

BUSINESS CRIME AND FRAUD LAW

Business crimes, also known as white-collar crimes, are characterised by four aspects: they occur in the business world; they do not involve physical force; they act against the principles of good faith in business; and they cause serious material and immaterial damages.

The current financial climate is prompting a surge in white collar crime. This increase can be attributed to several factors, including: senior management wanting to report a desired level of financial performance; financial targets being more difficult to achieve; and employees wanting to make their numbers in order to earn performance related bonuses. As companies look to increase top-line growth and reduce operational costs in the current stressed economic environment, supply chain and accounting related frauds are likely to be an important issue. The drive to secure new business means that bribery and corruption offences by employees may become an issue for companies.

The boom in technology and increase of globalisation has also acted as a catalyst for fraud and other business crimes, as it is now less complicated, quicker to carry out and easier to conceal. Identity theft is a continuing problem, as well as more traditional frauds such as insider trading and price-fixing cartels.

To mitigate this threat, organisations must make sure that they monitor their businesses and their procedures and also those of other institutions to which they rely on for services

and information. As a result, business crime consultancy is shifting its focus from reacting to existing problems to acting pre-emptively to prevent such crimes taking place.

In the UK, the government has responded to the increasing threat by announcing the formation of a new agency out of the Serious Fraud Office, Financial Services Authority and Office of Fair Trading with the aim of tackling serious economic crime. The government has also implemented the Bribery Act 2010, which gives regulatory bodies greater powers to tackle national and international corruption.

The act defines four new criminal offences:

- offering or paying a bribe
- requesting or receiving a bribe
- bribing a foreign public official
- a corporate offence of failing to prevent bribery being undertaken on its behalf.

The legislation applies to all companies, partnerships and individuals based in England, Scotland, Wales and Northern Ireland, as well as foreign companies and individuals doing business in the UK. Its reach is global, applying to acts or omissions taking place anywhere in the world.

Under the radical reforms, the new agency will take responsibility for the investigation and prosecution of corporate crime. Companies may also be held liable for the actions of their staff in a move that would overturn current laws protecting businesses from their employees' misdemeanours.



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When companies are looking at their corporate governance procedures and putting fraud controls in place, Van Bavel Advocaten acts as a sparring partner and advisor to the compliance officer.

Cees J. van Bavel, partner at Van Bavel Advocaten, notes that new legislation has been implemented within his jurisdiction to provide for preventive control on business entities, their directors and shareholders.

When dealing with a client that has inadvertently breached regulatory rules and requires legal representation, Mr van Bavel states that his firm has an excellent reputation and contact with the prosecutorial department, and will try to settle any problems out of court.

Van Bavel Advocaten work on both internal and external fraud. An example of a recent external fraud case that the firm has worked on is an IT consultant who stole data from the server and sold it to the competition.

The creation of the EU Single Market and the breaking down of barriers can provide increased opportunities for money laundering and financial crime. While European legislation has been adopted to protect the financial system, Mr van Bavel states that almost all the cases Van Bavel Advocaten handles have an international dimension, and the firm works closely with other law firms in Switzerland, Luxembourg, Lichtenstein, Germany, Spain and the Netherlands Antilles.

Finally, Mr van Bavel adds that his firm works in cooperation with media advisors to train clients on how they should deal with the press in case of an emergency.

Van Bavel Attorneys is a law firm specialised in tax criminal law and economic criminal law. In cases of corporate fraud that require assets to be traced across the world, Van Bavel Advocaten are able to act as the contact between the client and forensic auditors, the prosecutorial department, the investigators, and other counsel all over the world. The firm can devise the strategy and make certain that all necessary actions will be taken.

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DLA Piper is one of the largest Law Firms in the world with 3,500 lawyers located in 30 countries and 69 offices. Domenico Aiello, partner head of the White Collar Crime team at DLA Piper in Italy, states that the firm assists companies in every stage of criminal proceedings involving corporate crimes, also through executing large internal investigations, managing relationships with the Public Prosecutor's Offices, filing deeds and obtaining Criminal Court interim orders.

Mr Aiello commented: "We grant our clients a professional and ongoing assistance before Criminal Courts and any other involved Authority in Italy.

"Often our clients and the General Counsels are not updated on the risks, countless by now, typical of the criminal Italian law on corporate matters. For this reason, we keep in touch with our clients through constant updating, newsletters and reports concerning any relevant law development or amendment as well as their regulatory environment.

