

# Failing to Prepare is Preparing to Fail: UK Government Proposes ‘Failure to Prevent Fraud’ Corporate Criminal Offence

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Economic crime has risen to such a level in the United Kingdom that UK Finance, a trade association for the UK banking and financial services sector, considers financial fraud to be a [‘national security threat’](#). More than £750 million was stolen from banking customers by fraudsters in the first half of 2021 alone, which represents almost a 30% increase from the same period in 2020. In response to this fraud epidemic, the UK government promises that the Economic Crime and Corporate Transparency Bill, which is currently being ushered through Parliament, will implement key reforms necessary to support regulators with their fight against fraud.

The UK government has now introduced amendments to the bill intended to reform corporate criminal liability. The proposals are summarised in a [‘factsheet’ issued by the government](#). The stated aim is ‘to hold organisations to account if they profit from fraud committed by their employees’. This follows exhaustive debate for many years concerning the most desirable route forward, most recently reflected in [the Law Commission’s 10 June 2022 options paper](#), which presented various guiding principles and options for reform.

There is an existing framework of specific ‘failure to prevent’ offences in the UK – the failure to prevent bribery (contrary to the Bribery Act 2010) and the failure to prevent the facilitation of tax evasion (contrary to the Criminal Finances Act 2017). The number of actual convictions and prosecutions for these offences is low by comparison to the expectation that surrounded their introduction. While there have been some bribery-related convictions, it is particularly striking that there have been zero prosecutions for failing to prevent the facilitation of tax evasion since the introduction of the offence. However, the introduction of these offences has undoubtedly materially altered the UK’s compliance landscape and improved industry standard corporate controls, procedures and training.

The proposals will introduce a new corporate offence of failure to prevent fraud. The proposed draft text in its current form reads:

## ‘Failure to prevent fraud

(1) A relevant body which is a large organisation is guilty of an offence if, in a financial year of the body (“the year of the fraud offence”), a person who is associated with the body (“the associate”) commits a fraud offence intending to benefit (whether directly or indirectly)

- (a) the relevant body, or
- (b) any person to whom, or to whose subsidiary, the associate provides services on behalf of the relevant body.

(2) But the relevant body is not guilty of an offence under subsection (1)(b) if the body itself was, or was intended to be, a victim of the fraud offence.

(3) It is a defence for the relevant body to prove that, at the time the fraud offence was committed –

- (a) the body had in place such prevention procedures as it was reasonable in all the circumstances to expect the body to have in place, or
- (b) it was not reasonable in all the circumstances to expect the body to have any prevention procedures in place.

(4) In subsection (3) “prevention procedures” means procedures designed to prevent persons associated with the body from committing fraud offences as mentioned in subsection (1).’

The new offence will cover a wide range of matters, including fraud by false representation, fraud by failing to disclose information, fraud by abuse of position, obtaining services dishonestly, participating in a fraudulent business, false statements by company directors, false accounting, fraudulent trading and cheating the public revenue. The wide scope of the new offence may make it challenging for companies to implement reasonable procedures that can effectively prevent fraud, given that the fraudulent behaviour in question could take a multitude of forms.

The proposed offence will apply to companies, partnerships and charities. However, only 'large organisations', defined as those meeting two out of three of the following criteria, will be in scope:

1. More than 250 employees.
2. More than £36 million turnover.
3. More than £18 million in assets.

It also will have extraterritorial effect: Foreign companies can be prosecuted if they (and their fraudulent employees) commit fraud under UK law or target UK victims.

Fines for committing this new offence will be unlimited and will fall to be assessed by reference to the specific facts of the case before the court.

## What next?

This new wider offence is another step change in the UK's compliance landscape and will require a renewed focus on internal procedures intended to prevent fraud. We will wait to see if it also will bring more prosecutions and deferred prosecution agreements; however, Serious Fraud Office Director Lisa Osofsky has said, 'This new offence would be a game changer for law enforcement – bringing the law on fraud in line with bribery. As the UK's top economic crime prosecutors, this would help us crack down on fraudulent enterprises, compensate their victims and ultimately protect the integrity of our economy'.

The new offence certainly will make it easier to secure convictions against companies for fraud committed by employees for the benefit of their employer, as it will be unnecessary to prove knowledge of the fraudulent activities by the 'directing mind' of the company, which the UK authorities view as a significant barrier to prosecution of large companies. In conclusion, any corporate entity that currently does business within the UK, or which is seeking to enter the market for the first time, will need to give careful consideration to its future compliance programme to ensure that it is fit for purpose – and that it does not inadvertently 'fail to prevent' a broad range of economic crimes.

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This is the complementary legislation to the Economic Crime (Transparency and Enforcement) Act 2022, which [we have posted about previously](#).

Section 465 of the Companies Act 2006.

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