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The Practitioner's Guide to Global Investigations

Volume I: Global Investigations in the United Kingdom and the United States

Fifth Edition

Editors
Judith Seddon, Eleanor Davison, Christopher J Morvillo,
Michael Bowes QC, Luke Tolaini, Ama A Adams, Tara McGrath

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Individual Penalties and Third-Party Rights: The UK Perspective

Elizabeth Robertson, Vanessa McGoldrick and Jason Williamson[1]

Individuals: criminal liability 30.1

The Serious Fraud Office (SFO) has agreed to a total of nine deferred prosecution agreements (DPAs)[2] with corporates since their introduction in February 2014.[3] The introduction of DPAs reflects a long-standing practice in the United States of granting corporates immunity from prosecution, through the use of DPAs (or non-prosecution agreements, which are not available under English law), in exchange for the fulfilment of certain requirements. However, it has been argued that '[a]n increased focus on corporate criminal liability should not result in the culpability of offending individuals within a corporation being overlooked.'[4] Terms of a DPA will likely require the company to co-operate on an ongoing basis, which may include co-operation in the prosecution of individuals. For

1 Elizabeth Robertson is a partner and Vanessa McGoldrick and Jason Williamson are associates at Skadden, Arps, Slate, Meagher & Flom (UK) LLP.

2 DPAs are only available to corporate organisations.

3 See *Standard Bank*, available at https://www.sfo.gov.uk/2015/11/30/sfo-agrees-first-uk-DPA-with-standard-bank/; *Sarclad Ltd*, available at https://www.sfo.gov.uk/2016/07/08/sfo-secures-second-dpa/; *Tesco*, available at https://www.sfo.gov.uk/2017/04/10/sfo-agrees-deferred-prosecution-agreement-with-tesco/; *Rolls-Royce*, available at https://www.sfo.gov.uk/cases/rolls-royce-plc/; *Serco Geografix*, available at https://www.sfo.gov.uk/2019/07/04/sfo-completes-dpa-with-serco-geografix-ltd/; *Güralp Systems Ltd*, available at https://www.sfo.gov.uk/2019/12/20/three-individuals-acquitted-as-sfo-confirms-dpa-with-guralp-systems-ltd/; *Airbus SE* available at https://www.sfo.gov.uk/2020/01/31/sfo-enters-into-e991m-deferred-prosecution-agreement-with-airbus-as-part-of-a-e3-6bn-global-resolution/; *G4S Care & Justice Services (UK) Limited*, available at https://www.sfo.gov.uk/2020/07/17/sfo-receives-final-approval-for-dpa-with-g4s-care-justice-services-uk-ltd/ accessed 13 November 2020; and *Airline Services Ltd*, available at https://www.sfo.gov.uk/download/airline-services-limited-deferred-prosecution-agreement/.

4 V K Rajah SC, Prosecution of financial crimes and its relationship to a culture of compliance, Company Lawyer, 2016, at p. 5, accessed via Westlaw UK.

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example, the *Rolls-Royce* DPA requires Rolls-Royce to 'co-operate . . . in any investigation or prosecution of any of its present or former officers, directors, employees'.[5] However, to date, the SFO has not been successful in prosecuting any individual involved in the conduct related to a DPA and has dropped a number of its larger investigations into individuals, including those connected to conduct under the *Rolls-Royce* DPA. The SFO's successful conviction rate for 2019 also paints a mixed picture with 17 of 32 defendants being convicted, representing a 53 per cent conviction rate by individual and 86 per cent by case.[6]

The SFO's annual report for 2019–2020 confirms that nine defendants were charged in that period, including six individuals, and an additional eight defendants were awaiting trial at the end of 2020, indicating that it remains the SFO's focus to pursue individuals involved in corporate misconduct.[7] The most recent DPAs support this view. Six months after announcing the *Airbus* DPA, the SFO charged Airbus subsidiary GPT Special Project Management Limited and three individuals with corruption offences between 2007 and 2012 in relation to a £2 billion contract for the Saudi military. The individuals charged included GPT's former managing director and finance officer.[8] Likewise, the judgment delivered by Mr Justice William Davis on 17 July 2020 with respect to the G4S DPA signalled that there was the prospect of proceedings against individuals.[9] While not connected to a DPA, the SFO has also had recent success in securing the conviction of three former Unaoil executives for conspiring to make corrupt payments to secure lucrative oil contracts in Iraq.[10]

On 6 August 2019, the SFO published its Corporate Co-operation Guidance, which forms part of the SFO's Operational Handbook. The guidance seeks to formalise the approach adopted during previous DPAs and outlines what the SFO expects corporates seeking to co-operate to provide in respect of individuals. It states that corporates should consult with the SFO before interviewing potential witnesses or suspects to avoid prejudice to the investigation, identify potential witnesses, make employees (and, where possible, agents) available for SFO interviews (including arranging for them to return to the United Kingdom if necessary) and provide the last known contact details of ex-employees, agents and consultants if requested. Corporates seeking co-operation credit by providing witness accounts also need to provide any recordings, notes and transcripts of the interview. Additionally, on 17 January 2020, the SFO published as part of the

5 *Rolls-Royce*, available at https://sfo.gov.uk/cases/rolls-royce-plc/ at paras. 10, 11.

6 SFO annual report 2018–2019, 14 February 2020 (https://www.sfo.gov.uk/publications/corporate-information/annual-reports-accounts/), last accessed 13 November 2020.

7 SFO annual report 2019–2020, 22 July 2020 (https://www.sfo.gov.uk/publications/corporate-information/annual-reports-accounts/), last accessed 13 November 2020.

8 https://www.sfo.gov.uk/cases/gpt-special-project-management-ltd/, 30 July 2020, last accessed 13 November 2020.

