SLAUGHTER AND MAY/

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RECENT PUBLICATIONS //

Adding to the patchwork rather than wholesale revolution - The future of corporate criminal liability (1 July), by Jonathan Cotton and Anna Lambourn.

THE FUTURE OF "FAILURE TO PREVENT" CORPORATE CRIMINAL OFFENCES //

The Law Commission has published its long-awaited Options Paper for reforming the laws on corporate criminal liability for economic crimes (*see our detailed briefing on the Options Paper here, and a background to the Law Commission's review here*). One of the options under consideration was whether to extend the "failure to prevent" offence model to other economic crimes, complementing the well-known section 7 of the Bribery Act 2010, and sections 45 and 46 of the Criminal Finances Act 2017. The Law Commission's analysis and conclusions in this area were surprising in two regards: first, that the only option for reform suggested was "failure to prevent fraud by an associated person"; and second, though it represented a departure from its mandate, that the "failure to prevent" model might be extended outside the economic crime space.

Failure to prevent…just fraud?

Stakeholders in government and law enforcement have long advocated for the extension of the failure to prevent model to all economic crimes, or more particularly, to the crimes listed in Part 2, Schedule 17 to the Crime and Courts Act 2013 (crimes eligible for a Deferred Prosecution Agreement). This model has been put forward as both an alternate model for prosecuting economic crime based on the identification doctrine, and as a more accurate representation of a company's culpability where the employees or associated persons are the ones committing the wrongdoing (where their actions are not supported by the company itself).

The Law Commission considered the submissions and existing laws, and thought the best option was for the introduction of a corporate crime of failure to prevent fraud by an associated person. This would include fraud by false representation; obtaining services dishonestly; the common law offence of cheating the public revenue; false accounting; fraudulent trading; dishonest representation for

obtaining benefits; and fraudulent evasion of excise duty. The Law Commission thought that this liability model best supported offences that were commissioned for the benefit of the company.

The Law Commission was supportive of retaining a defence, but that this should be based on the Criminal Finances Act model; namely, that a company has a defence if it can prove that it has procedures in place that were "reasonable in all the circumstances". This is subtly, though importantly, different from the Bribery Act defence that the company had in place "adequate procedures". The Criminal Finances Act wording leaves open the possibility that it may be reasonable for a company to have no procedures in place at all; it would be for the company to prove that it had undertaken a risk assessment and concluded that procedures were either necessary, or not.

The backlash against limiting this liability model to fraud was immediate. Particularly in light of current geopolitical events and the domestic political agenda, some stakeholders were disappointed that the Paper did not support the creation of a "failure to prevent money laundering" offence. The Law Commission did consider this, but concluded it would create an overly burdensome and duplicative regime for companies. A failure to prevent money laundering offence would only "create additional positive duties on organisations which would overlap with the duties" under the existing regime (included in the Proceeds of Crime Act 2002 and the various Money Laundering Regulations), and not necessarily add anything new to the enforcement framework.

The future of "failure to prevent"

The Law Commission seemed to leave open the possibility of "failure to prevent" being extended to other economic crimes, in due course. Of equal interest was the Law Commission's consideration of where else this liability model might be used.

Although not strictly within its remit to examine the laws concerning corporate liability for economic crimes, the Law Commission thought that this model could be extended to other specific crimes, where it would be reasonable to impose a positive duty on companies to put in place preventative procedures. These included: failure to prevent human rights abuses (including by a UK company overseas); failure to prevent neglect and ill-treatment; and failure to prevent computer misuse. These offences—if enacted by the government—would represent a material change in the corporate enforcement framework.

RECENT NEWS //

SFO update: Glencore subsidiary pleads guilty to bribery; Chemring investigation dropped

A subsidiary of Glencore Plc pleaded guilty to seven counts of bribery following an investigation by the Serious Fraud Office (SFO). The investigation into Glencore Energy Ltd, first announced by the SFO in December 2019, concerned allegations that bribes were paid by employees and agents totalling over $28 million for preferential access to oil, including increased cargoes, valuable grades of oil, and preferable dates of delivery. These actions were approved by the company across its oil operations in Nigeria, Cameroon, Ivory Coast, Equatorial Guinea, and South Sudan. The company will be sentenced between 2-3 November at Southwark Crown Court.

