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PREFACE

Over the past year, the Biden administration continued to demonstrate its prioritisation of white-collar prosecutions. This includes changes in policy and guidance, such as a renewed focus on individual accountability and voluntary self-disclosure. The administration has continued to redistribute existing resources to prosecutions of corporate crime and, for the second year in a row, announced its intentions to hire more white-collar prosecutors. Given the administration's stated focus on its corporate enforcement priorities, US and non-US corporations alike will continue to face increasing scrutiny by US authorities.

The trend towards more enforcement and harsher penalties has by no means been limited to the United States; while the US government continues to lead the movement to globalise the prosecution of corporations, a number of non-US authorities appear determined to adopt the US model. Parallel corporate investigations in several countries increasingly compound the problems for companies, as conflicting statutes, regulations, and rules of procedure and evidence make the path to compliance a treacherous one. What is more, government authorities forge their own prosecutorial alliances and share evidence or, conversely, have their own rivalries and block the export of evidence, further complicating a company's defence. These trends show no sign of abating.

As a result, corporate counsel around the world are increasingly called upon to advise their clients on the implications of criminal and regulatory investigations outside their own jurisdictions. This can be a daunting task, as the practice of criminal law – particularly corporate criminal law – is notorious for following unwritten rules and practices that cannot be gleaned from a simple review of a country's criminal code. Of course, nothing can replace the considered advice of an expert local practitioner, but a comprehensive review of corporate investigative practices around the world will find a wide and grateful readership.

The authors who have contributed to this volume are acknowledged experts in the field of corporate investigations and leaders of the Bars of their respective countries. We have attempted to distil their wisdom, experience and insight around the most common questions and concerns that corporate counsel face in guiding their clients through criminal or regulatory investigations. Under what circumstances can the corporate entity itself be charged with a crime? What are the possible penalties? Under what circumstances should a corporation voluntarily self-report potential misconduct on the part of its employees? Is it a realistic option for a corporation to defend itself at trial against a government agency? And how does a corporation manage the delicate interactions with employees whose conduct is at issue? The *International Investigations Review* answers these questions and many more, and will serve as an indispensable guide when your clients face criminal or regulatory scrutiny in a country other than your own. And while it will not qualify you to practise criminal law in a foreign country, it will highlight the major issues and critical characteristics of a given

country's legal system and will serve as an invaluable aid in engaging, advising and directing local counsel in that jurisdiction. We are proud that, in its 13th edition, this publication features three overviews and covers 14 jurisdictions.

This volume is the product of exceptional collaboration. I wish to commend and thank our publisher and all the contributors for their extraordinary gifts of time and thought. The subject matter is broad, and the issues raised are deep, and a concise synthesis of a country's legal framework and practice was challenging in each case.

Nicolas Bourtin
Sullivan & Cromwell LLP
New York
July 2023

Chapter 7

ENGLAND AND WALES

Stuart Alford KC, Mair Williams and Callum Rodgers[1]

I INTRODUCTION

The law on corporate criminal attribution in England and Wales has historically made it difficult to hold entities to account for the actions of their employees. Meanwhile, the nature and scope of corporate investigations have been steadily growing, driven by developments in certain areas of criminal law,[2] increasingly aggressive enforcement in sectors such as financial services and increasing public demands for corporate accountability.

The following bodies have responsibility for various aspects of corporate investigations:

a The Serious Fraud Office (SFO) investigates and prosecutes the most serious cases of fraud and other economic crimes in the UK. The SFO also holds lead-agency responsibility for enforcing the Bribery Act 2010 (the BA 2010).[3]

b The Competition and Markets Authority (CMA) is the main competition regulator and is responsible for enforcing the Competition Act 1998 (the CA 1998) and the Enterprise Act 2002.[4]

c The Financial Conduct Authority (FCA) is both a prosecuting body and the regulator of financial institutions, with responsibility for maintaining the integrity of the UK financial markets, including the investigation of financial sector crimes, such as market abuse and insider dealing.[5]

d His Majesty's Revenue and Customs (HMRC) investigates tax and revenue-related offences with wide-ranging civil and criminal investigatory powers.[6]

e The Office of Financial Sanctions Implementation (OFSI) implements the UK sanctions regime.[7]

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1 Stuart Alford KC is a partner and Mair Williams and Callum Rodgers are associates at Latham & Watkins LLP. The authors would like to acknowledge the kind assistance of their colleague Nicholas MacManus in the preparation of this chapter.

2 For instance, the Bribery Act 2010, which introduced a corporate offence of 'failure to prevent bribery'.

3 The SFO was created by and derives its investigatory powers from the Criminal Justice Act 1987, including powers to request the production of documents and the answering of questions.

4 The CMA's powers are largely drawn from the CA 1998 itself.

5 The FCA's investigatory powers are derived from the Financial Services and Markets Act 2000.

6 HMRC's investigatory powers are derived from the Finance Act 2009 (civil) and the Police and Criminal Evidence Act 1984 (criminal).

7 The OFSI's powers come from the Policing and Crime Act 2017.

f The Crown Prosecution Service (CPS) prosecutes cases investigated by the police forces of England and Wales,[8] as well as on behalf of HMRC and the CMA (which have only investigatory powers and no prosecuting authority).[9] In April 2022, the CPS established the Serious Economic, Organised Crime and International Directorate (SEOCID), which merged the CPS Specialist Fraud Division with the International Justice and Organised Crime Division.

g The National Crime Agency (NCA), which includes the National Economic Crime Centre (NECC),[10] coordinates and assists the work of the other agencies and the police in the investigation and prosecution of economic crime.

These bodies have a range of powers to enforce the legislation applicable within their remits. These powers include the ability to execute search warrants and to file compulsory production notices for the production of documents in certain cases. Some of these powers can only be exercised with a court order, some have to be exercised with the assistance of the police and others are wholly in the control of the agencies themselves (determined by the statutory powers by which they are established).

The ability and extent of the bodies' powers to obtain material has been the subject of a number of important challenges through the courts in recent years, which will be discussed further below. Corporations are not permitted to withhold documents from the authorities on the grounds of client confidentiality and data privacy, and must hand over any materials requested by such notices and orders, except when legal privilege applies.[11] In England and Wales, failure to comply with a lawful production order is a separate criminal offence.

II CONDUCT

i Self-reporting

A corporate's approach to self-reporting in England and Wales must be considered against a broad spectrum of factors, which include:

a the nature of the issue;

b the prospect of enforcement activity;

c the benefits of cooperation with authorities;

8 The Serious Economic, Organised Crime and International Directorate (SEOCID) of the CPS focuses on prosecutions for organised criminality, fraud, money laundering and international crime, the lines between which 'are becoming increasingly blurred'. It is a new division formed in April 2022 by the merger of the International Justice and Organised Crime and Specialist Fraud Divisions of the CPS; it works alongside their Proceeds of Crime team: https://www.cps.gov.uk/cps/news/cps-responds-changing-nature-serious-economic-and-organised-crime-new-team.

