GIR INSIGHT

EUROPE, THE MIDDLE EAST AND AFRICA INVESTIGATIONS REVIEW 2019

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Preface

Welcome to the *Europe, Middle East and Africa Investigations Review 2019*, a Global Investigations Review special report.

Global Investigations Review is the online home for all those who specialise in investigating and resolving suspected corporate wrongdoing, telling them all they need to know about everything that matters.

Throughout the year, the GIR editorial team delivers daily news, surveys and features; organises the liveliest events ('GIR Live'); and provides our readers with innovative tools and know-how products.

In addition, assisted by external contributors, we curate a range of comprehensive regional reviews – online and in print – that go deeper into developments than our journalistic output is able.

The *Europe, Middle East and Africa Investigations Review 2019*, which you are reading, is part of that series.

It contains insight and thought leadership from 28 pre-eminent practitioners from these regions.

Across 12 chapters, spanning around 120 pages, it provides an invaluable retrospective and primer. All contributors are vetted for their standing and knowledge before being invited to take part.

Together, these contributors capture and interpret the most substantial recent international investigations developments of the past year, with footnotes and relevant statistics. Other articles provide valuable background so that you can get up to speed quickly on the essentials of a particular topic.

This edition covers France, Germany, Nigeria, Switzerland and the UK from multiple angles; has overviews of money laundering, data transfer, the regulation of cryptocurrency and international cooperation between agencies; and discusses the value experienced forensic accountants will bring to most investigations.

Among the gems, it contains:

- A thorough review of data-protection provisions in all the regions covered by the book, including Africa and the Middle East.
- Similar tours d'horizons for anti-money laundering and the regulation of fintech.
- A chapter on Africa and the 'extra' stuff to bear in mind when investigating there, along with how to overcome challenges.
- A summary of a momentous year in France.
- A summary of a curious year in the UK, certainly for the Serious Fraud Office – and what to read into certain of its decisions and results.
- An analysis of the Financial Conduct Authority's year, and how it is using its investigatory powers in an inquisitorial fashion, plus how some target firms are now making strategic use of the partial settlement mechanism to hedge their bets.

Along the way, you will encounter a personal experiment in cryptocurrency by those authors; and learn how an accountant can be to an investigation what Jamie Martin, Sotheby's head of scientific research, is to detecting fake Rothkos.

Enjoy!

If you have any suggestions for future editions, or want to take part in this annual project, we would love to hear from you.

Please write to insight@globalarbitrationreview.com.

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London
May 2019

UK: Anti-Corruption Enforcement and Investigation

Anna Gaudoin, Fred Saugman and Georgina Whittington
WilmerHale

The year 2018 brought mixed news for anti-corruption and enforcement action in the UK. While long-term anti-corruption plans – including the possible introduction of an offence of failure to prevent economic crime – continue to gather pace, changes in senior management at the Serious Fraud Office (SFO) and a series of setbacks in high-profile prosecutions have meant that short-term progress has been somewhat lacking. Nonetheless, the use of innovative new anti-corruption tools, coupled with a clarification of the law on the availability of legal professional privilege as it applies to investigations, means that the UK continues to be a key player in the global anti-corruption movement. This chapter explores recent developments in anti-corruption enforcement and investigations and offers insight into future trends for the UK's enforcement agencies in 2019.

Interim assessment of UK Anti-Corruption Strategy

In December 2017, the UK government published a five-year plan to tackle domestic and international corruption. The one-year update to this plan, published in December 2018, highlighted positive developments, including:[1]

- the draft Registration of Overseas Entities Bill, which targets the ownership of UK property through illicit means by establishing a public register of beneficial ownership of overseas legal entities owning UK property;
- the new multi-agency National Economic Crime Centre (NECC);
- the new role of Minister of Security and Economic Crime and a Ministerial Economic Crime Strategic Board to agree strategic priorities and scrutinise overall performance; and
- unexplained wealth orders (UWOs) and account freezing and forfeiture orders (AFOs).