9 *SFO v. G4S Care and Justice Services (UK) Limited* (Case No. U20201392), 17 July 2020, paras. 18 and 46.

10 https://www.sfo.gov.uk/2020/07/13/former-unaoil-executives-guilty-of-giving-corrupt-payments-for-oil-contracts-in-post-occupation-iraq/, last accessed 13 November 2020.

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Operational Handbook its guidance on 'Evaluating a Compliance Programme'.[11] While the new guidance does not comment on the prosecution of individuals, it emphasises that a prosecution will be in the public interest where the offending occurred while an ineffective compliance programme was in place. The prosecution of individuals involved in compliance failings remains high on the SFO's agenda, as evidenced by the prosecutions brought by the SFO against individuals connected to Alstom Power Ltd. With the publication of the new guidance, it follows that personnel involved in any alleged compliance failings are highly likely to be within the scope of an SFO investigation.

More recently, on 23 October 2020, the SFO updated its Operational Handbook, publishing a new chapter on DPAs. The new guidance emphasises the protection of the identity of individuals connected to the company entering the DPA, noting that consideration must be given to the 'necessity for and impact of the identities of third parties being published'. The SFO also notes that consideration should be given as to whether identifying a third party would comply with the Data Protection Act 2018 and the European Convention on Human Rights. Although the new guidance does not prohibit naming individuals in a DPA, it is a change to the DPA Code of Practice, which stood silent on the matter.

The relatively recent changes in the test for 'dishonesty' in criminal law may have the effect of encouraging prosecutors to pursue individuals for offences involving dishonesty, such as fraud or theft.

Under the test for dishonesty in *R v. Ghosh*,[12] the jury was first asked to consider whether the defendant's acts were dishonest by the ordinary standards of reasonable honest people. If the answer to that question was 'yes', the jury would then consider whether the defendant must have realised that their conduct was dishonest by those standards. In the case of *Ivey v. Genting Casinos t/a Crockfords*,[13] the Supreme Court held that the second limb of the *Ghosh* test no longer applies. The defendant's conduct, in light of his or her (subjective) knowledge or belief of the facts, must be judged as honest or dishonest by the (objective) standards of ordinary decent people alone.[14] This change will make it more difficult for defendants to escape liability on the basis of their own moral compass and potentially easier for prosecutors to secure a conviction.

The fact that 'the most serious cases of bribery generally involve companies'[15] renders the maximum custodial sentences for financial crimes somewhat obsolete

11 SFO Operational Handbook, Evaluating a Compliance Programme, 17 January 2020, (https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/sfo-operational-handbook/evaluating-a-compliance-programme/), last accessed 13 November 2020.

12 [1982] QB 1053.

13 [2017] UKSC 67; also confirmed in *R v. Alex Julian Pabon* [2018] EWCA Crim 420.

14 In the recent judgment by the Court of Appeal in *R v. David Barton and Rosemary Booth* [2020] EWCA Crim 575, the court held that the Supreme Court's *obiter* commentary in *Ivey* should be followed.

15 Richard Alexander, The Bribery Act 2010 in force: an opportunity to be taken, Company Lawyer, 2011, at p. 2, accessed via Westlaw UK.

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as individuals escape the maximum sentences for these serious corruption cases, which instead are borne by corporate entities and their shareholders in the form of unlimited fines. As Richard Alexander comments, 'any kind of agreement that penalises the company concerned, but does not deal with the individuals who were actually behind the commercial bribery, whether by paying the bribes or by arranging for others to do so, fails to recognise the essential nature of what took place.'[16]

While DPAs in the United Kingdom are not available for individuals – and there is no indication that they will be any time soon – there is an increasing emphasis on incentivising individuals to enter an early plea. Enshrined in section 144 of the Criminal Justice Act 2003 (CJA 2003) is the statutory authority that compels the courts to consider a reduction in the sentence of an offender who has pleaded guilty to an offence. Subsection 1 obliges the court to take into account the stage in the proceedings at which the offender indicated an intention to plead guilty; and the circumstances in which this indication was given. The Reduction in Sentence for a Guilty Plea: Definitive Guideline (the Definitive Guideline) guides the courts in establishing an appropriate level of reduction for offenders.[17] Unless, on the facts, there is a sufficiently good reason for a lower amount, there is a presumption that for each of the following categories, the recommended reduction will be given. If the offender pleads guilty, the sentence should be reduced as follows:

- at the first stage of proceedings, by a maximum of one-third;
- after the first stage, by a maximum of a one-quarter; or
- after the trial has begun, by a maximum of one-tenth.[18]

The Serious Organised Crime and Police Act 2005[19] contains several provisions that can benefit an offender who assists in the investigation or prosecution of a crime. For example, if an offender provides or offers assistance in the investigation or prosecution of others, the court in return may reduce the offender's sentence.[20]

16 Ibid. at p. 2.

17 The Definitive Guideline applies regardless of when the offence was committed, but where the first hearing was held on or after 1 June 2017. Prior to this, the Sentencing Guidelines Council guideline applies.

18 Where the guilty plea is entered during the trial, the reduction should normally be decreased further, even to zero.

19 Chapter 2 (ss.71 to 75).

20 s.73 Serious Organised Crime and Police Act (SOCPA). See also s.74 SOCPA – A defendant, already serving a prison sentence, who provides or offers assistance in this regard could also benefit by having a sentence reviewed.