9 The prosecuting powers of the CPS (and the SFO and FCA) are governed by the Code for Crown Prosecutors, which was updated in 2018 (available at: www.cps.gov.uk/sites/default/files/documents/publications/Code-for-Crown-Prosecutors-October-2018.pdf).

10 The National Crime Agency was created by the Crime and Courts Act 2013. The NECC started operations on 31 October 2018.

11 The law of privilege in England and Wales has been the subject of a number of court challenges in recent years (see Section IV.iii).

d the industry sector in which the corporate operates, and
e the supervisory regime applicable to the corporate.

Although companies face no obligation to self-report most criminal conduct, notable exceptions exist for those operating in regulated sectors such as financial services. The decision whether to self-report will need to take into account this wide range of factors, as well as the possibility of enforcement actions in other jurisdictions (which will be subject to separate self-reporting decisions). Companies will usually take such decisions with the assistance of legal counsel.

The FCA's principles of openness create an expectation that the entities they regulate will self-report issues.[12] The regulator has regularly made clear that it regards self-reporting to be a key part of the open and cooperative relationship it expects of its regulated entities.[13] Within its guidance, the FCA mandates a large number of reporting requirements, including reporting in relation to complaints,[14] accounts[15] and market abuse.[16] The principle of openness has, on several occasions, formed the basis for fining firms that failed to adequately self-report. On 31 March 2021, the FCA published a policy statement[17] confirming its decision to extend its requirements to include more entities within the scope of the annual financial crime data reporting obligation (REP-CRIM). The FCA explained that this decision increases the number of firms that must submit a REP-CRIM return from around 2,500 to around 7,000. Firms being brought into scope are required to submit their first REP-CRIM within 60 business days of their first accounting reference date falling after 30 March 2022. The FCA believes that the data it gathers via these returns will help it to better identify financial crime risks, trends and emerging issues. The data will also help it to more accurately risk-rate firms and target its specialist resources. The change has resulted in fewer visits to firms posing lower risks, which the FCA recognises is an unnecessary burden for those firms and an inefficient use of its resources.

The CMA takes a more discretionary approach to self-reporting, but one based on an explicit framework for the recognition of reporting.[18] The leniency programme is designed to encourage companies that have been involved in wrongdoing to proactively cooperate with the CMA. To encourage self-reporting, the CMA offers a sliding scale of leniency ranging from total immunity to reduced financial penalties, depending on the timing of the self-reporting.[19] As with most self-reporting regimes, the earlier the company produces the report, the more lenient the authority will be.

12 Principle 11: Relations with regulators, PRIN 2.1, the FCA Handbook (available at: www.handbook.fca.org.uk/handbook/PRIN/2/?view=chapter).

13 www.fca.org.uk/news/speeches/internal-investigations-firms.

14 DISP 1.10, the FCA Handbook (available at: www.handbook.fca.org.uk/handbook/DISP/1/10.html).

15 SUP 16, the FCA Handbook (available at: www.handbook.fca.org.uk/handbook/SUP/16/?view=chapter).

16 MAR Schedule 2, the FCA Handbook (available at: www.handbook.fca.org.uk/handbook/MAR/Sch/2/2.html).

17 CP20/17, PS21/4.

18 OFT and CMA Penalty Guidance and criminal immunity provided by Section 190(4) of the Enterprise Act 2002.

19 CMA, 18 April 2018, 'CMA's guidance as to the appropriate amount of a penalty' (available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/700576/final_guidance_penalties.pdf).

The SFO and the CPS take a similar, though less structured incentive-based self-reporting approach as the CMA scheme. The SFO's policy on corporate self-reporting states that self-reporting will be a key factor in its decision whether to prosecute.[20] Initially, the SFO had indicated that only companies that self-reported would be eligible for a deferred prosecution agreement (DPA),[21] but Rolls-Royce,[22] Tesco[23] and, more recently, Amec Foster Wheeler[24] all secured DPAs without self-reporting. On 23 October 2020, the SFO published detailed guidance[25] on the DPA chapter of its Operational Handbook, which introduced 'suggested' terms for DPAs that SFO investigators were encouraged to use when negotiating DPAs. These terms emphasised the need for self-reporting of any misconduct that comes to a corporation's attention during the course of a DPA, as well as requiring SFO approval for any sale or merger of the corporation while a DPA is in effect.

An additional but discrete layer of strict self-reporting is required under the Proceeds of Crime Act 2002 (the POCA 2002). The POCA 2002 legislates for a number of criminal money laundering offences, including being concerned in an arrangement that the person knows or suspects facilitates the acquisition, retention, use or control of criminal property by or on behalf of another person.[26] Companies may voluntarily self-report through an authorised disclosure (a suspicious activity report) as a defence to such an offence.[27] Although self-reporting is not compulsory for non-regulated persons, it is a criminal offence for a person in the regulated sector[28] – who has reasonable grounds for knowing or suspecting that another person is engaged in money laundering – to fail to report such knowledge or suspicion.[29]

ii Internal investigations

Both international and domestic companies are increasingly using internal investigations as a way of mitigating risk, as well as honouring regulatory obligations. A company can no longer consider it a viable option to turn a blind eye to any allegations or suspicions that it receives about its business operations, and an internal investigation is a common first step in dealing with potential issues.

Legal professional privilege is an issue related to internal investigations that has received significant attention in the past few years. In England and Wales, internal legal counsel enjoy the same status, in terms of legal privilege, as external counsel; meaning that, instructing external counsel may not offer the same advantage, in this respect, that it does in other

20 www.sfo.gov.uk/publications/guidance-policy-and-protocols/corporate-self-reporting.

21 DPAs are not available for individuals.

22 https://www.sfo.gov.uk/cases/rolls-royce-plc/; it was noted that without self-reporting, Rolls-Royce was only considered for a DPA because of its 'extraordinary' cooperation (see: https://www.judiciary.uk/wp-content/uploads/2017/01/sfo-v-rolls-royce.pdf).

23 https://www.sfo.gov.uk/2017/04/10/sfo-agrees-deferred-prosecution-agreement-with-tesco/.

24 https://www.sfo.gov.uk/2021/07/02/sfo-enters-into-103m-dpa-with-amec-foster-wheeler-energy-limited-as-part-of-global-resolution-with-us-and-brazilian-authorities/.

25 https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/guidance-for-corporates/deferred-prosecution-agreements-2/.

26 Section 328(1), POCA 2002.

27 e.g., Section 328(1), POCA 2002.

28 Schedule 9, POCA 2002.

29 Section 330, POCA 2002.

jurisdictions. The extent of the privilege enjoyed is set out in the case of *Director of the SFO v. Eurasian Natural Resources Corporation Limited*,[30] which remains the current law in this regard.

iii Whistle-blowers

The Public Interest Disclosure Act 1998 (the PIDA 1998) sets out market-wide protection for whistle-blowers.[31] The PIDA 1998 has a significantly broader definition of 'worker' than the Employment Rights Act 1996, as it includes employees, employee shareholders and agency workers.[32] Should an employer dismiss a worker for the reason (or principal reason) that the worker made a 'protected disclosure', this dismissal will automatically be unfair.[33] Further, if an employer subjects a worker to any detriment for making a protected disclosure, the worker could also have a distinct claim for detriment up to the date the worker was dismissed. Detriment can include damaged career prospects, docking of pay, loss of work or disciplinary action.

