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GLOBAL INVESTIGATIONS BULLETIN

October 2021

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GROUP NEWS //

Awards: The Global Investigations Group has been shortlisted for Most Impressive Investigations Practice of the Year and Most Important Case of the Year by Global Investigations Review. We are one of 10 nominees and the only non-US firm to be shortlisted in the Practice of the Year category. Separately, the Shell/ENI/Brinded case – in which we successfully defended Mr Brinded - has been shortlisted for Most Important Case of the Year. Winners will be announced in November.

Sanctions Roundtable: Gayathri Kamalanathan recently participated in the Global Investigations Review Sanctions Roundtable (subscription service). The conversation focused on US/UK sanctions priorities, how the jurisdictions approach sanctions and licensing, and private sector views on tensions between commercial and compliance risks. Video of the event is available here.

Rankings: We were pleased to retain our Tier 1 ranking for Regulatory Investigations and Corporate Crime in the recent Legal 500 UK report, with partner Richard Swallow ranked as a Hall of Fame member, partner and co-head of the Global Investigations Group Jonathan Cotton named a Leading Individual, and Senior Counsel Ella Williams named a Rising Star. We also retained our ranking in the Financial Services: Contentious Regulatory category, with partners Deborah Finkler and Ewan Brown (also co-head of the Global Investigations group) named Leading Individuals, and partners Holly Ware and Jonathan Clark named Next Generation Partners.

NATWEST PLEADS GUILTY TO MLR 2007 BREACHES //

On 7 October, National Westminster Bank Plc ("NatWest") pleaded guilty to three offences under regulation 45(1) of the Money Laundering Regulations 2007 ("MLR 2007"), for failure to comply with regulation 8(1) of the MLR 2007 between 7 November 2013 and 23 June 2016, and regulations 8(3) and 14(1) of the MLR 2007 between 8 November 2012 and 23 June 2016, in relation to the accounts of a UK incorporated customer.

The Financial Conduct Authority ("FCA") brought criminal proceedings against NatWest in March 2021. NatWest was the first lender to face criminal charges for suspected MLR 2007 breaches in this jurisdiction.

The proceedings related to processing £365 million through a customer's account, thought to represent proceeds of drug-related crime. Regulations 8(1) and 8(3) of the MLR 2007 relate to ongoing monitoring of business relationships. Regulation 14(1) relate to the duty to apply enhanced customer due diligence and ongoing monitoring in higher risk situations. Per NatWest's announcement, the bank had been required to "determine and conduct risk sensitive ongoing monitoring of its customers for the purposes of preventing money laundering," and, as a result of operational weaknesses in the relevant time period, "did not adequately monitor the accounts of that customer".

NatWest's announcement states that the FCA will not take action against any individual current or former employee of NatWest, and that the bank is not anticipating any other authority to investigate the matter.

NatWest will be sentenced at the Southwark Crown Court at a subsequent hearing, expected to be in four to eight weeks' time. The bank is expected to make a provision for an anticipated fine in its Q3 results (not available at the time of writing).

RECENT NEWS //

SFO roundup: Petrofac pleads guilty to bribery over multi-billion dollar oil contracts; SFO announces investigation into £150m investment schemes following dawn raid

In a hearing at Southwark Crown Court on 1 October, Petrofac pleaded guilty to seven charges of failing to prevent former employees from paying bribes to secure overseas oil projects. Petrofac was subsequently ordered to pay £77 million, consisting of £22.8 million in confiscation, a £47.2 million fine, and £7 million in SFO costs. The SFO brought charges against Petrofac for breaches of section 7 of the Bribery Act 2010 after a four-year-long investigation. The contracts and payments at issue were made between 2012 and 2015 in Iraq, the Kingdom of Saudi Arabia, and the UAE. Petrofac's sentencing follows guilty pleas by former Petrofac executive David Lufkin, who pleaded guilty to 14 charges of bribery. Lufkin allegedly worked with other former Petrofac employees to facilitate the behaviour and was sentenced to a two year custodial sentence. Last spring, Petrofac was banned by the Abu Dhabi National Oil Company from bidding for contracts in the UAE. Lisa Osofsky, Director of the SFO, said: "today's result should serve as a warning; the SFO will use all the powers at its disposal to root out and prosecute companies and individuals, whose criminal activity detrimentally affects the reputation and integrity of the United Kingdom". Petrofac's statement on the investigation can be found here.

