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WHEN IT MATTERS MOST

**The Economic Crime
and
Corporate Transparency Act
(ECCTA): A Practical Guide
for Law Firms**





What you need to know

The Economic Crime and Corporate Transparency Act ("the Act") received Royal Assent on 26 October 2023. The Act is perhaps the most important development of the past decade in the area of criminal liability for UK companies, partnerships and other corporate entities.

There are two important points to note:

- The Act clarifies and extends the 'identification doctrine' so that a corporate can be held criminally liable where a senior manager is involved in an economic crime.
- The Act creates a new criminal offence of 'failure to prevent fraud'. This will make a large organisation criminally liable if it, or a customer, benefits from a fraud that is committed by an individual associated with the company.

Corporate criminal liability

What is the current position?

Under the common law **identification principle**, a corporate can be criminally responsible for the actions of an individual that represents its 'directing mind and will'. Prosecutors have often found it difficult to prove the criminal involvement of sufficiently senior individuals (e.g. board directors or other senior officers who carry out management functions on the company's behalf), particularly in the case of large, distributed organisations.

What will change?

Under section 196 of the Act, if a **senior manager** of a body corporate or partnership, acting within the actual or apparent scope of their authority, commits an **economic crime offence**, the body corporate is also guilty of the offence.

A '**senior manager**' is any individual who plays a '**significant role**' in making the decisions about how the whole or **a substantial part** of the activities of the body corporate are managed or organised or actual manages or organises these activities.

Schedule 12 list includes relevant economic crime offences. It is extensive, and includes offences under the Theft Act 1968, the Fraud Act 2006, the Bribery Act 2010, the Financial Services and Markets Act 2000 and the Proceeds of Crime Act 2000.

What will the impact be?

It will be up to the courts to cast light on the scope of the **senior manager** test. But it is very likely that the change will make it significantly simpler for prosecutors to prosecute corporates in economic crime cases.

What should companies do?

Companies should assess where their relevant economic crime risks may arise. They should also ensure they understand which individuals may fall under the category of '**senior manager**' and that those

individuals have been appropriately trained and are properly accountable.

Companies should also ensure that their relevant compliance policies and procedures are up-to-date and appropriately implemented in order to deal with relevant risks.

Failure to prevent offence

What is the current position?

Prosecutors who consider that a corporate entity has been involved in fraudulent criminal behaviour currently need to use the '**identification principle**' described above to attribute liability to the corporate based on the involvement of senior individuals.

What will change?

In addition to the change noted above in relation to senior managers, under section 199 of the Act, a '**large organisation**' will be criminally liable where it **fails to prevent** a person associated with it from committing a **relevant fraud offence** intending to benefit (directly or indirectly) the organisation or its clients. Where the large organisation is a parent undertaking of a group, the offence is only committed if the intention of the associated person when committing the fraud was only to benefit the parent undertaking, directly or indirectly.

The list of '**relevant fraud offences**' is contained in Schedule 13 of the Act and is relatively restricted. It includes the common law offence of cheating the public revenue and certain offences under the Theft Act 1968 and the Fraud Act 2006, including fraud and false accounting. The list of offences may be amended by order of the Secretary of State.

A person is 'associated' with the **large organisation** if they are an employee, agent or subsidiary or otherwise performs services for and on behalf of the it.

It will be a defence for the **large organisation** to show that it had **reasonable prevention procedures** in place at the time of the offence or that in all the circumstances it was reasonable for it not to have such procedures in place. The purpose of this defence is to encourage companies to institute the policies and procedures necessary to prevent their staff engaging in bribery in the first place.

This new offence will cover any **large organisation**, meaning a corporate entity or partnership established anywhere in the world, which in its financial year preceding the year of the fraud offence satisfied two or more of the following conditions:

- Turnover of more than £36 million
- Balance sheet total of more than £18 million
- Number of employees of more than 250

In the case of a parent undertaking, these tests are applied against the parent and its group as a whole.

What will the impact be?

The introduction of the new offence will provide another means for prosecutors to hold corporates to account for certain fraud offences committed by employees, agents or other third parties.



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The nature of the offence, and the available defence, will increase the compliance burden on large organisations.