The SFO closed its investigation into defence technology contractor Chemring Group Plc on 22 June. The SFO opened its investigation into Chemring and its subsidiary, Chemring Technology Solutions Ltd (CTSL), in January 2018 after CTSL self-reported to the agency. The SFO's investigation concerned allegations of breaches of bribery and anti-money laundering legislation. In closing the matter, the SFO acknowledged that there was insufficient evidence to support a realistic prospect of conviction, as

required by the Code for Crown Prosecutors. “Chemring has co-operated fully with the SFO throughout its investigation and is pleased that the matter is now closed,” CTSL said in a statement. Chemring Plc had previously announced that the investigation was related to two specific historical contracts, the first of which was awarded prior to the group taking over CTSL, and the second in 2011.

Sanctions enforcement: OFSI fines industrial technology company £15,000 for sanctions breaches; “Sanctions the next FCPA,” says US Deputy Attorney General

On 29 June, the Office of Financial Sanctions Implementation (OFSI) published the penalty notice it had issued against Tracerco Ltd, which was fined £15,000 for breaches of Syrian financial sanctions regulations. Tracerco was fined in respect of two payments, totalling £3,000, made to Syrian Arab Airlines for an employee to take flights home between May 2017 and August 2018. The flights were booked and paid for by a UAE travel agency, which Tracerco then reimbursed. Tracerco received a discount of 50% on the monetary penalty amount for self-reporting the misconduct. It did not exercise its statutory right to ministerial review.

Sanctions should “be at the forefront” of corporate compliance programmes, US Deputy Attorney General Lisa Monaco said in a keynote speech at GIR Live: Women in Investigations. Monaco noted that the expansive sanctions passed against Russia impact a number of industries that may not have encountered sanctions previously, and that a proactive approach to compliance could save companies money. “Sanctions have been considered by some as a concern mainly for banks and financial institutions,” Monaco said, appearing virtually at the event on 16 June. “As companies grapple with the fallout of Russian aggression and the new intensity of sanctions enforcement, though, they are recognising that the risk of sanctions violations cuts across industries and geographic regions.” Monaco also warned that sanctions are about more than Russia and its invasion of Ukraine: “It’s not just the war in Ukraine that has prompted a new level of intensity and commitment to sanctions enforcement. We have turned a corner in our approach. Over the last couple of months, I’ve given notice of that sea change by describing sanctions as ‘the new FCPA’”. The text of the speech is available here.

FCA update: three fines issued against institutions for financial crime controls failings; update given on market abuse and manipulation work; insider dealing re-trial sought

The Financial Conduct Authority (FCA) has handed out three financial penalties to firms for financial crime controls failings. It fined JLT Specialty Limited (JLTSL) £7,881,700 on 16 June for financial crime control failings in relation to their use of introducers, which resulted in bribe payments of over $3 million to be made to Colombian government officials. The FCA considered the failings particularly serious as they followed a prior FCA enforcement action against JLTSL in 2013 for similar bribery and corruption failings. JLTSL’s penalty was reduced to reflect its self-report and assistance during the FCA’s investigation, including providing FCA investigators with access to materials from JLT Group Plc’s internal investigation on the issues. As the FCA and JLTSL reached agreement at Stage 1 of the FCA’s investigation, a 30% discount applied to the penalty. The Final Notice is available here.

The FCA also fined Ghana International Bank Plc (GIB) £5.8 million for breaches of the Money Laundering Regulations 2007 (MLR 2007) – revoked by the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017/692 for activities from 2017 onwards – over its correspondent banking activities undertaken between January 2012 and December 2016. The FCA found that GIB did not adequately perform the additional checks required when it established relationships with overseas banks, and failed to demonstrate it had assessed those banks’ anti-money laundering (AML) controls. The FCA also found that, although no money laundering was detected, GIB’s controls weaknesses were so great that that the risk of money laundering or terrorist financing was

high. The FCA and GIB reached settlement at Stage 1 of the FCA's investigation and a 30% discount applied to the penalty. The Final Notice is available here.

Finally, TJM Partnership Limited (in liquidation) was fined £2.03 million for serious financial crime control failings, in relation to cum-ex trading. The FCA found that TJM failed to ensure it had effective systems and controls in place to identify and reduce the risk of financial crime and money laundering in its business. The penalty related to trades carried out on behalf of clients of the Solo Group between January 2014 and November 2015. These trades were carried out in a circular pattern, highly suggestive of financial crime; in particular to allow the arranging of withholding tax reclaims in Denmark and Belgium. This is the FCA's third case brought in relation to cum-ex trading, and the largest fine issued so far. TJM qualified for a 30% discount applied to the penalty.