Recognising such progress, the independent Financial Action Task Force (FATF) ranked the UK as the country with the strongest anti-money laundering and counter-terrorist finance controls

1 United Kingdom Anti-Corruption Strategy 2017-2022: Year 1 Update, published December 2018.

of any assessed to date.[2] As an added boost to the UK's ability to tackle corruption, the core funding of the SFO has been increased by over 50 per cent to £53 million, while the availability of 'blockbuster' funding has been maintained.

However, not all measures of the UK's progress paint a rosy picture: Transparency International has dropped the UK from its top 10 states in its Corruption Perceptions Index, which ranks countries based on their perceived level of public sector corruption.[3]

Although the update emphasises progress made in terms of legislation and infrastructure, it is thin gruel when it comes to successful prosecutions. Granted, the purpose of anti-corruption legislation is to prevent corrupt practice occurring in the first place, but the law still needs to be sufficiently robust to be used when a breach does occur. Otherwise, it loses its potency as a deterrent.

The slow progress that the UK has made in terms of securing convictions following allegations of bribery and corruption levelled at individuals and companies will be revisited throughout this chapter. It will doubtless be at the forefront of the minds of those tasked with drafting the two-year update to the Anti-Corruption Strategy who will be hoping for more significant progress.

Leadership overhaul disrupts SFO progress

The SFO was in a state of flux for much of 2018. A change in leadership and significant senior staff turnover contributed to a perceived lack of progress on many investigations. In April 2018, Sir David Green CB QC ended his six-year tenure as Director of the SFO and, after a long period of transition, former FBI agent Lisa Osofsky was announced as the new Director in June[4] and began her own five-year term in August.[5] This change at the top was followed by a shake-up in senior management with the announced departures of General Counsel Alun Milford and two senior case controllers.

Ms Osofsky appears to have a wide-ranging vision for the future of the SFO, including increased and improved cooperation with local, national and international law enforcement agencies, and enhanced collaboration with other regulatory bodies and the private sector. She has also made no secret of her desire to pursue the most challenging cases and appears willing to take her time untangling the most complex of crimes. However, her decision to drop investigations into Rolls-Royce Plc and GlaxoSmithKline Plc (discussed further below) without prosecution of individuals demonstrates that she is ready to make difficult calls on discontinuance of high-profile and long-running cases.

2 Anti-money laundering and counter-terrorist financing measures: United Kingdom, Mutual Evaluation Report, published December 2018.

3 Transparency International, Corruption Perceptions Index, published January 2019.

4 SFO News Release, Lisa Osofsky named next Director of the SFO (4 June 2018) www.sfo.gov.uk/2018/06/04/lisa-osofsky-named-next-director-of-the-sfo/.

5 SFO News Release, Lisa Osofsky begins tenure as SFO Director (28 August 2018), www.sfo.gov.uk/2018/08/28/lisa-osofsky-begins-tenure-as-sfo-director/.

SFO struggles to secure convictions against individuals

While the SFO continues to get to grips with changes in personnel, courtroom success has been thin on the ground. A high point came in February 2019, when it secured a guilty plea from an individual in its investigation into Petrofac Plc as part of the wider Unaoil probe. However, this stands in contrast to the SFO's recent results at trial and in bringing investigations to court.

As 2018 drew to a close, the SFO's long-running investigations into the Alstom group and FH Bertling Ltd came to an end with only partial success in the myriad trials of individuals. A few months later, the SFO closed its investigation into individuals at Rolls-Royce and the investigation into GSK, its subsidiaries and associated individuals. The SFO's decision in relation to Rolls-Royce comes despite the company entering into a deferred prosecution agreement (DPA) with the SFO in January 2017, resulting in a UK settlement of almost £500 million, plus interest and costs.

The simultaneous announcement of these decisions was perfunctory; the SFO provided little detail save that neither case had passed both the evidential and the public interest thresholds required to pursue a prosecution.[6] It is tempting to see the closure of these investigations as a change in strategy from the new leadership at the SFO, following the high-profile collapse of its prosecution of three former Tesco employees (see further below); as the SFO recalibrates its sights, the pursuit of high-profile individuals involved in allegations of corporate misconduct may become a lower priority. Indeed, following the conviction of six individuals linked to an SFO investigation into Solar Energy Savings Ltd, Ms Osofsky might judge that the SFO will enjoy greater success in prosecuting a higher number of smaller cases that have a direct impact on UK citizens.