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Imprisonment 30.1.1

The maximum sentence for an individual convicted on indictment of an offence by virtue of sections 1, 2 or 6 of the Bribery Act is 10 years' imprisonment.[21] Furthermore, where a corporate commits an offence under section 1, 2 or 6, if the offence is proved to have been committed with the consent or connivance of a senior officer (or person purporting to act in such a capacity), that officer or person can also be punished.[22] An individual tried and convicted summarily of any of the aforementioned offences is liable to a maximum prison sentence of 12 months. An individual convicted following summary trial will (if the offence merits more severe sanction) be committed to the Crown Court for sentence.[23]

The shift in policy in relation to the penalties imposed on individuals who commit financial crime can largely be attributed to the distrust and anger felt by the public towards misconduct in big business; particularly following the 2008 financial crisis.[24] Nowhere is this so apparent than in the case of Tom Hayes, who is currently serving an 11-year prison sentence,[25] one of the longest prison terms on record for UK white-collar crime,[26] for his role in the manipulation of the London Interbank Offered Rate while he worked as a derivatives trader at two different investment banks. It is widely accepted that the hefty sentence was handed down to serve as a warning to other individuals who may be tempted by the allure of profit to participate in such practices.[27] The case was accepted for review by the Criminal Cases Review Commission in June 2017, and an outcome is still pending.

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21 See s.11 Bribery Act 2010. An individual cannot be convicted of an offence under s.7 of the Bribery Act because the offence refers only to a 'commercial organisation' for which the only sentence available is an unlimited fine.

22 See s.14 Bribery Act 2010.

23 The maximum sentence for individuals under the Bribery Act is identical for any of the fraud offences both at common law and under the Fraud Act 2006 but is far greater (up to a maximum of 14 years' imprisonment) for any of the substantive money laundering offences pursuant to sections 327 to 329 of the Proceeds of Crime Act 2002 (POCA). Furthermore, an individual convicted of the tipping- off offence under section 333A of POCA is liable to a maximum of two years' imprisonment or to a fine, or both.

24 Historically, under the corruption regime that persisted until the later part of the 20th century, individuals were liable to three years' imprisonment on conviction of corruption charges. This was subsequently increased to seven years under the Criminal Justice Act 1988 and increased again under the current regime.

25 Reduced on appeal from an original sentence of 14 years.

26 https://www.theguardian.com/business/2015/dec/21/libor-trader-tom-hayes-loses-appeal-but-has-jail-sentence-cut-to-11-years, accessed 13 November 2020.

27 *R v. Hayes* [2015] EWCA Crim 1944, at para. 109. In passing sentence, the court said that it 'must make clear to all in the financial and other markets in the City of London that conduct of this type, involving fraudulent manipulation of the markets, will result in severe sentences of considerable length which, depending on the circumstances, may be significantly greater than the present total sentence.'

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Additionally, on 19 July 2018, Christian Bittar (Deutsche Bank) and Philippe Moryoussef[28] (Barclays Bank) were sentenced to a total of 13 years and four months' imprisonment for manipulating the Euro Interbank Offered Rate.[29] In the same trial, the jury was unable to reach verdicts on Carlo Palombo, Colin Bermingham and Sisse Bohart, formerly of Barclays Bank, but the SFO proceeded with a retrial, and in March 2019, Mr Palombo and Mr Bermingham were convicted (and Ms Bohart acquitted). In April 2019, Mr Palombo and Mr Bermingham were sentenced to a total of nine years' imprisonment and ordered to pay over £1.2 million to meet confiscation orders and the SFO's costs.[30]

In cases of financial crime, it is rare for defendants to be charged with only one count, and in the most serious cases – and as was the case for Mr Hayes – a judge can order the sentences for each individual count of which a defendant has been convicted to run consecutively.[31] Whether a judge perceives a concurrent or consecutive sentence as appropriate on the facts will be decided by reference to the same factors that judges tend to consider when deciding on the severity of a sentence, such as whether the defendant has any previous convictions, the magnitude of the offence[32] or where it can be established that the defendant failed to respond to warnings about his or her behaviour. Magnus Peterson was sentenced on eight counts of fraud, forgery, false accounting and fraudulent trading to 13 years in prison on 23 January 2015.[33]

See Chapter 17 on individuals in cross-border proceedings

Despite the continued prominence of financial crime cases in the media and the apparent fervour of prosecutors and courts to ensure that convicted individuals receive long custodial sentences, suspended sentences may well be considered appropriate in some cases. In *R v. Dougall*,[34] an employee heading a company's corrupt Greek practice who pleaded guilty to conspiracy to corrupt, and who was a co-operating defendant under section 73 SOCPA, had his 12-month custodial

28 Having been refused permission by the Court of Appeal to appeal his sentence in March 2020, Mr Moryoussef has signalled his intention to appeal to the European Court of Human Rights (ECHR). The ECHR had originally denied Mr Moryoussef's first application in 2019 on the basis that he had not yet exhausted his legal options in England and Wales.

29 https://www.sfo.gov.uk/2018/07/19/senior-bankers-sentenced-to-more-than-13-years-for-rigging-euribor-rate/, accessed 13 November 2020.

30 https://www.sfo.gov.uk/2019/04/01/senior-bankers-sentenced-to-9-years-for-rigging-euribor-rate, accessed 13 November 2020.

31 According to a Reuters news report: 'Hayes was sentenced consecutively for the conspiracies he was found guilty of while at two investment banks between 2006 and 2010. Had the market rigging been seen as one offence, Hayes would have faced a maximum 10-year sentence.' http://www.reuters.com/article/us-libor-hayes-appeal-idUSKBN0TJ1V820151130, 30 November 2015, accessed 13 November 2020.

32 In the Fraud, Bribery and Money Laundering Offences Definitive Guideline, it expressly states that: 'Consecutive sentences for multiple offences may be appropriate where large sums are involved.' https://www.sentencingcouncil.org.uk/wp-content/uploads/Fraud-Bribery-and-Money-Laundering-offences-definitive-guideline-Web.pdf, at p. 10, accessed 13 November 2020.

33 https://www.sfo.gov.uk/2015/01/23/magnus-peterson-sentenced-13-years-prison/, last accessed 23 November 2020.