In September 2019, the Council of Ministers adopted the EU Whistleblower Directive (the Directive),[34] which grants greater protections to individuals who report any breach of EU law. EU Member States were required to implement the standards set out in the Directive (if they did not already exist) by 17 December 2021. While the Directive creates a floor for unified protections across the EU, countries can further strengthen their own regimes as they wish. The UK did not implement the Directive prior to its exit from the EU, but many of the protections underpinning it already existed in legislation such as the PIDA 1998. The Directive is relevant for companies with operations in continental Europe who need consider its provisions to maintain a single unified whistle-blowing framework.

The second report of the UK All Party Parliamentary Group (APPG) for Whistleblowing, published in July 2020,[35] highlighted a 'historically low success rate' of 12 per cent for whistle-blowing claims and recommended revising the current law and creating an Independent Office of the Whistleblower (IOW). This recommendation was incorporated in the Protection for Whistleblowing Bill, introduced to Parliament in June 2022, which proposes to repeal and replace PIDA and establish a more rigorous regime of protection for whistle-blowers in the UK, setting minimum standards for whistle-blowing policies in UK organisations, creating offences related to the treatment of whistle-blowers in the UK, as well as establishing an IOW.[36]

30 *Director of the SFO v. Eurasian Natural Resources Corporation Limited* [2018] EWCA Civ 2006 (ENRC).

31 This section deals with workplace-based whistle-blowing. The UK Code of Practice for Victims of Crime (available at: https://www.gov.uk/government/publications/the-code-of-practice-for-victims-of-crime/code-of-practice-for-victims-of-crime-in-england-and-wales-victims-code) and the Witness Charter (available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/264627/witness-charter-nov13.pdf) provide protection outside the context of the workplace for whistle-blowers.

32 Section 43K(1), PIDA 1998 (available at: https://www.legislation.gov.uk/ukpga/1998/23/section/1).

33 IDS Employment Law Handbooks – Volume 14 – Whistleblowing at Work – Chapter 3 – Qualifying disclosures; *Cavendish Munro Professional Risks Management Ltd v. Geduld* [2010] ICR 325, EAT; and *Kilraine v. London Borough of Wandsworth* [2018] ICR 1850, CA.

34 https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L1937&from=en.

35 https://www.appgwhistleblowing.co.uk/_files/ugd/88d04c_56b3ca80a07e4f5e8ace79e0488a24ef.pdf.

36 https://lordslibrary.parliament.uk/research-briefings/lln-2022-0044/#:~:text=The%20Protection%20for%20Whistleblowing%20Bill,the%20handling%20of%20whistleblowing%20cases.

The UK financial services sector has developed a more rigorous whistle-blower regime than that created under the PIDA 1998. In March 2021, the FCA launched a campaign, 'In confidence, with confidence', to encourage individuals working in financial services to report potential wrongdoing.[37] However, data published by the FCA suggests that the campaign has not yet resulted in an increase in whistle-blower reports. From April 2021 to March 2022, the FCA managed and assessed 1,041 whistle-blower reports, which included 2,114 separate allegations.[38] The statistics constituted a slight decrease from the previous year, when the FCA handled 1,046 reports and 2,754 separate allegations.[39]

In March 2023, the UK government commissioned a review of how the laws that support whistle-blowers could be improved. The review will focus on: (1) who is covered by whistle-blowing protections; (2) the availability of information and guidance for whistle-blowing purposes; and (3) how employers and prescribed persons respond to whistle-blowing disclosures.[40]

The Financial Reporting Council (FRC),[41] which is responsible for setting UK standards of corporate governance, includes, within the UK Corporate Governance Code 2018, a principle that '[t]here should be a means for the workforce to raise concerns in confidence and – if they wish – anonymously.'[42] This Code, however, operates on a 'comply or explain' basis, so listed companies are not obliged to have a whistle-blowing policy in place, even if it is good practice.

Similarly, Ministry of Justice (MOJ) guidance on the BA 2010 suggests that having proportionate whistle-blowing procedures[43] may be an important part of asserting an 'adequate procedures' defence to the offence of failing to prevent bribery under Section 7 of the BA 2010. Further, the British Standards Institution outlines whistle-blowing procedures as part of its published standard for Anti-Bribery Management Systems.[44]

III ENFORCEMENT

i Corporate liability

In general, a corporate employer is vicariously liable for its employees' tortious acts, if this would be fair and just. Two 2020 Supreme Court decisions provide some clarification on the question of an employer's liability for the rogue acts of an employee. In *WM Morrison Supermarkets plc v. Various Claimants*,[45] the Supreme Court held that Morrisons was not vicariously liable for the actions of an employee who, without authorisation and in a

37 https://www.fca.org.uk/news/press-releases/fca-launches-campaign-encourage-individuals-report-wrongdoing.

38 https://www.fca.org.uk/publication/annual-reports/2021-22.pdf, p. 22.

39 https://www.fca.org.uk/publication/annual-reports/annual-report-2020-21.pdf, pp 46-47.

40 https://www.gov.uk/government/news/government-reviews-whistleblowing-laws#:~:text=The%20review%20will%20gather%20evidence,will%20conclude%20in%20Autumn%202023.

41 The FRC regulates the audit industry in the UK.

42 www.frc.org.uk/getattachment/88bd8c45-50ea-4841-95b0-d2f4f48069a2/2018-UK-Corporate-Governance-Code-FINAL.pdf, Code 1.6. at p. 5.

43 MOJ Guidance about procedures that relevant commercial organisations can put into place to prevent persons associated with them from bribing (available at: https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf).

44 www.tuc.org.uk/sites/default/files/Whistleblowing%20Commission%20Report%20Final.pdf.

45 *WM Morrison Supermarkets plc v. Various Claimants* [2020] UKSC 12.

deliberate attempt to harm his employer, uploaded payroll data to the internet using personal equipment at home. This decision provided welcome confirmation for employers that they will not always be liable for data breaches that rogue employees commit. In *Barclays Bank plc v. Various Claimants*,[46] the Supreme Court, overturning a Court of Appeal decision, held that Barclays was not vicariously liable for the acts of a self-employed medical practitioner who was alleged to have committed sexual assaults while carrying out medical assessments of the bank's prospective employees. However, the decision noted that a person can be held vicariously liable for the acts of someone who is not their employee, provided the relationship between them is sufficiently akin to employment. If the employees' acts are within the ordinary course of their employment, this will usually suffice for the employer to incur vicarious liability.

