

SHEARMAN & STERLING

November 12, 2020



# UK BUSINESS CRIME FORUM

# THE PANEL



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**LITIGATION**

# TOPICS FOR DISCUSSION

- Impact of COVID-19
- Enforcement Round-Up – SFO, FCA, NCA, HMRC and OFSI
- Review of Corporate Criminal Liability
- Information Commissioner’s Office
- Other Matters of Interest
- Post-Brexit Co-operation



# IMPACT OF COVID-19



In *Managing Financial Crime Risks in Challenging Circumstances*, a webinar we delivered on 12 May, we explored what enforcement authorities expect businesses to do to manage risks during the pandemic and how businesses can meet those expectations.



COVID-19 has also had an impact on the work of enforcement authorities. Many faced significant disruption in the early months of the pandemic as they adjusted to the new operating environment, and redeployed resources to combat new and emerging threats.



Between 23 March and 30 April 2020, the SFO did not conduct any interviews (under compulsion or caution), did not apply for or execute any search warrants and only issued 16 notices compelling the provision of information.



The FCA opened 36 enforcement cases between 1 March and 31 May 2020 compared with 148 during the same period in 2019 – only 14 concerned firms compared with 73 a year earlier. It has secured just seven financial penalties this year totalling £153,899,118.



Recent outcomes, coupled with anecdotal evidence, suggest that enforcement authorities are now making strides forward in their progression of cases, but with a backlog in the region of 47,000 cases before the Crown Court, further delays are inevitable.

# ENFORCEMENT ROUND-UP

# SERIOUS FRAUD OFFICE

- The SFO opened just five investigations in 2019 – five fewer than the previous year – and closed 10 investigations – one fewer than in 2018.
- Following the Airbus SE DPA in January, the first half of the year was relatively quiet, but more recently the SFO has:
  - secured DPAs against **G4S Care and Justice Services (UK) Ltd** and **Airline Services Limited**;
  - brought charges against **GPT Special Project Management Ltd** – a UK subsidiary of Airbus SE – for alleged bribery in relation to work carried out for the Saudi Arabian National Guard; and
  - announced an investigation into suspected bribery in relation to the sale of aircraft by **Bombardier Inc** to Garuda Indonesia.



# SERIOUS FRAUD OFFICE

## G4S Care and Justice Services (UK) Ltd – July 2020

- G4S C&J accepted responsibility for three counts of fraud against the MoJ by deceiving it as to the true extent of profits between 2011 and 2012 from contracts for the provision of electronic monitoring services.
- The three-year DPA requires G4S C&J to pay a financial penalty of £38,513,277 and the SFO's full costs of £5,952,711 – compensation of £121.3 million having already been paid to the MoJ as part of a civil settlement.
- G4S C&J received a 40% reduction in the financial penalty – only the second time a discount of less than 50% has been applied under a DPA – due to the delayed nature of its "substantial cooperation".

## Airline Services Limited – October 2020

- ASL accepted responsibility for three counts of failing to prevent bribery arising from its use of an agent between 2011 and 2013 to win three contracts, together worth over £7.3 million, to refit airliners for Lufthansa.
- The one-year DPA requires ASL to pay £2,979,685, consisting of a penalty of £1,238,714, disgorgement of profits of £990,971, and a contribution to the SFO's costs of £750,000. ASL is also obliged to fully co-operate with the SFO and any other domestic or foreign law enforcement agencies.
- ASL has been effectively dormant since 2018 following the sale of its core businesses, remaining only as a shell supported by its major investor to permit the SFO to conduct its investigation and to conclude the DPA.

# SERIOUS FRAUD OFFICE

- Trial of Ziad Akle, Paul Bond and Stephen Whiteley – three individuals accused of bribery in connection with the activities of **Unaoil** in Iraq – reached a conclusion in July following an almost two-month hiatus due to the pandemic.
- Akle and Whiteley were convicted and sentenced to five and three years' imprisonment respectively. Basil Al Jarah, who had pleaded guilty in July 2019, was sentenced to three years and four months' imprisonment. The jury was unable to reach a verdict in relation to Bond. He faces a re-trial in January 2021.
- Outcome overshadowed by publicity of SFO Director's contact with a US private investigator acting for the Ahsani family, who ran Unaoil, which was revealed following a failed abuse of process application by the defendants. The contact will be the subject of a review at the conclusion of Bond's re-trial.



