

# *Criminal liability of corporates*

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*Andrew Bird K.C.*

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Senior managers at companies need to be up to speed with their responsibilities under the Economic Crime and Corporate Transparency Act, particularly as there are no provisions for special defences for the corporate.

Andrew Bird KC, barrister at 5 St Andrew's Hill explains the implications in his article below for [Accountancy Daily](#).

The Economic Crime and Corporate Transparency Act 2023 received Royal Assent on 26 October 2023. It is not to be confused with the Economic Crime (Transparency and Enforcement) Act 2022, which is already in force. The key difference of interest to readers of Accountancy Daily lies in the word 'corporate'.

**The new Act reforms the law in the following areas:**

Part 1 tightens up the law surrounding the incorporation and naming of companies, business names, and brings in associated reforms to Companies House. It also imposes duties to ensure that directors are properly identified. This is clearly designed to address the misuse of shell companies and straw directors.

Part 2 provides similar measures for partnerships, including limited partnerships.

Part 3 makes further provision for the Register of Overseas Entities (introduced in the 2022 Act).

Part 4 provides powers for the confiscation and forfeiture of cryptoassets. Combined with recent developments in Financial Conduct Authority (FCA) regulation this is likely to lead to greater law enforcement action against both exchanges and holders of cryptocurrency and non fungible tokens (NFTs).

Part 5 is headed 'Miscellaneous' but under that innocuous heading lie some very important changes to the criminal liability of corporate entities. This is what will be addressed in the remainder of this article.

### **A change in the law to the attribution of criminal liability to corporates**

Until now a body corporate or partnership is not generally vicariously liable for the criminal acts of its employees or agents, even if they commit the offence while acting in the course of their employment.

Only in cases where the individual was the 'directing mind and will' would his or her offending be attributed to the company.

Section 196 of the new Act came into force on 26 December 2023. It provides that where a 'senior manager' of a body corporate or a partnership, acting within the actual or apparent scope of his authority, commits a 'relevant offence' then the organisation (as well as the manager personally) is guilty of the offence.

The words in inverted commas all have definitions within the Act, and the 'relevant offences' are the economic crimes currently listed in Schedule 12. 'Senior manager' means an individual who plays a significant role in decision-making, managing or organising the activities of the corporate.

There are no provisions for special defences for the corporate, and no need for any such offence to have been for the benefit of the corporate.

Familiar principles of prosecutorial decision-making will apply, so a corporate may well avoid prosecution in the public interest where it was itself deceived, or where, despite all its efforts, the senior manager 'went rogue', and clearly there will be scope for representations to be made to avoid prosecution in meritorious circumstances.

To take an example, a sales manager (of sufficient seniority to come within the scope of 'senior manager') who makes extravagant and fraudulent claims for his employer's products or services, even if in fact he is not authorised to do so and is going rogue, may nevertheless saddle his employer with a criminal prosecution and conviction.

A sufficiently senior accountant or solicitor who facilitates money-laundering or tax evasion for a client will expose his firm to criminal liability for his actions.

### **New offence of 'failure to prevent fraud'**

There are currently offences on the statute book of failing to prevent bribery, and failing to prevent tax evasion. The new Act introduces a new offence of failing to prevent fraud. Such an offence will be committed (section 199) by a 'relevant body' which is a 'large organisation' if 'an associate' commits a 'fraud offence' intending to benefit (directly or indirectly) either the relevant body itself or another person to whom the associate provides services on behalf of the relevant body.

The expression 'large organisation' means a relevant body which, in its financial year preceding the year of the fraud satisfies at least two of the following criteria: turnover more than £36m; balance sheet total more than £18m; more than 250 employees.

The 'associate' includes an employee, agent or subsidiary. This new offence is not limited to preventing fraud by senior management. The 'fraud offences' are listed in schedule 13.

There is a statutory defence if the relevant body can prove that it had in place at the time such

prevention measures as it was reasonable in all the circumstances to expect.

By section 204 the secretary of state must issue guidance as to procedures that relevant bodies can put in place to prevent their 'associates' committing fraud. The new offence will not come into force until the guidance has been published.

Let's take an example where there is a large firm which has an 'associate' (employee, agent or consultant). If the associate commits a fraud intending to benefit a client of the firm, then the firm will itself commit the new offence as a matter of strict liability.

If the firm can demonstrate that it had in place such prevention measures as would be reasonable to expect then the firm will have a defence.

### **Enforcement options**

We live in interesting times. A deluge of new legislation from parliament, but will the government give any new resources to law enforcement to do anything with it?

For some years the Serious Fraud Office (SFO) has dealt with the 'failure to prevent bribery' offences through the encouragement of self-reporting and the use of deferred prosecution agreements (DPAs) – getting the corporate to fund its own investigation and prosecution. That may well be an increasing trend across a broader spectrum of cases.

**Andrew Bird KC** is a specialist in white-collar crime, civil and criminal asset forfeiture, and civil and public law proceedings which overlap with the criminal process.

Since taking Silk in 2021, he has appeared for the defence in cases of murder, bribery & fraud, in addition to continuing his Private Prosecution practice. Andrew is ranked in Chambers and Partners in the fields of POCA and Asset Forfeiture (Band 1 Silk), Financial Crime and Private Prosecutions - Financial Crime. He is ranked in The Legal 500 in the field of POCA and Asset Forfeiture. He is also recognised in Who's Who Legal at the UK Bar in the fields of Asset Recovery, Civil Fraud, and Criminal Fraud.

