

April 2023

Failure to Prevent Fraud

Recent News

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GROUP NEWS //

Rankings: We are pleased to retain our place in the GIR 100 list published in February 2023, with a profile referring to our “stellar global investigations practice” as “one of the UK’s best investigations practices [acting on] some of the world’s most high-profile matters of 2022.”

NEW ‘FAILURE TO PREVENT’ FRAUD OFFENCE - WHERE ARE WE AND WHAT'S NEXT? //

In February the government confirmed its intention to introduce a new corporate criminal offence of ‘failing to prevent’ fraud and potentially other misconduct. The new offence will be introduced by way of amendment to the Economic Crime and Corporate Transparency Bill, which is making its way through Parliament and is currently at Committee Stage in the House of Lords.

Although understanding the precise contours of the new offence will be key, this long-heralded reform may prove to be one of the most significant developments in economic crime in recent years, obligating firms to examine and reassess their existing anti-fraud procedures to ensure they are compliant with the new legislation. Corporates and commercial organisations should monitor the progress of the Bill closely and prepare for it coming into force.

What will the new offence look like?

Whilst much of the detail is still unknown, it is generally expected that a corporate which fails to prevent fraud by an ‘associated person’ will be committing an offence. A corporate may have a defence, however, if it can show it had put in place reasonable procedures to prevent fraud, or that it was not reasonable for such procedures to be in place.

Where are we?

The Bill is currently going through the House of Lords Committee stage. This stage commenced on 27 March and is expected to run for a few weeks. During this stage the committee will carry out a detailed, line-by-line examination of the Bill and consider any amendments. It is expected that fuller details on the new offence will be published and debated during this stage.

Key questions for debate

Numerous questions are still open for debate on the parameters of the offence and how it will be formulated. These include:

- (1) Whether it will be limited to the ‘core fraud offences’ identified by the Law Commission in its June 2022 [Options Paper](#). These were:
 - fraud by false representation
 - obtaining services dishonestly
 - cheating the public revenue
 - false accounting
 - fraudulent trading
 - dishonest representation for obtaining benefits and
 - fraudulent evasion of excise duty.
- (2) The possibility that the offence will include the failure to prevent money laundering.
- (3) Whether the offence will include failure to prevent the facilitation of fraud (similar to the failure to prevent the facilitation of tax evasion under the Criminal Finances Act 2017).
- (4) The introduction of a possible exemption for small companies.
- (5) The extraterritorial reach of the offence.
- (6) The inclusion and formulation of a requirement that the base offence, committed by an associated person, was done with the intention to benefit the company (referred to as the ‘benefit safeguard’).

We will publish more on this topic as the Bill moves towards royal assent and the parameters of the new offence become more clearly defined.

RECENT NEWS //

All change at UK enforcement agencies

The CPS, SFO and FCA will all see new leadership in 2023, as Max Hill KC, Director of Public Prosecutions (DPP) became the latest enforcement official to announce his intention to depart. Hill made the announcement on 21 March, confirming that he will step down as DPP in November 2023, after five years in the role. The current Director of the SFO Lisa Osofsky has also confirmed that she will step down when her tenure expires this summer. The search for her replacement formally commenced on 24 March when the Attorney General posted an [advertisement](#) for the role, confirming that applications are now open.

There have been concerns about delays in the recruitment process to find Osofsky's replacement. Osofsky has confirmed she is willing to remain in the position for a short period beyond August, until a successor is appointed.

On 23 March, the FCA [announced](#) that it has appointed Therese Chambers and Steve Smart as new joint heads of Enforcement and Market Oversight. Chambers and Smart will take over from the current head of enforcement, Mark Steward, when he departs this summer. Chambers is currently the FCA's director of consumer investments and Smart will join from the National Crime Agency (NCA) where he is currently acting as director of intelligence. The FCA said the appointment will support the FCA's "ongoing transformation to become a more assertive, more adaptive and more innovative regulator."

SFO update: SFO seizes over \$7 million from former Petrobras executive; Individual pleads guilty in first DPA related conviction; SFO drops case against former G4S executives; Airbus successfully completes DPA

The SFO [announced](#) on 17 March that it had recovered over \$7 million from the London bank account of former Petrobras executive Mario Ildeu de Miranda, in a case which stems from the Brazilian bribery and corruption scheme known as 'Operation Car Wash'. This is the largest amount seized by the SFO from a single bank account and demonstrates the SFO's increasing use of account freezing orders. The order follows a one-week trial in February 2023 where the SFO claimed that Miranda's funds were profits from a sham consulting business used to bribe Petrobras officials. Miranda was convicted of 37 counts of money laundering in Brazil in 2019 as part of 'Operation Car Wash'.