On 17 June, the FCA published a press release about its work on market abuse and manipulation, prompted by recent reports about the regulator's approach in this area. The FCA states that it uses a "data-led approach" involving daily monitoring of data to ensure the timeliness and accuracy of the disclosure of inside information. Data is complemented by suspicious transaction and order reports (STORs) which are assessed by a specialist team. The FCA receives over 30 million transaction reports and 100 million order reports each day, and over 90 STORS each week. The FCA publishes the findings of its oversight work in its Market Watch publications, which share good practice and highlight weaknesses likely to be common in firm's systems and controls. Intensive scrutiny is as important as a deterrent as it is for detection, the FCA states; where market abuse or manipulation is detected, it takes enforcement action, including criminal prosecution. The FCA acknowledges that in many of the reports or concerns it reviews, strong suspicion is often matched by weak or non-existent evidence. The agency also uses civil action to secure redress for investors and has more than ten subjects awaiting decisions on their cases (following investigations for market abuse or manipulation).

The FCA announced that it would pursue a re-trial of Stuart Bayes and Jonathan Swann for insider dealing offences, after the jury were discharged for being unable to reach a verdict. The pair were released following an eight-week trial at Southwark Crown Court. The alleged offending took place between 2 May and 10 June 2016, and involved trading in shares in British Polythene Industries plc (BPI), ahead of an announcement that RPC Group plc was to acquire BPI. During this period, Bayes was employed by RPC Group plc and Swann worked as a tenancy support officer. The total profit from alleged insider dealing was approximately £138,700. Mr Bayes faced 3 counts of insider dealing on the indictment: one of dealing and two alternative counts alleging that he either disclosed inside information to Mr Swann or encouraged him to deal whilst in possession of inside information. Mr Swann faced one count of dealing.

ICO and NCSC urge solicitors not to advise clients to pay ransomware demands

The Information Commissioner's Office (ICO) and the National Cyber Security Centre (NCSC) published a joint letter on 12 July urging members of the Law Society of England and Wales to not advise clients to pay ransomware demands should they fall victim to a cyber attack. The letter stated that the payment of a ransom neither protects the stolen data, nor reduces the risk to individuals, and incentivises harmful behaviour. Paying a ransom is not an obligation under data protection law and the ICO will not take it into account as a mitigating factor when considering the type or scale of enforcement action. In the event of a ransomware attack, organisations should instead abide by the regulatory requirement to report to the ICO as the data regulator and engage with the NCSC for support and incident response in order to mitigate harm. The ICO will recognise early engagement and co-operation with the NCSC, as well as compliance with appropriate NCSC guidance when setting its response. The ICO release is available here and the NCSC coverage is available here.

UK improves anti-money laundering laws but fails to make "sufficient progress," says FATF

On 9 June, the intergovernmental body Financial Action Task Force (FATF) said that the UK has improved its anti-money laundering and terrorist financing framework, but has "not made sufficient progress" in its technical compliance of deficiencies identified in a 2018 assessment. According to the statement, while the UK has had its status upgraded from "partially compliant" to "compliant", the country will remain in "regular follow up" and will inform the FATF of further progress in its implementation of anti-corruption measures.

Legislation permitting regulators/supervisors to view and scrutinise SARs to be introduced

The government published its response to a consultation on the Money Laundering Regulations 2017 (MLR 2017), concluding that regulators and other institutions responsible for preventing money laundering should be allowed to access and view the suspicious activity reports (SARs) sent by companies to the National Crime Agency (NCA). The government has approved proposals to amend the MLR 2017 so that there can be a "clear legal gateway" for supervisory bodies to be able to receive reports from firms under their remit, and also consider the quality of their content. AML and counter-terrorist funding supervisors include the FCA, HMRC, and professional bodies, such as the Chartered Institute of Taxation and the Institute of Chartered Accountants in England and Wales.

