

Corporate liability across borders: A multi-jurisdictional guide to Failure to Prevent Fraud Offences

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Introduction

In recent years, the regulatory efforts to combat fraud have grown immensely, though there is still a lack of consistency on a global scale.

An important recent development has occurred in the United Kingdom with the implementation of the Failure to Prevent Fraud Offence (**UK FtPF**), which seeks to hold companies liable for failure to prevent a specified fraud event from occurring, often making it easier to prosecute corporations for fraud.

The UK FtPF is part of the Economic Crime and Corporate Transparency Act 2023 (**ECCTA**). It outlines the instances in which a company can be held accountable for fraud, including when: (i) an employee or agent commits the fraud; and (ii) the fraud is intended to benefit the organisation or a person to whom services are provided on behalf of the organisation. The UK FtPF also incorporates a defence of 'reasonable procedures' which organisations must review and implement into their existing anti-fraud systems, to avoid prosecution.

Further information on the UK FtPF can be found [here](#).

Globally, there is increasing emphasis on the prevention of fraud, and the overarching concepts of the prevention of bribery and corruption, though many countries are yet to implement a formal legal framework. Certain regions such as the EU have certain regulations surrounding the matter, often non-criminal, with Member States developing them further. Outside of the EU, several countries have implemented some degree of regulation on the topic. Most notably [Australia](#) and [South Africa](#).

This short guide explores whether jurisdictions have implemented offences similar to the UK FtPF.

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Australia	<p>Federal Register of Legislation - Crimes Legislation Amendment (Combatting Foreign Bribery) Act 2024</p> <p>Federal Register of Legislation - Criminal Code Act 1995</p> <p>New foreign bribery offence commences 8 September 2024 Australia Global law firm Norton Rose Fulbright</p>	<p>Australia has a failing to prevent foreign bribery offence that is similar in nature to the UK FtPF offence. The main difference is that it only applies to body corporates in Australia.</p> <p>The Crimes Legislation Amendment (Combatting Foreign Bribery) Act 2024 amended the Criminal Code Act 1995.</p> <p>Section 70.5A of the Criminal Code makes it a criminal offence for body corporates to fail to prevent an associate of that body corporate committing the offence listed in 70.2 (bribery of foreign public officials) and the associate does the bribery for the profit or gain of the body corporate (70.5A(1)(a)-(c)).</p> <p>For the purposes of 70.5A associate means, pursuant to 70.1:</p> <p><i>associate</i>: a person is an <i>associate</i> of another person if the first-mentioned person:</p> <ul style="list-style-type: none"> (a) is an officer, employee, agent or contractor of the other person; or (b) is a subsidiary (within the meaning of the <i>Corporations Act 2001</i>) of the other person; or (c) is controlled (within the meaning of the <i>Corporations Act 2001</i>) by the other person; or (d) otherwise performs services for or on behalf of the other person. <p>The definition of body corporate is contained in 70.5A(1)(a)(i)-(iii), that being:</p> <ul style="list-style-type: none"> (a) the first person is a body corporate: <ul style="list-style-type: none"> (i) that is a constitutional corporation; or (ii) that is incorporated in a Territory; or (iii) that is taken to be registered in a Territory under section 119A of the <i>Corporations Act 2001</i> <p>However, much like the UK FtPF an exception to 70.5A is contained in 70.5A(5) where subsection 70.5A(1) does not apply where:</p>

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		<p><i>the first person proves that the first person had in place adequate procedures designed to prevent:</i></p> <ul style="list-style-type: none"> (a) the commission of an offence against section 70.2 by any associate of the first person; and (b) any associate of the first person engaging in conduct outside Australia that, if engaged in in Australia, would constitute an offence against section 70.2. <p>Additional points to note include:</p> <ul style="list-style-type: none"> (a) There is also a broad definition of a 'foreign public official' under 70.1: <ul style="list-style-type: none"> • an individual who performs official duties under a foreign law • an employee of a foreign public enterprise • an employee or official of a public international organisation • an employee or official of a foreign government • an authorised intermediary of a public official (or a person who represents themselves to be so) • a member of the executive, legislature or judiciary of a foreign country, including heads of state, ministers and their staff • an individual holding an official post as a result of a local custom • an individual standing or nominated as a candidate to be a foreign public official • an individual providing a public service as defined in the foreign country's domestic law. (b) Provisions regarding the jurisdictional reach of the failure to prevent offence factors <ul style="list-style-type: none"> • It includes offences: <ul style="list-style-type: none"> • committed inside Australia by an associate (whether or not the associate is an Australian individual or other

