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GLOBAL INVESTIGATIONS BULLETIN

April 2021

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The Practitioner's Guide to Global Investigations - "Beginning an Internal Investigation"

Jonathan Cotton, Holly Ware and Ella Williams have co-written a chapter in the fifth edition of the Global Investigation Review's Guide to Global Investigations, the premier practitioner-led guide. The authors focus on the key factors relevant to a company's decision whether, when, and how to launch an internal investigation, highlighting the key considerations in conducting the early stages of an investigation. You can download a copy of the chapter via our website [here](#), and the whole publication is available on the GIR website [here](#).

2021 Investigations and Enforcement Outlook: podcast series

On 4 March, we published the [third and final episode](#) of our 2021 Investigations and Enforcement Outlook podcast series. In this episode, Jonathan Cotton, Sir David Green and Holly Ware discuss the criminal investigations and enforcement outlook for 2021. In particular they look at recent activities with the Serious Fraud Office (SFO), possible changes to the corporate criminal liability regime, the impact of Brexit, and other likely international developments.

In case you missed it, the [first episode](#) and the [second episode](#), discussing GDPR enforcement and follow on civil litigation, and financial services investigations and enforcement activity, are also available on our [podcast webpage](#).

For further information on any of the above, please contact [Anna Lambourn](#).

FCA INITIATES CRIMINAL PROCEEDINGS AGAINST NATWEST UNDER MLR 2007 //

The UK's Financial Conduct Authority ("FCA") announced on 16 March 2021 that it had begun criminal proceedings against National Westminster Bank Plc ("NatWest") for breaches of the Money Laundering Regulations 2007 ("MLR 2007"). This is the first time that the FCA has used these powers, and the first time a bank has been prosecuted under the MLR 2007. This month's Bulletin examines the FCA's decision to prosecute using these powers, the allegations facing NatWest, and possible penalties.

Background

The MLR 2007 came into force on 15 December 2007, substantially implementing Directive 2005/60/EC and aimed at preventing the use of the UK’s financial system for the purpose of money laundering and terrorist financing. The MLR 2007 are currently no longer in force, having been revoked and replaced by the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (“MLR 2017”). However, the MLR 2007 may still be enforced for conduct occurring before their date of revocation (26 June 2017).

The MLR 2007 impose duties on relevant parties, including financial institutions, to: undertake customer due diligence; conduct ongoing monitoring of business relationships; retain certain and specified records; make suspicious activity reports if money laundering or terrorist financing is suspected; train employees on money laundering and terrorist financing offences; and establish and maintain policies and procedures to prevent money laundering and terrorist financing. These systems and controls-based offences are to be contrasted with the primary money laundering offences (of concealing, entering into arrangements involving, and acquiring, criminal property) set out in the Proceeds of Crime Act 2002 (“POCA”).

The MLR 2007 can be enforced through either civil or criminal proceedings under regulations 42 and 45 respectively. Historically, the FCA has favoured bringing civil regulatory actions against firms for MLR 2007 breaches rather than criminal proceedings, as follows:

	Year of Fine	Fine
Habib Bank AG	2012	£525,000
Turkish Bank	2012	£294,000
EFG	2013	£4,200,000
Guaranty Trust Bank	2013	£525,000
Standard Bank	2014	£7,640,400
Deutsche Bank	2017	£163,076,224
Canera Bank	2018	£896,100
Standard Chartered Bank	2019	£102,163,200
Commerzbank	2020	£37,805,400
Total		£317,125,324

When the FCA takes civil regulatory action for a breach of the MLR 2007, its practice when applying financial penalties is to apply the standard 5-step calculation process taken in other enforcement cases.

Charges against NatWest

The announcement that NatWest will be criminally prosecuted for MLR 2007 breaches is significant, but not entirely unexpected. The FCA has repeatedly made clear that it was prepared to use its prosecutorial powers for what it considers to be serious breaches of MLR 2007 (and its successor regulations) and that anti-money laundering (“AML”) is a priority area. In this regard, it has been reported that a number of twin-track AML investigations (in which the FCA leaves open the possibility during its investigation of using either its criminal prosecution or regulatory enforcement powers) have been on foot for some time.