What should companies do?

Large organisations will need to ensure that they have in place reasonable fraud prevention procedures. The nature of those procedures will depend on the size and risk profile of the organisation.

Although official guidance is yet to be published, it is likely that it will follow a similar structure to the guidance accompanying the Bribery Act 2010 and the Criminal Finances Act 2017 which set out six principles to be followed: proportionality; risk assessment; due diligence; communication (including training); monitoring and review; and top-level commitment.

Prosecuting agencies have made it very clear in the past that there is no such thing as a one-size-fits-all approach, and that prevention procedures must always be proportionate and properly tailored to the organisation's risk profile.

Companies may therefore wish to begin risk assessing their business, and planning a framework for a review of their current policies and procedures in light of their fraud risks.

The SRA's new unlimited fining powers in cases relating to economic crime

What is the current position

Section 44D of the Solicitors Act 1974 (as amended) and paragraph 14B of the Administration of Justice Act 1985 effectively gives the Solicitors Regulation Authority (SRA) the power to direct a solicitor or recognised body, its managers or employees, to pay a financial penalty not exceeding £25,000. This limit was increased to its current level by statutory instrument on 20 July 2022 from £2,000.

What will change?

Section 207 of ECCTA provides for new provisions, to come into effect on such day that a statutory instrument is made, in relation to section 44D of the Solicitors Act 1974 and paragraph 14B of Schedule 2 to the Administration of Justice Act 1985 in respect of powers to fine in cases relating to economic crime.

These new provisions have the effect of removing the limit on the amount of the penalty that the SRA may direct an individual or law firm to pay when taking action against them for purposes relating economic crime. Specifically, where the SRA considers that an individual or firm it regulates has failed to prevent or detect economic crime, or that its failure to act had the effect of inhibiting the prevention or detection of economic crime, it can now impose an unlimited fine.

What will the impact be?

Whereas previously, unlimited fining powers were granted solely to the Solicitors Disciplinary Tribunal, and the SRA's powers were statutorily limited, the new provisions in ECCTA mean the SRA will now have unlimited fining powers when it comes to matters relating to economic crime. Economic crime is also defined widely under section 193(1) and Schedule 11 of ECCTA and covers a broad range of crimes from theft, false accounting and bribery to offences under the Proceeds of Crime Act 2002, the Fraud Act 2006 and the Terrorism Act 2000.

The SRA's increased powers to request information relating to economic crime

What is the current position?

Under section 44B of the Solicitors Act 1974, the SRA has the power (as the body responsible for the regulatory functions of the Law Society) to issue a notice to a solicitor, employee of a solicitor, a recognised body, or an employee or manager of, or a person with an interest in, a recognised body, requiring them to provide information and documents.

Section 44B(3) limits this power to demand disclosure to information and documents that are necessary for the purpose of investigating:

- (a) whether there has been professional misconduct by a solicitor;
- (b) whether a solicitor, or an employee of a solicitor, has failed to comply with any requirements imposed by or by virtue of this Act or any rules made by the Society;
- (c) whether a recognised body, or any of its managers or employees has failed to comply with any requirement imposed by or by virtue of the Administration of Justice Act 1985 or any rules made by the Society and applicable to the body, manager or employee by virtue of section 9 of that Act;
- (d) whether there are grounds for making, or making an application to the Tribunal for it to make, an order under section 43(2) with respect to a person who is or was involved in a legal practice (within the meaning of section 43(1A)).

In addition to requiring disclosure, the SRA can also require the receiver of the s44B notice to provide an explanation of any information provided or document produced pursuant to the notice (section 44BA of the Solicitors Act 1974).

The SRA can apply to the High Court to enforce the notice for delivery or production of documents if needs be (section 44B (6) and paragraph 9 of Schedule 1)

What will change?

The SRA's powers outlined above will not change. However, ECCTA grants the SRA additional powers to request documents and information where a matter relates to economic crime. In these situations, the SRA will be able to issue a notice requiring a person¹ to provide information or produce documents as specified in the notice (section 111A (1)). This information power may only be exercised where the SRA consider it necessary or expedient to have the information or documents requested for the purposes of, or in connection with, the performance of its regulatory functions relating to the prevention or detection of economic crime (section 111A (2)).