The SFO [agreed deferred prosecution agreements \(DPAs\) in July 2021](#) with two UK companies in connection with bribery offences under sections 1 and 7 of the Bribery Act 2010. The companies agreed to pay a total amount of £2,510,065 for both disgorgement of profits and financial penalties. The DPAs were originally subject to reporting restrictions, whilst investigations into individuals for related misconduct continued. The SFO has now identified the companies as Bluu Solutions Limited and Tetrus Projects Limited, subsidiaries of Jones Lang LaSalle. At the time, they were the eleventh and twelfth DPAs secured by the SFO. Nearly a year after the DPAs, project manager Roger Dewhurst [pleaded guilty](#) to two related counts of accepting or agreeing to receive bribes. This is the first time, since the introduction of DPAs eight years ago, that the SFO has been successful in securing an individual conviction or plea in an investigation where the corporate has agreed to a DPA.

In contrast to the successful conviction of Mr Dewhurst, on 10 March 2023 the SFO [abandoned its prosecution](#) of three former executives at private security company G4S. The executives had been [charged with seven offences of fraud](#) relating to alleged false representations made to the Ministry of Justice between 2009 and 2012, in connection with a prisoner tagging contract. A G4S subsidiary had agreed a DPA with the SFO in respect of the same conduct which was approved by the court in July 2020. The SFO informed the court hearing the individual prosecutions that it was "no longer in the public interest" to proceed with the case against the executives, in part because it was unable to resolve outstanding disclosure issues within a reasonable time frame. The SFO has now been unsuccessful in 18 out of 19 attempts to prosecute individuals after agreeing DPAs, highlighting the continued difficulty in securing convictions in these cases. This case is redolent of the SFO's ongoing difficulties in respect of disclosure, as highlighted in the Calvert Smith and Altman reviews published last year.

Airbus's three-year deferred prosecution agreement with the SFO has come to a [close](#) and the SFO has confirmed it has discontinued its prosecution against the aircraft manufacturer. The DPA, which was agreed in January 2020, was part of a landmark coordinated settlement with authorities in the UK, US and France. As part of the settlement Airbus paid over \$3 billion in total to the authorities in connection with bribery and corruption offences. Airbus has now successfully completed the terms of its DPA, which included being subject to the monitorship of the French Anti-corruption Agency (AFA) for three years.

Glencore sentenced by New York Court

Glencore International A.G. was sentenced on 28 February in connection with the [plea agreement](#) it entered into in May 2022 with the DOJ whereby the company agreed to plead guilty to bribery offences contrary to the US Foreign Corrupt Practices Act (FCPA). The plea agreement was part of coordinated resolutions with authorities in the UK, US and Brazil. The company was ordered to serve five years' probation and to pay over \$700 million in fines and forfeiture as agreed with the DOJ.

As agreed in its plea agreement, the company has now installed independent legal monitors to oversee its internal conduct for three years. The legal monitors have the power to carry out interviews, request information and documents and attend meetings, with a view to evaluating Glencore's compliance programme and internal controls.

FCA Update: FCA opens enforcement investigation into LME; FCA publishes Supervisory Notices; Statement of Objections from FCA to money-transfer firms

On 3 March, the FCA announced that it had opened an enforcement investigation into the London Metal Exchange (LME) following its decision to suspend nickel trading last year. The exchange cancelled almost £4 billion in transactions following market volatility in the wake of Russia's invasion of Ukraine. The investigation into the LME by the FCA's enforcement division is the first public action of its kind targeting a UK exchange. The investigation will focus on the LME's conduct and its systems and controls in the period between 1 January and 8 March 2022 (when trading was suspended). Please see our [Financial Regulation Weekly Bulletin](#) for more on this.