The SFO announced on 29 September that it is investigating the Alpha and Green Park group of companies for suspected fraud and money laundering in relation to the companies' student accommodation and holiday park developments. On 29 September, following a six-month covert investigation into the businesses, the SFO executed a series of co-ordinated dawn raids, interviews and mandatory requests for evidence across the country. The SFO carried out formal searches on multiple properties, arresting and interviewing one suspect. At the same time, the SFO issued several Section 2 notices, forcing the companies to provide relevant information. The SFO suspects the Alpha-branded companies of fraudulently misleading investors into purchasing leaseholds for student accommodation for Lancashire, Staffordshire and West Yorkshire. The Green Park-branded companies, meanwhile, are suspected of involvement in a similar scheme to sell leaseholds for holiday accommodation in Devon.

Mick Gallagher, Chief Investigator at the SFO, said: “Thousands of ordinary people lose their pensions or life savings on risky schemes, while those at the top line their own pockets and enjoy a lavish lifestyle. […] We invite anyone who believes they have a connection with our investigation to come forward”. Investigators will ask UK-based investors to fill out a questionnaire by 30 November 2021 to help the SFO to identify and pursue new information and to continue progressing the investigation as quickly as possible.

FCA roundup: former investment adviser sentenced for money laundering; FCA warns stockbrokers of intervention in fraud cases

The FCA announced that Richard Faithfull, a former investment adviser, was sentenced to 5 years and 10 months' imprisonment for money laundering, and disqualified from being a company director for 10 years. Following a four-day hearing, His Honour Judge Tomlinson rejected Faithfull's submissions and accepted the FCA's statement of case, holding that Faithfull was able to use knowledge gained while working in a regulated sector to launder £2.5 million as part of a trans-national organised crime group for more than a year, laundering the proceeds of at least seven professionally run investment frauds.

In a “Dear CEO” letter, the FCA warned stockbrokers and wealth management companies of action if they present a heightened risk of harm to customers. The FCA states that it has seen examples of customers experiencing losses due to investment frauds or scams, including where companies are intentionally investing in unsuitable products, or are facilitating scams and financial crime.

FRC roundup: FRC issues formal complaint against KPMG for misconduct; Grant Thornton fined over Patisserie Valerie audit failings

The Executive Counsel for the Financial Reporting Council have issued a formal complaint against KPMG LLP, a former KPMG partner, and other former and current KPMG employees. The formal complaint alleges that the parties engaged in misconduct by providing the FRC with both falsified and misleading documents in an FRC inspection of two audits carried out by KPMG for two separate clients, Carillion plc and Regeneris plc.

The FRC imposed sanctions against Grant Thornton (“GT”) and David Newstead, its Audit Engagement Partner who audited Patisserie Holding Plc. In October 2018, Patisserie Holdings announced that it became aware of potentially fraudulent accounting irregularities from 2015 to 2017 and the company subsequently entered into administration, leading to the closure of 70 stores and more than 900 job losses. GT received a fine of £2.34 million and Mr Newstead received a fine of £87,750. Deputy Executive Counsel to the FRC said: “GT has taken remedial actions to improve its processes and to prevent a recurrence of these types of breaches. The package of financial and non-financial sanctions should also help to improve the quality of future audits”.

CMA seeks to remove appeal rights in settlement cases

The UK's Competition and Markets Authority (CMA) has proposed eliminating companies' ability to appeal in cases where they have reached a settlement agreement with the agency, launching a consultation into the proposed change, which it said will increase procedural efficiencies and “resource savings”. The catalyst for the amendment was musical instrument maker Roland's unsuccessful appeal against the CMA's decision to fine it £4 million for forcing a retailer to sell its electronic drum kits, related components, and accessories at or above a minimum price between January 2011 and April 2018. In its ruling to dismiss the appeal in April, the Competition Appeal Tribunal said it would undermine the settlement process if a company could settle with the CMA and retain a lower fine despite appealing against the decision.

