SLAUGHTER AND MAY/

GLOBAL INVESTIGATIONS BULLETIN

November 2021

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GROUP NEWS //

Rankings: We were pleased to be ranked in Band 1 for both Litigation and Financial Crime: Corporates in Chambers and Partners' 2022 guide. We also retained our ranking in the Financial Services: Contentious Regulatory category.

CORPORATE LIABILITY FOR ECONOMIC CRIMES - A REVIEW //

One year ago, the Government asked the Law Commission to review the law concerning corporate liability for economic crime (including bribery and corruption, fraud, false accounting, and money laundering) and draft an Options Paper containing suggestions for reform. The Law Commission has promised a response Paper by the end of 2021. This month's Bulletin reviews the current law on corporate liability for economic crimes and the work the Law Commission has undertaken, in anticipation of the Commission publishing their suggestions for reform in the coming weeks.

Corporate Criminal Liability for Economic Crimes

Attributing criminal responsibility to a company can be difficult. Most economic crimes include a mental element (the *mens rea* of an offence) in addition to the prohibited act itself (the *actus reus*), but a company can only "think" and "act" through its employees. Unless statute provides otherwise, liability can be established in two ways: vicariously, or by the identification principle. Vicarious corporate liability arises most often with strict liability offences that do not require intention. For offences with a *mens rea* element, the identification principle is used to attribute the mental element arising from employees to the company itself.

To establish the identification principle and therefore that a company possessed the requisite guilty state of mind, it must be proven that the "directing mind and will" of the company is behind the offence. The principle was first introduced by the House of Lords in *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705, which established that liability for an act could be imposed on a company via the acts of its directors, because there is a rebuttable presumption that the directors are the controlling minds of a company. This principle was more fully explored in *Tesco Supermarkets Ltd v*

Nattrass [1971] UKHL 1, which held that the principle applies to actions of "the board of directors, the managing director, and [...] other superior officers who carry out functions of management and speak and act as the company". If the alleged wrongdoers are not board members or managing director, they must have "full discretion to act independently of instructions" for attribution to take place. This case is seen as the leading authority on attributing criminal liability to corporations.

The Argument for Reform

There have been very few successful prosecutions of companies for economic crimes, and the list grows smaller if one removes instances of a company pleading guilty before or during trial. The primary argument for reform is that it has proven difficult for prosecutors to establish guilt for large entities with devolved management structures. Conversely, it is much easier to attribute guilt to a small or medium-sized company with clear management roles (such as was more common when the principle was first introduced). A gap is therefore perceived in how the law applies.

Consider two cases that illustrate the problem. In December 2014, UK printing company Smith & Ouzman Ltd was convicted of overseas bribery offences after a contested trial. Two directors were also found guilty of making corrupt payments to overseas public officials during the period between 2006 and 2010 (before the Bribery Act came into force). Filings with Companies House state that there were 96 employees in 2010, the last year in which the offending occurred. The jury were satisfied that the identification principle was met with this company.

Compare this with the failed prosecution of Barclays Plc and Barclays Bank Plc (together, "Barclays") by the Serious Fraud Office ("SFO") for conspiracy to commit fraud by false representation and unlawful financial assistance. The charges were initially dismissed by the Crown Court in May 2018. The SFO subsequently applied to the High Court to reinstate the charges in July 2018, but the High Court ruled against the application after considering the identification doctrine in detail (*Serious Fraud Office v Barclays Plc & Anr* [2018] EWHC 3055 (QB)).

Several former executives and senior officers of Barclays — including the Group Chief Executive, and numerous senior heads and executives of other Barclays group businesses — were named in the proceedings as the "directing mind and will" behind the alleged misconduct. On the face of it, one might have assumed that their roles and seniority would have met the directing mind requirement. However, Lord Justice Davis considered the legal authorities on this matter and concluded that "there is no way" (which was accepted by the SFO) that the executives were the directing mind and will for all purposes of Barclays' business. The question was thus: "whether they (or any of them) were the directing mind and will of Barclays for the purpose of performing the particular function in question". This was not the case. Davis LJ concluded (at [122]): "That the individuals had some degree of autonomy is not enough. It had to be shown, if criminal culpability was capable of being attributed to Barclays, that they had entire autonomy to do the deal in question".

