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Anti-Corruption

UK: Trends & Developments

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Trends and Developments

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Ten Trends and Developments in Anti-Bribery Anti-Corruption (ABAC) in the UK

A continuing and growing co-ordination both with domestic agencies and with international organisations

The Serious Fraud Office (SFO), through its director, Lisa Osofsky, has made it clear that it regards close co-operation within the enforcement community, both domestically and internationally, as essential to effective and speedy enforcement. Sharing intelligence and best practice, and co-operating in joint investigations, remains her goal. In October 2020, she spoke glowingly of the domestic co-ordination and co-operation achieved with the National Economic Crime Centre, the Joint Money Laundering Intelligence Taskforce, the NCA-led Foreign Bribery and Corruption Clearing House and the previously aloof, if not altogether dismissive, Government. Joint action from the public and private sectors has accelerated since the UK Economic Crime Plan was devised back in 2019 and even Companies House has now obtained more powers to detect and investigate the ultimate beneficial owners (in some cases, criminals) hiding behind complicated corporate structures.

Seconded at the SFO have come and gone and the SFO has worked closely with multi-lateral development banks, such as the European Bank for Reconstruction and Development, in investigating large-scale international corruption.

Although there have been a few bumps in the road concerning UK/US relations, highlighted by the recent employment case involving a former lead investigator at the SFO in relation to the UK/US investigation into Unaoil, this relationship is continuing to grow while the current director is in post and especially following the UK's eventual exit from Europe.

Currently, the high-water mark of international co-operation is the Airbus fine which demonstrated the effectiveness of multi-jurisdictional co-operation between the UK, US and France and the several jurisdictions in which the offences were committed. This co-operation and the rewards of such co-ordination can only grow, especially as other jurisdictions not only develop their own laws in the area of ABAC but decide to investigate and prosecute bad actors.

Continuing scrutiny of third-party relationships

The use of third-party partners, including agents, consultants, and distributors, is on the increase again, as companies seek to deliver innovative products and services while controlling costs

in a fast-paced global market. Partnering with third parties can provide significant value but brings with it compliance risks. This will continue to be the focus of UK ABAC investigations going forward.

These risks often play out in emerging markets. Working with third parties can generate risks in several ways. For example, in some countries there is a legal requirement to use local companies (often known as local content) such as distributors or a local import and export company. This requirement also gives rise to the need for multinational manufacturers to engage third parties for promotional and procurement negotiations.

Most multi-national companies have third-party due diligence processes in place to vet distributors before engaging their services. However, problems can arise where third parties engage customers individually, especially when the third parties are one-time sales agents. Their qualifications, relationships with government officials, business capacity, and reputation are typically harder to vet.

Companies continue to face risks working with third parties such as consultants, who provide intangible services. If those consultants have close government ties, charge success fees, or the company does not monitor gifts and hospitalities, they could also trigger a risk of derivative liability for the company.

The evolution of deferred prosecution agreements

The biggest ABAC development seen in the UK over the last five years is the use by the SFO of Deferred Prosecution Agreements (DPAs). It is clear that UK DPAs will continue to evolve and will continue to be a very effective tool for the SFO.

The most recent DPA requires Airline Services Ltd to pay just under GBP3 million, which includes a GBP1.2 million penalty and a repayment of related profits. It is the ninth UK DPA and the third DPA agreed with the SFO so far in 2020.

On 23 October 2020, the SFO published a new chapter for its Operational Handbook, which provides further guidance on DPAs. According to the SFO's director, the guidance aims to provide transparency on "what we expect from companies looking to co-operate with us". The guidance covers much of the same ground as the previous main source of information, the Code of Practice for DPAs (the Code). However, the guidance fills in some gaps and provides helpful clarity on some topics.

It states that self-reporting is an important aspect if done within a “reasonable time” of suspicions coming to light. Immediate self-reporting is thus not essential, which should allow a company to conduct an internal investigation if necessary. Indeed, the SFO will reward disclosure of internal investigation reports with “considerable weight”. It goes on to provide that waiving privilege will work in a company’s favour, but the SFO accepts that it cannot compel a company to do so. Additionally, the guidance warns that the terms of a DPA will ensure that the SFO is permitted to share information provided by a company with other agencies.

The guidance also expands on the Code’s position that the SFO will broadly follow statutory guidelines for the level of discount for an early guilty plea, which is a discount of one third. The SFO, however, reveals that the majority of DPAs have involved discounts of 50% being approved by the courts. The SFO attributes this generous discount to companies generally displaying high levels of co-operation.

The guidance puts forward considerations that may be considered in reaching a more favourable agreement for the company. These are:

- whether the financial terms would risk putting the company out of business;
- the impact a fine would have on employees and/or shareholders; and
- the impact a fine would have on the ability of the company to implement effective remedial and compliance measures.

These financial considerations could be of particular importance in the current economic climate. The SFO also states that there is “provision” for a company to delay payment, or to pay in instalments.