DPAs allow individuals to be thrown under the bus

Tesco Stores Limited entered into a DPA with the SFO in April 2017, related to allegations of false accounting.[7] Parallel to this investigation, the SFO charged three former Tesco employees with false accounting and fraud by abuse of position in September 2016.

In November 2018, at the halfway point of a retrial, the Crown Court ruled that two of the three defendants had no case to answer. This decision was upheld by the Court of Appeal the following month and in January 2019 the SFO offered no evidence against the third defendant.

Embarrassing as the decision was for the SFO after a lengthy investigation and protracted trial process, its impact would not have been so significant had the individuals concerned not been named in the Tesco DPA. The DPA was published in January 2019 after the conclusion of the case against the former employees. The accompanying statement of facts contained an admission by Tesco that it had engaged in 'dishonest falsification' of its financial results. The

6 SFO News Release, SFO closes GlaxoSmithKline investigation and investigation into Rolls-Royce individuals (22 February 2019), www.sfo.gov.uk/2019/02/22/sfo-closes-glaxosmithkline-investigation-and-investigation-into-rolls-royce-individuals/.

7 *SFO v Tesco Stores Limited* (unreported, 10 April 2017).

statement implicated by name the three employees, saying they 'were aware of and dishonestly perpetuated the misstatement . . . thereby falsifying or concurring in the falsification of accounts.'[8]

The High Court has no jurisdiction to remove or amend the statement of facts, so, despite their acquittals, the statement remains on record as the assessment of their conduct as agreed between the two parties and approved by the court.

DPAs are necessarily negotiated without input from any individuals named within, though the Tesco DPA was the first to name individuals in this way. They provide an opportunity for companies to demonstrate cooperation by accepting the misconduct of individuals and thereby avoid more significant punishment. Those individuals have no recourse to absolve themselves of allegations of misconduct, even when subsequently pronounced not guilty of that same misconduct.

These events may dissuade the court from publishing the names of unconvicted individuals in future DPAs. However, the decision also highlights the dilemma for companies that recognise their only route to avoiding a damaging prosecution may be to feed their own employees to the lions.

Expansion of 'failure to prevent' offences still pending

The Tesco DPA was the first not to include an allegation of conduct contrary to the Bribery Act 2010. The conviction of companies under the Bribery Act may be sought for the failure by the company to have in place adequate measures to prevent misconduct. This is not available in cases of fraud or false accounting, where convictions must still be sought under the identification principle, which requires the attribution of criminal misconduct to a 'controlling mind' of the company.

Convictions of companies under the identification principle have proven extremely difficult for the SFO and other prosecutors. Given the result of the case against the Tesco employees, and this inherent difficulty, companies approached to negotiate a DPA for non-Bribery Act offences may think harder before agreeing.

Equally, this will put further political pressure on the government to expand 'failure to prevent' offences across the gamut of financial crime. This is a move that has been on the back burner since a 2017 consultation and is one expressly supported by Ms Osofsky and Lord Leveson.[9] The result of the consultation is eagerly awaited and will have significant implications for how financial crime is prosecuted in the UK.

SFO persists with fraud prosecutions

The SFO's failure to secure convictions against individuals in the Tesco trial has not deterred it from pursuing fraud prosecutions. On the contrary, several high-profile prosecutions formed the cornerstone of its work in 2018.

8 Statement of Facts accompanying *SFO v Tesco Stores Limited*, published 23 January 2019.

9 Lords Select Committee, Bribery Act 2010 Committee, 13 November 2018.

In July 2017, fraud charges were brought against Barclays Plc and four of its senior executives in relation to fundraising transactions undertaken in June and October of 2008, at the height of the global financial crisis. As the only prosecution to come out of the financial crash, the outcome of the investigation was eagerly awaited. However, the SFO stumbled at the first hurdle; the corporate charges against Barclays Plc were thrown out in May 2018 in the Crown Court at Southwark and the SFO failed in its application to have them reinstated. Although it pushed on with the trial of the individuals, which began in January 2019, the jury was discharged in April 2019.

