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TEMPLARS ThoughtLab

The United Kingdom’s New “Failure to Prevent Fraud” Offence: Impact on Nigerian Companies

What Has Happened?

In a bid to aggressively confront and address economic crimes and fraud which accounted as the most common offence in the United Kingdom, amounting to 41% of all crime in September 2022, the Economic Crime and Corporate Transparency Act (the “ECCTA”/ “Act”) 2023 was promulgated as one in a series of numerous legislative interventions by the UK Government aimed at addressing the UK’s teeming economic crimes.

The Act, introduced in the UK in October 2023, represents a significant step towards combating economic crimes and fraud. This piece of legislation introduces several reforms to corporate criminal liability laws in the UK and principally aims to tackle economic crime as well as improve transparency over corporate entities. One new key feature of the statute is that it introduces the offence of Failure to Prevent Fraud (the “**FTP Fraud Offence**”) to the Corporate Crime system in the UK. A relevant body which qualifies as a large organisation¹ under the Act, will be found liable for this offence where a fraud offence is committed by an employee or agent, for the organisation’s benefit or for the benefit of any person to whom such an employee or agent provide services on behalf of the organization, and the organisation did not have ‘**reasonable fraud prevention procedures**’ in place.

¹ Note that the FTP Fraud Offence can only be committed by organisations that qualify as “large organisations” (as defined by the ECCTA, a large organisation is an entity that meets at least two of the following: turnover of more than £36 million, a balance sheet total of more than £18 million, An average of more than 250 employees) and their subsidiaries, regardless of where they are incorporated or formed.

The **FTP Fraud Offence** is a strict liability offence influenced by the 'failure to prevent offences' earlier introduced under the **UK Bribery Act** which catered to bribery offences and punished corporations for bribery offences committed by its officers and associates. With both laws maintaining extra-territorial application. The ECCTA offers a defense against the 'failure to prevent fraud' charge only if a company can prove that it had 'reasonable prevention procedures' in place to deter persons associated with the organisation from committing fraud offences. In this regard, we should also mention that the UK government is expected to issue guidelines detailing what 'reasonable prevention procedures' would entail before the new offence comes into force either in late 2024 or in early 2025.

Another key feature introduced by the Act is a new test for determining corporate liability for economic crime. This new test is a shift from application of the narrower "identification doctrine", under which the offence must be carried out by a person representing the "directing mind and will" of the corporate body, to a broader, more efficient framework for corporate crime prosecution. In a nutshell, the identification doctrine is a legal principle used to determine if the actions and intentions of an individual can be attributed to a corporation. The prevailing law before the enactment of the Act, which is similar to the position under Nigerian law stipulates that the individual must hold a high enough position to be seen as the "directing mind and will" of the corporation. If the individual identified as the "directing mind and will" commits a crime while acting in that role, the crime, including the intent to commit it, is deemed to be that of the corporation. Consequently, the corporation will face prosecution as if it were the individual identified as the "directing mind and will". Under the new law however, a corporate body² or partnership will be guilty of an offence if the offence is carried out by a "senior manager" acting within the actual or apparent scope of his/her authority. A senior manager is defined as an individual who plays a significant role in the making of decisions about how the whole or a substantial part of the activities of the body are to be managed or organised, or the actual managing or organising of the whole or a substantial part of those activities. In practice this could be wide enough to cover persons in the direct chain of management of the organization as well as those involved in strategic or regulatory compliance roles.

Why it Matters to Companies Doing Business in Nigeria with a UK Touch Point

Although there is still some level of unpredictability on the extent of the extra territorial jurisdiction of the offence, the UK government has stated in the policy paper on the Act that *"if an employee commits fraud under UK law, or targets UK victims, the employer*

² Note that unlike the FTP Fraud Offence, this is not restricted to "large organisations" as defined in the Act.

could be prosecuted, even if the corporate and the employee are based overseas".³

What this mean is that businesses outside the UK including Nigerian businesses, that operate within the UK or have dealings with UK companies may be held liable for economic crimes under the new corporate criminal liability provisions of the Act. More specifically, if an employee of a 'large organization' based in Nigeria commits a fraud offence under the UK Laws or targets UK Victims for the benefit of the company, that company may be liable under the 'FTP Fraud Offence'. Therefore, businesses outside the UK that have dealings with UK companies or operate within the UK will need to understand and comply with these new rules.

It should be borne in mind that the new offence holds large organisations liable if an employee or agent of an organisation that lacks reasonable fraud prevention procedures, commits any of the fraud offences specified under the Act⁴ for the organization's benefit or for the benefit of an organization that it services. It is therefore very essential for Nigerian businesses with a UK connection to proactively address fraud risks and implement effective prevention measures in their compliance programs to avoid potential liability. This can be achieved by **conducting risk assessments** specific to fraud prevention, developing, and implementing robust anti-fraud policies and procedures; reviewing their compliance programs with anti-fraud measures; providing appropriate training on fraud prevention tailored to different roles within the organization.

Multinational organisations with nexus to the UK may also consider rolling out standardized group-wide fraud prevention policies or upscaling existing policies where necessary.

³ <https://www.gov.uk/government/publications/economic-crime-and-corporate-transparency-act-2023-factsheets/economic-crime-and-corporate-transparency-act-failure-to-prevent-fraud-offence>

⁴ Fraud by false representation, fraud by failing to disclose information, fraud by abuse of position, obtaining services dishonestly, participation in a fraudulent business, false statements by company directors, false accounting, fraudulent trading; and cheating the public revenue.