# Ashurst Governance & Compliance Update – Issue 58

**12 November 2024**

## Economic Crime and Corporate Transparency

### 1. Government publishes guidance on preventing fraud and sets implementation date

The UK government has published the long-awaited guidance on the 'failure to prevent fraud offence' in the Economic Crime and Corporate Transparency Act 2023.

The offence will apply to all UK companies, limited liability partnerships and limited partnerships that meet the statutory test for being a "large" organisation (meeting at least two out of the following three criteria: more than 250 employees; more than £36 million turnover; or more than £18 million in total assets).

The offence will mean that in-scope organisations can be held criminally liable and exposed to a potentially unlimited fine where an employee, agent, subsidiary or other 'associated person' acting on its behalf commits fraud intending to benefit the organisation.

An organisation will have a defence if it has reasonable procedures in place to prevent fraud. The guidance sets out the framework for 'reasonable fraud prevention procedures', which includes the following six principles: (i) top level commitment; (ii) risk assessment; (iii) proportionate risk-based prevention procedures; (iv) due diligence; (v) communication (including training); and (vi) monitoring and review.

We will publish more detailed analysis on the guidance in the coming weeks. In the meantime, what follows are the initial thoughts on the guidance from our Global Disputes and Investigations team. You can also find their 'Pathway to Readiness' briefing here.

*In its guidance, the government has taken on board the representations made by industry bodies for a longer nine-month implementation period. This is welcome. But it is also an acknowledgment that there will be significant work organisations need to undertake to be ready for the roll-out of the offence*.

*Our five first-impression takeaways from the Guidance are as follows*:

- *The commentary on how to build reasonable fraud prevention procedures goes beyond existing 'failure to prevent' guidance. Here we see much greater detail on the practical steps senior management can take to foster a counter fraud culture. Businesses will welcome direction on how*

*to develop and conduct a risk assessment using nominated risk owners in the business – which is the foundational step to compliance.*

- *Vitally, in the wake of last the budget, the Guidance states that it is not necessary to duplicate existing work. The government acknowledges that many large companies will already be subject to existing regulations – such as financial reporting or health and safety and competition law compliance frameworks - for which they will have processes which may mitigate the risk of fraud. This will be welcome news - albeit the guidance makes clear that compliance with other frameworks may not be sufficient, on its own, to constitute the defence of reasonable procedures, and that organisations should adapt their procedures to take account of the new offence.*
- *The Guidance demonstrates an appreciation that the new offence sits within an existing eco-system of financial crime compliance. It encourages businesses to use, among other sources, the UK Corporate Governance Code, case law, practitioners' texts and accountancy profession journal articles to identify fraud indicators and the measures to act on them. This aspect of the guidance shows a welcome richness and maturity, but the expectation will likely require a change in approach for many legal and compliance teams.*
- *One of the most interesting features of the Guidance is the emphasis on the importance of whistleblowing processes as part of an effective fraud prevention framework. This will no doubt be welcomed by the Serious Fraud Office and other bodies for whom the protection of whistle-blowers – and whether to pay them - are top of the agenda in the public debate about detecting and investigating economic crime.*
- *For hints at target areas for investigation and enforcement, we see ESG as a potential focus. Example scenarios called out in the guidance include manipulating accounts to attract investors, misstating ESG credentials of financial products, and fraud connected to environmental crime. Financial institutions will want to take note of potential greenwashing – an area we see enforcement authorities keen to prioritise.*

The government has also published regulations, regulation 3 of which confirms that the relevant sections of ECCTA dealing with the failure to prevent fraud will come into force on 1 September 2025.

## 2. ECCTA - Other developments

Last month we reported on the outline transition plan for reforming the role of Companies House, highlighting that around 50 statutory instruments are to be initiated over the next 18 months (see AGC Update Issue 57, Item 6). This process has now commenced with the publication of draft regulations in the areas highlighted below.

**Power to fine LLPs and remove them from the register**

New regulations have been made to ensure that further amendments made by ECCTA to company law will also apply in a modified way to LLPs. In particular, as an alternative to pursuing criminal prosecution through the courts, the regulations empower Companies House to impose financial penalties on LLPs and their members directly for relevant LLP-related offences.

Companies House will also be able to remove an LLP from the register and consequently bring about its dissolution if there are reasonable grounds to believe that false or misleading information was provided when the LLP was formed.

The regulations will come into force at the same time as other provisions in ECCTA giving Companies House the power to strike off companies registered on a false basis come fully into force. We will issue an update as and when that date is know.