By contrast, corporate criminal liability is most often only established if a criminal offence imposes strict liability, meaning that the state of mind of the company (acting through its employee) does not need to be established. There are also a growing number of statutory offences that create a specific criminal liability for a commercial organisation. Section 7 of the BA 2010 created the offence of 'failure to prevent bribery', which is discussed further below, and the UK government has introduced a 'failure to prevent fraud' and other economic crime offences into the Economic Crime and Corporate Transparency Bill (ECCT Bill), expected to become law this year.[47] The offence will apply to all partnerships and corporate bodies which satisfy at least two of the three criteria: (1) having more than 250 employees; (2) having a turnover of over £36 million; and (3) having more than £18 million in assets.[48] Consistent with other 'failure to prevent' offences, the government has indicated that a defence of having 'reasonable procedures' in place to prevent the offences will be included;[49] this is understood to be a lesser burden than the defence of 'adequate procedures', which is required under the BA 2010.[50]

Apart from those offences that create a direct corporate liability, companies will only otherwise be liable for offences requiring proof of a criminal state of mind by application of the 'identification principle'. The identification principle imputes, to the company, the acts and state of mind of the individuals who represent the 'directing mind and will' of the company. This scope is much more narrow than the basis of attribution in the US, for instance, where a company can be liable for the actions of its agents and employees if they act within the scope of their employment and, at least in part, to benefit the company (which is more akin to the basis for civil liability in England and Wales). However, certain stakeholders have been calling for a shift away from the 'directing mind and will' principle. On 10 June 2022, the UK Law Commission published a report into corporate criminal liability, which set out various alternative proposals. Options included expanding the identification principle so that the actions of 'senior management' could be attributed to the company.[51] The UK

46 *Barclays Bank plc v. Various Claimants* [2020] UKSC 13.

47 https://bills.parliament.uk/bills/3339.

48 https://bills.parliament.uk/publications/50684/documents/3274.

49 For instance, Sections 45 and 46 Criminal Finances Act 2017.

50 https://content.mlex.com/#/content/1463236?referrer=email_instantcontentset&paddleid=1&paddleaois=2002.

51 https://www.lawcom.gov.uk/project/corporate-criminal-liability/.

government confirmed in its 'Economic Crime Plan 2', published on 30 March 2023, that it was committed to expanding the identification principle to 'strengthen its application to all corporate structures'.[52]

When the BA 2010 came into force in 2011, it introduced a new approach to establishing corporate criminal liability in the UK, legislating for bribery offences committed in the UK and abroad by individuals and companies. Section 7 of the BA 2010 created the offence of 'failure to prevent bribery', which can only be committed by corporate entities. Section 7 first requires that a person associated with the company has committed an offence under Sections 1 or 6 of the BA 2010 or would have done if they were within the territorial scope of the BA 2010. A person is 'associated with' the company if they perform services for or on behalf of the organisation in any capacity. This definition is, therefore, not confined to employees but can also cover third parties such as agents and independent contractors. Second, Section 7 of the BA 2010 requires that the person who committed the offence to have intended either to obtain or retain business or an advantage in the conduct of business for the company. Knowledge on the part of the company is not required. Section 7 of the BA 2010 has a broad territorial scope and applies not only to UK-incorporated companies, but also to those that carry on a business or part of a business in the UK. The BA 2010 provides a complete defence to the corporate offence of failure to prevent bribery, if the company had in place 'adequate procedures' designed to prevent acts of bribery by persons associated with it at the time of the alleged conduct (this is discussed in more detail below).

Offences under Section 7 of BA 2010 have continued to be prosecuted, in particular by the SFO. On 4 October 2021, following a guilty plea, Petrofac Limited was sentenced to pay £77 million for seven counts of failure to prevent bribery between 2011 and 2017.[53] This fine came after a four-year investigation by the SFO into cross-border corruption at the Petrofac Group and was accompanied by the conviction of David Lufkin, the group's former head of sales, of 14 counts of bribery contrary to Section 1(1) and 1(2) of the BA 2010, after he had agreed to give evidence of the wrongdoing to the SFO.

In addition to the failure to prevent bribery under Section 7, a company can also be charged with bribery under Section 1 of the BA 2010, in the same way that an individual can. In June 2022, Glencore Energy UK Ltd pleaded guilty to five counts of bribery under Section 1, and two counts of failure to prevent bribery under Section 7; the first time a company has been convicted under the BA 2010 for active authorisation of bribery, rather than purely for a failure to prevent bribery.[54]

ii Penalties

Corporations considered liable for corporate misconduct can suffer penalties ranging from a minor fine to a substantial financial penalty and severe criminal consequences from a selection of prosecuting bodies.

52 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1139843/government-counter-fraud-profession-strategy_2023-25.pdf, p. 12.

53 https://www.sfo.gov.uk/2021/10/04/serious-fraud-office-secures-third-set-of-petrofac-bribery-convictions/.

54 https://www.sfo.gov.uk/2022/11/03/glencore-energy-uk-ltd-will-pay-280965092-95-million-over-400-million-usd-after-an-sfo-investigation-revealed-it-paid-us-29-million-in-bribes-to-gain-preferential-access-to-oil-in-africa/, and https://www.judiciary.uk/wp-content/uploads/2022/11/Sentencing-Remarks-Glencore.pdf, pp. 1–2.

The Financial Services and Markets Act 2000 (the FSMA 2000) grants the FCA the power to impose a variety of sanctions ranging from public censure to revocation of FCA authorisations and large regulatory fines.[55] In 2022, a number of notable fines were associated with breaches of the FCA's Principles for Business; which are made public through the FCA's website.[56] The FSMA 2000 also grants the FCA the power to bring criminal prosecutions for the purpose of tackling financial crime, such as investigations for insider dealing pursuant to the Criminal Justice Act 1993, and breaches of the more recently enacted Sanctions and Anti-Money Laundering Act 2018. The FCA's Decision Procedure and Penalties Manual sets out a non-exhaustive list of the factors that the FCA considers before issuing a penalty, which includes looking at the nature, seriousness and impact of the suspected breach, the conduct after the breach and previous disciplinary record and the compliance history of the person in question. The FCA will also consider 'the full circumstances of each case' when determining whether to impose a penalty.[57]

The CMA also has a range of criminal and civil legislative powers which it can exercise with regard to infringements of competition law. The CMA can impose fines for breach of the CA 1998 if the CMA is satisfied an infringement has either been intentionally or negligently committed.[58] The most notable fine that the CMA can impose is an amount up to 10 per cent of a firm's worldwide turnover in the business year that precedes the date of the CMA's decision.[59]

The CMA can also agree terms of settlement and the making of commitments.[60] Settlement allows early resolution of investigations by way of a voluntary process, if a business under investigation by the CMA for a breach of competition law admits a breach and accepts a streamlined version of the process that will govern the remainder of the CMA investigation. In return for its cooperation and an admission of wrongdoing, the business will gain a reduction in any financial penalty that the CMA imposes.