The [press release](#) issued by the FCA alleges that NatWest failed to adhere to the requirements of regulations 8(1), 8(3) and 14(1) of the MLR 2007. These regulations require a firm to determine, conduct, and demonstrate risk-based due diligence, including in some cases enhanced due diligence, and ongoing monitoring, in order to prevent money laundering.

In particular, it is alleged that NatWest's systems and controls failed to monitor adequately and scrutinise increasingly large deposits into a customer account, amounting to £365 million (£264 million of which was in cash) between 11 November 2011 and 19 October 2016. The customer is identified by the FCA only as a UK-incorporated company.

NatWest has been scheduled to appear at Westminster Magistrates' Court on 14 April 2021. The FCA confirmed that no individuals are being charged in connection with these proceedings.

Criminal prosecutions under the MLR 2007 & available penalties

This is the first time a regulated firm has been prosecuted by the FCA under the MLR 2007 for AML systems and controls failings.

[Regulation 45\(1\)](#) of the MLR 2007 provides a list of regulations that, if breached, amount to a criminal offence. Notably, there is no requirement under MLR 2007 for the prosecutor to prove that systems and controls failures resulted in money laundering actually occurring: the regulations are breached by the systems and controls failures themselves.

The offence may be triable either way (summarily or on indictment, with the latter reserved for more serious cases). If convicted summarily, the court may impose an unlimited fine. If convicted on indictment (before a jury), the court may impose an unlimited fine and/or a term of imprisonment not exceeding two years (imprisonment would not apply to a corporate). A statutory defence is available ([regulation 45\(4\)](#)) where it can be shown that the defendant "took all reasonable steps and exercised all due diligence to avoid committing the offence."

If an offence under regulation 45 is committed by a corporate with the consent or connivance of an officer of the offending company, or as a result of any neglect on their part, that officer will also be guilty of an offence and liable to be prosecuted. For these purposes, an "officer" is any director, manager, secretary, chief executive, member of the management committee, or any person purporting to act in such a capacity.

RECENT NEWS //

SFO round-up: investigation into UK subsidiaries of KBR Inc. closed; Former SBM Offshore exec sentenced in Unaoil bribery case

The Serious Fraud Office (SFO) [announced](#) on 18 March 2021 that it has closed its investigation into the activities of KBR Inc.'s UK subsidiaries, their officers, employees and agents. The SFO said in their statement that, "following a thorough investigation of the available evidence," the evidence in this case did not meet the evidential test as defined in the Code for Crown Prosecutors, which specifies that the evidence must support a realistic prospect of conviction and that the prosecution must be in the public interest. The SFO opened an investigation into KBR Inc's UK subsidiaries in 2017, as part of its investigation into the activities of Unaoil.

On 1 March 2021, following his conviction on [24 February 2021](#) of two counts of conspiracy to give corrupt payments, Paul Bond, former senior sales manager at SBM Offshore (SBM), was [sentenced](#) to three and a half years' imprisonment. This is the fourth conviction in the SFO's Unaoil bribery investigation which discovered the payment of over \$17m worth of bribes to obtain \$1.7bn worth of contracts for Unaoil and its clients. Bond conspired with Unaoil employees and bribed Iraqi public officials at state-owned South Oil Company (SOC) and the Ministry of Oil with \$900,000, to gain entry to sensitive information which allowed SMB to win a \$55m contract for the provision of installing single offshore mooring buoys (SPMs) in the Persian Gulf.