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		<p>person) that constitutes an offence against 70.2 of the Criminal Code, or</p> <ul style="list-style-type: none"> committed outside Australia by an associate (whether or not the associate is an Australian individual or other person) that would constitute an offence against 70.2 of the Criminal Code if it had been engaged in in Australia. The offence will also apply to foreign corporations for conduct: <ul style="list-style-type: none"> committed inside Australia by an associate (whether or not the associate is an Australian individual or other person) that constitutes an offence against 70.2 of the Criminal Code. <p>(c) The Commonwealth Attorney-General published guidance on what constitutes adequate procedures to prevent the commission of foreign bribery, which is broadly similar to the UK Government's guidance on the failure to prevent offence under s 7 of the <i>Bribery Act 2010</i>. The key principles include:</p> <ul style="list-style-type: none"> Fostering a control environment to prevent foreign bribery Responsibility of top-level management Risk assessment Communication and training Reporting foreign bribery Monitoring and review <p>Contact:</p> <p>Rajae Rouhani Partner Norton Rose Fulbright Australia Melbourne Tel +61 3 8686 6239 rajae.rouhani@nortonrosefulbright.com</p>
Belgium	Justel: 1867-06-08/01	Article 18 of the new Belgium Criminal Code states that “Any legal person is criminally liable for offences that are intrinsically linked to the fulfilment of its purpose or the

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	<p>Book 1 of the Belgian Criminal Code</p> <p>Book 2 of the Belgian Criminal Code</p>	<p><i>defense of its interests, or for offences that are demonstrably committed on its behalf</i>".</p> <p>Therefore, any legal person may be responsible for the offences (including fraud) committed by its employees, directors, agents, etc.</p> <p>Fraud is made a criminal offence by Articles 479 and 480 of the new Belgium Criminal Code whilst Articles 487 and 638 deal with private and public corruption, respectively.</p> <p>In certain circumstances, parent companies may be held liable for the offenses of the subsidiary company, notably if the offences were committed on behalf of the parent company rather than the subsidiary.</p> <p>Contact:</p> <p>Sabine Holinde Senior Knowledge Lawyer Norton Rose Fulbright LLP Brussels Tel +32 2 237 61 21 sabine.holinde@nortonrosefulbright.com</p>
Canada	<p>Criminal Code</p> <p>Corruption of Foreign Public Officials Act</p> <p>Failure to Prevent Whitepaper.pdf</p>	<p>Canada does not have any similar laws to the failure to prevent fraud / bribery legislation.</p> <p>Bribery of foreign officials is a crime pursuant to the federal Corruption of Foreign Public Officials Act (CFPOA) (and bribery of domestic officials is criminalised pursuant to sections 119 – 125 of the Canadian Criminal Code).</p> <p>There are criminal offences for fraud (primarily s. 380 of the Canadian Criminal Code) and corruption (the CFPOA, and ss. 119-125 of the Canadian Criminal Code). Corporates can be criminally liable for fraud and corruption – which would require the Crown to prove that a 'senior officer' of the corporation was somehow a party to the crime, by action, negligence, or wilful blindness (or failing to take a reasonable measure to prevent the crime when they know it's about to happen).</p> <p>However, neither the CFPOA nor the Criminal Code of Canada impose requirements on bodies corporate to take steps to prevent associated persons committing bribery and / or corruption.</p>

