

# Financial crime: legislative predictions for the year ahead

**RPC explores potential developments that in-house counsel and practitioners should consider in 2023.**

2022 proved to be another unprecedented year. It began with the creation of further and increasingly complex sanctions against Russia which set in motion a number of other legal and policy initiatives to combat kleptocracy. The coupling of extreme economic and political climates and the constantly evolving threats from financial crime also served to feed enforcement agencies with a number of corruption, fraud and money-laundering cases to investigate.

As a result, 2022 was a busy year for complex, high-value and international matters. We anticipate that 2023 will be the same in terms of activity but different in relation to both risks and opportunities. In particular, this article explores potential legislation that any in-house counsel or practitioner will be thinking about in 2023, namely: the effect of the UK Economic Crime and Corporate Transparency Bill; potential change to the compensation for victims of international bribery; a new UK corporate offence of failure to prevent fraud; and expanding legal requirements to include ESG within due diligence and third party risk management.

## **(i) UK Economic Crime and Corporate Transparency Bill**

This Transparency Bill is a further measure to crack down on kleptocracy and protect the openness of the UK economy from abuse by financial criminals. It is currently progressing through the House of Commons and is projected to be signed into law sometime in early 2023.

As drafted, the Transparency Bill extends the SFO's section 2 powers to compel the sharing of information or documents in a suspected crime to the provision of documents and information to cover all cases at the pre-investigation stage, broadening the SFO's reach and ability to obtain information from innocent parties and companies under threat of a criminal conviction. This materially enhances existing powers,

which are currently limited to only international bribery and corruption investigations that have already reached an advanced stage. The Bill will also enhance the powers of Companies House so that it is not only a 'library' but a guardian of the data it holds. Specifically, this includes empowering Companies House to conduct verification checks when there are suspicions of wrongdoing in the identification information provided.

Whilst these legislative changes could provide a much-needed boost to law enforcement as well as to businesses who need access to up-to-date and accurate company information, they may be stymied by a lack of resourcing in crucial enforcement departments. Here, given government finances, our prediction is that insufficient funding will result in a lack of resources to 'give teeth' to this Bill. As a consequence, these changes will only have a material impact in specific matters or over the medium term.

## **(ii) Rethinking compensation for victims of foreign bribery**

Bribery is not a victimless crime and victims of international corruption have again come to the forefront this year. There has been a number of high-profile cases and ground-breaking penalties, most recent and significant being the £280m sentencing of *Glencore* in relation to widespread criminal activity to secure access to oil in a number of African states between 2011 and 2016.

Press and NGO interest in these significant international cases have highlighted how little compensation is paid to victim states. Due to the high-profile nature of the *Glencore* matter, and the substantial penalty involved, we anticipate that in 2023 there will be further debate on how victims of foreign bribery are recognised and compensated. For example, given the SFO is on notice of the public pressure in this area, we expect defendants in international corruption cases or those companies aiming for deferred prosecutions agreements (DPAs) in



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2023 and 2024 to proactively consider compensating victim states or receive harsher treatment by the authorities.

We also expect to see progress on a more robust scheme for compensating victims of foreign bribery. This could come either by changes to the current UK sentencing guidelines or by creating compensation rules more aligned with the US Mandatory Victims Restitution Act through which claims can be filed before sentencing.

### **(iii) Further progress towards a new UK corporate offence of failure to prevent fraud**

On the legislative horizon for 2023 is a new corporate offence for the failure to prevent fraud, similar to that for bribery or tax evasion. As of early 2023, there appears to be real parliamentary appetite to legislate for this offence. In late January, a failure to prevent fraud offence was included as an amendment to the Economic Crime and Corporate Transparency Bill. The amendment was subsequently withdrawn following ministerial assurances that the new offence would be discussed in the House of Lords. It is anticipated that following debate within the House of Lords, this offence will be reintroduced into the Economic Crime and Corporate Transparency Bill. In February 2023 a proposed amendment was made to the Financial Services and Markets Bill adding a similar offence that would impose legal obligations on entities and individuals in the regulated sector to prevent fraud.