**Facilitating identity verification for LLPs**

ECCTA requires identity verification for directors, persons exercising significant control over companies (**PSCs**) and anyone filing information at Companies House. Draft regulations were previously issued enabling Companies House to allocate unique identifiers (**UIDs**) to individuals associated with companies.

New draft regulations (**UID regulations**) have now been issued which give Companies House the power to allocate UIDs to individuals associated with other business entities such as LLPs and limited partnerships, ensuring that identity verification operates effectively for such entities as well as for companies.

The UID regulations will come into force at the same time as the identity verification provisions in ECCTA come fully into force. Again, we will issue an update as and when this date is known.

**Further measures to protect residential addresses**

Revised draft regulations  have also been published which extend the circumstances in which individuals, such as directors or PSCs, may apply to protect their usual residential address (**URA**) where it appears on the register, by requiring Companies House not to display the address publicly. In particular, the draft regulations enable an individual to apply to protect their URA if the address is derived from the filing of an annual return at Companies House.

The draft regulations also apply modified provisions to LLPs, ensuring that the framework for addresses and disclosure of information held at Companies House remains in line with that for companies. If approved by Parliament, the regulations will come into force on 27 January 2025.

# IoD Code of Conduct for Directors

## 3. New IoD Code of Conduct for directors finalised

The Institute of Directors has published its new voluntary Code of Conduct for Directors in final form. The Code serves as a framework to guide directors in making ethical decisions and promoting high standards of leadership across entities of all sizes in the private, public, and not-for-profit sectors. The Code is intended to help directors to fulfil their responsibilities by providing a clearly articulated statement of what good conduct looks like.

The Code retains the six core principles from its earlier draft version, which was released for public consultation in June 2024. These principles are:

- **Leading by Example**;
- **Integrity**;
- **Transparency**;

- **Accountability**;
- **Fairness**; and
- **Responsible Business**.

Each principle is underpinned by a number of specific undertakings. By applying the principles and fulfilling the undertakings, it is suggested that directors will be well placed to achieve the positive outcomes set out in the Code.

The principles align with the 1995 ethical framework, the Seven Principles of Public Life, but they also emphasise modern business challenges such as sustainability and social responsibility. Directors are encouraged to act ethically, maintain transparency, and integrate fairness into their decision-making processes, considering broader societal and environmental impacts.

The Code emphasises the practical application of the principles. Directors are encouraged to exercise their judgement in the application of the Code and seek professional advice to fulfil their legal obligations.

Although the Code is voluntary and not intended to constrain directors, boards are encouraged to publicly commit to the Code. Possible mechanisms for this commitment include disclosure in annual reports and on websites.

The IoD plans to update the Code periodically and will develop guidance on applying the Code in various circumstances.

# Corporate Legal and Regulatory Reform

## 4. Government signals upcoming reforms to UK company law

The Department for Business and Trade has announced in a ministerial statement, and published a Green Paper on, its vision for the UK's modern industrial strategy whilst indicating accompanying company law reforms.  These include the following:

- **Corporate re-domiciliation**. As previously reported (see AGC Update Issue 57, Item 9), the government welcomed the publication of a report of the Independent Expert Panel on corporate re-domiciliation, which supports the adoption of a two-way re-domiciliation regime, allowing both inbound and outbound re-domiciliation in the UK which the panel believes will increase the attractiveness of the UK. The government says it will consult on a corporate re-domiciliation regime in due course.
- **Corporate reporting**. The government will lay legislation by the end of 2025 to remove redundant reporting requirements, to uplift the monetary size thresholds for micro-entities, small and medium-sized companies, and to make "technical fixes" to the UK's audit framework. The statement estimates that the changes will benefit up to 132,000 companies by moving them to a smaller size category. Separately, the government confirmed it will not be moving forwards in the immediate term with its proposed changes to reporting by medium-sized companies.
- **Non-financial reporting**. The government will also launch an ambitious consultation in 2025 aimed at simplifying and streamlining the UK's non-financial reporting framework. This follows the government's previous call for evidence on this topic.

- **Virtual AGMs**. The government intends to examine the potential for updating shareholder communication in light of new technology and 'clarify the law' in relation to virtual AGMs.
- **Capital markets**. Finally, the government intends to implement the outstanding recommendations from the Secondary Capital Raising Review published in 2022. This includes reducing the minimum time in which a company must offer new shares to existing shareholders before offering them to the wider market from ten working days to seven.