The SFO has the power to prosecute in cases involving serious or complex fraud, bribery and corruption. Alternatively, the SFO may consider inviting a company to enter into a DPA, which is supervised by a judge and governed by the DPA Code published by the SFO and the CPS. The DPA Code states that the SFO's role is as a prosecutorial authority and that DPAs are for use only in exceptional circumstances.[61] Successful completion of a DPA means a company can avoid a criminal conviction.

Individuals prosecuted and convicted by these agencies can be sentenced to pay fines, compensation and court costs and may receive prison sentences if the offences are serious enough. In addition, individuals may be disqualified from holding directorships in the UK.

55 See the FSMA 2000.

56 FCA website, '2021 fines' (www.fca.org.uk/news/news-stories/2021-fines), '2022 fines' (www.fca.org.uk/news/news-stories/2022-fines).

57 FCA, The Decision Procedure and Penalties Manual, DEPP 6 (available at: www.handbook.fca.org.uk/handbook/DEPP.pdf).

58 The CA 1998.

59 Section 36(8) of the CA 1998 and Section 4 of the CA 1998 (Determination of Turnover for Penalties) Order 2004, SI 2000/309 (available at: https://www.legislation.gov.uk/ukpga/1998/41/section/36 and https://www.legislation.gov.uk/ukpga/1998/41/section/4, respectively).

60 Sections 31E and 34 of the CA 1998 (available at: https://www.legislation.gov.uk/ukpga/1998/41/section/31E and https://www.legislation.gov.uk/ukpga/1998/41/section/34, respectively).

61 https://www.cps.gov.uk/sites/default/files/documents/publications/dpa_cop.pdf.

iii Compliance programmes

Both the CMA and the FCA publish a variety of documents to assist companies in meeting their compliance obligations, including annual plans and a great deal of guidance in the run-up to and following Brexit.

As described above, the BA 2010 provides a defence to the Section 7 offence, if a commercial organisation can show on the balance of probabilities that it had in place adequate procedures designed to prevent bribery. The MOJ has provided guidance on what may be considered to constitute adequate procedures for the purposes of the defence, although ultimately the courts will determine what constitutes adequate procedures.[62]

The BA 2010 adequate procedures defence has only been tested once at court, in the case of *R v. Skansen Interiors Limited*.[63] The case concerned two bribes that had been paid to an employee managing the tender for an office refurbishment by Skansen Interiors Limited (SIL), a small refurbishment company. When a new chief executive officer took over at SIL and learned about the payments that had been made, he initiated an internal investigation and established an anti-bribery and corruption policy. SIL then submitted a suspicious activity report to the NCA.

The question for the jury was whether SIL had adequate procedures in place. SIL argued, inter alia, that its policies and procedures were proportionate to its size – it was a very small business operating out of a single open-plan office; its business was very localised, removing the need for more sophisticated controls; it was 'common sense' that employees should not pay bribes; the ethos of the company was one of honesty and integrity; and a company of its size did not need a more formal policy. The jury did not agree and returned a guilty verdict.

iv Prosecution of individuals

The CPS and the SFO also look to bring financial crime charges against individuals if a business is prosecuted within England and Wales. The Guidance on Corporate Prosecutions states that the prosecution of a company should not be seen as a substitute for the prosecution of criminally culpable individuals such as directors, officers, employees or shareholders of the offending company.[64] The authorities view the prosecution of individuals in circumstances involving corporate misconduct as essential in providing a strong deterrent against future corporate wrongdoing.[65]

When proceedings or enforcement actions are launched against individuals, the company involved must be conscious of its obligations towards its employees. Often, corporates will suspend the individuals suspected of wrongdoing for the duration of any investigations; however, any suspension must be deemed to be fair and reasonable. Individual employees may be entitled to support from their employer company by means of assistance with legal fees in the event of any investigations, although currently there is no statutory requirement for this. Alternatively, some employees may be entitled to support from officer

62 https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf.

63 *R v. Skansen Interiors Limited* [2018] (unreported).

64 The Crown Prosecution Service, 'Guidance on Corporate Prosecutions' (available at: www.cps.gov.uk/legal-guidance/corporate-prosecutions).

65 ibid.

liability insurance, which can provide cover for the duration of an investigation or trial. Given the scale and cost of typical government investigations, this insurance cover has become the norm in larger companies.

Recently there has been attention on the SFO's mixed success in prosecuting individuals connected to companies that are the subject of criminal proceedings. For example, on 10 March 2023 the SFO's inability to fulfil its disclosure obligations resulted in the collapse of its case against three executives at G4S Care and Justice Services (UK) Ltd, which had entered into a DPA with the SFO in relation to a scheme to defraud the MOJ.[66] This result constitutes the third time in five years that the SFO has failed in its attempts to charge individual employees having reached a DPA with the company; with charges against executives at Tesco and Serco being dropped in 2019.

However, in March 2023, the SFO succeeded in securing its first ever conviction of an individual in association with a DPA. In July 2021, two office refurbishment companies, Bluu Solutions and Tetris Projects, entered into DPAs with the SFO and agreed to pay £2.5 million in fines for using bribes to secure several office-refurbishment contracts.[67] In March 2023, Roger Dewhirst, a project-manager to whom the bribes were paid, was convicted under the BA 2010 of accepting bribes to help the two companies win the contracts. This was an isolated success, as three of Dewhirst's co-defendants were acquitted, meaning that the SFO has secured convictions in only one out of the 19 individual prosecutions brought in connection with a DPA.[68]

The SFO has had success in other individual prosecutions. In May 2022, the SFO secured convictions of Andrew Nathaniel Skeen and Junie Conrad Omari Bowers for a 'green investment' fraud,[69] and more recently, in February 2023, the SFO convicted three executives of a British steel trading business, Balli Steel Plc, on seven counts of fraud, following the collapse of the company in 2013.[70]

IV INTERNATIONAL

i Extraterritorial jurisdiction

Any departure from the general presumption against the creation of extraterritorial liability must be expressly provided by the legislature. Below is an overview of key examples of pieces of UK legislation containing corporate offence provisions with extraterritorial reach.

The BA 2010 has a wide territorial remit, covering offences that take place in the UK or overseas as long as the company is either UK incorporated or carries on at least part of its business in the UK.[71]

66 https://www.sfo.gov.uk/cases/g4s/.

67 https://globalinvestigationsreview.com/article/sfo-wins-first-dpa-related-conviction#:~:text=For%20the%20first%20time%20in,prosecution%20agreement%20over%20related%20misconduct.

68 https://globalinvestigationsreview.com/article/sfo-wins-first-dpa-related-conviction#:~:text=For%20the%20first%20time%20in,prosecution%20agreement%20over%20related%20misconduct.

69 https://www.sfo.gov.uk/2022/05/31/first-sfo-trial-of-2022-results-in-double-conviction/.

70 https://www.sfo.gov.uk/2023/02/02/serious-fraud-office-secures-three-convictions-in-500-million-trade-finance-fraud/.

