Financial fraud Apr 22 2025

# Economic crime act 'only moves the dial from almost impossible to quite difficult'

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**Melanie Tringham**

British prosecutors have had a hard time trying to get a criminal conviction on a company for financial crime.

There have been convictions for environmental pollution and for corporate manslaughter, but trying to find a way to make a company criminally liable for occurrences in the business has been much harder.

The case that really brought it home in the legal as well as the wider world is the action against Barclays and Barclays Bank, and subsequently its former directors, regarding the way that investments were made with the state of Qatar during the financial crisis, in an effort to stave-off a government bailout.

While all were acquitted – though the bank was more recently fined over its conduct with regards to listings rules in part of the same affair by the Financial Conduct Authority – the case was cited as an example of how difficult it was to attribute criminal liability to a whole firm, from the alleged actions of some of its most senior personnel. The former chief executive and three other officers were acquitted separately over conspiracy to commit fraud by false representation and unlawful financial assistance.

Prosecutors and lawyers are now hoping that a change in the law, which came into force in December 2023, with the Economic Crime and Corporate Transparency Act (ECCTA) 2023, will change the game fundamentally.

The key part of the legislation here allows for the fact that senior managers can effectively be representing the company itself, and therefore the organisation can be prosecuted if senior managers have been up to criminal behaviour.

Section 196 of the ECCTA 2023 says:

> "If a senior manager of a body corporate or partnership ("the organisation") acting within the actual or apparent scope of their authority commits a relevant offence after this section comes into force, the organisation is also guilty of the offence."

It defines a "senior manager" as:

> "an individual who plays a significant role in (a) the making of decisions about how the whole or a substantial part of the activities of the body corporate or (as the case may be) partnership are to be managed or organised; or (b) the actual managing or organising of the whole or a substantial part of those activities."

Jonathan Fisher KC, a financial crime expert, says: "It broadens the scope of liability quite significantly. If the criminal conduct is committed by a senior manager lower down the food chain, that will bind the company as well."

What happened in the Barclays case was that the Serious Fraud Office was alleging criminal behaviour of the senior executives (concealing the true nature of payments to Qatari authorities in the context of investments they made into the bank), and trying to prosecute the company itself.

As recorded in a judgment on the proceedings, Barclays relied on witness evidence from the then-chair, which stated that the board did not know of these alleged secret payments.

The company's position was that it had not delegated authority to the executives to constitute the "directing mind and will" of the company.

Jonathan Fisher KC, a financial crime expert.© FT

The issue at stake, which the ECCTA seeks to change, is broadening out liability beyond the board or the “directing mind and will” of the company.

The Barclays case, where the SFO were trying to establish corporate criminal liability, hinged on the SFO making the case that the alleged offences committed by the chief executive and chief financial officer amounted to the “directing mind and will” of the company, because they were left to “do the deal”, according to one of the judgments.

But the judge, Lord Justice Davis, in a subsequent judgment determined that the board was not involved directly in the alleged “false” service agreements with the Qataris, and neither did the individuals concerned have full authority to “do the deal”.

The problem among the legal community is that the law as it was, was designed for much smaller companies where there might only be one or two directors, so the “directing mind and will” of the business was clearly restricted to just a couple of directors, heavily involved in the company.

Fisher says: “With these large companies where you can have a board that’s internationally based, there are executive directors and non-executives who are not involved in the nitty gritty of running a company.

"In the Barclays scenario . . . the prosecutors could not hold the company liable, because with the people at the very top, they wouldn't be able to show they knew what was going on, and that was not binding the company."

He adds that it massively widens the scope for companies to receive a criminal conviction. "It means a company can be vicariously liable for what senior managers do, whereas hitherto, companies would not be liable in this way."

Simon Airey, co-head of the global investigations and compliance practice at McDermott Will & Emery, says the new law really opens up the landscape for prosecutors to go after people much further down the food chain.

"Anybody who is a senior manager can now infect the company with criminality; somebody who plays a significant part in managing the company, not just executive leadership.

"It could be HR, legal and compliance; if they are part of the group anywhere around the world and they are satisfying the definition of a senior manager, if they commit a crime, their conduct can be attributed to the company."

Simon Airey, of McDermott Will & Emery

In his work Airey helps large firms with compliance, and he says that anyone making significant decisions could now fall under the radar, and unlike the 'failure to prevent fraud' part of the ECCTA – where a business can show that compliance steps they took to try to prevent fraud are a defence – there is not much of a defence, in his mind, one can put in place.

He says that for any company that finds itself in hot water over the actions of a senior manager (but for example junior to the board), will then find itself running to catch up to find a way to defend itself, as the individual will most likely have been suspended, have engaged different lawyers and will likely be unwilling to talk to the company direct. And the company may simply not even know what happened.

"We know there are certain people at the SFO who are excited about this; they need to find a senior manager and will have a clear run at this."

However, there are others who are more cautious about the consequences of the new law.

Nick Barnard, partner at Corker Binning, a law firm specialising in white collar and corporate crime, says: "This does increase the opportunity for holding corporates liable for crimes committed by their employees and directors, but it only moves the dial from almost impossible to quite difficult."

Firstly, the individual concerned has to be acting "within the actual or apparent scope of their authority," as stated in the ECCTA.

Barnard says: "If I'm a director of a company and I hack into a customer's accounts to transfer money to myself, I'm not acting in the course of my authority."

Additionally, if the person involved is not a senior manager, they do not have a significant role in how the business or a substantial part of it is run, so then the company can also escape censure.

"The smaller the organisation the more likely that a senior manager is sufficiently involved in the activities under scrutiny."