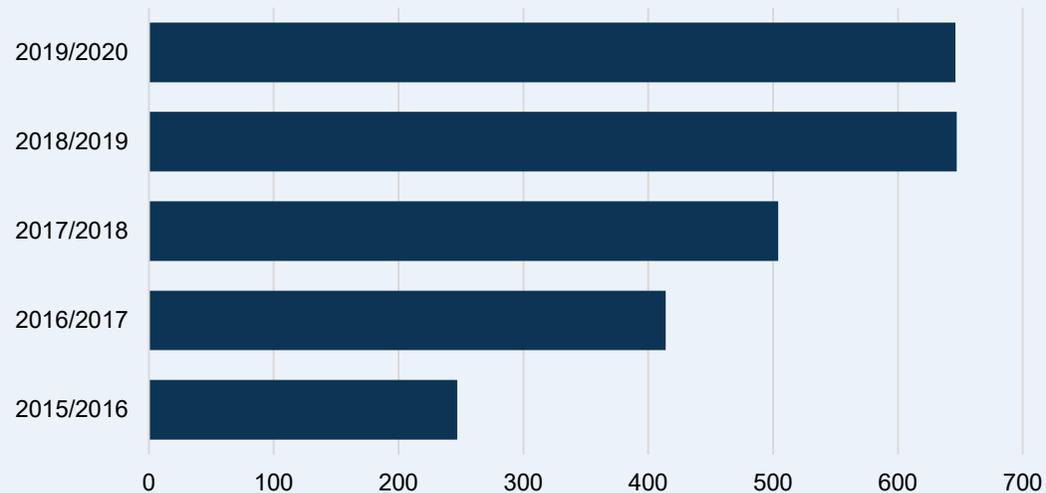
# SERIOUS FRAUD OFFICE

- In October, the SFO published the section of its Operational Handbook dealing with DPAs. Although the Handbook is for "internal guidance only," it is commonly made available "in the interests of transparency."
- Although the chapter runs to a few dozen pages, those familiar with the DPA Code of Practice, recent judgments concerning DPAs and other SFO guidance will find little within the chapter that they were not already aware of, but it does provide a useful insight into how the SFO approaches DPAs and how it engages with companies where a DPA is a prospective outcome. It also provides those unfamiliar with the law and procedures relating to DPAs with a helpful overview.
- During a speech delivered in October, the SFO Director set out her "wish list" to enable the SFO to be more effective. Unsurprisingly, the introduction of a new offence of failure to prevent serious fraud (or economic crime more generally) topped it. However, Ms Osofsky would also welcome:
  - the ability to use s. 2 investigative powers in relation to serious fraud and domestic bribery before opening a formal investigation (as it is able to do in relation to foreign bribery); and
  - a s. 2 'tipping off' offence.