The *Barclays* case seems to have split the attribution test into two strands: the person(s) embodying the directing mind and will of a company must either have absolute decision making authority in all instances, or they must be the directing mind and will for performing the particular function in question. This is an incredibly high bar for prosecutors to meet. Critics of the current law say it does not provide enough of a deterrent for corporate wrongdoing, or even encourages senior managers, who might be considered the directing mind and will, to purposely ignore misconduct happening among the junior ranks.

Law Commission Consultation

In 2017, the Ministry of Justice published a Call for Evidence on Corporate Liability for Economic Crime, and undertook a detailed analysis of whether the identification doctrine was effective to enforce economic crimes against large modern companies. The Government's Response Paper, published in November 2020, stated that "the evidence submitted was inconclusive", and commissioned an expert review by the Law Commission. The Law Commission undertook its own consultation, with discussion papers available and responses sought between June and August 2021. It also held a number of events at which industry practitioners were invited to attend and engage in the debate (recordings of those events are available to the public).

The Law Commission's findings, expected in the coming weeks, are eagerly anticipated by businesses, practitioners, and law enforcement alike.

RECENT NEWS //

SFO Roundup: Investigation into individuals linked to Amec Foster Wheeler ended; three long-running investigations stopped

The SFO recently dropped its investigation into individuals linked with Amec Foster Wheeler Energy Ltd ("Amec"), in the wake of the company's deferred prosecution agreement ("DPA") entered into in July. An update to the SFO's public case file, published on 28 October, stated: "The SFO has informed those connected with the investigation that it will not be pursuing prosecutions against individuals". MLex reported a spokesperson for the SFO as saying: "There is a high bar for the SFO to charge individuals with a criminal offence. We close cases where it is not in the public interest for us to continue with our investigation". Slaughter and May partners Ewan Brown and Holly Ware acted for Amec in relation to its DPA.

The Serious Fraud Office announced the closure of three of its long-running investigations. In a brief statement issued on 14 October, the SFO announced that it had closed its criminal investigation into Speciality Steels, formerly a business unit of Tata Steel UK Ltd. Speciality Steels produces alloy and stainless steel products for the aerospace, oil and gas, and engineering industries. It was sold in 2017 to Liberty Steel, owned by Sanjeev Gupta's Gupta Family Group Alliance. According to a Liberty Steel spokesperson, "This was a historical investigation relating to a time period prior to Liberty owning the business. Nevertheless, Liberty cooperated fully with the SFO which has been acknowledged". The investigation into Speciality Steels is not connected to a more recent probe into GFG Alliance over alleged fraud and money laundering associated with the collapsed supply-chain business Greensill Capital. The former Speciality Steels investigation ran from April 2016 to October 2021, spanning five and a half years.
The SFO also closed the remainder of its investigation into Quindell Plc, now known as Watchstone Plc, over accounting practices. The investigation was opened in August 2015, after Quindell's 2014 accounts were published with substantial restatements of prior year revenues, profits, and net assets. Its 2013 profit after tax of £83 million should have been reported as a loss of £68 million, and net assets as at 31 December 2013 should have been £446 million, rather than the £668 million reported. Finally, the SFO also closed its investigations into Pinnacle Angelgate, North Point Pall Mall, and New Chinatown. These were joint investigations run with the North-West Regional Organised Crime Unit, into suspected fraud at three property developments in Manchester and Liverpool.