71 Section 7 of the BA 2010 applies to any 'relevant commercial organisation' that Section 7(5) of the BA 2010 defines as: (1) a body incorporated under the law of any part of the UK and that carries on a business (whether there or elsewhere), or any other body corporate (wherever incorporated) that carries on a

Among other laws, the POCA 2002 contains the UK's money laundering offences. Broadly speaking, the money laundering provisions aim to tackle the channels through which proceeds of criminal activity pass. In terms of jurisdictional reach, the location of the underlying criminal conduct is irrelevant; if the conduct would amount to a criminal offence in the UK, had it occurred there, then it will fall within the ambit of the POCA 2002, subject to very limited exceptions.[72] In addition, UK nationals living overseas can be prosecuted for money laundering offences committed outside the UK. The Home Office published a consultation (which ran from 28 January 2021 to 19 March 2021) to obtain feedback on potential changes to the bodies to which the POCA 2002 grants certain financial investigatory powers, including those extending to money laundering investigations. At the time of writing, the outcome of the public feedback is yet to be released.

The offence of failure to prevent the facilitation of tax evasion was introduced by the Criminal Finances Act 2017 (the CFA 2017) and applies to both domestic and overseas tax evasion. Under the CFA 2017, companies are liable for the conduct of their associated persons who facilitate the evasion of either UK or overseas tax. For the UK tax evasion offence, the conduct can occur anywhere in the world; for the foreign tax evasion offence, the relevant body must either be incorporated in the UK carry on business in the UK, or the relevant conduct must have taken place in the UK. 'Relevant bodies' will be liable for failing to prevent the actions of their employees or other associated persons who criminally facilitate tax evasion.[73] A 'relevant body' is a company or partnership, irrespective of jurisdiction of incorporation or formation.[74] A 'person associated' with the relevant body is an employee, agent or any other person performing services for or on behalf of that relevant body.[75] To the extent the offence took place outside the jurisdiction, UK prosecutors need to prove, to the criminal standard, that both the taxpayer and the associated person committed an offence. Like the corporate offence under the BA 2010, the CFA 2017 provides companies with a defence whereby they can show that they had in place 'reasonable procedures' to prevent the offending.

With the increase in online criminal activity, the Crime (Overseas Production Orders) Act 2019 (the COPO Act) will provide a useful basis for investigators and prosecutors that require quick access to electronic data (such as emails) situated outside the UK. However, the extraterritorial power will only be effective if there is a cooperation agreement in place between the UK and the jurisdiction where the holder of the data is located. At the time of writing, there is only one cooperation agreement in place, between the UK, Northern Ireland and the US.[76] Reliance on the COPO Act is likely to increase in light of the recent

business, or part of a business, in any part of the UK; or (2) a partnership formed under the law of any part of the UK and that carries on a business (whether there or elsewhere), or any other partnership (wherever formed) that carries on a business, or part of a business, in any part of the UK.

72 As confirmed by *R v. Rogers* [2014] EWCA Crim 1680.

73 The Law Society Practice Note, 4 January 2019 (available at: www.lawsociety.org.uk/support-services/advice/practice-notes/criminal-finances-act-2017/).

74 Sections 44(2) and (3) of the CFA 2017 (available at: https://www.legislation.gov.uk/ukpga/2017/22/section/44/enacted).

75 Section 44(4) of the CFA 2017.

76 Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America on Access to Electronic Data for the Purpose of Countering Serious Crime (available at: https://assets.publishing.service.gov.uk/government/uploads/

case of *R (on the application of KBR, Inc) v. Director of the Serious Fraud Office*,[77] in which the Supreme Court held that the SFO did not possess the power to compel a US company to produce documents it held outside the UK. The Supreme Court ruled that Section 2(3) of the Criminal Justice Act 1987 does not have extraterritorial effect, overturning the earlier judgment in which the High Court allowed the application of Section 2(3) to a foreign company if a sufficient connection existed between the company and the UK. This ruling's practical impact is that the SFO must continue to rely on other routes to obtain documents a foreign company holds overseas, such as by using overseas production orders under the COPO Act and the mutual legal assistance regimes.

ii International cooperation

The UK authorities work with their counterpart authorities in other jurisdictions in a variety of ways. Some 'formal' methods of cooperation exist,[78] but it is not uncommon for international enforcement authorities to share information with their foreign counterparts through informal channels of communication, relying on established relationships.[79]

Following Brexit, there has been a degree of uncertainty regarding the future framework for international cooperation between the UK and Europe. After the UK's transition period ended, the European Union, the European Atomic Energy Community and the UK entered into the Trade and Cooperation Agreement (the Trade Agreement). Title VII of the Trade Agreement outlines provisions that facilitate international cooperation between the UK and EU Member States regarding law enforcement. It introduces the concept of surrender, which deals with the issue of extradition and aims to replace the European arrest warrant system as a fast-tracked extradition system between EU Member States and the UK with limited grounds for refusal and time-limited processes. The new arrest warrant, which appears in Annex Law-5 of the Trade Agreement, mirrors the European arrest warrant's content and form.

iii Local law considerations

Economic Crime (Transparency and Enforcement) Act 2022

In response to Russia's invasion of Ukraine, the UK government fast-tracked new financial crime legislation aimed at curbing the flow of ill-gotten gains into the country. Under the Economic Crime (Transparency and Enforcement) Act 2022 (ECA), passed on 15 March 2022, the 'Register of Overseas Entities' (Register) came into force on 1 August 2022, requiring anonymous foreign owners of UK property to reveal their identity. This requirement applies to all overseas entities that purchase a freehold estate or a leasehold estate granted for more than seven years (Qualifying Estates), including purchases made on or after 1 January 1999 in England and Wales or 8 December 2014 in Scotland.[80] For overseas entities that bought

system/uploads/attachment_data/file/836969/CS_USA_6.2019_Agreement_between_the_United_Kingdom_and_the_USA_on_Access_to_Electronic_Data_for_the_Purpose_of_Countering_Serious_Crime.pdf).

77 *R (on the application of KBR, Inc) v. Director of the Serious Fraud Office* [2021] UKSC 2.

78 For example: Part 9 of the Enterprise Act 2002; Section 68 of the Serious Crime Act 2015; memorandums of understanding, and multilateral and bilateral mutual legal assistance treaties.

79 'Enhancing international cooperation in the investigation of cross-border competition cases: tools and procedure', Note by the UNCTAD secretariat, 5–7 July 2017 and 'The serious business of fighting fraud', SFO Speeches, 19 January 2017.

80 https://www.gov.uk/guidance/register-an-overseas-entity.

Qualifying Estates within these time periods, failure to register is a criminal offence punishable by a fine, imprisonment or both, and from 1 January 2023, any purchases of Qualifying Estates must be recorded on the Register before being registered with the Land Registry.[81]

The ECA also removed perceived obstacles to the use of unexplained wealth orders (UWOs) – of which only nine have been obtained in relation to four cases to date. Chief among the changes are:

a an alternative test for obtaining a UWO, namely whether the court is 'satisfied that specified assets have been obtained through unlawful conduct';

b a ban on costs orders against enforcement agencies in UWO cases, unless they acted unreasonably in making an application or acted dishonestly or improperly during the proceedings; and

c the option for enforcement agencies to apply for more time to review information provided by the respondent.