# FINANCIAL CONDUCT AUTHORITY

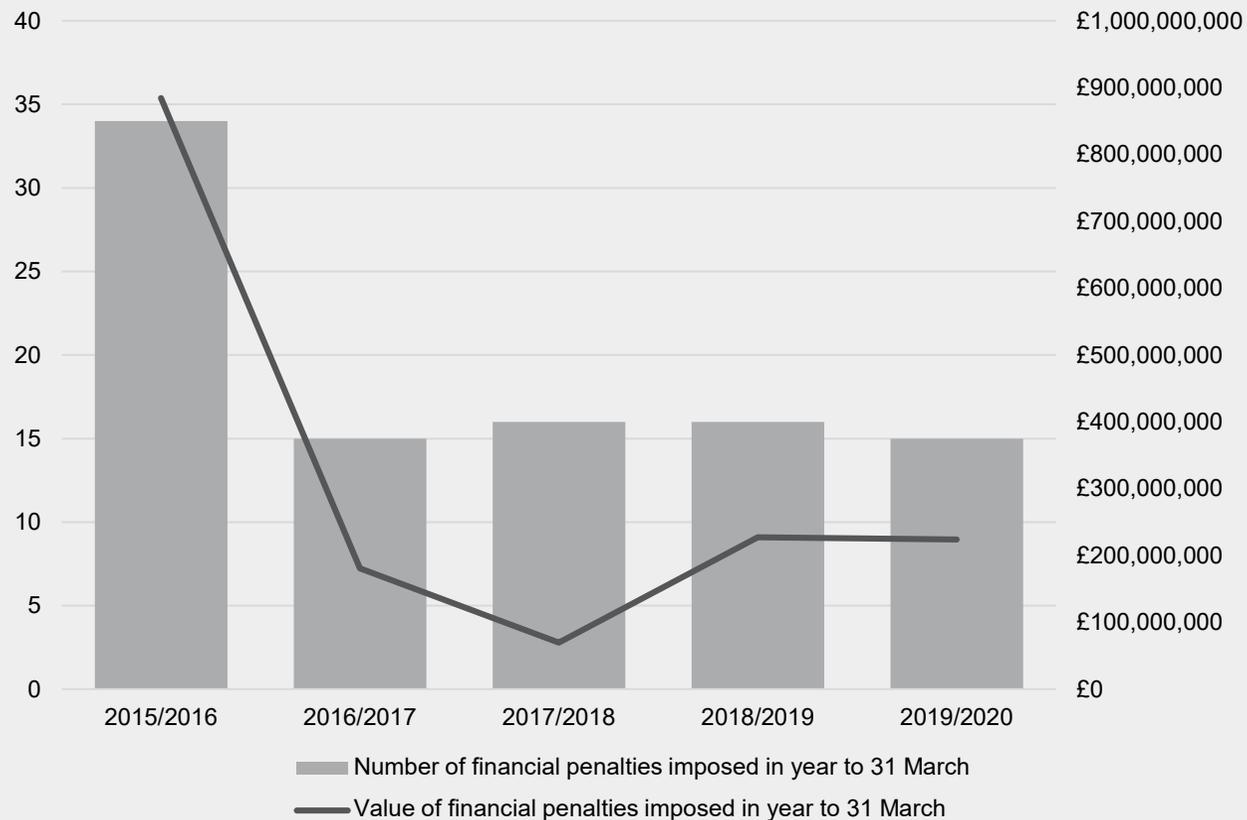
- The FCA's Annual Report showed that there were 646 enforcement investigations open on 31 March 2020 – one fewer than on 31 March 2019.
- It is the first time since Mark Steward, Executive Director of Enforcement and Market Oversight, took the helm in September 2015 that the number of open investigations has not increased year on year.
- Overall, cases are taking longer to resolve and proving more costly.

