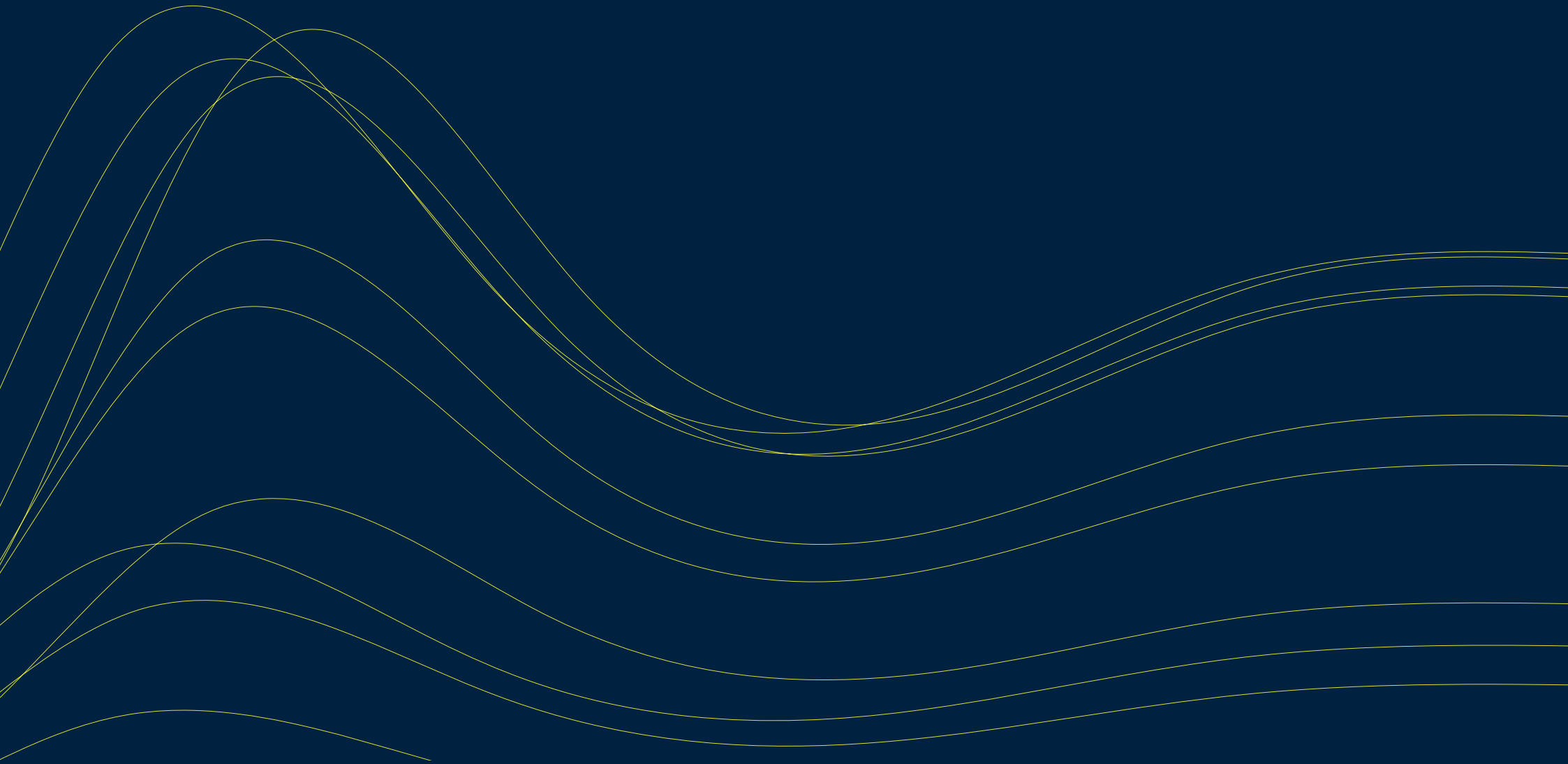















# Failure to prevent offences: A comparative guide

This quick reference guide is designed to support you in preparing for the changes as a result of the Economic and Corporate Crime and Transparency Act, to help you understand its potential impact on your business. The important thing to note is that this legislation is designed to drive a culture of compliance across businesses operating in England and Wales. The measure being applied is whether your business is taking reasonable preventative procedures to protect against fraud. The measure of this will depend on your business and whilst it is currently open to interpretation, we can draw from the guidance of the Bribery Act and other failure to prevent legislation.