Privacy

Recent case law has emphasised that media outlets in the UK must exercise caution when reporting on criminal investigations prior to the point of charge. In February 2022, the Supreme Court held that publishing the name and details of an individual suspected of a criminal offence who was not yet charged was an unlawful interference with their right to private and family life under Article 8 of the European Convention on Human Rights.[82] The court considered that there was a reasonable expectation of privacy in relation to such information given the reputational damage it ordinarily causes. This expectation is not negated by role or status, although the court noted that the limits of acceptable criticism are wider for high-profile individuals. The public interest may justify disclosing details of an investigation, but it is advisable for media outlets to conduct, and keep a record of, a thorough public interest assessment. In some cases, however, the public interest favours non-disclosure, as where it may prejudice the relevant investigation.

Data privacy

After the Brexit transition period ended, the EU's General Data Protection Regulation (the EU GDPR) ceased to directly apply to the UK.[83] The EU GDPR had extraterritorial application to organisations that monitor behaviour of individuals that takes place within the EU, or to organisations offering services or goods to individuals in the EU.[84] The UK government has issued its own version of the GDPR, namely the United Kingdom General

81 https://www.gov.uk/government/publications/overseas-companies-and-limited-liability-partnerships-pg78/practice-guide-78-overseas-companies-and-limited-liability-partnerships.

82 *Bloomberg LP v. ZXC* [2022] UKSC 5.

83 Regulation (EU) 2016/679 (available at: https://eur-lex.europa.eu/eli/reg/2016/679/oj).

84 https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/.

Data Protection Regulation (the UK GDPR), which took effect on 31 January 2020 and does not contain any significant differences from the EU GDPR, as evidenced by the Keeling Schedule, last updated on 18 December 2020.[85]

The UK GDPR imposes strict data protection obligations and prohibits the transfer of personal data from the UK to a location outside the UK, unless the recipient, jurisdiction or territory is able to ensure an adequate UK-equivalent level of protection, as confirmed by an 'adequacy decision'. The UK currently only has 'adequacy decisions' in place with a few countries, including the members of the European Economic Area (EEA), as well as all countries covered by the European Commission's own adequacy decisions.[86] The US and UK do not have an adequacy decision in place, although a data-transfer deal is being worked on between the two countries. This deal is expected to follow the EU's own data-transfer agreement with the US, which is likely to come into effect this year.[87]

Legal professional privilege

Legal professional privilege has been a heavily litigated issue in recent years. England and Wales recognises two forms of legal professional privilege, in respect of both in-house and external counsel:

a 'litigation privilege', which attaches to communications passing between a lawyer and a client, and also between a lawyer or a client and a third party (such as a forensic accountant), for the sole or dominant purpose of preparing for adversarial litigation.[88] The litigation can either be in progress or in contemplation, and includes civil and criminal litigation;[89] and

b 'legal advice privilege', which attaches to confidential communications passing between a lawyer and a client for the purposes of giving or receiving legal advice. It will not usually apply to communications between a company and its own employees in the context of an investigation.

The meaning of 'client' was discussed in detail in *Three Rivers No. 5*,[90] yet the ratio of the case has been inconsistently understood and, although it has been recently criticised,[91] *Three Rivers No. 5* remains the leading authority in this respect. The concept of 'client' in a corporate context was considered again in *Re The RBS Rights Issue Litigation*, in which Hildyard J held that interview notes produced by lawyers during the course of an internal investigation were not protected by legal advice privilege.[92] Hildyard J understood the *Three*

85 The United Kingdom General Data Protection Regulation (Keeling Schedule available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/685632/2018-03-05_Keeling_Schedule.pdf).

86 https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/international-transfers/.

87 https://www.gov.uk/government/news/uk-and-us-meet-to-make-positive-progress-on-data-and-tech.

88 *The Civil Aviation Authority v. Jet2.Com Ltd* [2020] EWCA Civ 35.

89 *Director of the SFO v. Eurasian Natural Resources Corporation Ltd* [2017] EWHC 1017 QB.

90 *Three Rivers No. 5* [2003] EWCA Civ 474.

91 *Raiffeisen Bank International AG v. Asia Coal Energy Ventures Limited & Anor* [2020] EWCA Civ 1; *The Civil Aviation Authority v. Jet2.Com Ltd* [2020] EWCA Civ 35.

92 *Re The RBS Rights Issue Litigation* [2016] EWHC 3161.

Rivers No. 5 decision as establishing the principle that the 'client', for the purposes of a lawyer–client communication protected as legal advice privilege, must be someone who is authorised to seek and receive legal advice.[93]

V YEAR IN REVIEW

In light of the Russian invasion of Ukraine and the focus on the UK as a destination of choice for money laundering, the UK government has increased its efforts to tackle the nation's reputation as a safe haven for kleptocrats and to legislate for a tougher approach on economic crime. Despite the government's commitments, in January 2023 the UK dropped to its lowest ever position in Transparency International's 28th annual Corruption Perception Index (Corruption Index), dropping from 11th to 18th in the rankings.[94]

The most significant legislative initiative proposed is the ECCT Bill, which is expected to be passed into law during 2023. This Bill sets out a raft of new reforms aimed at combating money laundering and increasing the transparency of corporate structures in the UK. At the centre of the Bill are sweeping reforms to enable Companies House to become an active 'gatekeeper' of company data, rather than merely a passive recipient. Proposals include granting Companies House the power to actively scrutinise and query submitted information, disclose information to law enforcement and impose civil penalties for breaches of the Companies Act 2006.[95] The Bill also aims to introduce mandatory identification measures for all new and existing registered company directors and 'Persons with Significant Control'; give law enforcement the power to seize cryptocurrency assets; and require UK companies to cross-check (and report discrepancies in) information obtained on their business partners against information on Companies House.[96]

Significantly, the ECCT Bill also intends to expand the scope of corporate criminal liability. The government has included a 'failure to prevent fraud (and other economic crimes)' offence in the Bill. While expansion of the 'identification principle' has been ruled out of scope for the ECCT Bill, the government has confirmed it will look to introduce legislative reforms to the identification principle in the future.[97]

The government's focus on combating economic crime was set out in its three-year 'Economic Crime Plan 2', published on 30 March 2023, following on from the original plan published in 2019. The 2023 plan outlines the government's commitment to: (1) reducing money laundering and recovering criminal assets; (2) combating kleptocracy and sanctions evasion; and (3) reducing fraud. Central to the plan is the government's desire to increase collaboration with private companies and leverage the capabilities and expertise of the private sector as a whole to fight economic crime. Indeed, it is notable that half of the £400 million investment underpinning the plan will be funded by the private sector through the Economic Crime Levy, an annual charge on entities supervised under the money laundering

93 ibid.

94 https://www.transparency.org.uk/uk-corruption-perceptions-index-2022-score-CPI.