34 [2010] EWCA Crim 1048.

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sentence suspended on appeal.[35] This case also demonstrates the risks individuals face when conduct spans multiple jurisdictions and no settlement or amount of co-operation provides an absolute guarantee against further proceedings being pursued in any jurisdiction.

See Chapter 23 on negotiating global settlements

The Attorney General's Guidelines on Plea Discussions in Cases of Serious or Complex Fraud (Attorney General's Guidelines) set out a process by which a prosecutor may discuss an allegation of serious or complex fraud with a suspect.[36] The implementation of the Attorney General's Guidelines, with the support of the judiciary and prosecuting authorities, has garnered a quasi-plea discussion system that can be advantageous to defendants. Although the Attorney General's Guidelines do not make any provision for a defendant to receive a greater discount on the sentence than is available for simply entering a guilty plea (as set out above), in a case brought by the FCA's predecessor, the Financial Services Authority (FSA),[37] against Paul Milsom, a senior equities trader, for disclosing inside information between October 2008 and March 2010, Judge Pegden QC indicated, in passing sentence on 18 March 2013 at Southwark Crown Court, that he had given Mr Milsom full credit for pleading guilty at the earliest opportunity (i.e., a discount of one-third) and extra credit for entering into a plea agreement with the FSA.[38] The sentencing remarks of Judge Pegden QC convey the 'clearest articulation to date that an individual can reasonably expect to receive in excess of one third discount on sentence in circumstances where he enters into early plea discussions with a prosecutor'.[39]

In *Bittar*, when sentencing, the judge also took into consideration Mr Bittar's early guilty plea, along with other mitigating factors such as the delay between the period of offending and the resulting trial, the low likelihood of further future offending and Mr Bittar's previous good character.[40]

Another case worthy of note, and one that again highlights how co-operation with the authorities can really pay dividends when it comes to sentencing after conviction, was that of Bruce Hall. On 22 July 2014, Mr Hall, CEO of Aluminium Bahrain BSC from September 2001 to June 2005, received a 16-month custodial

35 The Court of Appeal held that 'where the appropriate sentence for a defendant whose level of criminality, and features of mitigation, combined with a guilty plea, and full co-operation with the authorities investigating a major crime involving fraud or corruption, with all the consequent burdens of complying with his part of the SOCPA agreement, would be 12 months' imprisonment or less, the argument that the sentence should be suspended is very powerful'. Ibid., at para. 36.

36 The Attorney General's Guidelines came into force on 5 May 2009.

37 As of 3 April 2013, the FSA became two separate regulatory bodies; the Financial Conduct Authority (FCA) and the Prudential Regulation Authority (PRA).

38 https://webarchive.nationalarchives.gov.uk/20130402175500/http://www.fsa.gov.uk/library/communication/pr/2013/022.shtml, last accessed 13 November 2020.

39 Chris Dyke, The Benefits of Early Plea Discussions, https://www.corkerbinning.com/corker-binning-solicitor-writes-about-the-benefits-of-early-plea-discussions-in-crimeline/, last accessed 13 November 2020.

40 https://www.sfo.gov.uk/2018/07/19/senior-bankers-sentenced-to-more-than-13-years-for-rigging-euribor-rate/, last accessed 13 November 2020.

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sentence[41] for conspiracy to corrupt (having allegedly received £2.9 million in bribes[42]). However, were it not for Mr Hall's co-operation and early plea, Judge Loraine-Smith stated that his prison sentence would have been far longer. The case demonstrated that civil recovery proceedings and criminal proceedings are not mutually excluded provided that the conduct can be divided.

30.1.2 Fines

Fines for individual perpetrators of financial crime can be unlimited and are handed down either separately or in conjunction with a custodial sentence. Section 164 of the CJA 2003 regulates the fixing of fines in criminal cases. The Sentencing Council's Fraud, Bribery and Money Laundering Offences Definitive Guideline states that as a general principle in the setting of a fine for fraud, bribery or money laundering: 'The court should determine the appropriate level of fine in accordance with section 164 of the Criminal Justice Act 2003, which requires that the fine must reflect the seriousness of the offence and requires the court to take into account the financial circumstances of the offender.'[43]

30.1.3 Unexplained wealth orders

The Criminal Finances Act 2017 (CFA 2017) came into force on 30 September 2017 and created a new High Court power to make an unexplained wealth order (UWO), which can require a person who is suspected of involvement in, or association with, serious criminality or who is a politically exposed person (PEP) to explain the origin of assets that appear to be disproportionate to their known income.[44] A failure to provide a response will give rise to a presumption that the property is recoverable, in order to assist any subsequent civil recovery action. UWOs are intended to alleviate the burden on enforcement authorities and come with wide-ranging powers to gather evidence in other jurisdictions and potentially support parallel enforcement actions. The powers to make UWOs under the CFA 2017 commenced on 31 January 2018, with the National Crime Agency (NCA) obtaining at least 15[45] UWOs since commencement.[46]

41 Mr Hall was also ordered to pay a confiscation order of £3,070,106.03 within seven days or face serving an additional term of imprisonment of 10 years; a compensation order of £500,010; and to pay £100,000 as a contribution to the prosecution's costs.

42 https://www.sfo.gov.uk/2014/07/22/bruce-hall-sentenced-16-months-prison/, last accessed 13 November 2020.

43 https://www.sentencingcouncil.org.uk/wp-content/uploads/Fraud-Bribery-and-Money-Laundering-offences-definitive-guideline-Web.pdf, at p. 51, last accessed 13 November 2020.