Lord Chancellor and Attorney-General speak on economic crime

The MoJ published speeches by the Lord Chancellor and Attorney-General delivered at the Cambridge Economic Crime Symposium on 9 September. The Rt Hon Robert Buckland noted, "the increase in the availability and update of digital services across the economy, as well as the stark realities of the pandemic, have increased the opportunities for economic criminals to exploit and given rise to new ones". These include abusing our growing reliance on online banking, shopping, and communication, the increasing use of popular crypto assets and Covid-19 stimulus measures. The speech urges continued collaboration between the criminal justice system and private sector, including "designing out" fraud at the source, boosting public/private co-operation more generally to address vulnerabilities, and improving high-value intelligence sharing. The Lord Chancellor also spoke of capitalising on the UK's presidency at the February G7 summit to strengthen the international response to illicit finance and corruption. The Lord Chancellor added that a priority "has been to improve our response not just to crime itself but to how we treat victims of crime" by expanding the National Economic Victim Care Unit and improving public communication on this type of crime. The Law Commission Options Paper, expected by the Government "by the end of this year or early next", may urge reform that balances criminalising corporate behaviour against avoiding imposing undue burden of compliance on companies.

The Attorney-General, in his speech, stated that the UK Government and UK Finance Economic Crime Plan 2019-22 "represented a true step change" in its response. The Rt Hon Michael Ellis QC MP observed that the UK Government and UK Finance joint statement "shows that the public-private partnership is delivering real progress on several fronts – with 20 of the 52 original actions in the Plan being delivered and clear plans in place to deliver the remaining actions". The Attorney-General concluded, "we all bear a responsibility [for economic crime] – working together in lockstep rather than silos – to address the continuing threat". The speeches are available here and here.

UK Finance publishes anti-bribery and corruption compliance guidance

UK Finance has published guidance on anti-bribery and corruption compliance, including the definition of "public officials". Although written with a focus on UK legislation, the paper also considers complementary global anti-corruption legislation, including anti-money laundering and counter-terrorist financing laws. The paper proposes "a broad, overarching approach", building on the Bribery Act 2010 definition to provide "a practical risk-based approach". The three-step approach involves: (1) focusing on employees or officials of relevant bodies, whether employed, elected or appointed; (2) further defining "relevant bodies" by adopting an approach from the second limb of the Bribery Act definition, "carrying out a public function for a foreign country or the country's public"; and (3) including known exceptions to the first two steps where sufficiently clear and material to anti-corruption risk. The guidance states that "public official" status relies on the nature of a person's employment or appointment, unlike the AML/CFT requirements under which a public official identified as a Politically Exposed Person may retain this designation even after leaving office. In determining criteria for relevant bodies, the paper refers to: (1) whether the organisation is owned or controlled by the government, including part ownership and even minority ownership, as long as the government has effective control over the organisation; and (2) whether the organisation is not owned or controlled by the government but where it is delivering a monopoly service or public function under the terms of a commercial government contract or government grant.

Corporate criminal liability reform consultation: TI-UK, CLLS respond to Law Commission consultation

Transparency International UK ("TI-UK") responded to the Law Commission's consultation on corporate criminal liability reform by stating "the UK is a safe haven for corrupt and criminal wealth". It expressed concerns over the challenges in bringing successful prosecutions against large companies for serious economic crime in the UK, due to difficulties in establishing corporate criminal liability. "The lack of effective deterrent may be evidenced by the huge costs of economic crime to the UK economy", TI-UK argued. TI-UK stated that legislative reform in the area is "long overdue", with the current identification principle unfit for purpose: it "is unnecessarily restrictive and makes it very difficult to prosecute large companies…The result is an unfair situation in which the 'low hanging fruit' of crimes committed by small companies, with simpler corporate structures, are more easily prosecuted".