The guidance shows a degree of flexibility on the part of the SFO, which was not necessarily evident in the previous SFO director’s tenure. DPAs are very important to an under-funded enforcement agency such as the SFO. Time will tell whether this flexibility will encourage companies to self-report, but for the SFO to be successful going forward it will need many more DPAs.

Monitorships or compliance reviews

Talking of recent DPAs (and although in relation to a fraud-related case), the G4S Care & Justice Services (UK) Ltd DPA (G4S C&J) may also represent a watershed moment regarding the appointment of independent monitors or, as the SFO has been keen to stress, compliance reviewers.

The reasons for this are:

- this DPA would seem to provide for an extension of obligations to the third-party compliance conditions previously imposed by the SFO and will afford the SFO greater oversight of a company’s compliance activities throughout the three-year term of the DPA;
- monitors have been appointed by US-government enforcement agencies, and multi-lateral development banks such as the World Bank and the African Development Bank, which have relied on independent monitors or independent integrity-compliance consultants as part of their sanctions processes for many years;
- parent companies that have subsidiaries being investigated by the SFO will actively have to consider whether they could, and should, engage with the SFO in their individual capacity, as the SFO may require the parent to be deeply involved in any remediation process. As control of any group compliance and remediation policies would generally sit with the parent rather than the subsidiary, it has, understandably, brought the parent company into focus. Failure of the parent company to engage may jeopardise the chances of the subsidiary being invited to negotiate, or to agree to, a DPA;
- the heightened compliance expectations and standards which the G4S Group is now set on meeting are likely to serve as a benchmark in future UK-government procurement processes and subsequent contract monitoring.

The continuing importance of whistle-blowers and whistleblower legislation and schemes

The majority of internal investigations relating to ABAC are still seen as emanating from a whistle-blower where there is an internal referral or someone informing a third party, such as a non-governmental organisation (NGO) or investigative journalist. Whistle-blowers have had protection in several jurisdictions for some time. Indeed, in some jurisdictions, whistle-blowers can recover a percentage of money recovered from fines resulting from their tip-off. This has been discussed in the UK but as yet has not been introduced. This is not likely to change any time soon.

It is long overdue, but in the European Union a new directive now sets minimum standards to protect whistle-blowers. Despite its almost two-year implementation deadline – December 2021 – many companies are taking steps already. This includes UK companies, notwithstanding Brexit and the fact that the UK has had very stringent laws protecting whistle-blowers for many years. The directive aims to introduce effective, confidential, and secure reporting channels. The new law will provide a high level of protection against retaliation, introducing safeguards against whistle-blowers being suspended, demoted, or intimidated.

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There is an ever-growing trend of cases being generated from whistle-blowers and an even greater number of alleged “scandals” being unearthed as a result of investigative journalists (such as those resulting from the Panama Papers, the Paradise Papers and the recent FinCEN files) and NGOs.

Increased expectations for corporate compliance programmes

Corporate compliance programmes have increased in number and detail over the last ten years. However, taking a lead from the US and recent DOJ guidance, together with the regulations relating to anti-money laundering, these programmes will have to be shown to have been implemented, tested and work.

Going forward, the UK enforcement agencies will expect larger, more sophisticated companies to use technology to improve systems and controls, including the monitoring of relationships and transactions. They will expect the use of machine learning and artificial intelligence generally to detect anomalies, trends and suspicious transactions. Companies will need to point to an adequate risk assessment, a policy which implements learning from the risk assessment, effective systems demonstrating implementation of the policy and ongoing monitoring of both compliance with the policy and the effectiveness of such implementation in relation to the risks facing the business.

Focus on personal/individual responsibility

Culture and the tone from the top, which gained greater importance following the introduction of the s.7 Corporate Criminal liability offence in the UK Bribery Act 2010 (UKBA), will continue, if not increase, in importance going forward. As other jurisdictions incorporate similar legislative changes or guidance this will only enhance its importance in the UK. With a bird’s-eye view, senior and middle management are uniquely well-placed and have a responsibility to lead in this area.

Enforcement agencies and regulators strongly advocate a desire to punish individuals. The SFO continues to have mixed results in this regard. However, they have no alternative but to prosecute “bad actors”. They have a public duty to do so. Although finances may be stretched and the director knows that without DPAs for individuals and the rigour applied by defence counsel and juries it will continue to be difficult to obtain convictions, there is no opportunity (or desire) for the SFO or other agencies to refrain from seeking to prosecute individuals.

Ongoing relevance of anti-money laundering legislation

If the UKBA cannot compel self-reporting, the UK Proceeds of Crime Act (POCA) might do so. A hardened criminal will not observe the POCA any more than he or she or they would the UKBA. However, a corporate entity is not necessarily in the same position. The tests applicable under the POCA relating to the knowledge or suspicion of dealing with proceeds of crime,

including the benefits of any secret commissions or bribes, offer a very low threshold (suspicion = “more than merely fanciful”). The enforcement agencies are already relying heavily on POCA charges and it is likely that this trend will continue to grow.

