

Government confirms introduction of failure to prevent fraud offence

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During the Commons Report Stage of the Economic Crime and Corporate Transparency Bill (ECCT Bill) on 25 January, Security Minister Tom Tugendhat MP confirmed the Government's intention to bring forward a failure to prevent fraud offence in the ECCT Bill when it progresses to the House of Lords. John Binns, Partner at BCL, Quinton Newcomb, Partner at Fieldfisher, Neil Swift, Partner at Peters & Peters, and Sam Tate, Partner at RPC, have commented on this significant development.

The Minister's assurance at the despatch box follows a proposed amendment by former Lord Chancellor Sir Robert Buckland KBE KC MP to include a failure to prevent fraud offence in the ECCT Bill. In light of the Minister's commitment to address the need for a failure to prevent fraud offence in the Lords, Mr Buckland's amendment was not pressed to a vote.

The Lords Second Reading of the ECCT Bill is scheduled for 8 February.

John Binns has commented:

‘This may be the perfect example of a change happening gradually, then suddenly, and of the risks that follow when that happens.

The government, the Law Commission, and lawyers in the field have been thinking for several years about the issues involved in holding corporates liable for economic crime.

The fact that no perfect solution has been found in all that time is not an accident.

At play are the additional overheads for business (in a less than ideal economic context) as well as legal certainty and the risks for associated individuals.

The Bribery Act is widely regarded as a success and has doubtless improved behaviour as well as generated DPAs for the SFO.

But we’ve already seen plenty of examples where the corporate and the prosecutor agree that an individual is guilty, but where the evidence hasn’t been enough to support that conclusion in a criminal trial.

The drafting of clauses and guidance will need to bear all these things in mind and there must be a risk that it is now, ironically, caught up in a timetable that may be too tight, in a bill that is really designed to achieve other things.’

Quinton Newcomb has commented:

'This is a significant development, and the long anticipated fruition of a process which began in earnest over 6 years ago with the original abortive Government call for evidence back of January 2017. The original drivers for this offence, as summarised in the introduction to that document by then Minister of State for Justice, Sir Oliver Heald KC MP have only been amplified in the intervening years, with growing

concerns over the epidemic level of fraud and the attendant chronic lack of effective enforcement against financial crime more generally.

Whilst the Law Commission's report and the previous iteration of the proposed offence tabled previously by Sir Robert Buckland KBE KC MP whilst he was Solicitor General, are likely to provide the basis for the new offence that is ultimately introduced, the devil—in its guise as the ultimate burden on business—will be in the detail.

Not only will the precise terms of the offence, and whether it initially bites only upon fraud or whether it immediately incorporates other economic crimes such as money laundering and false accounting, be all important in that regard, but also the nature and scope of the statutory defence (whether 'adequate procedures or 'reasonable prevention measures'), and whether that, in turn, leads to amendment, unification and clarification of aspects of the existing failure to prevent offences, which are currently in force in relation to bribery and tax evasion.

There are no surprises in the Director of the SFO's swift and emphatic endorsement of the value of the new offence: it is no secret that the overwhelming majority of successful enforcement actions in the SFO's recent history have come in the shape of DPA's or guilty pleas, which in whole or part are founded upon the Section 7 Bribery Act 2010 offence. Conversely, UK law enforcement's recent track record in respect of successfully prosecuting substantive economic crime through to conviction has been criticised by many as abject in its failure.'

Neil Swift has commented:

‘The undoubted success of the Bribery Act 2010 was to achieve behavioural change by focussing companies’ attention on compliance. The aim is that further failure to prevent offences will further focus that attention.

The big question mark is whether failure to prevent offences, and the underlying policy of making it easier to hold companies to account under the criminal law, is the most appropriate solution. It may be part of the enforcement toolbox, but without a good track record of holding individuals criminally to account for their roles in the same alleged offending, its effectiveness as an enforcement tool is diminished.

There remains a substantial disparity between companies accepting responsibility for failing to prevent bribery, and the evidence upon which that acceptance is based coming up short in a trial of the allegedly culpable individuals.

The introduction of further failure to prevent offences should not be allowed to distract from shortcomings elsewhere.'

Sam Tate has commented:

'HM Government now seems serious about bringing in expansions to the criminal failure to prevent offences that already exist for corporates in the areas of corruption and tax evasion. A new or current bill will include these measures so it does not seem like idle talk.

This could be the most significant criminal law legislative change in over a decade for companies.

As regards the discussions in Parliament, the focus appears to be 'enablers' eg lawyers and accountants re fraud and money laundering but the drafting does seem to include all commercial organisations ie all companies with a part of their business in the UK.

This would have material ramifications for all UK businesses and many global businesses who would be expected to meet reasonable and proportionate standards in

crime prevention (yet to be provided). In particular it would likely impact tech and telecoms businesses that were the focus of criticism in a recent House of Lords report for not preventing fraud on their customers. It would also have significant impact on the banking sector and anyone processing payments.

The final drafting and form of an Act will take some time to come through and will need careful thought from many stakeholders and industries—but it appears to have real momentum.’

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