Meanwhile, the SFO has continued to press on with its long-running Euribor-rigging investigation. Last year, it secured the conviction of two traders who were accused of conspiracy to defraud by rigging the benchmark. The SFO also sought and obtained the retrial of three further traders on whom the jury was unable to reach a verdict. After nearly six years of investigation, this trial concluded with a further two convictions. A final trial of one trader is scheduled to begin in June and will mark the end of the SFO's tenacious pursuit.

Extraterritorial application of section 2 notices upheld

A further success came in September 2018, when the High Court ruled that the SFO can compel foreign companies to produce documents held outside the jurisdiction where a 'sufficient connection' exists between that company and the UK.[10]

Under section 2 of the Criminal Justice Act 2003, the director of the SFO may compel a company or individual to provide documents relating to an SFO investigation. The section's extraterritorial application, however, had not previously been tested by the courts. This changed when the US construction company KBR Inc (KBR) applied for a section 2 notice served on it to be quashed by way of judicial review. KBR is the parent company of KBR Ltd, a UK company under investigation by the SFO for suspected bribery offences. The SFO served its notice on KBR when one of its directors met with the SFO in London to discuss the investigation.

In dismissing KBR's challenge, the High Court found that as a matter of policy, section 2 must have 'an element of extraterritorial application'; without this, 'a UK company could resist an otherwise lawful s.2(3) notice on the grounds that the documents in question were held on a server outside the jurisdiction.' The High Court further clarified that what constituted a 'sufficient connection' to the UK was a question of fact. In this instance, 'sufficient connection' was found on the basis that suspected improper payments made by KBR Ltd were processed and approved by KBR's treasury and compliance teams. The Court was clear, however, that 'sufficient connection' would not be found merely because a foreign company had a UK subsidiary. The Court further noted that it was in the SFO's discretion whether to seek documents via Mutual Legal Assistance or section 2 notice; due to delays associated with the former, there were 'good practical reasons' for section 2 notices to be deployed instead.

In the wake of the High Court's decision, it is likely the SFO will serve section 2 notices on foreign companies connected to its investigations with increasing frequency. The Financial

10 *R (KBR Inc) v The Director of the Serious Fraud Office* [2018] EWHC 2012 (Admin).

Conduct Authority (FCA) and the Competition and Markets Authority, which have similar powers, may also now be encouraged to make such requests.

UK government sets sights on dirty money

No high-profile money laundering convictions or prosecutions took place in 2018, although the SFO cites money laundering offences in several of their ongoing investigations.[11]

Money laundering is nevertheless an area receiving increasing government attention. The government's new economic crime strategy, announced in November 2018, took particular aim at the 'facilitators' of money laundering – estate agents, accountants and lawyers – who have historically filed low levels of suspicious activity reports (SARs). In line with this new focus, in March 2019, HMRC launched a week-long probe into the real estate sector, culminating in Countrywide plc being fined £215,000 for anti-money laundering failings.

The Treasury Select Committee's March 2019 Report into Economic Crime also threw a spotlight on money laundering.[12] Noting that the scale of money laundering impacting the UK annually 'could be in the hundreds of billions of pounds', the report identified facilitators and Companies House – which performs very limited checks on its register of beneficial ownership – as weak links in the anti-money laundering chain. These sentiments echoed those of FATF's 2018 report which, among other things, highlighted the low quantity of SARs filed in the real estate, accountancy and legal sectors and called for increased funding for the UK Financial Intelligence Unit (UKFIU) to ensure that SARs are properly exploited.[13] The initial signs point to the government taking FATF's concerns seriously: it recently announced a 30 per cent staffing increase to the UKFIU and stated that it would publish a full response to FATF's report in due course.