FCA Roundup: Credit Suisse settles US, UK "tuna bonds" investigations; Treasury Committee questions FCA about length of NatWest investigation; NatWest reserves £294 million to cover costs of money laundering breaches; analysis on firms' financial crime data (2017-2020) published

Credit Suisse has been fined $475 million to resolve US and UK investigations into the bank's involvement in the financing of projects in Mozambique that appear to have been tainted by corruption. The bank will pay £147 million to the Financial Conduct Authority ("FCA"), $99 million to the US Securities and Exchange Commission ("SEC"), and $175 million to the US Department of Justice ("DoJ"). The Swiss Financial Market Supervisory Authority ("FINMA") also found organisational shortcomings at Credit Suisse.

The House of Commons Treasury Committee published a letter sent by Chair Mel Stride to FCA Chief Executive Nikhil Rathi concerning the FCA's case against National Westminster Bank Plc ("NatWest"). Mr Stride explained that while he was pleased to see NatWest successfully prosecuted for money laundering offences, and praised the swiftness of resolving the criminal case after the prosecution commenced (7 months), he wanted to better understand why it took five years to investigate NatWest and bring proceedings. Mr Rathi stated that it would be inappropriate for the FCA to respond in detail while proceedings are ongoing. The FCA will be able to respond to the Committee's questions in full after NatWest's sentencing (see next item) once the statement of agreed facts is made public. NatWest Plc has set aside £294 million to pay the expected fine resulting from pleading guilty to money laundering violations on 7 October. The bank's Q3 results, published on 29 October, announced that it was reserving the sum to cover fines arising from breaching the Money Laundering Regulations 2007 and other matters. The lender pleaded guilty to criminal charges brought by the FCA, becoming the first bank in the country to face prosecution for money laundering offences. NatWest admitted three charges of failing to properly conduct ongoing monitoring of a customer account between November 2012 and June 2016. The FCA said at the hearing at Westminster Magistrates' Court that it seeks to impose a £340 million financial penalty. NatWest will be sentenced on 13 December at Southwark Crown Court.

Finally, the FCA published an analysis of firms' annual financial crime reporting submissions (made under REP-CRIM) for the period 2017-2020. Over this period, the FCA received 5,685 REP-CRIM submissions from over 2,300 firms. Key findings are as follows:

- Firms reported approximately 89,000 politically exposed persons ("PEPs") as customers in 2018-19 and 2019-20, down from approximately 111,000 in 2017-18;
- Retail banking firms reported approximately 390,000 high-risk customers in 2019-20. This is almost half the number of high-risk customers reported by all firms and reflects the sector's business models, which increase firms' exposure, and vulnerability, to being used for the purposes of money laundering;
- The number of suspicious activity reports made to the National Crime Agency increased from 394,048 in 2017-18 to 480,202 in 2019-20;
- The number of firms reporting automated sanctions screening is increasing year on year, with a 16.5% increase over the period 2017-20. The investment management sector has the highest number of firms that do not use automated screening; and
- A total of 761,437 customers were exited during the 2019-20 reporting period. This has more than doubled since 2017-18. The retail lending and banking sectors have exited the most customers for each of the three reporting periods.

The analysis is aimed at providing firm MLROs and industry practitioners with insights on trends and development.

ICIJ's "Pandora Papers" reveal offshore banking arrangements

The International Consortium of Investigative Journalists ("ICIJ") have revealed the offshore banking arrangements of individuals from more than 200 countries in a new data leak being called the "Pandora Papers". According to the ICIJ, "more than 330 politicians and 130 Forbes billionaires" are implicated, along with "celebrities, fraudsters, drug dealers, royal family members and leaders of religious groups around the world". The list of names include Conservative Party donor and businessman Mohamed Amersi. Amersi reportedly advised Swedish telecommunications business Telia Company AB on payments amounting to $220 million to an offshore company owned by Gulnara Karimova, daughter of the thenpresident of Uzbekistan. Telia resolved allegations that the payments were bribes in a $965 million settlement with the US, Dutch, and Swedish authorities in 2017. Sherrod Brown, US Senator for Ohio and chair of the Banking, Housing and Urban Affairs Committee, viewed the leaks as further evidence of why the US "Treasury must implement [legislative reform for corporate transparency and anti-money laundering measures] swiftly and completely, and continue to press to end offshore tax havens". Meanwhile, Transparency International UK has called for "New legislation that would unmask those who own property in Britain via offshore companies" to be tabled before Christmas. The campaign group "has been calling on the Financial Action Task Force to require public, central registers of company owners in all countries". It argues that this "would also prevent jurisdiction-shopping seen in the new reports". Transparency International also wants anti-money laundering obligations to be extended to "private sector intermediaries such as corporate service providers, and that supervisory authorities are well-equipped to keep them in check". Finally, it believes "law enforcement action should extend not only to individuals named in the Pandora Papers, but also the corporate service providers over their role in facilitating corruption and financial crime".