Proposed UK corporate-liability reform creates "complications," government adviser says

On 3 March, Joanna Penn, a Conservative member of the House of Lords, [told the House](#) that lawmakers' proposals to create a new criminal offence for corporate bodies or partnerships of facilitating, and of failing to prevent, economic or financial crime, would require strong evidence to support it before it is introduced. "A new offence will also need to be designed rigorously with specific consideration given to how it sits alongside associated criminal and regulatory regimes and to the potential impact on business. Unlike with bribery and tax evasion, there are already extensive regimes, both criminal and regulatory, to hold both individuals and corporates to account for money laundering," Penn said. Commenting on the possible complications of a new "failure to prevent" offence, Penn also noted that "[w]ider economic crime offences present more complications. Fraud, for example, covers a much wider range of activity and business areas. The complexity of a broader economic crime offence is why the Government want to await the conclusions of the Law Commission's review."

CMA launches Apple App Store investigation

On 4 March 2021, the Competition and Markets Authority (CMA) [announced](#) that it has opened an abuse of dominance investigation into Apple following complaints that the terms and conditions for app developers are unfair and anti-competitive. The Apple App Store (App Store) is the only means by which app developers are able to distribute their apps on Apple products such as the iPhone or iPad. All apps distributed via the App Store must first be approved by Apple, with such approval requiring the developer to agree to Apple's terms and conditions. Developers have recently alleged that such terms and conditions are unfair and anti-competitive. In particular, the complaints focus on the fact that the App Store is the exclusive means for developers to distribute their apps to Apple product users and that app sales and in-app purchases must be made through Apple's payment system, for which Apple charges up to 30% commission. The CMA's investigation will firstly consider whether Apple has a dominant position in connection with the distribution of apps on Apple devices in the UK and secondly, whether Apple imposes unfair and anti-competitive terms on its developers, resulting in end-users having less choice or suffering higher prices. The CMA has indicated that it will take until September to gather evidence and request information. There are currently three additional open antitrust investigations into Apple's App Store before the European Commission. More information can be found on the CMA's [Investigation into Apple App Store casepage](#).

Mark Steward discusses the FCA's work in tackling market abuse

The FCA has [published a speech](#) delivered by Mark Steward, Executive Director of Enforcement and Market Oversight, on the levels of market abuse during 2020 and the steps the FCA has taken to reduce it. Points made by Steward include:

- the FCA saw a 34% increase in transactions and transaction reports in 2020, largely due to heavier trading between March - June 2020 as investors adjusted to the impact of COVID-19;
- the FCA saw a reduction in suspicious transaction and order reports (STORs) over the same period, potentially attributable to the regulator's recent surveillance and investigation work which has reduced the number of trades requiring a STOR. STOR levels have now returned to expected levels;
- the FCA's introduction of a new approach to short selling reporting that enables short positions to be reported on its Electronic Submission System (ESS) has speeded up validation and introduced automated alerts that facilitate more readily the identification of delayed notifications and other issues. The regulator intends to roll this out for long position reporting as well; and
- the FCA's introduction of a new market cleanliness measure in September 2020, the potentially anomalous trading ratio (PATR) focuses on the underlying trading behaviour of price sensitive announcements and whether such behaviours can be

Steward also provided information on key recent enforcement cases including: (i) market abuse proceedings against former hedge fund manager, Corvado Abbatista, which resulted in a £100,000 fine; (ii) proceedings against Hong Kong-based hedge fund, Asisa Research and Capital Management Ltd, resulting in a £873,000 fine for regulatory notification and market disclosure failures; and (iii) the public censure of Redcentric, the IT systems provider, and the requirement to provide investor compensation totalling £11.4m in relation to false and misleading statements about the company's financial position.

FCA publishes webpage on enforcement fines

The FCA also [published a webpage](#) with details of enforcement fines imposed during 2021. So far, one fine has been imposed on Adrian Horn (along with a Prohibition) under a Final Notice which refers to breaches of the FCA Handbook, Market Conduct (MAR) and the Fit and Proper test for Employees and Senior Personnel (FIT), amounting to £52,500.