Economic crime is defined widely under section 193(1) and Schedule 11 of ECCTA and covers a broad range of crimes from theft, false accounting and bribery to offences under the Proceeds of Crime Act 2002, the Fraud Act 2006 and the Terrorism Act 2000.

If a person refuses or otherwise fails to comply with a notice under section 111A (1), the SRA may apply to the High Court for an order requiring the person to comply with the notice or with such directions for the like purpose as may be contained in the order (section 111B (1)).

¹ For these purposes, section 111A of ECCTA defines a 'person' to be: a solicitor; an employee of a solicitor; a body recognised under section 9 of the Administration of Justice Act 1985; an employee or manager of, a person with an interest in, such a body; a licensed body; a manager or employee of a licensed body; a non-authorised person who has an interest or an indirect interest, or holds a material interest in a licensed body; a person who was, but is no longer, of a description mentioned above.



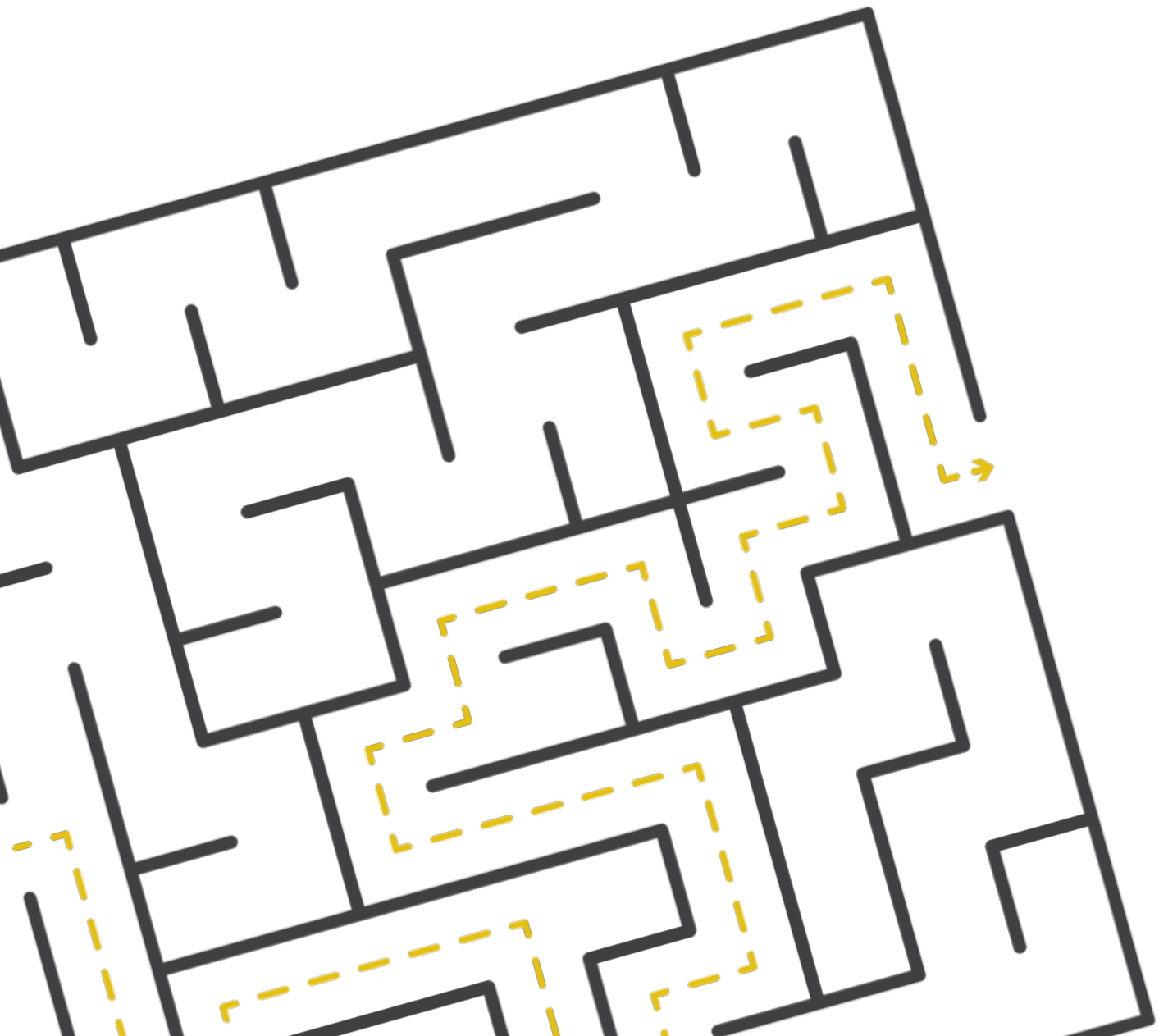
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What will the impact be?