The FCA has [published two Supervisory Notices](#) addressed to Abbey Lane Financial Associates Limited (Abbey Lane) and Estate Capital Financial Management Limited (Estate Capital) in relation to unsolicited settlement offers to former members of the British Steel Pension Scheme (BSPS). The members are likely to be part of the redress scheme that the FCA has established. This [follows the FCA's warning on 7 February 2023](#) to advisory firms to stop making unsolicited settlement offers to former BSPS members. Under the redress scheme, relevant firms will have to review the advice they gave and pay redress to those who lost money because the advice was unsuitable. The FCA has raised concerns that these unsolicited settlement offers, which are likely to be for less money than entitlements under the redress scheme, are a deliberate attempt to exclude former BSPS members from the redress scheme. The FCA has now formally required these two firms to stop making these offers. Abbey Lane and Estate Capital made offers to over 80% of their former members which the FCA considers misaligned with the average calculated redress. The firms will be required to apply the redress scheme to consumers who have accepted these offers in the same way as they must for consumers who have not accepted offers.

The FCA [announced](#) that it has sent a Statement of Objections to three Glasgow-based money-transfer companies alleging that these companies colluded to fix exchange rates offered to consumers for converting UK Pounds into Pakistani Rupees and to set the flat rate transaction fee which customers were charged for sending money to Pakistan. The companies now have the opportunity to respond to the Statement of Objections through written and oral representations. The FCA has had the power to enforce competition law in the regulated financial services sector alongside the CMA since 2015. To date it has only publicly announced that it has sent one other Statement of Objections. That investigation led to the FCA, in 2019, [issuing fines against two asset management groups](#) for sharing strategic information during a placing and an IPO. The new Statement of Objections signals that the FCA will continue to monitor firms for competition law compliance.

ICO updates: Experian partly wins appeal against ICO; ICO fines It's Ok for nuisance calls

Credit reference agency Experian has had an ICO enforcement notice largely [overturned by the First Tier Tribunal](#). The ICO issued an [enforcement notice](#) to Experian in October 2020 alleging that how Experian processed personal data in relation to offline marketing services breached [Article 5](#) and [Chapter 3](#) of the GDPR. The Tribunal found that Experian did breach the GDPR by failing to send a privacy notice to approximately 5.3 million people, but the Tribunal declined to order Experian to notify that group now, saying that forcing it to identify and contact them would be disproportionate. The Tribunal criticised the ICO saying that it “got the balance wrong in terms of proportionality” as it had “fundamentally misunderstood the actual outcomes of Experian’s processing.”

The ICO issued a [monetary penalty notice](#) fining It’s OK Ltd £200,000 for making 1,752,149 nuisance calls over an 11-month period to people registered with the Telephone Preference Service, representing an average of over three calls every minute.

FRC Update: Fine against PwC for audit failings; Investigation under Accountancy Scheme concluded

The Financial Reporting Council (FRC) has issued a [final settlement decision notice](#) fining PwC £5.6 million and imposing sanctions on PwC and two former audit partners. The sanctions relate to failings in the audits of defence group Babcock International for FY2017 and FY2018. The FRC has [stated](#) that its investigation into PwC’s FY2019 and FY2020 audits of Babcock group’s financial statements is still ongoing.

The FRC has [concluded its investigation](#) under the Accountancy Scheme into the preparation and approval of the financial statements of companies in the Serco Group. Under the Accountancy Scheme, the FRC may investigate Accountancy Scheme Members and Member Firms. The FRC has previously [announced](#) sanctions against Deloitte and its audit engagement partner Helen George in July 2019 in connection with the audit of Serco Geografix Limited.

Sanctions update: Belarusian company loses application to overturn sanctions designation; OFAC ends investigation into Metro Bank without penalty; Swedbank prepares for potential settlement with OFAC; OFSI publishes updated guidance on enforcement and monetary penalties

The High Court [ruled](#) on the 14 March that there were “reasonable grounds” for the Foreign, Commonwealth and Development Office (FCDO) to suspect that Minsk-based security company Synesis contributed to human-rights violations in Belarus by selling video surveillance equipment to the Belarusian Ministry of Internal Affairs. Mr Justice Jay therefore dismissed the challenge to the FCDO’s designation of Synesis under the Belarus sanctions regime. This case was the first challenge to a sanctions designation under section 38 of the Sanctions and Anti-Money Laundering Act 2018.

Metro Bank stated in its 2 March [annual report](#) that the Office of Foreign Assets Control (OFAC) has concluded an investigation into the bank regarding potential sanctions breaches without levying any financial penalties.

Swedish bank Swedbank [disclosed](#) on 10 March that it has set aside 40 million SEK (approximately £3 million) to resolve an investigation by OFAC into “historical shortcomings”. Investigations into the bank by the Department of Justice, the Securities and Exchange Commission and the Department of Financial Services in New York are still ongoing. Swedish prosecutors fined the bank [\\$380 million in 2020](#) for deficiencies its anti-money laundering measures at its Baltic subsidiaries. In May 2021, [NASDAQ Stockholm fined it](#) for similar failures.