"Furthermore, we assist companies in executing preventive internal audit activities as well as due diligence and internal investigations focused on possible criminal risks (i.e. Embargo provisions, risk assessments, anti-money laundering, corporate internal investigation and directors/employees' unfaithful behaviors).

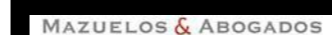
"We also support companies in carrying out compliance programs voted to avoid criminal risks (pursuant to Italian Legislative Decree no. 231/2001 provisions)." Mr Aiello lists the following examples:

- assisting the Agency of Ministry of Finance, whether dealing with public bids for tender, in drafting and implementing the Organisational Model pursuant to Legislative Decree 231/2001;
- assisting banks and financial institutions in drafting and implementing the Organisational Model, from the preliminary phase of risk assessment to the final implementation of the Model.

DLA Piper has more than 450 lawyers specialised in White Collar Crime. Mr Aiello stated: "Our Italian White Collar Crime team is also specialised in all kind of corporate, bankruptcy and tax crimes (also whether on a multi jurisdictional ground) as well as in regulatory investigations (including accounting irregularities, corruption, bribery, fraud, regulators' inspections etc.). As the above refers, our typical legal issues includes mainly corporate crimes (bribery, fraud, false/inaccurate accounting, money laundering, market abuse, crimes involving privacy and data protection, tax crimes, counter-terrorism financing) as well as competition and anti-trust issues, employment law profiles (internal investigation aimed at finding out employees and directors criminal misconducts) and cyber crimes."

DLA Piper and Mr Aiello list a few cases that DLA Piper has dealt with relating to insurance, tax and benefit fraud:

- the "Parmalat case" before Milan Court: assisting a leading financial institution charged, in a criminal proceedings pending before Italian and USA Courts, for market rigging and fraud on bonds issues and structured finance derivatives.
- assisting a leading banking group in an ongoing, well known, Italian criminal proceedings in which both the bank and several employees and managers had been charged for fraud on derivatives, with damage to an Italian Municipality and bondholders.
- a multi jurisdictional internal investigation involving more than 20 countries throughout the world, for a major financial institution in order to ascertain the possible breach of US Embargo provisions.
- assisting in a criminal proceedings an important software house company charged for unlawful access to third parties software, unlawful duplication of third parties software and misappropriation of industrial secrets.
- assisting in various criminal proceedings leading companies operating in the field of green energies, in particular ecological power (wind and solar mainly), with reference to town planning and real estate matters.



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Mazuelos & Abogados is a Peruvian law firm specialised in Criminal Law and Procedural Criminal Law. Julio F. Mazuelos Coello, main partner at the firm, has witnessed a considerable increase in business crime in Peru over the past 20 years. This has led to a corresponding growth in regulation, with the definition of new types of penalties to punish fraud of all types. Mr Mazuelos commented: "The reasons for this increase are not directly related to a slump in the national economy or a financial crisis; instead, they are linked to factors associated with the country's economic growth, an increase in GDP, increased foreign investment, the implementation of new projects and public works."

This has resulted in a shift in the focus of business crime consultancy from finding solutions to existing problems to a more preventive role.

Mr Mazuelos continued: "To this end, in the course of our daily duties it is possible to identify, together with business crime, company crime, the effective treatment of which protects companies from all possible risks deriving from fraud in general."

Companies are also working to perfect their corporate government procedures and to establish better controls to counter fraud, and specialist law firms are playing a vital role in this field.

Mr Mazuelos noted that the importance of prevention as part of legal consultancy has increased with regard to the issue of money laundering. He explained: "It is the duty of the entrepreneur to know who his counterpart in any deal is and, above all, to know where the money or goods associated with the deal in question are coming from, in order to avoid finding himself involved as a possible accessory or facilitating the laundering of assets gained through illegal activity."

This has led to companies taking all precautions necessary to protect their own interests and rights against the risk of any economic or commercial "contamination" from any third party who might be looking for a way to transform their assets and lend them the appearance of legitimacy through a business deal.

Mr Coello has noticed an increase in information technology crime, principally in the form of entrepreneurial and industrial espionage through computer technology.

"It is not only IT fraud which is the problem, but also information technology as the means for the perpetration of other types of economic fraud, meaning that the preventative measures we develop must be undertaken in conjunction with expert technical support."



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Schellenberg Wittmer is a leading Swiss business law firm with offices in Zurich and Geneva.

According to Paul Gully-Hart, partner, the Swiss business community is not sufficiently aware of the risk of fraud and many companies need to improve their internal practices and procedures.

Switzerland has a sophisticated regulatory framework in the financial sector, particularly since the inception of the Swiss Financial Market Supervisory Authority (FINMA) in 2009. Swiss company law has also been recently overhauled to improve corporate governance procedures and transparency.