# A quick reference comparison

	FAILURE TO PREVENT FRAUD	FAILURE TO PREVENT BRIBERY	FAILURE TO PREVENT CRIMINAL FACILITATION OF TAX EVASION
 Applies to companies?	✓ <sup>*</sup>	✓	✓
 Applies to partnerships?	✓ <sup>*</sup>	✓	✓
 Applies to individuals?	✗	✗	✗
 Triggered by underlying offence?	✓	✓	✓
 Intention to benefit the organisation required?	✓ <sup>*</sup>	✓	✗
 Is an employee an “associated person”?	✓	✓ <sup>*</sup>	✓
 Is an agent an “associated person”?	✓	✓ <sup>*</sup>	✓
 Is a subsidiary an “associated person”?	✓	✓ <sup>*</sup>	✓ <sup>*</sup>
 Is a service provider an “associated person”?	✓	✓	✓
 Is the offence extra-territorial?	✓ <sup>*</sup>	✓ <sup>*</sup>	✓ <sup>*</sup>
 Is there a defence?	✓	✓	✓

<sup>\*</sup>see details in table below

# Let's take a closer look

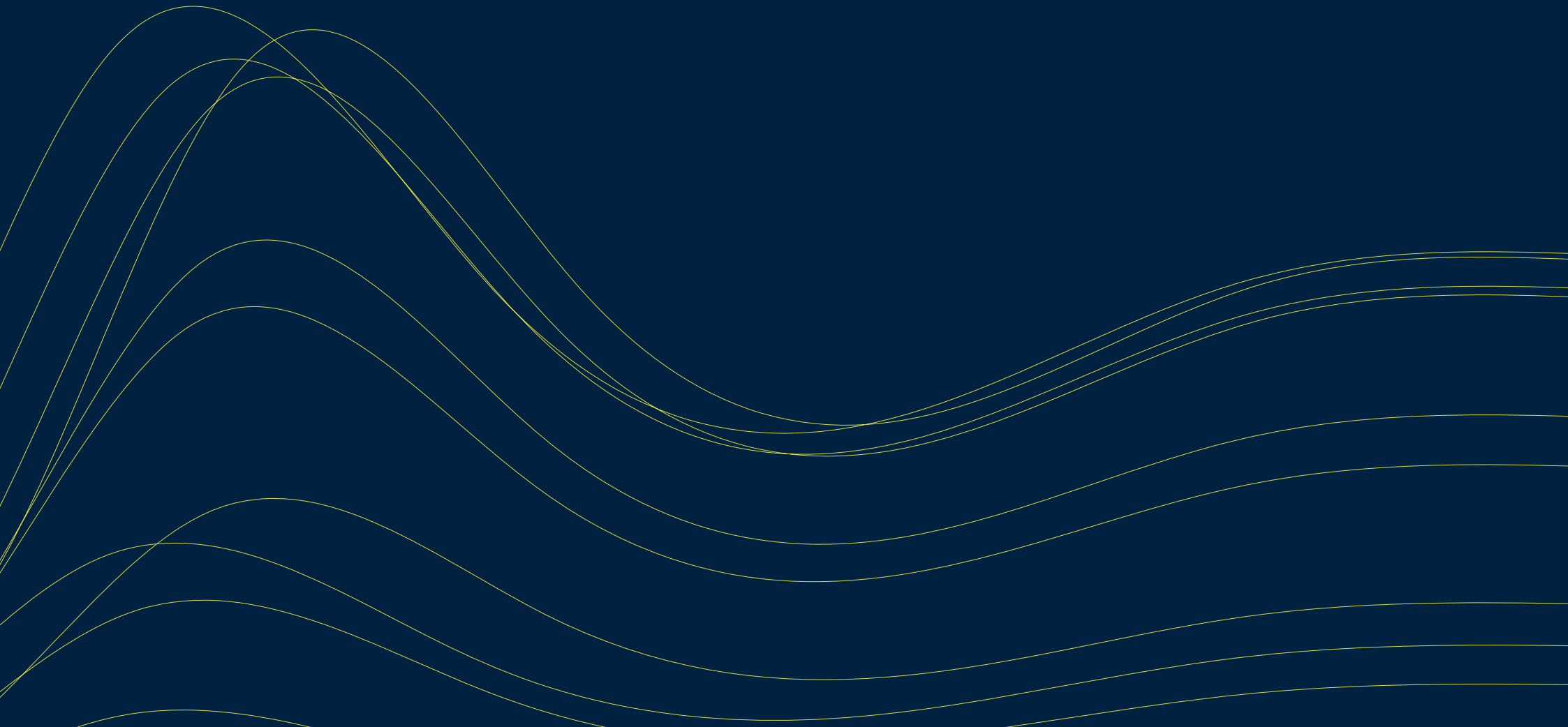
	FAILURE TO PREVENT FRAUD	FAILURE TO PREVENT BRIBERY	FAILURE TO PREVENT CRIMINAL FACILITATION OF TAX EVASION
Who does the offence apply to?	Companies, partnerships and limited liability partnerships ("LLPs") which are " <b>large organisations</b> ", or whose <b>parent undertakings</b> are " <b>large organisations</b> " where a specified fraud offence is committed with intent to benefit the relevant body.	Companies, partnerships and LLPs.	Companies, partnerships and LLPs.
What triggers the corporate offence?	<i>Associated person</i> commits a <b>specified fraud offence</b> in a financial year of the relevant body/parent undertaking <b>intending to benefit (whether directly or indirectly) the relevant body, its client, or its client's parent company.</b>	<i>Associated person</i> <b>bribes</b> another person <b>to obtain or retain business</b> , or an <b>advantage</b> in the conduct of business, for the <b>relevant body.</b>	<i>Associated person</i> <b>dishonestly facilitates</b> the <b>evasion of UK or foreign tax</b> by another. <b>Innocent or negligent facilitation will not trigger offence.</b>  No change to underlying UK tax evasion or facilitation offences. Avoidance is not captured.
Who is an "associated person" for the purposes of the offence?	<b>Employee, agent, subsidiary, or person who performs services for or on behalf</b> of the <i>large organisation</i> .  Includes <b>employee of a subsidiary</b> where fraud was <b>intended to benefit the relevant body.</b>  May include <b>other party to a joint venture.</b>	Any <b>person who performs services for or on behalf</b> of the <i>relevant commercial organisation</i> , irrespective of capacity in which services are performed.  <b>Employees presumed</b> to provide services for or on behalf of relevant body.  May include <b>other party to a joint venture.</b>	<b>Employee, agent, or person who performs services for or on behalf</b> of the <i>relevant body</i> , acting in that capacity (not on a frolic of their own).  May include <b>other party to a joint venture.</b>