# Modern Slavery

## 5. Report recommendations for improvement of Modern Slavery Act

The House of Lords Modern Slavery Act 2015 Committee has published a report addressed to the government on the impact and effectiveness of the Modern Slavery Act 2015, which makes various recommendations for improvement.

The recommendations include:

- Increasing company accountability for modern slavery in their supply chains by making the content of modern slavery statements (and their publication on a central registry) mandatory, and introducing 'proportionate' sanctions for non-compliance.
- Bringing public bodies within the supply chain reporting requirements.
- Introducing legislation requiring companies over a certain threshold to undertake mandatory modern slavery supply chain due diligence.
- Carefully assessing and monitoring the potential adverse impact of immigration legislation on the identification and protection of victims.
- Establishing an arms-length Single Enforcement Body, which would act as a single point of contact for labour exploitation across all sectors.

The report also urges the government to legislate to facilitate wider use of Slavery and Trafficking Risk Orders and Slavery and Trafficking Prevention Orders under the MSA.

The government is due to respond to the report by 16 December 2024.

# Sustainability

## 6. Scaling transition finance

Following its March 2024 call for evidence, the Transition Finance Market Review (**TFMR**) has published a report providing recommendations to scale transition finance.

The TFMR was set up in January 2024 to consider what the UK financial and professional services ecosystem needs to do to become a leading hub for transition financial services (see AGC Update Issue 48).

Key findings of the report include that, despite significant growth in green finance, there remains a substantial gap of over US $7 trillion in the funding required to support the global transition.

The TFMR assesses that the UK, as a major financial centre, has the potential to lead in transition finance, leveraging its strengths in sustainable finance to support both domestic and global decarbonisation efforts.

The report makes several recommendations including:

- Defining Transition Finance as financial flows, products, and services that facilitate an economy-wide transition to net zero, including investments in high-emitting sectors such as heavy industry, transport, energy, agriculture, and the built environment.
- A Transition Finance Classification System and Guidelines for Credible Transition Finance to help financial institutions classify and assess transition finance activities and entities.
- Mandatory transition plan disclosures for large companies and financial institutions, supported by data verification, assurance, and ratings.
- Developing clear sectoral decarbonisation pathways and communicating these effectively to the market, including through reinstating a form of the Net Zero Council to improve policy coordination.
- Actions to scale transition finance in emerging markets and developing economies including establishing a Transition Finance Lab to design and test innovative financing structures.
- Collaboration by the Bank of England and the Financial Conduct Authority on system-level analysis required to monitor UK progress towards net zero.
- Establishing a Transition Finance Council, housed within the City of London Corporation, to oversee the implementation of the recommendations.

## 7. TNFD guidance on nature transition planning published

The Taskforce on Nature-related Financial Disclosures has published a discussion paper outlining draft guidance for corporates and financial institutions on developing and disclosing nature transition plans (**NTPs**).

The draft guidance follows the disclosure recommendations and guidance published by TNFD in September 2023 (see TNFD makes major contribution to sustainability reporting landscape).

The Kunming-Montreal Global Biodiversity Framework (**GBF**) goals of halting and reversing biodiversity loss by 2030 and establishing a world living in harmony with nature by 2050 will require significant changes to business practices across all industry sectors.

The discussion paper builds on best practices from climate transition planning (including the Glasgow Financial Alliance for Net-Zero (**GFANZ**) October 2024 consultation on guidance for financial institutions on incorporating nature into net zero transition plans) to define NTPs and propose a structured approach to their development.

The draft guidance proposes to define an NTP as an aspect of an organisation's overall business strategy that lays out the organisation's goals, targets, actions, accountability mechanisms and intended resources to respond and contribute to the transition implied by the GBF.

The TNFD's draft NTP guidance covers the five key GFANZ themes and adapts them to take account of nature (Foundations, Implementation Strategy, Engagement Strategy, Metrics and Targets, and Governance).

It is also aligned with the Transition Plan Taskforce recommendations on Climate Transition Plan (**CTP**) disclosures. Key nature-related adaptations concern how to take account of the multiple aspects of nature (contrasted with CTPs which cover the emissions of a small number of greenhouse gases that can be summarised with a single metric, carbon dioxide-equivalent ($CO_2$ e)) and the importance of location in assessing nature-related impacts and mitigation efforts. The TNFD guidance encourages organisations to integrate nature and climate transition plans over time.