44 Under Part 1 ss.1-9 of the Criminal Finances Act 2017, which amends POCA s.362.

45 The NCA's National Strategic Assessment of Serious and Organised Crime stated that it had obtained 15 UWOs over property worth an estimated £143 million. Its publication was made prior to the discharge of three UWOs on 8 April 2020 in *National Crime Agency v. Baker & Ors* [2020] EWHC 822 (Admin). Recognising the impact the judgment would have in subsequent UWO applications, the NCA immediately sought to appeal the decision, but the Court of Appeal refused the application.

46 Barney Thompson, 'Mystery banker's wife challenges UK unexplained wealth order', *Financial Times*, last accessed 13 November 2020.

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The CFA 2017 enables a number of UK regulators and enforcement agencies, namely the SFO, the NCA, HM Revenue and Customs, the FCA and the Director of Public Prosecutions, to apply to the High Court for a UWO, regardless of whether civil or criminal proceedings have been initiated against the respondent to the order or whether the respondent is located in the United Kingdom or another jurisdiction.[47]

There must be reasonable cause to believe that the respondent holds the property and that the value of the property is greater than £50,000. There must also be reasonable grounds for suspecting that the known sources of the respondent's lawfully obtained income would have been insufficient for the purposes of enabling the respondent to obtain the property. Respondents must also either be (1) a PEP or (2) someone for whom there are reasonable grounds for suspecting that they have been involved in serious crime. Under the CFA 2017, a person is considered to be involved in serious crime in the United Kingdom or another jurisdiction if the person would be so involved for the purposes of Part 1 of the Serious Crime Act 2007.[48]

The first UWO, obtained in February 2018, was made against two properties valued at approximately £22 million, connected to Mrs Zamira Hajiyeva, the wife of Mr Jahangir Hajiyev, a former banker imprisoned for fraud and embezzlement in Azerbaijan. Mrs Hajiyvera challenged the orders in the High Court on a number of grounds, including that her husband had been incorrectly classified as a PEP. However, the court dismissed these challenges, finding that Mr Hajiyev was a PEP from a non-EEA country against whom a UWO could be granted, and that as his wife, Mrs Hajiyeva was herself also a PEP.[49] Having been unsuccessful in the High Court, Mrs Hajiyeva applied to the Court of Appeal on the basis that the court had *inter alia* erred in relying on Mr Hajiyev's conviction in Azerbaijan for fraud and corruption offences as evidence that his lawful income was insufficient to purchase the properties.[50] The Court of Appeal dismissed the appeal, agreeing with the High Court's reasoning. The consistent approach taken by both the High Court and the Court of Appeal demonstrates that a respondent seeking to discharge a UWO on the basis that the 'income test' is not satisfied will have to demonstrate evidence of lawful income sufficient to have purchased the property in question.

47 As of July 2020 and according to publicly available information, only the NCA has applied for UWOs.

48 This widens the category of potential respondents significantly to include persons who: (1) have committed a serious offence; (2) have facilitated the commission of an offence; or (3) conducted themselves in a way that was likely to facilitate the commission by themselves – or another person – of a serious offence, whether or not the offence was committed. The CFA 2017 widens the category of respondents even further to include anyone who is connected with a person who is or has been involved in serious crime, whether in the United Kingdom or in another jurisdiction.

49 *National Crime Agency v. Mrs A* [2018] EWHC 2534 (Admin).

50 Ibid. It was also submitted that the High Court had erred in applying the statutory test to identify a PEP and that the UWO itself conflicted with the rules against spousal privilege and self-incrimination.

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The second UWO was also made against property belonging to a PEP in May 2019.[51] In this instance, the three properties subject to the UWO were worth in excess of £80 million, owned by the late Mr Rakhat Aliyev, a former senior government official in Kazakhstan accused of bribery, corruption and murder. The properties subject to the order were held by offshore private foundations, and the NCA brought an application against the foundations and their president, Andrew Baker, who was also an English solicitor. In August 2019, the respondents to the NCA's application, as well as Mr Aliyev's ex-wife and her son, provided information to the NCA confirming that Mr Aliyev was not the ultimate beneficial owner of the properties, but the NCA declined to withdraw the UWOs. The respondents challenged the UWOs, and, on 8 April 2020, Mrs Justice Laing discharged the orders, stating that the NCA's assumption that Mr Aliyev was the source of the funds for the purchase of the properties was 'unreliable'.[52]

Before July 2019, the NCA had not obtained a UWO against a respondent considered to be involved in serious crime.[53] A second UWO against a respondent considered to be involved in serious crime followed shortly thereafter on 24 July 2019. On this occasion, the UWO was obtained against six properties worth around £3.2 million in total belonging to a woman believed to be associated with criminals involved in paramilitary activity and cigarette smuggling.[54]

Interim freezing orders can also be granted by the High Court with each UWO, under section 362J POCA, meaning that the assets subject to the UWOs cannot be sold, transferred or dissipated for the duration of the order.

Respondents are required by a UWO to provide certain information about the specified property, including the nature and extent of the respondent's interest, how it was obtained and any other information specified in the order. Aside from contempt of court proceedings, the failure to respond to a UWO creates a presumption that the property is recoverable in civil proceedings, which reduces the burden imposed on enforcement authorities under the current POCA regime, to prove that property derives from criminal conduct or constitutes the proceeds of crime. Section 362S of POCA provides that when a UWO is issued, where the enforcement authority believes that the property is outside the United Kingdom, it may send a request for assistance in relation to the property to the Secretary of State, who in turn may forward the request to the government of the receiving country. The request for assistance is a request that any person be prohibited from dealing with the property or assisting with dealing with the property.

51 *National Crime Agency v. Baker & Ors* [2020] EWHC 822 (Admin).

52 Ibid., at para.100.

53 https://www.nationalcrimeagency.gov.uk/news/nca-secures-first-serious-organised-crime-unexplained-wealth-order-for-property-worth-10-million, accessed 13 November 2020. The NCA press release stated: 'Officers believe the businessman's property purchases valued at £10 million were funded by a number of criminal associates involved in drug trafficking, armed robberies and supplying firearms.'