Is the offence extra-territorial?	Applies to foreign companies/partnerships/LLPs.  Broadly would suffice if <b>any of the victims were from, or elements of the fraud offence took place in, England or Wales.</b>	Applies to foreign companies, partnerships and LLPs caught <b>provided they carry on part of a business in any part of the UK.</b>  Catches <b>any act of bribery</b> whether takes place <b>in UK or elsewhere.</b>	Applies to foreign companies/partnerships/LLPs and <b>catches conduct taking place in the UK or elsewhere</b> , provided there is sufficient UK nexus.  For facilitation of foreign tax evasion, those acts must amount to equivalent crimes in both the UK and the foreign jurisdiction.
Is there a statutory defence?	Relevant body must prove (on the balance of probabilities) that it had " <b>reasonable prevention procedures</b> " in place designed to prevent associated persons committing fraud. <b>Or that it was not reasonable in all the circumstances to expect the body to have any prevention procedures in place.</b>  Relevant body not liable if it was/was intended to be a victim of the fraud offence.  Guidance is awaited but the six principles are anticipated to reflect other failure to prevent requirements.	Relevant body must prove (on the balance of probabilities) that it had in place " <b>adequate procedures</b> " designed to prevent associated persons from making bribes.  Prevention procedures should be <b>informed by six principles</b> : risk assessment; proportionality; top-level commitment; due diligence; communication and training; and monitoring and review.	Relevant body must prove (on the balance of probabilities) that it had " <b>reasonable prevention procedures</b> " in place designed to prevent associated persons from dishonestly facilitating criminal tax evasion. <b>Or that it was not reasonable in all the circumstances to expect the body to have any prevention procedures in place.</b>  Prevention procedures should be <b>informed by six principles</b> : risk assessment; proportionality; top-level commitment; due diligence; communication and training; and monitoring and review.