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China	<p>The Criminal Law</p> <p>China Business ethics and anti-corruption – Asia Pacific laws Global law firm Norton Rose Fulbright</p> <p>Bribery and Corruption Offences, Enforcement and Penalties: China Practical Law</p>	<p>While China does not have a specific criminal offence equivalent to the UK FtPF, Chinese laws do impose criminal, civil and administrative liabilities on companies for wrongful acts committed by their employees/agents under certain circumstances.</p> <p>In China companies can be held criminally liable pursuant to Article 30 of the Criminal law of the People’s Republic of China (PRC) (the Criminal Law).</p> <p>Article 30 states that “<i>Any company, enterprise, institution, State organ, or organization that commits an act that endangers society, which is prescribed by law as a crime committed by a unit, shall bear criminal responsibility.</i>”</p> <p>The Supreme Court of the PRC has stated that crimes committed by the officers, employees and agents of an entity can be treated as crimes committed by the entity itself, if the crimes are committed in the name of the entity with the illegal gains owned by the entity.</p> <p>Article 61 of the Civil Code of the PRC states that “<i>Where the legal representative of a legal person engages in civil activities in the name of the legal person, the legal consequences incurred shall be undertaken by the legal person.</i>” Article 162 further provides that companies shall also be liable for acts of their appointed agents.</p> <p>Article 7 of the Anti-Unfair Competition Law imposes administrative liability (i.e. fines, and in serious cases, revocation of business license) on companies whose employees engage in commercial bribery: “<i>Bribery committed by a staff member of a business operator shall be deemed as bribery committed by the business operator, except where the business operator has evidence to prove that the conduct of the said staff member has nothing to do with seeking transaction opportunities or competitive advantage for business operator</i>”, which may have a similar</p>

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		<p>practical effect to the UK's offence of failing to prevent bribery.</p> <p>Contact:</p> <p>Rongxin Huang Partner Shanghai Pacific Legal Shanghai Tel +8621 60860166 rozngxin.huang@shanghaipacificlegal.com</p>
Germany	<p><u>Act on Regulatory Offences (Gesetz über Ordnungswidrigkeiten – OWiG):</u></p>	<p>Failure to prevent bribery or fraud within a company may constitute a breach of supervisory duties incumbent on the owner of a company, which in turn could constitute an administrative offence.</p> <p>Section 130 para. 1 of the Act on administrative Offences (<i>Ordnungswidrigkeitengesetz</i>, OWiG), states that “<i>whoever, as the owner of an operation or undertaking, intentionally or negligently omits to take the supervisory measures required to prevent contraventions, within the operation or undertaking, of duties incumbent on the owner and the violation of which carries a criminal penalty or a regulatory fine [i.e. bribery, fraud], shall be deemed to have committed a regulatory offence in a case where such contravention has been committed as would have been prevented, or made much more difficult, if there had been proper supervision. The required supervisory measures shall also comprise appointment, careful selection and surveillance of supervisory personnel.</i>”</p> <p>The administrative offence of s.130 OWiG may be sanctioned with a monetary fine of up to EUR 1 Million. (In addition to liability according to the OWiG, the company owner may also be criminal liable if the failure to prevent administrative or criminal offences reaches the level of omission relevant under criminal law. The consequence would be imprisonment or a monetary fine.)</p> <p>If an administrative offense or a criminal offense has been committed by the owner of the company, this may also have an impact on the company itself. Section 30 para. 1 OWiG states that a monetary fine can also be imposed on the company, when management personnel of such company “<i>has committed a criminal offence or a regulatory offence as a result of which duties incumbent on the legal person or on the association of persons have been violated, or where the</i></p>