We may also see more deferred prosecution agreements being arranged, between companies and prosecutors, where the company accepts it has committed wrongdoing, and the SFO, for example, will defer prosecution in exchange for the company paying a penalty and adhering to certain conditions such as compliance checks.

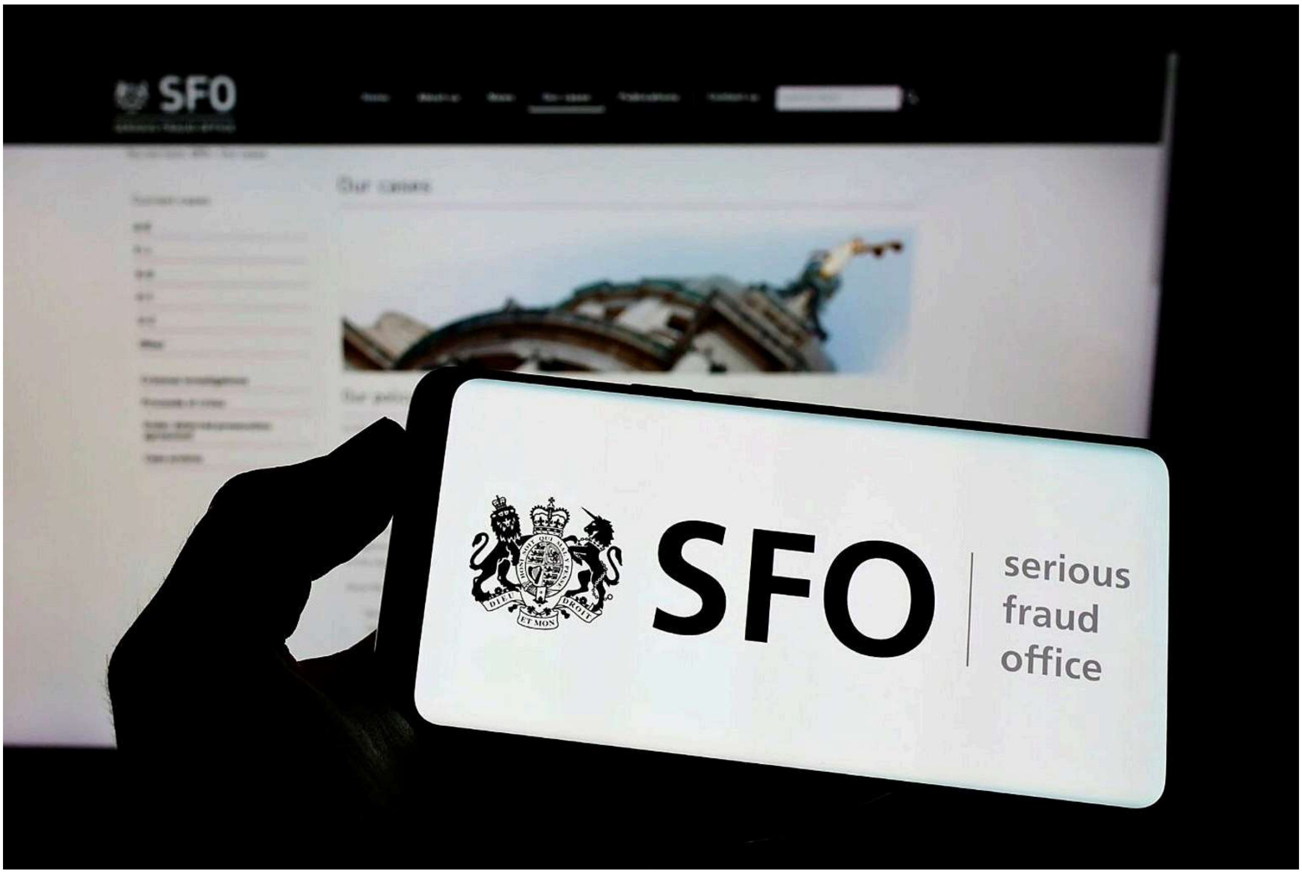
It means that the company avoids a criminal conviction, the evidence is not tested in court and the company is ideally free of the issue after a few years.

Paul Nash, a managing director at corporate investigator Nardello & Co, says that there have been several cases of criminality, where the senior managers knew what was going on, but the junior employees got the blame.

“There’s got to be the right environment created for senior managers to own the problem; it’s having the confidence to raise issues up the line.”

The SFO’s view is that it is important to go after companies, with a corporate conviction, rather than the directors individually, to act as a deterrence. The reasoning is, if there were not seen to be any lasting consequences for the company itself, history would end up repeating itself, with a new set of directors involved in another form of criminality.

The reason it went after Barclays, the corporate entity, was because the bank benefited directly from the alleged actions of the directors, keeping the bank out of public ownership.

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An SFO lawyer says: "What [the ECCTA] suggests is that Joe Bloggs is doing X, Y and Z. Is he doing it in his own capacity or is he doing it more as a representative of the company?

"In these circumstances where the individuals are committing the offences, are these senior managers and are they for the benefit of the company?



"We can't prosecute anyone unless we have the evidence."

Steven Francis, partner of Faegre Drinker, says that sometimes FCA disciplinary can be a good way of dealing with cases that do not meet a criminal threshold: "It's not quite as terrifying being [disciplined] by the FCA, but it's quite a good way of making sure that the conduct that doesn't meet the criminal standing doesn't go unpunished."

Ultimately, says Fisher, large companies have a role to play in society and they should be treated as legal entities, including when up to no good.

"Companies are seen as major entities that have their own character, and they have a responsibility in society. If something is done in their name criminally, there’s an argument that the company should be held criminally responsible for that in the way that an individual would be.

“The idea being if you hold companies criminally responsible, you take the prevention of crime seriously.”

*Melanie Tringham is features editor at FT Adviser*