“Nevertheless,” Mr Gully-Hart explains, “the regulatory framework does not extend to the non-financial sector and thus it is up to companies to put into place efficient mechanisms to prevent fraud or to cope with fraud if it occurs. We believe our firm can add value to these corporate fraud

prevention programmes.”

Schellenberg Wittmer regularly act for clients who are the target of investigations for the breach of regulatory rules or are the subject of international legal assistance in criminal and regulatory matters. The firm is experienced in providing legal advice to such clients, representing them in judicial proceedings or negotiating with the relevant authorities.

Schellenberg Wittmer’s recent cases indicate that internal fraud is more prevalent than external fraud. Mr Gully-Hart states that the theft or illegal use of confidential data by employees is one of the major concerns of many of the firm’s clients.

He added: “On several occasions, we have represented banks who have been victims of blackmail from employees who have threatened to use client records. We have also been involved in a number of cases where clients’ money has been misappropriated by employees or recklessly dissipated by asset managers in breach of their clients’ investment profile. We have also dealt with alleged wrongdoing by trustees and / or protectors in breach of their fiduciary duties.”

Schellenberg Wittmer has handled numerous cases of tax fraud under Swiss law and international legal assistance in relation to tax offences and has closely followed recent and significant developments in international tax enforcement that have affected Switzerland. However, these cases peaked in the 80’s and 90’s. Alex von Ziegler, partner, states that Customs and VAT frauds have been the subject of the firm’s recent mandates.

He explains: “The victims were freight forwarders which handled, for a consideration of a small fee, the goods for customs clearance and then were confronted with huge claims by foreign Customs offices. While the target of the fraud was the respective government, the “victim” was the freight forwarder, or in other words their liability insurer, which we successfully represented.”

Schellenberg Wittmer has been heavily involved on behalf of Swiss financial institutions in the implications of the Madoff scandal. Large banks have also turned to the firm for advice in relation to suspected fraud.

“However,” Mr Gully-Hart concluded, “we do not believe that the number of major fraud investigations has significantly increased in Switzerland. One possible explanation is that the economic downturn has been less severe in Switzerland than in many other European jurisdictions.”



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Cubism Law is a London City Law firm specialising in corporate and commercial services. Dan Hyde, a consultant at the firm, believes that it is essential that there is a swift and targeted response when corporate fraud has taken place.

He commented: “We work closely with international investigators to trace appropriated funds and assets that might be part of a recovery. The obtaining of freezing orders can, in appropriate circumstances, be an effective way of preserving assets and avoiding their dissipation. It is additionally a disclosure tool in that it can compel (subject to very limited exceptions) disclosure of bank accounts, property and other assets held.”

According to Mr Hyde, the prosecution of business crime is fragmented and, of late, politicised.

He commented: “The future of the FSA is uncertain with the Chancellor (George Osborne) intent on handing its macro-prudential regulation to the Bank of England, its micro-

prudential, company regulation to a new Consumer Protection and Market Agency and white collar fraud to a new “super agency” likely titled the Serious Economic Crime Agency.

Unfortunately funding and competence question marks remain as to whether this would succeed; our view is that it is premature.”

Cubism Law assists firms with both internal and external fraud, though Mr Hyde notes that the firm tends to receive more instructions in relation to external fraud.

He added: “Perhaps this is due to firms being reticent to approach us where there internal systems have failed and the fraud is both in-house and against the company.”

Cubism Law deals with all aspects of business crime, including prosecuting and defending in both civil and criminal arenas. The firm has formed associations with Byfields PR (UK) and Infinity PR (US) to offer a highly specialised service that combines reputation protection and legal defence. This product, branded as “PressLegal”, allows a client to obtain coordinated, top level PR and legal assistance in the UK and US from a single instruction.

Mr Hyde states: “This ensures that, where necessary, the media aspect of the case is handled to best protect the client whilst the legal aspect of the case develops. In instances where the client’s reputation is at risk through press and other media coverage (insider dealing, bribery, fraud etc) it is imperative that the legal advice and PR advice are in tandem and aimed at minimising reputational damage and consequent loss of business.”

The economic downturn has led to an increase in fraud and related work, both domestic and international. My Hyde notes that certain countries appear to have consistently higher levels of corporate fraud than others.

“This is often to do with a prevailing sub-culture of fraud and the failure to effectively tackle it. The existence of counter fraud legislation is only part of the battle, there needs to be the will to expose and prosecute fraud at state level.”