54 https://www.nationalcrimeagency.gov.uk/news/nca-secures-unexplained-wealth-order-against-properties-owned-by-a-northern-irish-woman, last accessed 13 November 2020.

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Where a respondent complies or purports to comply, the enforcement authority must determine, within 60 days starting with the date of compliance, what enforcement or investigatory proceedings, if any, it considers ought to be taken in relation to the property.

POCA also provides that a criminal offence is committed if a respondent gives a false or misleading statement in response to a UWO, with a maximum penalty of two years' imprisonment.[55] The CFA 2017 amends POCA so that the FCA and HMRC have civil recovery powers to recover property in cases where there has not been a conviction but where it can be shown on the balance of probabilities that property has been obtained by unlawful conduct. Such proceedings would be brought in the High Court to recover criminal property without the need for the owner of the property to be convicted of a criminal offence.[56] The NCA has sought to make use of this new tool. On 14 August 2019, it announced that account freezing orders (AFOs) had been obtained at Westminster magistrates' court over eight bank accounts holding more than £100 million.[57]In December 2019 it also reached a settlement for £190 million with businessman Mr Malik Riaz Hussain following AFOs being obtained over his property. As part of the settlement Mr Riaz Hussain forfeited money held in accounts over which AFOs had been obtained, as well as a London property valued at £50 million.[58]

Confiscation orders 30.1.4

It is becoming more common for courts to address the confiscation of the assets of a convicted individual, especially when the court is satisfied that the defendant was said to be living a 'criminal lifestyle'.[59] Furthermore, Step 6 of the Sentencing Council Guidelines on Fraud, Bribery and Money Laundering Offences states that the court must proceed with a view to making a confiscation order if it is asked to do so by the prosecutor or if the court believes it is appropriate to do so.[60] The FCA secured £1.9 million in confiscation orders on 11 May 2018, as part of

55 s.362E CFA 2017.

56 This is a lower threshold than that required for restraint proceedings under POCA, where a criminal investigation or proceedings must have been commenced.

57 https://www.nationalcrimeagency.gov.uk/news/100m-account-freezing-orders-are-largest-granted-to-nca, last accessed 13 November 2020.

58 https://uk.reuters.com/article/uk-britain-settlement-hussain/pakistani-tycoon-agrees-to-hand-over-190-million-to-settle-uk-probe-idUKKBN1Y71KJ, last accessed 13 November 2020.

59 Pursuant to s.75 of the CJA 2003, '(1) a defendant has a criminal lifestyle if (and only if) the following condition is satisfied. (2) The condition is that the offence (or any of the offences) concerned satisfies any of these tests – (a) it is specified in Schedule 2; (b) it constitutes conduct forming part of a course of criminal activity; or (c) it is an offence committed over a period of at least six months and the defendant has benefited from the conduct which constitutes the offence'.

60 https://www.sentencingcouncil.org.uk/wp-content/uploads/Fraud-Bribery-and-Money-Laundering-offences-definitive-guideline-Web.pdf, accessed 13 November 2020.

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Operation Tabernula,[61] and £2.2 million in confiscation orders in May 2017, as part of Operation Cotton.[62]

Confiscation orders, which are debts to the Crown, are available only after a defendant has been convicted. Where a confiscation order is not paid, the defendant will serve a period of imprisonment in default. This mechanism is highlighted in three cases; (1) Phillip Boakes, who, after failing to satisfy the full value of a confiscation order determined by the courts, was ordered to serve 730 days' imprisonment in addition to the 10 years he was already serving after pleading guilty, *inter alia*, to two counts of fraudulent trading;[63] (2) Alex Hope, who was sentenced to 603 days' imprisonment for failing to pay the full value of a confiscation order made against him, in addition to the seven years he was serving for defrauding investors;[64] and (3) Peter Chapman, who in September 2019 was ordered to pay a confiscation order of £441,944.38 and failure to pay within three months will result in him returning to prison for a default sentence of four years.[65]

The Supreme Court also recently clarified the position regarding the reduction of default sentences for partial repayment of sums ordered under a confiscation order. In *R (on the application of Gibson) v. Secretary of State for Justice*,[66] the Supreme Court held that the calculation of reductions in default terms should not take into consideration accrued interest. The appellant had been convicted of a drug trafficking offence in 1999 and sentenced to 25 years' imprisonment. At a confiscation hearing in 2000, he was ordered to pay £5.4 million within 12 months or serve a six-year default sentence and accrue 8 per cent interest per annum. The appellant did not pay the amount ordered, triggering the accrual of interest on the outstanding amount. By the time the appellant was committed to prison under the default sentence, the outstanding amount was £8.1 million. However, £90,370 had been paid off the order, entitling the appellant to a reduction in his default sentence. The issue for the courts was therefore to determine whether the reduction should be calculated as a percentage of the initial £5.4 million order or of £8.1 million. The appellant argued that the calculation should be based on the original £5.4 million order, entitling him to a reduction of 35 days. However, in the Administrative Court and Court of Appeal it was held that a reduction of only 24 days should be applied, calculated on the basis of the £8.1 million outstanding. In January 2018, the Supreme Court held in the

61 https://www.fca.org.uk/news/press-releases/fca-secures-1-6m-confiscation-order-against-richard-baldwin, last accessed 23 November 2020.

62 https://www.fca.org.uk/news/press-releases/fca-secures-confiscation-orders-totalling-1-69-million-against-convicted-insider-dealers; https://www.fca.org.uk/news/press-releases/fca-secures-eight-confiscation-orders-totalling-almost-22-million, last accessed 13 November 2020.