**Number of enforcement investigations open on 31 March each year**



# FINANCIAL CONDUCT AUTHORITY

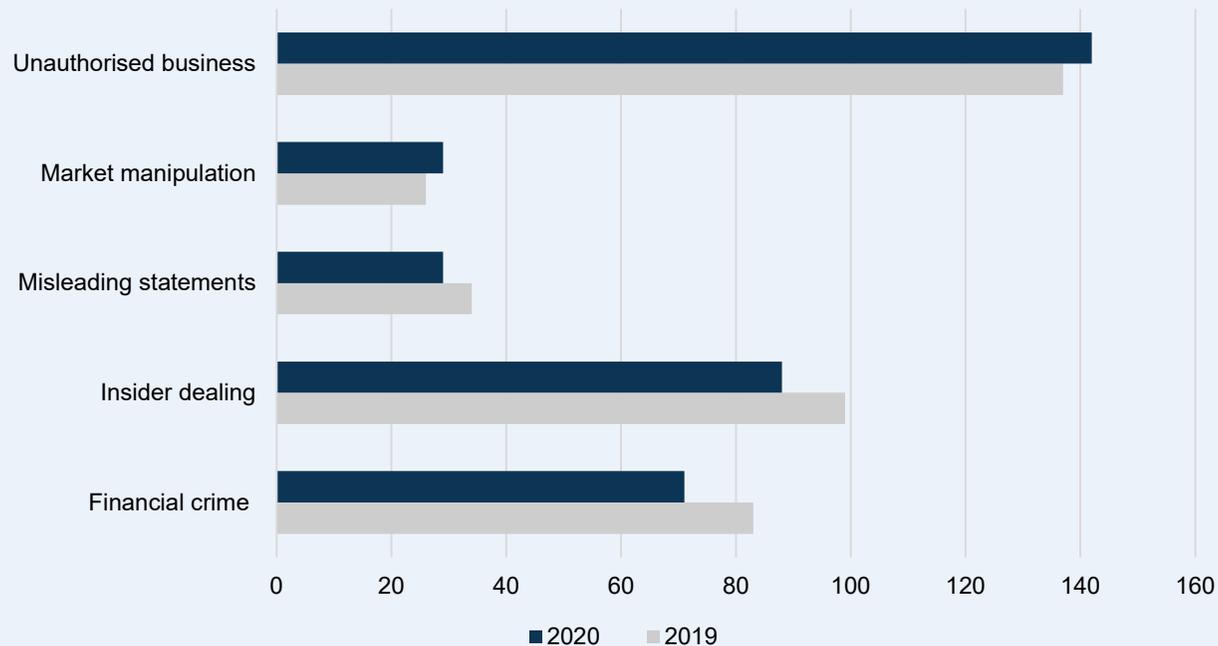
- Both the number and total value of financial penalties imposed in the 12 months to 31 March 2020 remained consistent – 15 totalling £224.4 million.



# FINANCIAL CONDUCT AUTHORITY

- The FCA does not provide a breakdown of the number of criminal and regulatory investigations it has open, but there are indications it is scaling back its pursuit of criminal investigations.
- There were decreases in the number of open investigations in many of the areas in which the FCA often pursues criminal investigations.

**Number of open investigations on 31 March by conduct**



# FINANCIAL CONDUCT AUTHORITY

- Despite opening a couple of dozen investigations, the FCA is yet to charge an individual or firm with an offence under the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (or previous legislation).
- In September, it revealed it has now closed half of the 14 criminal investigations under the Regulations that were open at the beginning of the year. Of the seven that remain open, six are being pursued on a 'dual-track' basis (i.e. they may still result in a regulatory outcome).
- Recent outcomes against firms indicate that the FCA is still far more likely to seek regulatory outcomes for AML failings.



# FINANCIAL CONDUCT AUTHORITY

## Commerzbank AG – July 2020

- Penalty of £37.8 million imposed for failing to put adequate AML systems and controls in place between October 2012 and September 2017.
- The FCA found significant weaknesses in the Bank's AML policies and procedures, the carrying out of customer due diligence and transaction monitoring. It found the Bank was aware of these weaknesses and failed to take reasonable and effective steps to remedy them despite the FCA raising specific concerns in 2012, 2015 and 2017.

## Goldman Sachs International – October 2020

- Total penalty of £96.6 million imposed by the FCA and PRA for failing to adequately manage financial crime risks when GSI underwrote, purchased and arranged three bond transactions in 2012 and 2013 that raised a total of \$6.5 billion for 1MDB.
- The FCA also found that GSI failed to properly address allegations of bribery in 2013 and to manage allegations of misconduct in 2015 in connection with 1MDB.
- The penalty formed part of the \$2.9 billion settlement reached with several US and Singaporean authorities. The settlement is in addition to that reached with Malaysian authorities in August 2020, which totalled \$3.9 billion.

# FINANCIAL CONDUCT AUTHORITY

## Regina v Konstantin Vishnyak

- In September, Vishnyak was acquitted of one count of destroying documents which he knew or suspected were or would be relevant to an investigation contrary to s. 177(3)(a) of the Financial Services and Markets Act 2000. It was the first time the FCA had brought a prosecution for the offence.
- In 2018, whilst subject to an investigation for insider dealing, he deleted WhatsApp from his mobile telephone, having been asked to provide the device to investigators. He was never charged with insider dealing.
- During the trial, Vishnyak stated he deleted the application because he feared being dragged into a "political scandal" if his links with a Russian suspect in a British murder investigation were known.

