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The Practitioner's Guide to Global Investigations

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

SIXTH EDITION

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

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Publisher's Note

The Practitioner's Guide to Global Investigations is published by Global Investigations Review (www.globalinvestigationsreview.com) – a news and analysis service for lawyers and related professionals who specialise in cross-border white-collar crime investigations.

The Guide was suggested by the editors to fill a gap in the literature – namely, how does one conduct (or conduct oneself) in such an investigation, and what should one have in mind at various times?

It is published annually as a two-volume work and is also available online and in PDF format.

The volumes

This Guide is in two volumes. Volume I takes the reader through the issues and risks faced at every stage in the life cycle of a serious corporate investigation, from the discovery of a potential problem through its exploration (either by the company itself, a law firm or government officials) all the way to final resolution – be that in a regulatory proceeding, a criminal hearing, civil litigation, an employment tribunal, a trial in the court of public opinion, or, just occasionally, inside the company's own four walls. As such it uses the position in the two most active jurisdictions for investigations of corporate misfeasance – the United States and the United Kingdom – to illustrate the practices and thought processes of cutting-edge practitioners, on the basis that others can learn much from their approach, and there is a read-across to the position elsewhere.

Volume II takes a granular look at law, regulation, enforcement and best practice in the jurisdictions around the world with the most active corporate investigations spaces, highlighting, among other things, where they vary from the norm.

Online

The Guide is available at www.globalinvestigationsreview.com. Containing the most up-to-date versions of the chapters in Volume I, the website also allows visitors to quickly compare answers to questions in Volume II across all the jurisdictions covered.

The publisher would like to thank the editors for their exceptional energy, vision and intellectual rigour in devising and maintaining this work. Together we welcome any comments or suggestions from readers on how to improve it. Please write to us at: insight@globalinvestigationsreview.com.

Foreword

Mary Jo White

Partner and Senior Chair, Debevoise & Plimpton LLP; Former Chair, US Securities and Exchange Commission; Former US Attorney for the Southern District of New York

The sixth edition of GIR's *The Practitioner's Guide to Global Investigations* is emblematic of the important work GIR has now done for many years, making sure that the lawyers and others who practise in the field have the resources and information they need to stay current in a transforming world. Compared with white-collar practice when I began my career, the landscape today can seem dizzying in its ever-expanding complexity. The amount of data now available, and the variety of means of communication, are boundless. Pitfalls are everywhere, from new and sometimes conflicting rules on data privacy to varied and changing standards for the attorney–client privilege across the world, among many others. The talented editors and very knowledgeable authors of this treatise, many of whom I have had the pleasure of working with first-hand throughout the course of my careers in government and now again in private practice, have done us all a great service in producing this valuable and practical resource.

The Guide tracks the life cycle of a serious issue, from its discovery through investigation and resolution, and the many steps, considerations and decisions along the way – and, at each critical point, includes chapters from the perspective of experienced practitioners from both the United States and the United Kingdom, and at times other jurisdictions. The chapters provide invaluable advice for the most experienced practitioners and a useful orientation for lawyers who may be new to the subject matter and are full of practical considerations based on a wealth of experience among the authors, who represent many of the leading law firms around the world, including my own. Unlike many other treatises, the Guide also offers separate – and essential – perspectives from leading in-house lawyers and from outside consultants who are critical parts of the investigative team, including forensic accountants and public relations experts.

The comparative approach of this book is unique, and it is uniquely helpful. Having the US and UK chapters side by side in Volume I can deepen understanding for even veteran practitioners by highlighting the different (and sometimes significantly divergent) approaches to key issues, just as learning a foreign language deepens our understanding of a native tongue. These comparisons, as well as the primers for other regions around the world in Volume II, are an essential guidebook for fostering clear communications across international legal and cultural boundaries. Many a misunderstanding could be avoided

by starting with this book when a new cross-border issue arises, and appreciating that we bring to each legal problem internalised frameworks that have become so familiar as to be invisible to us. The comparative approach of this treatise shines a light on those differences, and can prevent many missteps.

There are also very helpful situational comparisons, including chapters on interviewing witnesses when representing a corporation but also from the perspective of representing the individual. A lawyer on either side will benefit from reading the chapter on the other perspective.

The specific chapter topics in the Guide are a checklist for the many complexities of modern cross-border investigations, including considerations of self-reporting and co-operation, extraterritorial jurisdiction, remediation and dealing with monitorships. Significant attention is given to electronic data collection and strategies for using it to best advantage, and appropriately so. In almost any modern investigation, the amount of electronic data available to investigators will far exceed the resources that reasonably can be applied to reviewing it. Developing a well targeted but adaptive strategy for turning these mountains of data into actionable investigative information is absolutely critical, both to understanding the issue in a timely fashion and in delivering value to clients. The proliferation of stringent but diverse data privacy laws only adds to the complexity in this process, and the Guide is right to emphasise that understanding these issues early on is essential to the success of any cross-border investigation.