63 https://www.fca.org.uk/news/phillip-boakes-sentenced-for-failing-to-pay-confiscation-order, last accessed 13 November 2020.

64 https://www.fca.org.uk/news/press-releases/alex-hope-sentenced-failing-pay-confiscation-order, last accessed 13 November 2020.

65 https://www.sfo.gov.uk/2019/09/05/currency-fraudster-peter-chapman-ordered-to-pay-441944-38/, last accessed 17 November 2020.

66 [2018] UKSC 2.

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appellant's favour, entitling him to the additional 11-day reduction in his default sentence. The ruling confirms that there is a continued incentive for individuals subject to confiscation orders to continue making contributions even after a default sentence has been triggered.

Confiscation orders derive from section 6 of POCA and are intended to deprive the defendant of the benefit of any proceeds of his or her crimes; they are not, however, intended to act as a fine or further punishment. They do not always involve the sequestration of the defendant's personal property. Instead, they usually entail the payment of a sum of money: 'Where, however, a criminal has benefited financially from crime but no longer possesses the specific fruits of his crime, he will be deprived of assets of equivalent value, if he has them.'[67] In accordance with the decision in *R v. Waya*,[68] prosecutors should ensure that the confiscation is proportionate, which entails an assessment of the ability of the defendant to pay the order in full.

In determining the amount of £165,731 that Mr Boakes was required to pay under his confiscation order, the court was able to take into account how the money that he had acquired was spent. The court determined that much of the proceeds that Mr Boakes had benefited from was spent on a lavish lifestyle and unsuccessful financial trading that was indicative of a criminal lifestyle, which the courts will take into account when determining the recoverable amount.

The Attorney General's Guidelines are silent as to confiscation orders – they provide no framework to regulate the discussions and agreement of confiscation orders as part of plea discussions. Should the prosecution and the defendant reach any form of agreement in relation to a confiscation order, that agreement would not bind a court. In Mr Milsom's case, however, the judge agreed to make a confiscation order at the sentencing hearing in the value of his personal benefit from his offending, which had been agreed between the prosecution and the defence within the basis of the plea and joint sentencing submission. This suggests that prosecutors could be willing to negotiate the terms of a confiscation order as part of a plea negotiation, and that the courts may be willing to accept the joint submission that 'provid[es] a defendant with greater certainty and control over his financial liabilities'.[69]

The burden of proof in criminal confiscation orders rests with the defendant, who must show, on the balance of probabilities, that his or her assets are not derived from criminal conduct.

Where it is reasonably foreseeable that a court will make a confiscation order, the prosecution may take steps in the High Court to ensure that the defendant's assets will remain available to meet the terms of the order. Such steps include, *inter*

67 *R v. May* [2008] UKHL 28, at para. 9.

68 [2012] UKSC 51.

69 Chris Dyke, The Benefits of Early Plea Discussions, https://www.corkerbinning.com/corker-binning-solicitor-writes-about-the-benefits-of-early-plea-discussions-in-crimeline/, last accessed 13 November 2020.

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alia, an order requiring the defendant to disclose where assets are kept, an order appointing a receiver and an order restraining assets.[70]

30.1.5 Compensation orders

Like a confiscation order, a compensation order is an ancillary court order and is designed to compensate a victim for personal injury or any loss or damage that may have resulted from the offence committed by the defendant and is made in addition, or instead of, other sentencing options under section 130 of the Powers of Criminal Courts (Sentencing) Act 2000. The Sentencing Council Guidelines on Fraud, Bribery and Money Laundering Offences also provide that, under Step 6, the court must proceed with a view to making a confiscation order, if it is asked to do so by the prosecutor, or if the court believes it is appropriate to do so.[71]

In both a magistrates' court[72] and the Crown Court, the amount that can be awarded as compensation is now unlimited but is restricted to an amount that can feasibly be paid by the defendant. The court must have regard to the evidence of the defendant's financial means when deciding the level of compensation to award the victim and must prioritise the payment of compensation over any other financial penalty.

30.1.6 Disqualification orders

Directors of companies are fiduciaries and there is consequently a high level of probity expected of them by the law. It is therefore expected that '[t]hose who are involved in bribery, whether as individuals or as part of their role as directors, are very likely to be disqualified from acting as a director for a lengthy period of time.'[73]

See Chapters 25 on fines, disgorgement, etc. and 42 on directors' duties

Directors disqualification orders (DDOs) are designed to help protect creditors and the public from those individuals who may act dishonestly and can bar a person from acting as a director of any UK company for up to 15 years. DDOs can be made where the defendant director of a company has been convicted of an indictable offence which, by virtue of the decision in *R v. Creggy*,[74] must have some relevant factual connection with the management of the company.

70 See s.37(1) Supreme Court Act 1981.

71 https://www.sentencingcouncil.org.uk/wp-content/uploads/Fraud-Bribery-and-Money-Laundering-offences-definitive-guideline-Web.pdf, last accessed 13 November 2020.

72 Before 11 December 2013, the amount that a magistrate could award as part of a compensation order was £5,000, but, by virtue of s.131 Powers of Criminal Courts Sentencing Act 2000, this limit has been removed.

73 Eoin O'Shea, *The Bribery Act 2010, A Practical Guide*, Jordans, at p. 238.

74 [2008] EWCA Crim 394.

