



Corporate crime briefing

Further UK criminal liability reform – corporates may be liable for actions of senior managers

Further Government amendments which have recently been made to the Economic Crime and Corporate Transparency Bill (the "Bill") would expand the scope of the "identification doctrine" imposing corporate criminal liability on companies for economic crime offences committed by their "senior managers".

These measures build on the provisions in the Bill which would create a new corporate offence of [failure to prevent fraud](#) as part of the UK Government's wider strategy to tackle economic crime. We examine the new proposals in this briefing

1. What is the identification doctrine?

Under the current law of England and Wales, a company can only commit a criminal offence requiring a particular mental state (knowledge, recklessness etc.) if the mental state of a senior person representing the company's "directing mind and will" can be attributed to the company. Whilst the interpretation of this test depends on the particular offence and the company's governance, in practice this has typically been considered to require one or more members of the board to hold the requisite mental state. In one case the Court considered that even a company's CEO might not constitute the company's "directing mind and will" in a particular factual context.

It has been suggested (see for example the Law Commission's [discussion paper](#) on the topic) that the doctrine does not adequately deal with the realities of corporate structures, making it disproportionately difficult to prosecute large organisations for wrongdoing committed by their employees. This is reflected in the government's [announcement](#) of the new proposals, which notes that "*complex management structures*

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can conceal who key decision makers are" and that "senior executives often possess a huge amount of influence and autonomy but cannot currently be considered a part of the 'directing mind'".

The new measures in the Bill are therefore intended to redress this perceived imbalance and facilitate the prosecution of legal entities involved in economic crime

2. Detail of the proposed reforms

The new measures in the Bill extend the category of employees capable of incurring liability on the company's behalf to senior managers for the purposes of particular economic crimes.

The [proposed amendments](#) to the Bill (from item 104 onwards) provide that, if a senior manager of a body corporate or partnership, acting within the actual or apparent scope of their authority, commits a "relevant offence", then the organisation will also be guilty of that offence. Breaking down some of the key elements of this provision:

- **"Senior manager"** is defined as an individual who *"plays a significant role in (a) the making of decisions about how the whole or a substantial part of the activities of the [organisation] are to be managed or organised, or (b) the actual managing or organising of the whole or a substantial part of those activities."* The government's announcement notes that this will involve a practical consideration of the individual's decision-making power, rather than just their job title.
- A **"relevant offence"** is one listed in a schedule to the Bill, together with an attempt or conspiracy to commit a listed offence, an offence of encouraging/assisting etc. a relevant offence under Part 2 of the Serious Crime Act 2007, or aiding, abetting, counselling or procuring the commission of a relevant offence. The list of relevant offences (which can be found at item 109 of the proposed amendments) is wide-ranging and includes the following (among others):
 - common law offences such as cheating the public revenue and conspiracy to defraud;
 - various offences under the Theft Act 1968 and Fraud Act 2006;
 - offences under the Bribery Act 2010;
 - various tax offences;
 - substantive money laundering (and failure to report) offences under the Proceeds of Crime Act 2002;
 - breach of financial sanctions regulations made under the Sanctions and Anti-Money Laundering Act 2018;
 - criminal offences under the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017; and
 - various offences under the Financial Services and Markets Act 2000 and the Financial Services Act 2012.

Importantly the Bill also grants the Secretary of State the power to make regulations amending the list of "relevant offences".

The new provisions can apply to organisations incorporated overseas. However, their jurisdictional scope is limited such that, where the relevant offence takes place entirely outside the UK, the organisation will not be guilty of an offence unless it would be guilty of the relevant offence had it (rather than the senior manager) carried out the relevant steps.

To take the example of breach of sanctions, it would appear that a UK company can still be liable for a breach of financial sanctions by a (UK national) senior manager acting overseas, on the basis that the company itself can be liable for a breach of UK sanctions in respect of conduct anywhere in the world. However, although a UK national senior manager of an overseas-incorporated company can be personally liable for breach of sanctions even when acting outside the UK, the overseas company would not incur corporate liability for the manager's actions in this scenario.

Unlike the Bill's proposals regarding failure to prevent fraud, the above provisions apply to all companies, irrespective of size. That said, it is typically larger companies that have historically been more difficult to successfully prosecute thanks to the identification doctrine, and who are therefore presumably the targets of the reform.

3. Commentary

The [Bill](#) is currently at the House of Lords Report stage and will then return to the House of Commons for consideration of the latest amendments before it receives Royal Assent and becomes law. The scope of the new provisions therefore remains subject to change. However, the amendments have been introduced by the Government and it is clear that the new measures enjoy widespread support. We therefore anticipate that they will remain in the final version of the Bill, probably in a largely similar form. Reform of the identification doctrine was in any event a key action in the government's [Economic Crime Plan 2023-26](#), although the Plan does not set out when it is expected that the changes will come into force.

Companies will no doubt wish to keep abreast of any changes to this part of the Bill during the parliamentary process, in particular any changes to the definition of "senior manager" or the list of "relevant offences".

There is of course a degree of overlap with the new offence of failure to prevent fraud. However, it is important to note that:

- Failure to prevent fraud provides a much broader scope for liability – the company can be liable for the acts of any employees at any level within the organisation, and third party "associated persons". The reform addressed in this briefing applies to the "guilty mind" only of senior managers.
- Mitigating (somewhat) this broader scope, failure to prevent fraud is coupled with the "reasonable procedures" defence discussed in our previous briefing. There is no corresponding defence to the expanded identification doctrine.

Ultimately, these amendments will (if enacted) make it easier to bring prosecutions in some cases where this would not currently be possible. The practical impact will likely flow through over the coming years, as the change will be prospective and complex fraud offences typically take a number of years to investigate and prosecute.

4. Contacts



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