HMT and OFSI publish updated guidance on monetary penalties for breaches of financial sanctions

HM Treasury (HMT) and its Office of Financial Sanctions Implementation (OFSI) have [published updated guidance on monetary penalties for breaches of financial sanctions](#). Coming into force on 1 April 2021, it describes OFSI's processes and considerations in relation to the case assessment process, the penalty calculation process, and procedural rights. The guidance provides an explanation of the powers given to the Treasury in the Policing and Crime Act 2017, and a summary of OFSI's compliance and enforcement approach. It includes an overview of how OFSI will assess whether to apply a monetary penalty and what factors it will take into account. The guidance also includes an overview of the process that will determine the level of penalty and an explanation of how OFSI will impose the penalty, including timescales at each stage and rights of review and appeal. The [current monetary penalty guidance](#) will continue to apply until the updated guidance comes into force.

TRACE Releases 11th Annual Global Enforcement Report

Anticorruption research group and consultancy TRACE International [announced](#) on 9 March the findings of the 2020 Global Enforcement Report, noting that the pace of global transnational anti-bribery enforcement held steady in 2020. The report, TRACE's 11th annual compilation, provides anti-bribery enforcement data from 2020 and summarizes 44 years of anti-bribery enforcement activity. Although U.S. Foreign Corrupt Practices Act (FCPA) resolutions resulted in a record-setting total dollar amount of fines and penalties in 2020, the number of U.S. enforcement actions dropped 29% when compared with 2019. Non-U.S. foreign bribery enforcement actions held steady compared to 2019, and there was a slight increase in investigations by enforcement authorities globally into alleged bribery of domestic officials by foreign companies. "The fact that more countries are opening more investigations into possible transnational bribery occurring within their own borders is a promising sign that enforcement authorities globally are building investigative capacity and taking anti-corruption seriously," TRACE President Alexandra Wrage said. "We expect that this momentum toward accountability will only increase as a result of the ongoing global health crisis. Enforcement authorities have repeatedly emphasized that the pandemic isn't an excuse for lapses in anti-corruption compliance." Companies in the extractive industries face the most open investigations and enforcement actions globally again in 2020. Engineering/construction is currently the second-most investigated sector outside of the United States, and financial services is the second-most investigated sector within the United States.

Wood Group resolves Scottish Unaoil case

The Crown Office and Procurator Fiscal Service (COPFS) in Scotland [announced](#) on 16 March that Wood Group has resolved its open bribery investigation. The Civil Recovery Unit will recover £6.46 million under Proceeds of Crime legislation after WGPSN admitted one of its subsidiaries, PSNA Limited, had benefitted from payments made to Unaoil to secure contracts in Kazakhstan. WGPSN's ultimate holding company is John Wood Group PLC (Wood). The payments to Unaoil were made in connection with three contract tenders, two of which were successful, to provide services for the operation and maintenance of onshore and offshore oil and gas, chemical and petrochemical facilities in Kazakhstan. The successful contracts were entered into in 2008 and 2010 by a joint venture in which PSNA Limited held an interest. Wood conducted an internal investigation and, in May 2017, the results of the investigation were submitted to the COPFS. WGPSN went on to submit a formal report under the self-reporting initiative in September 2019.

Covert Human Intelligence Sources (Criminal Conduct) Act 2021 received Royal Assent

The [Covert Human Intelligence Sources \(Criminal Conduct\) Act 2021](#) (the Act) has received Royal Assent and will enter fully into force on such diverse days as the Secretary of State may appoint. The Act amends the Regulation of Investigatory Powers Act 2000 and provides an express power to authorise a covert human intelligence source to participate in conduct which would otherwise constitute a criminal

offence. These criminal conduct authorisations (CCAs) must be necessary, proportionate and compatible with obligations under the European Convention on Human Rights. The Act requires the Investigatory Powers Commissioner to keep under review public authorities' use of the power and to include limited information on CCAs in their annual report. The public authorities able to authorise the use of covert human intelligence sources are the intelligence agencies, the police, HMRC, HM Forces, the SFO, the Environment Agency, the FCA, the Food Standards Agency, the Gambling Commission, the Home Office, the Ministry of Justice, the Department of Health and Social Care, the National Crime Agency and the Competition and Market Authority.