The additional powers granted to the SRA are manifold in their impact. First, they represent a significant extension of power to require persons to disclose information and produce documents *even when the SRA is not at the point of investigating a matter*. This sits in contrast to the more restrained powers the SRA currently has under section 44B of the Solicitors Act 1974. While the new powers under ECCTA are restricted to only those situations where disclosure and production of information and documents are necessary for the SRA to have in preventing or detecting economic crime, this limitation is itself very broad, not least because the definition of economic crime under ECCTA is drafted widely.

Further, the definition of persons to which this new power will apply is much wider than that which applies in respect of section 44B of the Solicitors Act 1974. Notably, the new information power will apply to persons who were, but are no longer, a solicitor, recognised body, licensed body or an employee or manager of such entities.



The SRA's new regulatory objective relating to economic crime

What is the current position?

Currently, section 1 of the Legal Services Act 2007 (the 'LSA') sets out eight regulatory objectives, which by virtue of section 28(2) of the LSA, the SRA as an approved regulator must in so far as is reasonably practicable act in accordance with. Those regulatory objectives are:

- (a) Protecting and promoting the public interest;
- (b) Supporting the constitutional principle of the rule of law;
- (c) Improving access to justice;
- (d) Protecting and promoting the interests of consumers;
- (e) Promoting competition in the provision of services within subsection (2)²
- (f) Encouraging an independent, strong, diverse and effective legal profession;
- (g) Increasing public understanding of the citizen's legal rights and duties;
- (h) Promoting and maintaining adherence to the professional principles.³

What will change?

ECCTA makes provision for section 1 of the LSA to be amended such that a new regulatory objective is added as:

- (i) Promoting the prevention and detection of economic crime.

In addition, a new subsection is to be added as follows:

- (5) In subsection (1)(i) "economic crime" has the meaning given by section 193(1) of the Economic Crime and Corporate Transparency Act 2023.

What will the impact be?

The new regulatory objective underpins the extended powers that have been granted to the SRA and provides the reason upon which they are deemed necessary. Thus, having unlimited fining powers in relation to economic crime and having a wider power to request information and documentation relating to economic crime (as discussed above) are deemed necessary in order for the SRA to fulfil its new regulatory objective.

² Section 1(2) of the LSA sets out the "professional principles" as being that authorised persons should act with independence and integrity, maintain proper standards of work, and act in the best interests of their clients (section 1(2)(a)-(c)); that persons who exercise before any court a right of audience, or conduct litigation in relation to proceedings in any court, by virtue of being authorised persons should comply with their duty to the court to act with independence in the interests of justice (section 1(2)(d); and that the affairs of clients should be kept confidential (section 1(2)(e)).

³ As defined in footnote 1 above.



How we can help

Although the ECCTA itself is new, we have extensive experience advising on issues which are likely to arise once all relevant provisions are in force, and which companies should prepare for now.

This includes corporate and individual criminal offences, fraud, investigations, company law issues, and corporate compliance in general.

We can, for example:

- prepare tailored face-to-face or online training sessions;
- conduct or review your firm's economic crime risk plan and / or assessment;
- Draft or review your internal guidance, policies and other procedures;
- advise on dealing with law enforcement agencies, including responding to notices and information requirements;
- advise on the evolving SRA approach to economic crime;
- and, of course, give bespoke, legal advice on any issues you may have.

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