The Guide's chapters on negotiating global settlements are spot on. Despite professed global and domestic agreement against 'piling on', it remains a rarity to have only a single enforcement authority or regulator involved in a significant case. And although it is now accepted wisdom – and in my experience, the reality – that authorities across the globe are coordinating more than ever, this coordination does not mean the end of competition among them. As we frequently see in the United States, competition – even among authorities and regulators in the same jurisdiction – is still the frustrating norm. All of this amplifies both the risks that significant issues can bring, and the challenge for counsel to understand the competing perspectives that are at play.

The jurisdictional surveys in the second volume are also a tremendous resource when we confront a problem in an unfamiliar locale. These are necessarily high-level, but they can help identify the important questions that need to be asked at an early stage. As any good investigator can attest, knowing the right questions to ask is often more than half the battle.

This sixth edition arrives just as many of us are looking forward to returning to the office and to travel, meeting more people and investigations face to face. As predicted in the previous volume, the strain and disruption of the pandemic has only increased the number of serious issues requiring inquiry across the globe. The Guide will be a tremendous benefit to the practitioners who take them on – particularly for those who consult it early and often.

New York
November 2021
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Preface

The history of the global investigation

For over a decade, the number and profile of multi-agency, multi-jurisdictional regulatory and criminal investigations have risen exponentially. Naturally, this global phenomenon exposes companies – and their employees – to greater risk of hostile encounters with foreign law enforcers and regulators than ever. This is partly owing to the continued globalisation of commerce, the increasing enthusiasm of some prosecutors to use expansive theories of corporate criminal liability to exact exorbitant penalties as a deterrent and public pressure to hold individuals accountable for the misconduct. The globalisation of corporate law enforcement, of course, has also spawned greater coordination between law enforcement agencies, domestically and across borders. As a result, the pace and complexity of cross-border corporate investigations has markedly increased and created an environment in which the potential consequences, direct and collateral, for individuals and businesses, are unprecedented.

The Guide

To aid practitioners faced with the challenges of steering a course through a cross-border investigation, this Guide brings together the perspectives of leading experts from across the globe.

The chapters in Volume I cover, in depth, the broad spectrum of law, practice and procedure applicable to investigations in the United Kingdom and United States. The Volume tracks the development of a serious allegation (originating from an internal or external source) through all its stages, flagging the key risks and challenges at each step; it provides expert insight into the fact-gathering phase, document preservation and collection, witness interviews, and the complexities of cross-border privilege issues; it discusses strategies to successfully resolve international probes and manage corporate reputation throughout; and it covers the major regulatory and compliance issues that investigations invariably raise.

In Volume II, local experts from major jurisdictions across the globe respond to a common and comprehensive set of questions designed to identify the local nuances of law and practice that practitioners may encounter in responding to a cross-border investigation.

In the first edition, we signalled our intention to update and expand both parts of the book as the rules evolve and prosecutors' appetites change. The Guide continues to grow in substance and geographical scope. By its third edition, it had outgrown the original

single-book format. The two parts of the Guide now have separate covers, but the hard copy should still be viewed – and used – as a single reference work. All chapters are, of course, made available online and in other digital formats.

Volume I, which is bracketed by comprehensive tables of law and a thematic index, has been wholly revised to reflect developments over the past year. These range from US prosecutors reprising their previously uncompromising approach to pursuing *all* individuals involved in corporate misconduct and promising a surge in enforcement activity to UK authorities securing a raft of deferred prosecution agreements, some of which remain under reporting restrictions at the time of going to press. For this edition, we have commissioned a new chapter on emerging standards for companies' ESG – environmental, social and governance – practices. This issue has rocketed to the top of corporate agendas, and raised the eyebrows of legislators and regulators, far and wide. The Editors feel that this is an area to watch closely and that corporate ESG investigations will proliferate in the coming years.

The revised, expanded questionnaire for Volume II includes a new section on ESG issues so readers can gauge the developments in each jurisdiction profiled. Volume II carries regional overviews giving insight into cultural issues and regional coordination by authorities. The second volume now covers 21 jurisdictions in the Americas, the Asia-Pacific region and Europe. As corporate investigations and enforcer co-operation cross more borders, we anticipate Volume II will become increasingly valuable to our readers: external and in-house counsel; compliance and accounting professionals; and prosecutors and regulators operating in this complex environment.