New powers that have been introduced under subsequent legislation, such as Unexplained Wealth Orders and Listed Asset Orders, will be used more frequently, notwithstanding an early setback for the National Crime Agency in relation to UWOs. The enforcers now have a significant arsenal of weapons to use and they will do so going forward in relation to those who corrupt and bribe and those who facilitate such bribery and corruption.

“Failure to prevent” and “pushing the envelope” on greater enforcement powers

The UK Government announced on 3 November 2020 that its three-year examination of the case for corporate criminal liability reform had ended - the conclusion being that it was “inconclusive”! The Government has tasked the Law Commission, an independent body designed to recommend legal reforms, to conduct further analysis. Some predict a response may not be received for another 15 to 18 months. There will then need to be further consultation with the government. Except for certain offences, including the s.7 UKBA 2010 offence and the facilitation of tax evasion by another offence in the Criminal Finances Act 2017, corporate criminal liability in the UK is generally based on the principle that a company can only be held criminally liable for financial crime offences if prosecutors can prove beyond reasonable doubt that the “directing mind and will” of the company committed or was aware of the misconduct.

This has been notoriously difficult for the prosecutors to establish, the most recent example being the SFO’s failed prosecution of Barclays Bank for alleged fraud tied to a GBP3.95 billion investment deal with Qatar in 2008. The courts found that the SFO was unable to show whether the alleged perpetrators of the fraud exercised ultimate control over the deal or Barclays itself. The SFO director regards the establishment of a “failure to prevent” offence for economic crime as top of her wish-list. It is believed that the law will eventually be changed, whether to a vicarious-liability test, as is the case in the US, or to strict liability, as is the case with the s.7 UKBA “failure to prevent” offence. However, this is not likely to happen for several years.

The SFO is also flexing its muscles in other directions. It is responding to an appeal of a High Court ruling that Section 2 of the Criminal Justice Act 1987 (s.2 CJA), which grants the SFO the power to require an individual under investigation to produce documents relevant to an investigation, extends to foreign companies if that business has a “sufficient connection” to the UK. That ruling rejected the appellant’s attempt to quash a

s.2 CJA notice demanding that it provide 27 categories of information. It was the first time an English court had determined the extraterritorial application of powers for compulsory document-production by UK criminal law enforcement agencies. The High Court held that s.2 CJA must have an element of extraterritorial application and that it was “scarcely credible” that a British company could resist a s.2 CJA notice simply because relevant material was held overseas.

Further, the SFO also wishes to have its powers extended to allow it to use s.2 CJA before it opens a formal investigation in fraud and domestic bribery cases (in the same way as it now can in overseas corruption cases). It also wants to create a “tipping-off” offence in relation to s.2 CJA notices, in order to prevent those served with such a notice jeopardising the covert status of the investigation and allowing others potentially to interfere with it.

Lisa Osofsky clearly has a plan. She is not trying to reform criminal justice root and branch or overnight. She and the SFO will succeed, but it will take time.

COVID-19, Brexit, the death of ABAC/rise of fraud

These issues are worthy of several chapters; however, both COVID19 and Brexit bring challenges for the prosecuting authorities. They also create opportunities - for criminals. The toxic mix of a global health/human crisis and disentangling the UK from the highly regulated world of Brussels, combined with the greed and desperation of human nature (in equal and separate measures) will stretch the UK enforcement authorities' budgets to the limits. Choices will have to be made: do we go after the fraudsters preying on the sick and those making a quick “buck” out of the chaos that comes with a collapse in regulated trade and finance, or do we investigate the often sophisticated actions of agents/companies doing business in far-flung jurisdictions winning contracts to “make Britain great again”? To speak of the death of ABAC investigations is misconceived and wrong, but with the growing importance of issues such as cyber-crime, modern slavery and, yes, fraud, the SFO/enforcement agencies will need DPAs and the willingness of companies to self-report as never before to keep ABAC as the primary source of corporate crime business.

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Covington & Burling LLP has one of the largest white-collar practices in the world, and the international team regularly manages complex matters that involve multiple jurisdictions and regulators, including anti-corruption, money-laundering, cartel, and trade controls matters. Senior members of the white-collar, regulatory, industry, privacy/data security, and e-discovery practices on the ground in the firm's 13 offices across the Americas, Africa, Europe, and Asia are well placed to provide seamless cross-border representation, conduct internal

investigations, and help design and implement effective compliance programmes. The firm also recognises that a host of legal and regulatory issues may arise in the course of an investigation, and that they may garner the attention of regulators, enforcement authorities, and private litigants. The firm has extensive experience handling multi-regulator, multi-forum investigations and litigation, as well as the collateral issues that come along with them.

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Ian Hargreaves is a partner and advises clients on major fraud – both civil and criminal elements, asset tracing and recovery, bribery and corruption, money laundering, modern slavery, sanctions, and investigations/compliance work generally.

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