## Russell David Jameson, Mark Horsey and Frank Cochran

- In November, the FCA banned three individuals following their convictions for serious non-financial offences.
- In the three unrelated cases, each had been convicted of sexual offences whilst working in the financial services industry and had received immediate or suspended sentences of imprisonment.
- Mark Steward stated "the FCA expects high standards of character, probity, and fitness and properness from those who operate in the financial services industry and will take action to ensure these standards are maintained."

# NATIONAL CRIME AGENCY

## COVID-19

- The current pandemic is proving to be one of the first major tests for the National Economic Crime Centre housed within the NCA.
- The "Otello COVID-19 Fusion Cell", co-sponsored by the NECC and the private sector, brings together experts from the financial sector, insurance companies, trade bodies, law enforcement and the wider public sector. It aims to "rapidly share information on changes to the economic crime threat related to COVID-19 and to proactively target, prevent and disrupt criminal activity, protecting businesses and the public."
- Through analysis of SARs and other available data, it produces a weekly "public-private threat dashboard" to "inform areas for proactive tactical development and disruptive action."
- There are indications that these efforts are delivering results, but it is likely to be some time before the full extent of the NECC's effectiveness in delivering a co-ordinated response can be judged.

## SARs Reform

- The Home Office continues to state that it is committed to fundamental reform of the SARs regime as set out in the Economic Crime Plan published in 2019.
- It promises that the improved IT infrastructure will be operational by the end of 2021 and that an enlarged Financial Intelligence Unit will allow for a more responsive service with greater feedback to, and engagement with, those submitting SARs.
- How far HM Government is willing to alter the legislative framework underpinning the SARs regime remains to be seen.

# HM REVENUE & CUSTOMS

- As at 13 October 2020, HMRC had 13 "live investigations" for failure to prevent the facilitation of tax evasion.
- A further 18 "live opportunities" were under review. It revealed 33 other potential opportunities had been reviewed and rejected.
- The investigations and opportunities "span 10 different business sectors, including financial services, oils, construction, labour provision and software development."
- To date, no charges have been brought under the corporate offences introduced by the Criminal Finances Act 2017.



# HM REVENUE & CUSTOMS

- HMRC is also deploying significant resources into investigating potential abuses of the various COVID-19 stimulus measures.
- In September, it revealed it:
  - may have paid out as much as £3.5 billion on fraudulent or mistaken claims under the furlough scheme;
  - had received 8,000 calls reporting furlough abuse; and
  - was examining 27,000 "high risk" claims.
- A number of arrests have been made in recent weeks by HMRC and the NCA for alleged abuses of the Eat Out To Help Out and Bounce Back Loan schemes.



# OFFICE OF FINANCIAL SANCTIONS IMPLEMENTATION

- OFSI received 140 reports of potential financial sanctions breaches in the 12 months to 31 March 2020 – a notable increase on the 99 reports it received the year before.
- The total value of reported breaches was £982.34 million – almost four times greater than the total value reported the previous year – £262.33 million.
- February 2020 also saw OFSI impose its largest total financial penalty to date – £20.47 million against **Standard Chartered Bank** – for breaches of EU sanctions imposed in connection with Russian action in Ukraine.
- In July, HM Government introduced the first Magnitsky-style financial sanctions for human rights violations. The sanctions, made possible through the provisions set out under the Sanctions and Anti-Money Laundering Act 2018 (SAML), target individuals in Russia, Saudi Arabia, Myanmar and North Korea. More recently, the regime has been extended to individuals in Belarus.
- As the UK prepares to embark on an autonomous, post-Brexit sanctions regime, it has introduced more than 30 separate regulations under SAML – the majority replicating those regimes currently in force at an EU-level and taking effect at the conclusion of the "transition period" on 31 December 2020.
- UK Finance has published useful resources for those tasked with ensuring compliance.