France's anti-corruption agency sets out bribery prevention guide

France's anti-corruption agency, the Agence Française Anticorruption ("AFA"), has published a guide for small and medium companies to help them implement measures to prevent bribery. The document, available in French, is designed to help the companies navigate the pitfalls of putting in place anti-corruption measures.

Law Society and CLLS respond to economic crime levy

The Law Society and the City of London Law Society ("CLLS") have published a joint response to the government's plan to impose an economic crime levy outlined in the 2019 economic crime plan. The levy seeks to raise £100 million from the anti-money laundering regulated sector, with the first charges taking place from 1 April 2022 to 31 March 2023. Both the Law Society and CLLS oppose the levy, calling it a tax on the regulated sector, who are already part of the fight against economic crime. This opposition notwithstanding, both entities have pledged to hold the government to account and ensure the legal sector's views are given weight in designing relevant policies, procedures and systems in relation to fighting financial crime.

OFSI publishes 2020/2021 Annual Review

The Office of Financial Sanctions Implementation ("OFSI") published its annual review for the financial year 2020-2021. It had an active year under director Giles Thomson, appointed in November 2020, largely as a result from the implementation of the autonomous sanctions regime after the Brexit transition period ended on 31 December 2020. OFSI added 278 new designated persons to the consolidated list, 159 of which implemented EU and UN legislation before the end of the transition period. New designations under the Sanctions and Anti-Money Laundering Act 2018 rose by 224% to 119 as of March 2021. As of September 2020, UK institutions held approximately £12.2 billion worth of frozen financial assets, including £11.53 billion held under the Libyan regulations. OFSI considered 132 reports of potential sanctions breaches, a slight decrease from the 2019/2020 period of 140 instances. Most reported breaches still originate from the banking and financial service sectors, but an increasing proportion are coming from other sectors, including legal, charity, insurance, media professional services, real estate, travel and telecommunications. OFSI updated its Monetary Penalty Guidance for sanctions breaches in April 2021, which applies to cases reported to OFSI after 1 April 2021. OFSI declined to report the total value of potential breaches reported during this period, stating that "the total value of potential breaches reported can be disproportionately affected by a small number of transactions with a large value, which can also end up being deemed not to be financial sanctions breaches".

ICO publishes updated guidance on statutory data sharing

The Information Commissioner's Office published an updated code of practice on statutory data sharing, which came into force on 5 October 2021. The code provides practical guidance for organisations on how to share personal data in compliance with the requirements of the UK GDPR and Data Protection Act 2018, including transparency, the lawful basis for processing, the accountability principle, and the need to document processing requirements. The new code replaces the prior code, published in 2011. Failure to act in accordance with the code does not make a person liable to legal proceedings, but the code is admissible in evidence in legal proceedings.