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		<p><i>legal person or the association of persons has been enriched or was intended to be enriched, a regulatory fine may be imposed on such person or association.</i>" The regulatory fine against the company can amount to EUR 10 million but can be exceeded if this is necessary to siphon of the financial benefit that was gained by the respective infringement (Section 17 para. 4 OWiG).</p> <p>Contact:</p> <p>Christina Hund Senior Associate Norton Rose Fulbright LLP Frankfurt Tel +49 69 505096 494 christina.hund@nortonrosefulbright.com</p>
Hong Kong	<p>Cap. 201 Prevention of Bribery Ordinance</p> <p>Cap. 210 Theft Ordinance</p> <p>Cap. 1 Interpretation and General Clauses Ordinance</p> <p>Cap. 571 Securities and Futures Ordinance</p> <p>Cap. 615 Anti-Money Laundering and Counter-Terrorist Financing Ordinance</p>	<p>There is no concept of strict liability for failure to prevent fraud in Hong Kong.</p> <p>Corporate entities (falling within the definition of "<i>persons</i>" within the Interpretation and General Clauses Ordinance) may be directly criminally liable for contravening a number of ordinances where, in alignment with well-established common law principles, sufficiently a senior individual, or any number of them, (typically executive directors) being the "<i>directing mind and will</i>" of such entity commits fraudulent acts or omissions. This includes contraventions of a specified provision contained in:</p> <ul style="list-style-type: none"> • The Anti-Money Laundering and Counter-Terrorist Financing Ordinance. • The Prevention of Bribery Ordinance. • The Theft Ordinance. • The Securities and Futures Ordinance. <p>Alongside the lack of strict liability for failing to safeguard against such contraventions, the scope of each above-mentioned ordinance remains significantly narrower than the UK's ECCTA due to the relatively small pool of employees who are deemed to "<i>direct the mind and will</i>" of such entities.</p> <p>It should also be noted that, whilst corporate entities can be criminally liable for most offences, Hong Kong authorities tend to target individuals for criminal prosecution and corporate entities for regulatory enforcement action. The</p>

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		<p>former is particularly true where the offence is only punishable by imprisonment.</p> <p>Contact:</p> <p>Etelka Bogardi Partner Norton Rose Fulbright (Asia) LLP Singapore Tel +65 6309 5455 etelka.bogardi@nortonrosefulbright.com</p>
Italy	<p><u>DECRETO LEGISLATIVO 8 giugno 2001, n. 231 - Normativa</u></p>	<p>Corporate administrative liability applies to any company, including foreign companies, in respect of criminal offences committed in Italy or otherwise relevant under Italian law (even if committed abroad).</p> <p>See Legislative Decree 8 June 2001, no 231 - Regulation of the administrative liability of legal persons, companies and associations, including those without legal personality, pursuant to Article 11 of Law No. 300 of 29 September 2000.</p> <p>More specifically, companies are held liable for offences committed by: (a) representatives, directors, managers and individuals exercising control over the company or over an organizational unit with financial and functional independence, as well as (b) persons under the direction and supervision of those under lett. a) (see Art. 5). The category of criminal offences assuming relevance in this context include, among others, market abuse, corporate crimes, tax offences as well as bribes and money-laundering (see Ch. I, sec III).</p> <p>An entity cannot be held liable for the offence committed by those under lett. a), if it is proved that:</p> <ul style="list-style-type: none"> • prior to the commission of the offence, the company adopted and effectively implemented organization and management arrangements (the so call 231 Model) capable of preventing the crimes of the type that occurred • a specific corporate body with initiative and control powers (the so-called Supervisory Body) is charged with overseeing the function of and compliance with the 231 Model and of updating it • the persons committed the crime by fraudulently circumventing the 231 Model

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		<ul style="list-style-type: none"> the Supervisory Body did not fail to perform or inadequately perform its oversight function. <p>It being understood that – for offence committed by those under lett. b) – liability cannot be excluded if the offence was due to failure to exercise direction and supervision (see art. 6 and 7).</p> <p>Contact:</p> <p>Maria Beatrice Gilesi Senior Associate Norton Rose Fulbright LLP Milan Tel +39 02 86359 477 mariabeatrice.gilesi@nortonrosefulbright.com</p>
United States of America	SEC.gov Statutes and Regulations	<p>Although the United States does not have a federal statute specifying that a company has a general and sanctionable legal requirement to prevent all manner of fraud, the United States does have the longstanding legal principle of respondeat superior.</p> <p>Respondeat superior is a common law doctrine that holds employers liable for certain actions of their employees. Generally, common law has established that a corporation can be held vicariously liable for the act of its employees when: (1) the employee commits the offense in the scope of their employment, and (2) the employee has some intent to benefit their employer.</p> <p>Regarding the first element, federal courts have explained that “<i>scope of employment</i>” is broadly defined as any act committed as part of the employee’s general line of work.¹ The act can still be considered part of the employee’s scope of employment even if it is contrary to the company’s policies.² Although “<i>scope of employment</i>” tends to be considered on a case-by-case basis, several courts have considered acts to be within scope when: (1) it is the kind of work the employee was hired to perform; (2) it occurs within the time and space</p>