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Costs 30.1.7

As in all criminal cases, cost orders are usually made against a convicted defendant, who will be required to pay the prosecution's costs as well as any court fees that materialise during the criminal proceedings.[75]

Individuals: regulatory liability 30.2

The FCA has continued the FSA's legacy of adopting a robust enforcement stance, underpinned by its 'credible deterrence' strategy. In furtherance of its policy of 'credible deterrence', the FSA had signalled a willingness to pursue criminal actions through the courts and to seek custodial sentences. For the FCA, the pursuit of criminal prosecutions, where appropriate, remains high on its agenda, particularly for market misconduct offences. This is supported by the FCA's Annual Business Plan for 2020/21, which states that tackling financial crime and money laundering remains a priority. The UK government's Economic Crime Plan 2019-22 also lists strengthening the capabilities of law enforcement as one of its strategic priorities, 'to detect, deter and disrupt economic crime'.[76] The FCA has introduced further changes to the Senior Managers and Certification Regime, which came into force on 9 December 2019, extending the regime to FCA solo-regulated firms[77] to make senior managers more responsible and accountable for their actions.[78]

See Chapters 25 on fines, disgorgement, etc. and 42 on directors' duties

Under the Financial Services and Markets Act 2000 (FSMA) as amended by the Financial Services Act 2012, the FCA has many tools at its disposal to punish non-criminal offences and breaches. This includes the issuing of public censures or statements, and imposing unlimited financial penalties. A number of other sanctions are available to the FCA.[79]

Chapter 6 of the FCA's Decision Procedure and Penalties manual (DEPP) contains the FCA's statement of policy in relation to the imposition and amount of penalties under FSMA.[80] DEPP 6A sets out its policy in relation to imposing

75 The legislative authority enabling a court to award costs in criminal proceedings is primarily contained in Part II of the Prosecution of Offences Act 1985 (sections 16 to 19B), the Access to Justice Act 1999 (in relation to funded clients) and in regulations that have since been made pursuant to these statutes, including the Costs in Criminal Cases (General) Regulations 1986, as amended.

76 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/816215/2019-22_Economic_Crime_Plan.pdf.

77 'Solo-regulated firms' are firms that are regulated exclusively by the FCA rather than dually regulated by the FCA and Prudential Regulatory Authority. The regime will commence for benchmark administrators on 7 December 2020 to allow the FCA to carry out a dedicated consultation for benchmark administrators before making final rules for the sector.

78 https://www.fca.org.uk/firms/senior-managers-certification-regime/banking; https://www.fca.org.uk/publication/policy/ps18-14.pdf, last accessed 13 November 2020.

79 Other sanctions available to the FCA include varying or cancelling a firm's permission under Part 4A of FSMA; intervening against an incoming EEA or EU Treaty firm; suspending or restricting a firm's Part 4A permissions; suspending or restricting the approval given to an approved person; prohibiting an individual from performing regulated functions; withdrawing the approval of an approved person; imposing a penalty on a person who has performed a controlled function without approval; and issuing a private warning.

80 In August 2018, the FCA issued a new version of the DEPP.

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suspensions or restrictions on firms and on approved persons. Chapter 7 of the FCA's Enforcement Guide sets out specific guidance on the FCA's powers in relation to financial penalties and public censures. Further, in April 2017, the FCA published an Enforcement Information Guide, which should be read in conjunction with DEPP and the Enforcement Guide.

See Chapter 25 on fines, disgorgement, etc.

30.3 Other issues: UK third-party rights

Section 393 FSMA gives third parties certain rights in relation to warning and decision notices given to another person in respect of whom the FCA is taking regulatory action. Where a warning notice has been given, section 393(1) provides that a third party prejudicially identified in the notice must be given a copy and a reasonable period to make representations on it.[81] No equivalent regime exists in the criminal sphere, where the DPA process (which involves the agreed statement of facts detailing the conduct of individuals) enables individuals to respond prior to the DPA being entered into.

Section 393(4) gives third-party rights in relation to a decision notice. It provides that a third party prejudicially identified in the notice must be given a copy of it and a reasonable period to make representations on it. Section 393(11) provides that a person who alleges that a copy of the notice should have been given to him or her may refer that alleged failure to the Upper Tribunal.[82]

The scope of the rights conferred by section 393(4) was reconsidered in *Macris v. FCA*.[83] On 19 May 2015, the Court of Appeal held that Mr Macris had been prejudicially identified in the FCA's settlement notices issued to a financial institution. Though he was not identified by name, the notices referred to him as 'CIO London management' and stated that 'CIO London management' had deliberately misled the FCA in a telephone call with the regulator in April 2012.

On 22 March 2017, the majority of the Supreme Court overturned the Court of Appeal's decision. Lord Sumption, writing for the majority, stated that someone is identified in a notice if 'he is identified by name or by a synonym for him, such as his office or job title'. Such a synonym would, in the view of Lord Sumption, need to be 'apparent from the notice itself that it could apply to only one person and that person must be identifiable from information which is either in the notice or publicly available elsewhere'. Information from other sources can only be used to interpret the language of the FCA's notice, rather than to supplement it, and must be easily ascertainable.

In concluding that it was not permissible to rely on information publicly available elsewhere, Lord Sumption stated that he was influenced by the deliberate drafting of section 393 FSMA with regard to fairness and the requirement for the material identifying the individual to come from the notice itself, as well

81 Unless he or she has been given a separate warning notice in relation to the same matter.

82 In April 2010 the Financial Services and Market Tribunal, established by s.132 of FSMA as an independent judicial body to hear decision notices issued by the FSA, was abolished and its functions transferred to the Upper Tribunal.

83 [2015] EWCA Civ 490; [2017] UKSC 19.

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as concern over the impact on the FCA's effectiveness if section 393 were to be interpreted differently. Lord Sumption also stated that the envisaged constituency, namely the audience of notices, was the public at large and not just those familiar with a particular industry.[84]

84 While agreeing with Lord Sumption, Lord Neuberger stated that an individual is identified in a document if '(1) his position or office is mentioned, (2) he is the sole holder of that position or office, and (3) reference by members of the public to freely and publicly available sources of information would easily reveal the name of that individual by reference to his position or office'.

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Appendix 1

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