Privilege: a return to the status quo

In a widely welcomed decision, in September 2018, the Court of Appeal overturned the High Court's controversial ruling in *Director of the SFO v Eurasian Natural Resources Corporation Limited (ENRC)*.[14] The ambit of litigation privilege that existed before the High Court's controversial 2017 decision has now effectively been restored.

By way of brief summary, the Court of Appeal found that documents created in ENRC's internal investigation were indeed protected by litigation privilege. It found that even when an investigation was in its early stages, litigation could still be in reasonable contemplation. This was a question of fact, and in ENRC's case, 'the whole sub-text of the relationship between ENRC and the SFO was the possibility, if not the likelihood, of prosecution if the self-reporting process did not result in a civil settlement.'

11 For example, Petrofac and Unaoil; Afren Plc; Chemring.

12 28th Report of the Treasury Committee: Economic Crime – Anti-Money Laundering Supervision and Sanctions Implementation, 8 March 2019.

13 Anti-money laundering and counter-terrorist financing measures: United Kingdom, Mutual Evaluation Report, published December 2018.

14 *The Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Limited* [2018] EWCA Civ 2006.

In a further important finding, the Court of Appeal ruled that legal advice given to avoid legal proceedings or achieve settlement is protected by litigation privilege in the same way as advice given to defend such proceedings. It also disagreed with the High Court that the dominant purpose of ENRC's internal investigation documents was to address compliance and governance concerns; more pragmatically, it observed that a company investigated whistleblower allegations not simply to ensure 'high ethical standards', but to deal with potential litigation.

Finally, the Court of Appeal opened the door to an expansion of who constitutes the 'client' for the purposes of legal advice privilege. In non-binding comments, it noted that the narrow definition under English law is at odds with other common law jurisdictions, and that there was a strong case for harmonisation of the position. Any change to the test in *Three Rivers No. 4*,[15] however, would need to be made by the Supreme Court. Whether the Supreme Court has this opportunity in the near future remains to be seen, but a reversal of the trend of recent cases which progressively eroded the scope of privilege would appear to be under way.

The NCA flexes new muscles

The NCA's action against financial crime has ratcheted up over the past year as it explores new powers granted by the Criminal Finances Act 2017. UWOs and AFOs have both played a prominent part in the NCA's investigations in recent months. In October 2018, it successfully fended off a challenge to its first UWOs. The wife of an Azerbaijani banker challenged the UWOs imposed on her and her husband in February 2018 on the grounds that there was no evidence to suggest that the couple's wealth came from anywhere other than her husband's employment and legitimate business background. However, the High Court dismissed her arguments, compelling her to reveal the source of her wealth or risk losing two properties named in the UWOs. While this is no doubt a step in the right direction, the fact remains that the power to use UWOs has been in force for over a year, yet only three – all relating to the same couple – have been issued. The NCA will need to significantly improve on these figures if it is to demonstrate its professed commitment to tackling money laundering.

On a more promising note, the NCA announced in February 2019 that it had, for the first time, successfully used its powers of AFOs to forfeit over £400,000 from three UK bank accounts suspected of harbouring dirty money. AFOs allow the NCA and SFO to apply to freeze, and subsequently forfeit, funds held in bank accounts and building societies.

Until this announcement, AFOs had been largely eclipsed by UWOs. However, apparently galvanised by this success, the NECC indicated its intention three weeks later to use AFOs to apply to freeze a further 95 accounts suspected of holding around £3.6 million in laundered money. In an unusual turn of events, it appears that the NCA has been somewhat of a trailblazer in using these new tools: the SFO swiftly followed suit, announcing in March 2019 that it had successfully forfeited over £1.5 million from a convicted fraudster. These figures demonstrate that AFOs may yet be converted into a substantial revenue stream for the government.

15 *Three Rivers District Council and others (Respondents) v Governor and Company of the Bank of England* (Appellants) (2004) [2004] UKHL 48.

FCA prioritises investigations based on assessment of harm

The FCA has pressed on with its expansive approach to investigations, continuing to use its powers as a diagnostic tool to probe facts and situations that could, but by no means definitely do, represent misconduct. This is an approach that has been championed by Mark Steward, the FCA's Director of Enforcement, since he took up his post in 2015, and has since become embedded in the agency's investigative style.