Separately, the Company Law Committee of the City of London Law Society ("CLLS") produced a Joint Working Paper in response to the Law Commission's discussion paper on corporate criminal liability. The CLLS endorses the approach taken in *SFO v Barclays [2020] 1 Cr App R 28*, arguing that the UK's criminal and regulatory framework should base its deterrents on the identification doctrine rather than creating new criminal offences to compensate for a lack of prosecutorial resource. The CLLS argues that if the "failure to prevent" model were to replace the identity principle, safeguards would be necessary: corporate liability might arise from a relevant employee committing an offence, such as fraud, or a test of whether the company could reasonably have been expected to be aware of the employee's actions and could have reasonably been expected to intervene. The CLLS remarks on the ambiguity in defining the scope of a "senior officer" and similar terms. It highlights the difficulty in developing an approach which can address the myriad range of corporate and management structures adopted by companies of varying size, complexity and international reach. It also notes that it impedes boards from following an approach to avoid their company committing an offence. The CLLS suggests that questions of attribution may thus depend on corporate group structure. It strongly supports a defence for companies based on their due diligence or prevention measures, which would encourage stronger compliance and corporate governance structure. The report also recommends a greater range of penalties for corporate breaches of regulatory rules and criminal conduct, including Profit Orders, Corporate Rehabilitation Orders, and Publicity Orders. Finally, the CLLS believes that a director ought not to be at risk of conviction based on neglect, nor should there exist offences based on consent or connivance alongside the existing offences of aiding and abetting, counselling or procuring.

ICO roundup: John Edwards approved as next Information Commissioner; ICO fines We Buy Any Car, Saga, and Sports Direct for nuisance

MPs approved the appointment of John Edwards as the new Information Commissioner, following his appearance before the DCMS Committee. Edwards, currently the New Zealand Privacy Commissioner, will take up his new role after Elizabeth Denham's tenure ends on 31 October. While the role and powers of the Information Commissioner are currently set out in the UK GDPR and Data Protection Act 2018, the Government has indicated plans for wide ranging reforms of the UK's data protection regime, including the Information Commissioner's Office (ICO).

The ICO announced fines totalling £495,000 to We Buy Any Car, Saga Services Ltd, Saga Personal Finance, and Sports Direct. Between them, the companies sent over 354 million "frustrating and intrusive" marketing emails and texts without permission from the recipients. Andy Curry, ICO Head of Investigations, said: "Today's fines show the ICO will tackle unsolicited marketing, irrespective of whether the messages have been orchestrated by a small business or organisation, or a leading household name".

Economic Crime Levy may tax large firms up to £250,000 per year

Following its announcement at Budget 2020, HM Treasury has introduced draft legislation for the Economic Crime (Anti-Money Laundering) Levy, also known as the ECL. The new tax, imposed on anti-money laundering regulated businesses (including law firms) in order to fund ambitious new anti-money laundering capabilities, is to be collected and managed by Commissioners for HMRC, the FCA, and the Gambling Commission. The Explanatory Note indicates that final legislation for the Finance Bill will set the levy as a fixed fee according to the band in which the entity's UK revenue falls: "small" (<£10.2m); "medium" (£10.2m-£36m); "large" (£36m-£1bn); and "very large" (>£1bn). The new levy is proposed to be payable from 2023/2024.

National Crime Agency and Europol sign up to new working arrangement

The National Crime Agency ("NCA") announced its new working arrangement with Europol which will sit under the UK-EU Trade and Cooperation Agreement ("TCA"). The NCA believes that "The Working and Administrative Arrangement, which complements and implements the TCA" will ensure the continuance of "operational cooperation between UK law enforcement agencies and EU Member States via Europol" already seen over the past year. According to the NCA, the new arrangement complements and implements the TCA by providing further clarity on how cooperation at operational level. The two agreements protect shared capabilities including: the presence of UK/NCA liaison officers based in Europol headquarters; access to EUROPOL's secure messaging system; the ability to attend and organise operational and other meetings at EUROPOL and contribute to EUROPOL analysis projects; and the fast and effective exchange of data. In the same statement, the NCA listed among the results of the continued working relationship the takedown of both the Emotet malware and the DoubleVPN cybercrime service.