

# UK government to introduce ‘failure to prevent fraud’ offence



**Rob Harkavy - 13/04/2023 ([CDR](#))**

**The new criminal offence will be incorporated into the Economic Crime and Corporate Transparency Bill as the government reveals that fraud accounts for more than 40% of UK crime.**

Following an intervention in the House of Lords by former solicitor-general **Lord Garnier KC** during the passage of the UK's [Economic Crime and Corporate Transparency Bill](#), on 11 April the government introduced the new corporate criminal offence of failure to prevent fraud. According to the government's own figures, fraud is the most common criminal offence in the UK, accounting for 41% of all crimes committed in the year October 2021 – September 2022.

While the new offence will apply to all sectors – including charities and partnerships – its scope is limited to larger organisations, defined as meeting two of these three criteria: more than 250 employees, an annual turnover of GBP 36 million or higher, or assets in excess of GBP 18 million. There is no requirement for an organisation's senior management or board to have any involvement in, or even knowledge of, the fraud in order to be criminally liable. The government's hope is that this will push tackling fraud to the top of boardroom agendas and encourage companies to proactively implement and improve fraud prevention procedures. Conviction can result in an unlimited fine.

**Kambiz Larizadeh**, a partner in the London disputes practice of **Akin Gump Strauss Hauer & Feld**, tells *CDR* that “there is no doubt that this is a significant development in that the effect of the offence will be to make it easier to prosecute a large organisation where an employee or agent commits a specified fraud offence for the organisation's benefit, and where the organisation did not have reasonable fraud prevention procedures in place”.

While the initial response to the introduction of the new offence has been generally positive from both business and the legal profession, **Helen Harvey**, a senior litigation associate at **Macfarlanes** in London, raises questions over exemptions for smaller concerns. She tells *CDR*: “While the introduction of the new failure to prevent fraud offence is broadly likely to be welcomed, the omission of small and medium enterprises (SMEs) from the scope of the offence is less welcome. The offence will contain built-in safeguards which would mean that the burden of compliance would not fall disproportionately – companies

will only be required to have in place ‘reasonable procedures’ to prevent fraud.”

“What is reasonable for a small company,” continues Harvey, “will almost certainly not be as burdensome as what is reasonable for a large organisation. The rationale for excluding SMEs is therefore unclear. The government’s fact sheet refers to avoiding placing ‘unnecessary burden on legitimate businesses’ but doesn’t explain why it isn’t deemed an unnecessary burden for large businesses. Presumably, the difficulties in holding large organisations (with their many layers of management) to account under the current ‘controlling mind’ test, appears to be a driving force.”

Larizadeh picks up the theme of ‘reasonable procedures’ adding: “While there may currently be some uncertainty as to what procedures will be deemed ‘reasonable’, the government will be under a statutory duty to publish guidance, clarifying the expectations on businesses in this respect.”

‘Failure to prevent’ legislation has a chequered history in the UK; for example, there has not yet been a single prosecution in relation to the failure to prevent the facilitation of tax evasion but, nonetheless, the new offence is likely to ensure that more companies – albeit only large ones – pay attention to their fraud risks.

In this respect, there are several practical steps that organisations can take. Larizadeh suggests that “large corporates should now revisit the policies and internal processes they likely already have in place in order to detect and prevent fraud, and give thought to whether such policies and processes require updating in order to address the essential elements of the proposed new offence”.

According to the government, it is the failure to prevent the following offences which will be covered by the new law: fraud by false representation (section 2, Fraud Act 2006); fraud by failing to disclose information (section 3, Fraud Act 2006); fraud by abuse of position (section 4, Fraud Act 2006); obtaining services dishonestly (section 11, Fraud Act 2006); participation in a fraudulent business (section 9, Fraud Act 2006); false statements by company directors (Section 19, Theft Act 1968); false accounting (section 17, Theft Act 1968); fraudulent trading (section 993, Companies Act 2006) and cheating the public revenue (common law).

Across the channel, [an investigation involving 150 French investigators and magistrates](#), together with six prosecutors from Cologne, Germany, revealed a huge amount of fraudulent activity in the banking sector.