Of particular focus for Steward is the level of harm caused by misconduct, and it is for this reason that the FCA has homed in on investigating cases of potential market abuse and financial crime. Underlining this new direction was the inaugural report analysing responses to the FCA's first financial crime survey.[16] The report provided a snapshot of the financial crime risks facing the UK's financial service sector; among the top risks identified was cybercrime, with identity theft, phishing and computer hacking all cited as key concerns for the FCA to be aware of. Not only should the survey provide guidance to the FCA in where to focus its investigative and enforcement efforts, but, as body of evidence builds up year on year, it could come to form a crucial benchmark measuring the success of the UK's fight against financial crime.

16 FCA report on Financial crime: analysis of firm's data (November 2018) https://www.fca.org.uk/publication/research/financial-crime-analysis-firms-data.pdf

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Anna Gaudoin represents clients in white-collar crime matters and UK regulatory and criminal investigations. These matters often involve allegations of fraud, bribery and corruption, market abuse and money laundering. Ms Gaudoin has experience in investigations and enforcement proceedings brought by the Serious Fraud Office, the UK Financial Conduct Authority, the National Crime Agency and other regulatory bodies. As well as broad criminal experience, Ms Gaudoin has also represented both individuals and corporations in a wide range of civil matters.

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Fred Saugman focuses his practice on white-collar criminal defence and regulatory and internal investigations in the corporate sector. Mr Saugman has experience defending clients in cases brought by the Serious Fraud Office, Crown Prosecution Service and professional regulatory bodies. As well as criminal matters, Mr Saugman has experience representing clients in extradition proceedings.
Mr Saugman is a member of the Young Fraud Lawyers Association and the Howard League for Penal Reform.

Georgina Whittington
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Georgina Whittington represents UK and US clients in regulatory and criminal investigations and enforcement proceedings. She has recently worked on a multi-jurisdictional internal investigation for a FTSE 100 company and represented an individual in a UK Financial Conduct Authority investigation. She has also represented a multinational corporate in a US Senator's inquiry.

WilmerHale has one of the leading investigations and criminal litigation practices in London.

The team advises on all aspects of criminal and regulatory investigations, working across jurisdictions on white-collar crime matters such as fraud, insider dealing, market abuse, bribery and corruption, cartel defence and corporate investigations. In addition, the team provides advice in relation to ethics and compliance.

The WilmerHale team are experienced in acting for multinational companies, corporate executives, high-ranking public officials and in-house counsel. They deal with investigations by a wide range of agencies and prosecution authorities, including the Serious Fraud Office (SFO), the Financial Conduct Authority (FCA), HM Revenue and Customs, the National Crime Agency, the police and the Crown Prosecution Service, as well as overseas agencies such as the US Department of Justice and Securities and Exchange Commission.

The UK group is headed by Stephen Pollard, a highly experienced practitioner who is widely recognised as one of the leading white-collar defence lawyers in the United Kingdom. Pollard and his team have particular experience in the defence of financial services fraud, multi-jurisdictional white-collar crime allegations, corruption allegations, criminal cartel allegations and sanctions/export control work. The group also has experience in conducting internal corporate investigations on behalf of companies that suspect employee misconduct or where there is a risk of exposure to a formal criminal or regulatory investigation.

The team is currently instructed on most of the significant SFO and FCA matters, including (among others) the investigations into ENRC, Petrofac, Barclays, KBR, Rio Tinto, British American Tobacco and G4S.

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As well as daily news, GIR curates a range of comprehensive regional reviews. This volume, the *Europe, Middle East and Africa Investigations Review 2019*, contains insight and thought leadership from 28 pre-eminent practitioners from these regions. Inside you will find chapters on France, Germany, Nigeria, Switzerland and the UK (from multiple angles); comparative pieces on money laundering, data transfer, the regulation of cryptocurrency and international cooperation between agencies; plus a guide to the challenges of investigating in Africa – and lots more.

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