95 https://www.gov.uk/government/publications/economic-crime-and-corporate-transparency-bill-2022-factsheets/factsheet-civil-sanctions-and-offences-relating-to-reform-of-companies-house-and-limited-partnerships.

96 https://bills.parliament.uk/publications/49554/documents/2831.

97 https://www.lexisnexis.com/uk/lexispsl/corporatecrime/document/412012/67ST-JF73-RRJ4-4002-00000-00?utm_source=psl_da_mkt&utm_medium=referral&utm_campaign=expansion-of-failure-to-prevent%E2%80%94the-theory-is-almost-reality.

regulations.[98] This will be used to fund various initiatives, including recruiting 475 new financial crime investigators dedicated to combating money laundering, establishing a new cryptocurrency-supervisory cell to tackle the abuse of cryptoassets and reforming the UK's supervisory regime to encourage more effective sharing of information and intelligence between governmental bodies.[99]

As part of the government's efforts to target money laundering, the Combating Kleptocracy Cell (CKC) was established in July 2022 within the NCA. Its mandate is to investigate 'Politically Exposed Persons' laundering money in the UK and evading sanctions.[100] While the extent of the CKC's activities is unclear, the NCA confirmed that the group has launched numerous investigations into criminal activity by oligarchs and the companies that support them, including arresting a Russian businessman on suspicion of money laundering in December 2022.[101] This group forms part of a significant recruitment effort at the NCA, which now employs over 150 staff members, putting it on track to reach its target of over 200 staff members by the end of the next financial year.[102]

The government's efforts come amidst a wider focus on fraud within the UK. A Parliamentary Justice select committee report on 'Fraud and the Justice System', published in October 2022, described an 'epidemic of fraud' in the UK, noting that fraud accounted for 40 per cent of all crimes in the UK but only 2 per cent of police resources.[103] Key recommendations from the Report included rolling out dedicated economic crime courts across the UK, increasing resources for the national fraud reporting centre (i.e., 'Action Fraud'), introducing specialised fraud training for police and publishing local and regional fraud statistics.[104] In its response to the Report in January 2023, the government rejected calls for economic crime courts, although it highlighted that £30 million in additional funding would be available for Action Fraud.[105] The government has been criticised for failing to demonstrate its commitment to tackling the 'epidemic of fraud' through a clear schedule of legislative reform addressing the key issues raised in the Report, leading to the publication of a 'Counter Fraud Profession' policy paper in March 2023, which outlined government proposals to enhance counter-fraud capabilities and increase collaboration across public sector bodies combating fraud.[106]

Civil liability for fraud has also been a focus of significant litigation. In February 2023, the Supreme Court heard oral argument in *Philipp v. Barclays Bank Uk plc*, a case in which the Court of Appeal had held that banks and financial institutions could be liable for the losses of their clients when they are victims of Authorised Push Payment (APP) fraud. The Supreme Court judgment is expected to provide helpful guidance on the scope of the *Quincecare* duty

98 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1139843/government-counter-fraud-profession-strategy_2023-25.pdf,p. 10.

99 ibid, p. 12.

100 https://www.nationalcrimeagency.gov.uk/who-we-are/publications/591-sars-in-action-march-2022/file.

101 https://www.nationalcrimeagency.gov.uk/news/wealthy-russian-businessman-arrested-on-suspicion-of-multiple-offences.

102 https://www.nationalcrimeagency.gov.uk/news/wealthy-russian-businessman-arrested-on-suspicion-of-multiple-offences.

103 https://committees.parliament.uk/publications/30328/documents/175363/default/, p. 3.

104 https://committees.parliament.uk/publications/30328/documents/175363/default/, pp. 12, 23, 24, 31.

105 https://committees.parliament.uk/publications/33421/documents/181645/default/, pp. 4, 13.

106 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1139843/government-counter-fraud-profession-strategy_2023-25.pdf,p. 10.

that banks owe to their customers, which requires them to refrain from executing payment instructions if, and for so long as, they have reasonable grounds for believing that their instructions were an attempt to misappropriate funds.

Cognisant of the rising threat of cybercrime, in a consultation paper published in February 2023, the government set out proposals to enhance law enforcement's powers to combat cybersecurity threats and online crimes. These proposals included: (1) giving law enforcement the power to take control of malicious domains and require individuals to preserve specific electronic data; and (2) introducing a general offence for possessing or using illegally obtained data.[107]

The ECCT Bill seeks to bolster the SFO's pre-investigation powers by allowing it to utilise those powers in all its cases, not just those involving fraud and overseas corruption.[108] This will enable the SFO to compel individuals and companies to disclose information at the pre-investigation stage, and thus represents a significant expansion of the SFO's powers to gather the requisite information to launch formal investigations.

The SFO has continued to face scrutiny and criticism over disclosure failings which led to convictions of individuals being quashed in the case of Unaoil, trials collapsing in the cases of Serco and Tesco and the prosecution being abandoned in respect of G4S. In light of all this, a report by former Director of Public Prosecutions and retired High Court judge Sir David Calvert-Smith, published in July 2022 at the request of the Attorney General, highlighted 'fundamental failures' in the SFO's culture, policies and practices. In the same month, a report published by Brian Altman KC identified several deficiencies within the SFO's disclosure processes, including inexperienced disclosure reviewers and inconsistent guidance on disclosure; this report offered a range of recommendations to improve the SFO's handling of disclosure. Despite this criticism, the SFO did record some victories in 2022, including in the case of Glencire, referred to above.

As in other years, the SFO has faced a mix of several high-profile wins being offset by sustained public criticism for its handling of long-running cases. The organisation is now preparing for a change of leadership, with director Lisa Osofsky set to step down in August 2023, after five years in the role. At the time of writing, the new director has yet to be identified. This change of leadership at the SFO comes at the same time as changes within the Enforcement Division of the Financial Conduct Authority (with Therese Chambers and Steve Smart replacing the outgoing Mark Steward as joint-Executive Directors of Enforcement and Market Oversight in March 2023), and the Director of Public Prosecutions, Max Hill KC, completing his term in office at the end of the year.

VI CONCLUSIONS AND OUTLOOK

The UK government is under sustained pressure to outline and implement a comprehensive plan to reduce economic crime. Given the scale and severity of the challenges facing the UK, without increased agency budgets and enforcement efforts it is unlikely that the ECA and ECCT alone will provide sufficient legislative footing to combat economic crime. While the recently published Economic Crime Plan has heralded significant investment for a range

107 https://www.gov.uk/government/consultations/computer-misuse-act-1990-call-for-information/outcome/review-of-the-computer-misuse-act-1990-consultation-and-response-to-call-for-information.

108 https://www.gov.uk/government/publications/economic-crime-and-corporate-transparency-bill-2022-factsheets/fact-sheet-the-extension-of-the-serious-fraud-offices-pre-investigation-powers.

of targeted initiatives, it serves as a summary of key issues rather than a detailed roadmap to countering rising economic crime. The government's various legislative and operational initiatives of the past two years have shown an increased focus on economic crime, but the impact and enforcement of those changes has yet to be felt.