by holding a “relevant body” accountable where they benefit from fraud committed by an associated party and have failed to prevent the relevant misconduct.

The offence shall be one of strict liability with the only statutory defence being where there are appropriate policies and procedures in place to prevent fraud.

What is the scope of the offence?
The scope of the offence was subject to significant debate in both the House of Commons and the House of Lords with the latter favouring an approach to capture all organisations, in keeping with existing corporate criminal offences.

However, the House of Commons continuously rejected amendments seeking to widen the scope of the offence, citing an increased regulatory cost and burden on smaller organisations as the key reason for its limitation.

On that basis an offence is only capable of being committed by a “large organisation”. This definition is well understood and includes companies where two or more of following criteria in the financial year that precedes the year of the predicate offence are met:

(1) a turnover of more than £36m;
(2) a balance sheet total of more than £18m; and
(3) a total number of employees more than 250.

The offence will apply to a “relevant body”, which is defined as a “body corporate or a partnership (wherever incorporated or formed)” that also meets the above test of a “large organisation”.

An offence will be committed where a “relevant body” fails to prevent fraud by an “associate” with this definition including:
• an employee, an employee of a subsidiary, agent or subsidiary undertaking; or
• a person who otherwise performs services for the relevant body.

What underlying offences are caught?
The applicable offences are set out at Schedule 13 of the Act and are narrower in scope than those caught by the “senior manager” test. Such offences will be caught where they are:

• committed by an employee or agent;
• for the benefit of the organisation or any person to whom services are provided; and
• the organisation did not have reasonable fraud prevention procedures in place.

The House of Lords originally sought amendments to capture failure to prevent money laundering offences. However, following the House of Commons voting to explicitly exclude such offences on the basis that existing regulations were sufficient, the House of Lords did not pursue the point.

There is a broad range of conduct, which can be caught by the new offence such as employee misconduct in relation to warranties, and any misrepresentations made in transaction documents, prospectuses annual reports and insurance claims may give rise to criminal liability attaching to an organisation.

Which organisations will be in scope?
The definition of an “associate” does not have any territorial limitations and may be the subject of later guidance and a “relevant body” does not need to be UK domiciled to be caught given that it applies “wherever incorporated or formed”.

The UK Government released a Factsheet on the failure to prevent offence during the legislative process, which stated:

“If an employee commits fraud under UK law, or targeting UK victims, their employer could be prosecuted, even if the organisation (and employee) are based overseas” [2].

This indicates that jurisdiction will be based on the predicate offence. In practice, this could mean that a relevant body with no UK presence could be liable for a failure to prevent offence where a UK associate commits an in-scope crime under Schedule 13 of the Act.

Reasonable procedures defence
The offence will be one of strict liability with the only statutory defence available being where there are “reasonable procedures” in place. The concept and requirements of “reasonable procedures” is not defined in the Act, however, it is likely that the requirements will follow those set out in the Ministry of Justice Guidance on the UK Bribery Act and the “reasonable procedures” laid out in the HMRC guidance to the Criminal Finances Act 2017.

Looking forward
The intended aim of the Act is to make it easier to target economic crime and prosecute organisations facilitating such activity.

The approach to tackling offences under the Act will take shape as guidance is released by the government and authorities and agencies test the waters in applying the new statutory framework to new cases.
Whether the new offences herald a more aggressive era of corporate criminal prosecutions remains to be seen but in scope organisations will need to think seriously about their policies and procedures and whether there are any further steps that need to be taken before the offences under the Act coming into force.

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