# OTHER RECENT DEVELOPMENTS

# REVIEW OF CORPORATE LIABILITY FOR ECONOMIC CRIME

- On 3 November, HM Government published its long-awaited response to its Call for Evidence.
- HM Government noted there may be scope for legislative change, but the Call for Evidence did not provide "a sufficient evidence base... to make immediate legislative change to the criminal law in relation to economic crime."
- The Law Commission will prepare an Options Paper setting out how effective the law is and where it can be improved. It is due to be published in late 2021.
- It has been asked specifically to carry out a detailed review of the "identification doctrine" (i.e. absent an express statutory provision to the contrary, a corporate body can only be held liable for the acts or omissions of individuals if they represent its "directing mind and will").
- It may also consider other options, such as a new form of vicarious liability similar to the US model or further "failure to prevent" offences.
- Any legislative change is some way off, but these developments are significant and may lead to a re-defining of corporate criminal liability in the UK.

# INFORMATION COMMISSIONER'S OFFICE

- The ICO continues to impose significant financial penalties, particularly against businesses whose failings leave their customers open to exploitation by criminal enterprises.
- In October, **British Airways Plc** was fined £20 million for failing to protect the personal and financial details of more than 400,000 of its customers in 2018 when a malicious actor accessed its systems leading to the exfiltration of cardholder data.
- Also in October, **Marriott International Inc** was fined £18.4 million for failing to keep customer data secure. It is estimated that 339 million guest records worldwide were affected following a cyber-attack in 2014 on Starwood Hotels and Resorts Worldwide Inc. The attack, from an unknown source, remained undetected until September 2018, by which time the company had been acquired by Marriott.
- These fines fall a long way short of those the ICO was considering imposing – £183 million and £99 million respectively. Both gained traction with the ICO in arguments over the facts and points of principle.
- In both instances, the ICO was prepared to reduce the penalty by 20% due to the current pandemic and its impact on the businesses concerned.

# OTHER MATTERS OF INTEREST

## COMPANIES HOUSE REFORM

- In September, HM Government announced reforms to Companies House "to clamp down on fraud and money laundering."
- Under the proposals, directors will not be appointed until their identities have been verified and Companies House will be given greater powers to query, investigate and remove false information.

## ECONOMIC CRIME LEVY

- HM Government is expected to provide its response to the consultation early in 2021.
- Under the proposals, £100 million would be raised from those subject to the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 using a revenue model with the first payments due to be collected in 2022.

## MODERN SLAVERY ACT 2015 REFORM

- HM Government proposes mandatory reporting of key information for organisations carrying on a business, or part of a business, in the UK with a global turnover of £36 million or more.
- The reporting obligations will also be extended to public bodies with an annual budget of £36 million or more.
- A single reporting deadline (30 September) and a government-run reporting service will be introduced.
- HM Government has stopped short of proposing criminal and/or civil sanctions for non-compliance for the time being.

# POST-BREXIT CO-OPERATION IN RELATION TO CRIMINAL MATTERS

- In 2019, the House of Commons Library stated the UK participated in approximately 40 EU measures aimed at supporting and enhancing internal security and policing, and judicial cooperation in criminal matters.
- Article 80 of the Political Declaration states that a future relationship should provide for "comprehensive, close, balanced and reciprocal law enforcement and judicial cooperation in criminal matters, with the view to delivering strong operational capabilities for the purposes of the prevention, investigation, detection and prosecution of criminal offences, taking into account the geographic proximity, shared and evolving threats the Parties face, the mutual benefits to the safety and security of their citizens, and the fact that the United Kingdom will be a non-Schengen third country that does not provide for the free movement of persons."



# POST-BREXIT CO-OPERATION IN RELATION TO CRIMINAL MATTERS

- If a comprehensive UK-EU deal is not agreed, there may be an appetite to conclude a separate agreement allowing for co-operation in relation to criminal matters.
- Without one, the Parties are likely to face a number of significant legal and operational challenges in relation to a variety of issues, including:
  - the mutual recognition of arrest warrants;
  - extradition;
  - access to security databases;
  - investigative co-operation;
  - the mutual recognition of asset freezing and recovery orders; and
  - criminal conviction data-sharing.



# QUESTIONS

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