Government report: UWOs have been "spectacularly unsuccessful"

On 30 June, the Foreign Affairs Committee published *The Cost of Complacency: illicit finance and the war in Ukraine*, which concluded that the UK's law enforcement agencies have failed to effectively utilise unexplained wealth orders (UWOs) due to lack of resources and a low risk appetite. The SFO has never sought a UWO and the NCA has not done so since the end of 2019. UWOs were introduced in the Criminal Finances Act 2017 to give law enforcement civil powers to compel individuals or companies to explain how they obtained certain assets if they appeared to have been acquired with illegally-obtained funds. The tool is available to the NCA, SFO, FCA, HM Revenue and Customs, and the Crown Prosecution Service. Despite government predictions that around 20 UWOs would be sought each year, the committee said they have only been used by the NCA, which has obtained just nine such orders in four separate investigations since coming into force. The report calls on the government substantially increase funding and expert resourcing for key law enforcement agencies and increase resources at the Foreign, Commonwealth and Development Office sanctions unit.

The Committee also welcomed the Economic Crime (Transparency and Enforcement) Act 2022, which makes material changes to the economic crime enforcement framework; but it said that, while the Act "meets some of the immediate needs to facilitate the UK response to the war in Ukraine", it represents "a small proportion of the long-promised measures that will begin to address the UK's vulnerability to illicit finance". The Committee will publish a final report into the "wider, systemic illicit and emerging financial threats and innovations that are transforming the global economic and financial system, and how countries are competing to shape the system of the future" in due course.

HMRC publishes corporate criminal offence investigation statistics as at 13 May 2022

Following various Freedom of Information requests, HMRC published details of the number of live investigations into the "failure to prevent the facilitation of tax evasion" offences as at 13 May 2022. These offences were introduced by Part 3 of the Criminal Finances Act 2017 and came into effect on 30 September 2017, and are applicable to organisations that failed to prevent the facilitation of tax

evasion from that date onwards. As of 13 May, HMRC had 28 potential cases underway, including seven live investigations with no charging decisions yet to be made. 21 live opportunities were under review with 69 opportunities already reviewed and rejected. The above investigations and opportunities spanned 11 different business sectors and sit across all HMRC customer groups, including software providers, labour provision, accountancy, legal services and transport. HMRC intends to update this information biannually with a similar freedom of information release.

Former F1 boss Ecclestone faces UK charge over £400 million tax "fraud"

Former chief executive of the Formula One Group, Bernie Ecclestone, faces being charged with fraud by false representation by UK prosecutors over an alleged failure to disclose £400 million worth of offshore assets to HMRC. The Crown Prosecution Service (CPS) has authorised the charging following a complex and worldwide criminal investigation by HMRC's Fraud Investigation Service, according to a press release published on 12 July. The first hearing in this case will be on 22 August at Westminster Magistrates Court, according to the CPS.

FRC to overhaul UK corporate governance code

On 12 July, the Financial Reporting Council (FRC), soon to be known as the Audit, Reporting and Governance Authority, or Arga, announced that it had published a Position Paper setting out recommendations made by the government earlier this year to reform corporate governance. The overhaul – the first in four years – will establish new rules to make boards more responsible for fraud and their company's finances, and bolster accountability for bad behaviour. The Positions Paper includes revising existing corporate codes, strengthening auditing and accounting standards, and laying out expectations to drive behavioural change ahead of statutory powers promised under forthcoming legislation. The revised code is designed to provide a stronger framework for reporting on internal controls and board responsibilities for expanded sustainability and reporting of environmental, social and governance principles. Some changes will require primary legislation; the government has indicated that a draft bill may be published in the next session of parliament. Other measures will be addressed through secondary legislation and changes to existing regulatory measures by the FRC.

Spotlight on Corruption publishes UK's economic crime enforcement gap report

Spotlight on Corruption published a report revealing the costs of economic crime, which the National Crime Agency estimates will result in losses of £290 billion to UK consumers, businesses, and the public sector every year. The report shows that enforcement outcomes are weak, that current levels of public investment in economic crime enforcement are insufficient to drive change, and that reinvestment of funds received from economic crime enforcement into enforcement authorities would result in a significant uplift in resourcing. The report sets out five recommendations that the government should implement to tackle economic crime, including: the creation of a central economic crime fighting fund; an independent review of the Asset Recovery Incentivisation Scheme; a new strategy for to protect public funds in economic crime law enforcement actions; large improvements in recruitment and retention ambitions; and a significant enhancement in transparency and accountability.