¹ United States v. Hilton Hotels Corp., 467 F.2d 1000, 1004 (9th Cir. 1972).

² United States v. Twentieth Century Fox Film Corp., 882 F.2d 656, 660 (2d Cir. 1989).

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		<p>parameters of work; and (3) is at least partially motivated by the intent to benefit the employer.³</p> <p>Regarding the second element, the employer need not actually enjoy any benefit from the employee's actions.⁴ Benefit to the employer is a broad concept. If an act <i>"is done with a view of furthering the master's business, of doing something for the master, then the expectation or hope of a benefit, whether direct or indirect, makes the act that of the principal."</i>⁵ Moreover, intent to benefit the employer does not need to be the sole reason the employee committed the act.⁶</p> <p>The United States has numerous federal laws that prohibit fraud in a multitude of contexts, including securities, banking, wire transfers, and government contracting. Some of the relevant statutes in those areas explicitly impose liability on employers for the acts of their employees. For example:</p> <ul style="list-style-type: none"> • Section 17(a) of the Securities Act of 1933 (Securities Act) prohibits fraud in connection with the offer or sale of securities. Section 15 of the Securities Act creates vicarious liability for "controlling persons." More specifically, Section 15 provides: <p><i>"Every person who, by or through stock ownership, agency, or otherwise, or who, pursuant to or in connection with an agreement or understanding with one or more other persons by or through stock ownership, agency, or otherwise, controls any person liable under sections 77k or 77l of this title, shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person had no knowledge of or reasonable ground to believe in the existence of the facts by reason of which the liability of the controlled person is alleged to exist."</i>⁷</p>

³ Goss v. Hum. Servs. Assocs., Inc., 79 So. 3d 127, 132 (Fla. Dist. Ct. App. 2012).

⁴ Standard Oil Co. of Tex. v. United States, 307 F.2d 120, 128-29 (5th Cir. 1962).

⁵ *Id.*

⁶ United States v. Gold, 743 F.2d 800, 823 (11th Cir. 1984).

⁷ 15 U.S. Code § 77o.

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		<p>Employees are considered controlling persons.⁸ Section 15 provides employers with an affirmative defense if they “<i>had no knowledge of or reasonable ground to believe in the existence</i>” of the fraud. Although not explicitly defined as such, employers have been considered controlling persons.</p> <ul style="list-style-type: none"> Section 10(b) of the Securities Exchange Act of 1934 (Exchange Act) and Rule 10b-5 thereunder prohibit fraud in connection with the purchase or sale of securities. Like Section 15 of the Securities Act, Section 20(a) of the Exchange Act provides for control person liability, meaning that employers can be liable for their employees’ violations of the statute. The relevant section is as follows: <p><i>“Each person who, directly or indirectly, controls any person liable under any provision of this chapter or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable (including to the Commission in any action brought under paragraph (1) or (3) of section 78u(d) of this title), unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action.”⁹</i></p> <p>Employers have an affirmative defense if they can demonstrate that they “acted in good faith and did not directly or indirectly induce” the fraud.</p> <p>The respondeat superior doctrine, as well as specific statutes with control person liability concepts, expose companies to potential liability for the acts of their employees. Companies therefore have strong incentives to establish reasonable and effective supervisory and compliance structures.</p>

⁸ Rochez Bros. v. Rhoades, 527 F.2d 880, 888 (3d Cir. 1975); Affiliated Ute Citizens v. United States, supra 406 U.S. at 128, 92 S.Ct. 1456.

⁹ 15 U.S. Code § 78t.

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