CPS secures €34 million cash forfeiture

The Crown Prosecution Service ("CPS") has secured a €34 million cash forfeiture from Du Toit & Co LLP ("Du Toit"), a South African law firm operating from UK offices, and Xiperias Ltd ("Xiperias"), a Cypriot registered company. The CPS assisted the City of London Police ("COLP") in obtaining account freezing orders on the two accounts on 16 June 2020. The investigation involved working with Europol, foreign law agencies, and stakeholders from the private sector. The investigation identified overwhelming evidence that the monies were unlawfully obtained from international money laundering and layered through the UK banking system to present a veneer of legitimacy. The CPS applied for account forfeitures at Westminster Magistrates' Court, which were granted by consent from the account holders on 22 October 2021. Du Toit and Xiperias agreed that over €34 million in the two bank accounts were the proceeds of unlawful conduct by others, of which they had neither knowledge nor suspicion. The case marks the first time that the CPS has used powers under the Proceeds of Crime Act 2002 to appeal in court on behalf of the police in an account forfeiture order.

UK Finance publishes report on the definition of public officials

UK Finance published a report aimed at practically establishing an operational definition of who amounts to a "public official" for the purpose of anti-bribery and corruption compliance. The report acknowledges that the definition of "public official" can be confusing, owing to differences between national legislation and guidance (including the Ministry of Justice's guidance on the Bribery Act 2010) and international legislation. UK Finance has developed key criteria for whether an individual is an employee or official of a relevant body, whether an origination is a relevant body, and whether a relevant body is effectively owned or controlled by the government.

European Commission plans increase in dawn raids and "new era of cartel enforcement"

On 12 October 2021, the European Commission confirmed that it had conducted dawn raids of companies active in the wood pulp sector at premises in several EU Member States. The Commission reported that the inspections were carried out in response to concerns that the companies in question may be in breach of Article 101 TFEU. The Commission carried out the inspections alongside its counterparts from the relevant national competition authorities. Several companies subsequently confirmed that they were raided, including Mercer International, Metsä Fibre, Stora Enso and UPM-Kymmene. Less than two weeks later, Executive Vice-President Margrethe Vestager announced that the Commission was planning a "series of raids" in the coming months to usher in a "new era of cartel enforcement". Two days later on 25 October, the Commission confirmed that it had carried out a further raid at the premises of a pharmaceutical company active in animal health in Belgium. The Commission explained that the inspection was carried out in response to concerns that the company in question may have infringed the EU antitrust rules that prohibit the abuse of a dominant position. These raids are the second and third publicly announced inspections conducted by the Commission in almost two and a half years. The last raid was announced on 22 June 2021 when the Commission confirmed it had performed unannounced inspections at the German premises of a clothing manufacturer and distributor. Before the pandemic, the Commission conducted an average of four unannounced inspections each year dating back to 2011. These new raids signal that the Commission is beginning to resume its pre-pandemic activity.

US DoJ announces shift in white-collar enforcement guidelines; SEC guidelines remain unchanged

The Deputy Attorney General of the US Department of Justice ("DoJ") spoke of a shift in policy whereby companies facing white collar enforcement actions will face much tougher conditions to settle. Speaking at the 36th Annual National Institute of White Collar Crime in Miami, Lisa Monaco said several relatively lenient Trump administration-era policies would be overturned as a "first step". "Companies need to actively review their compliance programs to ensure they adequately monitor for and remediate misconduct," she said, "or else it's going to cost them down the line." Monaco outlined three pillars to her policy changes. First, companies that want cooperation credit for misconduct must turn in all involved employees to prosecutors. Second, the DoJ will now consider a company's entire record — including whether it has faced previous domestic or foreign enforcement actions — when negotiating a settlement. 20% of major corporate criminal resolutions involve companies that have previously settled with the DoJ over criminal conduct. Third, companies cannot expect a presumption against the use of independent monitors. Monaco said the DoJ will also reconsider whether companies involved in past misconduct will be eligible for non-prosecution agreements ("NPAs") and deferred prosecution agreements ("DPAs"), but stopped short of promising policy reform in this area.

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Look out for:

19 November 2021: Consultation closure for planned reform of UK data protection laws, launched by the Department for Digital, Culture, Media and Sports.

By end of 2021: Law Commission to publish its report on suggested reform of corporate criminal liability laws.

If you have questions or would like to discuss any of the above content, please contact Jonathan Cotton, Ewan Brown, or Anna Lambourn.