High Court decides to stay proceedings in enforcement case

In *R (T and another) v Financial Conduct Authority [2021] EWHC 396 (Admin)*, the claimants issued a judicial review to challenge a decision by the FCA's Regulatory Decisions Committee (RDC) not to stay the regulatory proceedings against the first claimant. The FCA is currently progressing enforcement cases relating to international dividend arbitrage trading schemes, and the first of the two claimants in the judicial review is subject to such enforcement proceedings. The claimants wanted to stay the RDC proceedings pending the outcome of civil proceedings in the Commercial Court brought by the Danish Customs and Tax Administration, Skatteforvaltningen (SKAT), against various defendants, including the second claimant in the judicial review. The first claimant is not a party to the SKAT claims. However part of SKAT's case against the second claimant is that the 'knowledge, acts and intentions' of the first claimant should be attributed to the second claimant as the first claimant was the sole shareholder in and director of the second claimant. Swift J held that the risk of serious prejudice to the first claimant without a stay of the RDC proceedings outweighs other public interest considerations as they arise in the circumstances of the case. Therefore the RDC proceedings should be stayed pending the judgment of the Commercial Court on certain preliminary issues (scheduled for between October and December 2021). The FCA's request for permission to appeal was refused, so they are seeking permission from the Court of Appeal.

FCA launches campaign to encourage whistleblowing

The FCA has [launched](#) a campaign encouraging individuals working in financial services to report potential wrongdoing to the FCA and reminding them of the confidentiality processes in place. As part of the campaign, the FCA has published materials for firms to share with employees, as well as using its events to highlight the campaign. The FCA has also produced a digital toolkit for industry bodies, consumer groups and whistleblowing groups to encourage individuals to have confidence to step forward. Whistleblowers who report to the FCA will have a dedicated case manager. They can meet with the FCA to discuss their concerns and can receive optional regular updates throughout the investigation. The FCA says it will review every report it receives and protect individual whistleblowers' identities. Mark Steward, Executive Director of Enforcement and Market Oversight at the FCA said: "We listen to all whistleblowers and, if they shine a light on serious misconduct, we want to make sure we act responsibly. When whistleblowing works well it helps consumers, markets and firms and keeps everyone safe and that is our aim."

TPR launches consultation on newly published policy on use of criminal powers

The Pensions Regulator (TPR) has [launched a consultation](#) on a newly published draft policy on how it would use new criminal powers to investigate and prosecute those who avoid employer's debt to pension schemes or those who put savers' pensions at risk. TPR has published the [draft policy](#) as well as a [consultation](#) on how it plans to use these criminal powers, afforded to TPR by the Pensions Schemes Act (PSA) 2021. The PSA 2021 introduces two new criminal offences: the offence of avoidance of employer debt, and the offence of conduct risking accrued scheme benefits. These offences are expected to be in force by Autumn 2021. The consultation will be open for six weeks and will close on 22 April 2021.

DWP opens consultation into strengthening The Pensions Regulator's powers

The Department for Work and Pensions (DWP) has [opened a consultation](#) on the proposed drafting of two regulations which would strengthen the powers of The Pensions Regulator's to issue contribution notices and gather information, following changes introduced by the Pension Schemes Act 2021. The deadline for responding is 5.30 pm on 29 April 2021. The two regulations consulted on, which are expected to come into force in October 2021, are: [The Pensions Regulator \(Contribution Notices\) \(Amendment\) Regulations 2021](#) and [The Pensions Regulator \(Information Gathering Powers and](#)

Horizon Scanning

Look out for:

14 April 2021: NatWest is scheduled to appear at Westminster Magistrates' Court in relation to FCA's criminal proceedings against it in respect of offences under the MLR 2017.

Consultation closure: TPR's consultation on its draft policy regarding new criminal powers (mentioned above) closes on 22 April 2021.

Consultation closure: DWP's consultation on the proposed drafting of two regulations which would strengthen the powers of The Pensions Regulator's to issue contribution notices and gather information (mentioned above) closes on 29 April 2021.