While introducing a new offence has been on the agenda for many years, there is new impetus to legislate given the epidemic of fraud in the UK (which resulted in reports of a rise in the value of fraud prosecutions from £137.4m in the first half of 2021 to £532.6m in the first half of 2022) and the end of the Law Commission's review into the topic in June 2022.

Corporate liability for criminal activity normally requires satisfaction of a mental element from the organisation's most senior management.

However, it is often challenging to attribute a particular state of mind to a corporation. Specifically, in English law under the identification doctrine, 'a corporation will only be liable for conduct of a person who had the status and authority to constitute the body's "directing mind and will."' In the context of large global corporations, determining which individuals comprise the 'directing mind and will' of the company and showing their specific intention is a difficult and often impossible task.

Given the above, in June 2022 the Law Commission published an Options Paper on Corporate Criminal Liability which appeared to support a new failure to prevent offence for fraud which would create criminal liability for any company with even a part of its business in the UK. The Options Paper set out 10 recommendations to reform the legal framework on corporate criminal liability to ensure that the Government has strong legal tools for holding corporations accountable for criminal wrongdoing. Support continued to gather throughout 2022 for this particular offence and for legislation in 2023, with the House of Lords 'Fraud Act 2006 and Digital Fraud Committee' publishing a report in November 2022 pressing for a focus on telecoms and tech companies who they believed fail to prevent the use of their platforms by organised crime gangs committing fraud.

We anticipate that in-house counsel and practitioners will be following developments in this space intently as momentum continues to gather on a failure to prevent fraud offence and its potential broad scope of application.

### **(iv) Expanding the scope of due diligence to cover ESG risks?**

In 2023 we expect to see further responsibilities imposed on corporations to identify, prevent and mitigate environmental, social and governance (ESG) risks across their third-party management and supply chains.

## Under the Due Diligence Directive, existing and potential human rights and environmental risks will need to be identified as part of the due diligence process.

In the EU, this will likely arise under the Corporate Sustainability Due Diligence Directive (Due Diligence Directive) which will create an obligation on companies to carry out ESG due diligence. Similar initiatives are also gathering momentum in the UK.

In February 2022, the European Commission adopted a proposal for a Due Diligence Directive. The draft Directive establishes a corporate due diligence duty to identify, prevent and mitigate human rights and environmental impact of business activities, and will apply to companies that meet specific size and turnover thresholds. The Due Diligence Directive will compliment the Corporate Sustainability Reporting Directive which was approved by the European Council in November 2022 and imposes on certain companies detailed ESG reporting obligations.

Under the Due Diligence Directive, existing and potential human rights and environmental risks will need to be identified as part of the due diligence process. A failure to satisfy these obligations could attract administrative penalties or civil liabilities. It is however unclear what the final text of the Directive may be, with EU member states reportedly in disagreement regarding its scope, particularly as to whether it should apply only to the supply chain or entire value chain. For large multinational companies, entire value chains encompass a network of third party suppliers and customers across the globe. There is concern that extending this obligation to complete human rights and environmental impact due diligence of a company's entire value chain could for some companies impose particularly burdensome or unrealistic obligations.

In the UK, calls for a similar legal obligation and offence have picked up pace. In September 2022, 63 businesses, investors and civil society groups presented the then Prime Minister Liz Truss with a request that mandatory human rights and environmental due diligence be legislated for in the UK.

A requirement to consider ESG risks as part of the due diligence process also reflects growing acknowledgement of the nexus between financial crime risks and ESG. It is no longer practical to consider financial crime risks in isolation. For a company of any size, all compliance programmes must now actively engage with the interaction of human

rights violations and environmental crimes, and in particular how they impact money-laundering offences and governance or corruption risks.

### Conclusion

In this article, we have set out our forecast for 2023. In summary, this is a period of upheaval with many new anticipated burdens for corporates in particular, and the anticipated legislation, if passed into English law, will have a real and immediate impact on not only UK businesses but all global businesses with even a relatively small presence in the UK.

For further information or if your company would like to discuss any of the above, please get in touch with the team at RPC LLP. ■

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