# Predicate offences under ECCTA Schedules 12 and 13

Economic Crime and Corporate Transparency Act 2023 (ECCTA) Schedules 12 and 13		
PREDICATE OFFENCE	RELEVANT OFFENCES FOR SM	SPECIFIED OFFENCES FOR FTP LIABILITY
#Cheating the public revenue	✓	✓
Conspiracy to defraud	✓	
Companies Act 2006 — section 993 (fraudulent trading)	✓	✓
#Fraud Act 2006 — s1 (fraud), s9 (participating in fraudulent business carried on by sole trader), s11 (obtaining services dishonestly)	✓	✓
Theft Act 1968 — s17 (false accounting) and s19 (eg false statements by company directors)	✓	✓
Theft Act 1968 — s1 (theft), s20 (eg suppression of documents), s24A (dishonestly retaining a wrongful credit)	✓	
#Customs and Excise Management Act 1979 — s68 (offences in relation to exportation of prohibited or restricted goods), s167 (eg untrue declarations), s170 (fraudulent evasion of duty)	✓	
An offence under Forgery and Counterfeiting Act 1981 (forgery, counterfeiting and kindred offences)	✓	
#Value Added Tax Act 1994 — section 72 (fraudulent evasion of VAT)	✓	
Financial Services and Markets Act 2000 — s23 (contravention of prohibition on carrying on regulated activity unless authorised or exempt), s25 (contravention of restrictions on financial promotion), s85 (eg prohibition on dealing in transferable securities without approved prospectus), s398 (misleading the FCA or PRA)	✓	
Terrorism Act 2000 — s15 (fund-raising), s16 (use and possession), s17 (funding arrangements), s18 (money laundering), s63 (terrorist finance: jurisdiction)	✓	
#Proceeds of Crime Act 2002 — s327 (eg concealing criminal property), s328 (eg arrangements facilitating acquisition of criminal property), s329 (acquisition, use and possession of criminal property), s330 (failing to disclose knowledge or suspicion of money laundering), s333A (tipping off: regulated sector)	✓	
Fraud Act 2006 — s6 (eg possession of articles for use in frauds), s7 (making or supplying articles for use in frauds)	✓	
#Bribery Act 2010 — s1 (bribing another person), s2 (being bribed), s6 (bribery of foreign public officials)	✓	
Financial Services Act 2012 — s89 (misleading statements), s90 (misleading impressions), s91 (eg misleading statements in relation to benchmarks)	✓	
#Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 — regulation 86	✓	
#Sanctions and Anti-Money Laundering Act 2018 (money laundering and terrorist financing) — section 49	✓	

# The senior managers regime under ECCTA

Under ECCTA, an organisation is now criminally liable for misconduct where a specified fraud or tax offence is committed by an employee or agent who falls within the definition of senior manager. This is a loosely defined class of employee that is different to that of the Financial Services “Senior Managers & Certification Regime”. This change significantly increases the number of individuals who can trigger corporate criminal liability through their conduct. This is important for compliance functions, and any individuals dealing with whistleblowing reports to consider. If the suspected wrongdoers could constitute a senior manager under ECCTA, the risk of corporate criminal liability could be greater, and therefore an added degree of care is needed.





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