



#### IN BRIEF

- ▶ The government has announced that new failure to prevent offences provisions will be proposed as an amendment to the Economic Crime and Transparency Bill currently before Parliament.
- ▶ The provisions are likely to attract cross-party support and would make it an offence for an organisation to fail to prevent fraud and possibly also money laundering.
- ▶ Organisations will be compelled to review their internal controls.
- ▶ If the offence includes the failure to prevent money laundering just how the legislation will interact with anti-money laundering regulation will need to be worked out.

A radical expansion of the failure to prevent model is in sight following the government's backing of a new corporate offence of failure to prevent (FTP) fraud and possibly other conduct such as money laundering. On 25 January 2023, security minister Tom Tugendhat MP announced that the government would be introducing new offence provisions as an amendment to the latest Economic Crime and Corporate Transparency Bill when it passes through the House of Lords. On 8 February 2023, Lord Sharpe also confirmed that the government will bring forward an FTP amendment when the Bill is at the Lords Committee stage.

#### Widening the net

At the time of writing, a date for committee stage is still to be announced. As such, the contours of the amendment are not yet public, but the expansion of the model this year is likely given wide cross-party support. Another possibility is that the government's proposal will stretch considerably further than a new offence of FTP fraud, which was mooted as

far back as 2016 when the government hosted its first anti-corruption summit in London. A cross-party amendment tabled by former justice secretary Sir Robert Buckland MP, proposing to hold a commercial organisation criminally responsible for not only FTP fraud but also money laundering and false accounting, attracted spirited support during debate in the House of Commons on 25 January 2023. It came to be withdrawn only after the security minister's assurance that FTP provisions would be introduced. This in turn raises the prospect that the substance of the government's proposal will not stray too far from what has already been suggested by the former justice secretary.

Inevitably, when the government's proposal is unveiled, it will track the existing FTP provisions targeting bribery and the facilitation of tax evasion. It will also act as another lever for deferred prosecution agreements (DPAs). Companies or partnerships, either formed in the UK or formed elsewhere but which do some business here, can be expected to be exposed to prosecution if a person that is associated with it, such as an employee, consultant or agent, engages in the offending conduct, ie fraud or money laundering. Presently, for a company to be exposed to criminal liability for fraud, those with the 'directing mind' of the company must be involved. As illustrated by the collapse of the Barclays prosecution in 2018, in a large institution the directing mind could be the board, not just the CEO and other senior managers. Showing the involvement of the entire board can be an obstacle course for the authorities.

As with the existing bribery and tax provisions, there will be a statutory defence if the organisation had in place reasonable procedures. Reasonableness will be judged according to circumstances such as size,

risk profile and nature of the business as set out in government-approved guidance. Tailored procedures will be key. At least in the fraud context, any new offence will also likely require that the conduct confer an advantage on the organisation or a person that the organisation has a relationship with, to avoid an unpalatable scenario whereby a victim could technically be exposed to liability for failing to prevent a fraud on itself. In its options paper last summer, the Law Commission recommended such an approach if the expansion of the FTP offence was taken forward. The practical effect is that a corporate victim would not be exposed to criminal liability even if it had no anti-fraud controls in place.

#### Further recommendations

Whether the government endorses the other recommendations of the Law Commission is less straightforward. The Law Commission cautioned against transferring the extraterritorial aspects of the bribery and tax evasion facilitation provisions to any fraud equivalent, on the basis that extraterritoriality in criminal law is not the 'default position'. It is unclear if the government will show restraint in this regard when, like bribery, a fraud committed wholly outside of the UK can still advantage a company in the UK. Fraud is not an offence with only local consequences. A UK company which deliberately omits to make a material disclosure when tendering for work in a foreign country and which subsequently wins the contract no less benefits from the fraud because it happened outside the UK. The proceeds may flow back to the UK and the work may lead to new business partnerships and opportunities.

The assurances in the Commons on 25 January 2023 also suggest that other

recommendations are not front of mind. The Law Commission recommended that the focus of any new offence addressing financial crime should be fraud rather than the failure to prevent other conduct, such as money laundering. Government support for an offence of this kind—either as a standalone offence or combined FTP fraud and money laundering offence—risks placing on the statute books a provision that unnecessarily overlaps with the law elsewhere and which could lead to inconsistency in the anti-money laundering (AML) sphere. Law firms, estate agents, banks, trust providers and others in the AML regulated sector are already subject to a raft of exacting AML requirements backed by civil penalties and criminal sanctions. For sole practitioners and smaller businesses, keeping up to date with AML requirements can in practice pose a challenge and the weight of compliance is often sorely felt. The introduction of a new FTP offence targeted at money laundering risks over-regulation in this area.

There is also the potential for inconsistency. Presumably, a company having reasonable procedures to prevent money laundering will mean policies, controls and procedures that reflect the requirements of the Money Laundering, Terrorist Financing and Transfer of Funds

(Information on the Payer) Regulations 2017, SI 2017/692 (MLR 2017), but there is scope for guidance to clash. A company with gold-standard AML policies that are actually applied will have little to worry about, but there is a question mark over whether a company with AML controls that fall short of the technical requirements of the MLR 2017 in one or two areas could still run a defence of ‘reasonable procedures’ if charged with an offence. Just how any new FTP money laundering provision interacts with the AML regulations will require thought.

Looming behind the law reform debate is a larger question about how effective the new provisions will be. It is highly unlikely that new offences will generate a jump in corporate prosecutions in the near future. Experience shows that that is not the purpose of FTP offences. Prosecutions of FTP bribery are few and far between, and there is yet to be either a deferred prosecution or a prosecution for FTP tax evasion facilitation. On 23 January 2023, statistics released by HMRC showed that although there are presently nine live FTP tax evasion facilitation investigations, zero charges have been brought despite the offence provisions commencing on 30 September 2017. With the high-profile exception of the NatWest case, breaches of the MLR 2017 also rarely see a criminal court,

despite the requirements existing in one form or another for nearly two decades. Authorities have instead tended to deal with AML deficiencies by way of civil penalties.

It follows that even if a new offence is introduced in the coming months, it is unlikely that it will change the face of corporate prosecutions. Where the change will instead be felt is by businesses who will be required to revisit their internal controls and policies, mindful of the new exposure to prosecution. Some will be able to draw on existing controls and focus on considering areas for improvement, whereas others, including those based abroad with only small operations in the UK, will need to move at pace to develop something for the first time. Longer term, however, once the policies have been rolled out and the training delivered, there is a risk of complacency if the new offence provisions are never tested against a corporate.

The value of expanding the FTP model lies in its ability to compel businesses to implement cultural change, but unless any new offence also goes on to be used, there is a risk of optics being preferred over lasting impact. **NLJ**

**Anita Clifford** is a criminal barrister practising at Red Lion Chambers ([www.redlionchambers.co.uk/barrister/anita-clifford](http://www.redlionchambers.co.uk/barrister/anita-clifford)).

## Lexis® PSL Employment

Practical commercial advice and tools to help you get more done each day

We know that employment law is a fast-paced world and that staying on top of all the latest legal developments is a time-consuming job – add this to the time you spend carrying out research and tracking down the right precedents and you have really eaten into the precious hours in your working day. With LexisPSL Employment you can find the answer you need in seconds – on a whole range of employment issues from unfair dismissal to corporate transactions.

**Trial today**

[www.lexisnexis.co.uk/legal/employment-law](http://www.lexisnexis.co.uk/legal/employment-law)