The Office of Financial Sanctions Implementation (OFSI) has published an updated version of its [guidance](#) on enforcement and monetary penalties for breaches of financial sanctions. The guidance focuses on OFSI’s approach when an incorrect determination of ‘ownership and control’ is relevant to the breach.

The new guidance also sets out the principles-based approach for conducting due diligence and making assessments. In particular, where OFSI determines that a breach has occurred, and an incorrect assessment of ownership or control is relevant to the commission of the breach, OFSI will consider the ‘degree and quality’ of the research and due diligence conducted into the entity. Appropriate due diligence may be considered a mitigating factor if the determination was reasonable and made in good faith. This is significant for financial institutions, who should take note that OFSI will assess the level of due diligence and how it was conducted when considering enforcement. See our fuller briefing on the updated guidance [here](#).

New FATF guidance on recommendation 24 and revised version of recommendation 25

On 10 March the Financial Action Task Force (FATF) published new [guidance](#) on recommendation 24 regarding transparency and beneficial ownership of legal persons. It also recently issued a revised version of [Recommendation 25](#), on transparency and beneficial ownership of legal arrangements.

Recommendation 24 requires countries to prevent the misuse of legal persons for money laundering or terrorist financing and to ensure that there is adequate, accurate and up-to-date information on the beneficial ownership and control of legal persons. The new guidance will help countries identify, design and implement appropriate measures to ensure that beneficial ownership information is held by a public authority or body functioning as a beneficial ownership registry, or an alternative mechanism that enables efficient access to the information. The guidance will also help countries assess and mitigate the money laundering and terrorist financing risks associated with foreign companies. Recommendation 25 has been revised to state that countries should assess the risks of the misuse of legal arrangements for money laundering or terrorist financing and take measures to prevent misuse. Countries should ensure that there is adequate, accurate and up-to-date information on express trusts, and other similar legal arrangements, including information on the settlors, trustees and beneficiaries. This information should be accessible for national competent authorities efficiently and in a timely manner.

FATF report on ransomware financing

On 14 March the FATF published a [report](#) on countering ransomware financing. The Report is intended to improve global understanding of the financial flows linked to ransomware and to highlight good practices to address the threat. It also provides a list of potential risk indicators that will help regulatory authorities, and the private sector, detect these financial flows. The Report finds that payments and subsequent laundering of ransomware proceeds are almost exclusively conducted through virtual assets. The Report also finds that ransomware attacks are generally under-reported, which may explain, in part, the lack of experience in investigating money laundering related to ransomware. The FATF notes that relevant national authorities need to carry out further work to increase and enhance detection and reporting capabilities in this area. Please see [here](#) for our fuller briefing on the FATF report.

CMA Update: No extraterritorial effect for CMA’s investigatory powers; CMA issues cartel fines for construction cartel bid-rigging

The Competition Appeal Tribunal and the High Court issued a [joint judgment](#) in respect of the CMA’s claim that it could rely on its powers under the Competition Act 1998 (CA 1998) to request documents and information from foreign companies. The CMA issued notices under section 26 of the CA 1998 requesting documents from BMW AG and Volkswagen AG, both German companies. The CMA claimed the companies had information vital to its cartel investigation relating to end-of-life vehicles. The Court decided that the CMA’s attempt to impose an obligation on the German companies to produce documents was ultra vires. Mr Justice Marcus Smith wrote “There is, quite simply, no such power.” Our more detailed publication on this case can be found [here](#).

The CMA has fined 10 construction companies close to £60 million for colluding to rig bids for demolition contracts. Three directors of the companies involved have also been disqualified. The CMA has explained that the bids were rigged using a tactic known as ‘cover bidding’. This involves one or more of the companies agreeing to submit a bid that was designed to lose a tender and in some occasions the company which lost would be compensated by the winner. The CMA found the conduct took place over five years and involved the development of some well-known sites, eg. Bow Street Magistrates Court and Selfridges in London. The CMA’s decision follows a complex and large-scale investigation opened in 2019. This is the first cartel penalty issued by the CMA since the fine to Rangers Football Club, JD Sports and Elite Sports in September 2022.

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Look out for:

Passage of the Economic Crime and Corporate Transparency Bill (see above).