The TNFD considers that the benefits of an NTP are to provide a coherent structure for organisations to adjust their business models and value chains to respond to the nature transition and to manage nature-related dependencies, impacts, risks and opportunities effectively. Also, disclosure of material aspects of NTPs can provide investors with the information they need to finance the transition to a nature-resilient economy.

The TNFD is seeking feedback on the draft guidance by 1 February 2025, and encourages businesses and financial institutions to pilot test the proposed framework. The final guidance is expected to be published in 2025.

# UK Takeover Code

## 8. Jurisdiction of the UK Takeover Code redrawn

In April this year, the Takeover Panel proposed a new jurisdictional framework which would narrow the scope of the companies which are subject to the UK Takeover Code. The Panel's review was driven principally by the growth of private trading platforms, which could result in a larger number of otherwise private entities being caught in the Panel's net.

The consultation was strongly supported by the market and, on 6 November 2024, the Panel published RS 2024/1 which confirmed that the amendments would be adopted in substantially the same form as proposed in the consultation paper. Those amendments are detailed below.

- The scope of Code jurisdiction will be narrowed so that it will apply **only** to those companies which have their registered offices in the UK, the Channel Islands or the Isle of Man ("UK registered" companies) whose securities are admitted to trading on a UK regulated market or UK MTF, or a stock exchange in the Channel Islands or the Isle of Man ("UK quoted" companies), or were so quoted in the previous two years.
- Companies whose shares can be traded on private trading platforms and matched bargaining facilities, including the LSEG's Private Intermittent Securities and Capital Exchange System (**PISCES**) and The International Stock Exchange's recently launched private markets platform (**TISE Private Markets**), will not be captured by the revised scope. The Panel has assumed that companies who want their shares to trade on these sorts of platforms, but who do not want to be formally UK quoted, would not want to be subject to the jurisdiction of the Code. We would agree with this assessment.
- The changes remove the troublesome central management and control test which currently applies to UK registered PLCs which are not UK quoted and to certain UK registered private companies. The test has always been seen as opaque and apt to change in circumstances outside the reasonable control of the relevant company, since it principally operates by reference to the place

of personal residence of a majority of a company's directors (hence it is often referred to as the "residency test"). We therefore agree with its removal from the Code.

- The changes also reduce the application of the existing "10 year rule", so that UK registered companies whose shares have been UK quoted will cease to be subject to the jurisdiction of the Code two years (rather than 10 years) after delisting.
- For those companies which will fall outside of the Code's jurisdiction following the changes, transitional arrangements will apply for a period of two years. These have been set out in a Transitional Appendix to the Code. This provides those companies with the opportunity to put in place alternative arrangements, including making appropriate amendments to articles of association or enabling shareholders to exit their investments.

The proposed changes will take effect on **3 February 2025**, with transitional arrangements continuing until **3 February 2027**.

# Equity Capital Markets

## 9. Prospectus regulation reform in the UK and EU

As set out most recently in AGC Update Issue 55, Item 1, rules for the new public offers and admissions to trading regime, which will replace the UK Prospectus Regulation, are expected to be finalised by the end of H1 2025, subject to feedback and the approval of the FCA Board.

The latest proposals put forward in FCA Consultation Paper 24/12 - Consultation on the new Public Offers and Admission to Trading Regulations Regime include, amongst other things, an increased threshold for requiring a prospectus for further issuances from 20 per cent to 75 per cent and further detail on a revised liability regime, based on a higher threshold, for protected forward-looking statements in prospectuses. These proposed reforms follow the significant revisions to the UK listing regime, implemented in July, via the new UK Listing Rules (see AGC Update Issue 54, Item 2).

In parallel, the EU capital markets landscape has been subject to an important reform process, culminating on 8 October with the adoption of the EU Listing Act – a legislative package which includes updates to the EU Prospectus Regulation and EU Market Abuse Regulation and which is designed to make EU capital markets more attractive and accessible.

The European Securities and Markets Authority (**ESMA**), the EU's financial markets regulator and supervisor, has published a Consultation Paper on draft technical advice under the EU Prospectus Regulation together with a Call for Evidence on prospectus liability. The Consultation Paper contains recommendations aimed at facilitating European capital markets activity, and addresses prospectus content and format as well as the prospectus approval process. The Call for Evidence responds to the EU Listing Act's request for an analysis of prospectus liability and an assessment as to whether greater harmonisation is required in this respect. ESMA expects to publish its final technical advice to the European Commission in Q2 2025.

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