Judith Seddon, Eleanor Davison, Christopher J Morvillo, Michael Bowes QC, Luke Tolaini, Ama A Adams, Celeste Koeleveld
December 2021
London, New York and Washington, DC

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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 twelve deferred prosecution agreements (DPAs)[2] with corporates since their introduction in February 2014.[3] 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. However, to date, the SFO has not been successful in prosecuting

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; *Airline Services Ltd*, available at https://www.sfo.gov.uk/download/airline-services-limited-deferred-prosecution-agreement/; Amec Foster Wheeler Energy Limited, available at https://www.sfo.gov.uk/2021/07/02/sfo-enters-into-103m-dpa-with-amec-foster-wheeler-energy-limited-as-part-of-global-resolution-with-us-and-brazilian-authorities/; and separate DPAs with two unnamed companies for Bribery Act offences, available at https://www.sfo.gov.uk/2021/07/20/sfo-secures-two-dpas-with-companies-for-bribery-act-offences/.

any individual involved in the conduct related to a DPA and has dropped a number of its larger investigations into individuals. Recently, two individuals, who had been charged in relation to conduct connected to the *Serco Geografix* DPA, were acquitted following evidence-disclosure errors by the SFO.[4]

Nevertheless, conviction and charging rate figures from the SFO's annual report for 2020–21 indicate that it remains the SFO's focus to pursue individuals involved in corporate misconduct. The 2020–2021 report confirms that four individual defendants were convicted, and 20 defendants, comprising both individuals and corporates, were charged in that period. [5] Some of 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.[6] Elsewhere, two months after announcing the *G4S* DPA, the SFO charged three former G4S executives with multiple fraud offences in connection with a scheme to defraud the Ministry of Justice between 2009 and 2012.[7] While not connected to a DPA, the SFO has also had success in securing the conviction of three former Unaoil executives,[8] and more recently a former SBM Offshore executive, for conspiring to make corrupt payments to secure lucrative oil contracts in Iraq.[9]

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.

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

4 https://www.ft.com/content/769c8883-fdee-4251-a4c8-993b510a1b1b.

5 SFO annual report 2020-2021, 20 July 2021 (https://www.sfo.gov.uk/download/annual-report-and-accounts-2020-2021/), last accessed 1 September 2021.

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

7 https://www.sfo.gov.uk/2020/09/08/sfo-charges-three-former-g4s-executives-with-fraud-against-taxpayer/, 8 September 2020, last accessed 1 September 2021.

8 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.

9 https://www.sfo.gov.uk/2021/02/24/fourth-executive-convicted-of-bribery-in-post-occupation-iraq/, 24 February 2021, last accessed 1 September 2021.

a DPA, it is a change to the DPA Code of Practice, which stood silent on the matter.

Following the acquittal of a former chief executive of Barclays in 2019,[10] when the Court of Appeal held that the individual was not the directing mind of the bank, and the renewed debate following the Law Commission's consultation on corporate criminal liability,[11] there could be a move towards a broader offence of failure to prevent fraud, which could result in corporates having to provide information on the individuals involved in the alleged misconduct. The relatively recent changes in the test for 'dishonesty' in criminal law may encourage 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.

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. Section 75 of the Sentencing Act 2020 contains 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 2 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.[15] 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

10 *R v. Varley and others* [2019] EWCA Crim 1074.

11 https://www.lawcom.gov.uk/law-commission-seek-views-on-corporate-criminal-liability/.

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 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.

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.[16]

The Sentencing Act 2020 also 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.[17]

30.1.1 Imprisonment

The maximum sentence for an individual convicted on indictment of an offence by virtue of section 1, 2 or 6 of the Bribery Act 2010 is 10 years' imprisonment.[18] 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.[19] 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.[20]

In cases of financial crime, it is rare for defendants to be charged with only one count, and in the most serious cases a judge can order the sentences for each individual count of which a defendant has been convicted to run consecutively.

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

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

17 Sentencing Act 2020, s.74. See also ibid., s.388: A defendant, already serving a prison sentence, who provides or offers assistance in this regard could also benefit by having a sentence reviewed

18 See Bribery Act 2010, s.11. 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.

19 See ibid., s.14.

20 The maximum sentence for individuals under the Bribery Act 2010 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 the Proceeds of Crime Act 2002 (POCA), ss.327 to 329. Furthermore, an individual convicted of the tipping- off offence under POCA, s.333A is liable to a maximum of two years' imprisonment or a fine, or both.

the defendant has any previous convictions, the magnitude of the offence[21] or where it can be established that the defendant failed to respond to warnings about his or her behaviour.

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*,[22] 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 of the Serious Organised Crime and Police Act 2005,[23] had his 12-month custodial sentence suspended on appeal.[24] 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 17 on individuals in cross-border proceedings

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.[25] 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),[26] 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

21 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 (last accessed 13 November 2020).

22 [2010] EWCA Crim 1048.

23 Since 1 December 2020, sentence reductions for co-operating defendants are governed by the Sentencing Act 2020, s.74. Such reductions previously fell under the Serious Organised Crime and Police Act 2005 (SOCPA), s.73.

24 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'. [2010] EWCA Crim 1048, at para. 36.

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

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

at the earliest opportunity (i.e., a discount of one-third) and extra credit for entering into a plea agreement with the FSA.[27] 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'.[28]

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. Sections 124 to 126 of the Sentencing Act 2020 regulate the fixing of fines in criminal cases. Those sections require that any fine imposed must reflect the seriousness of the offence and require the court to take into account the financial circumstances of the offender.

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.[29] 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[30] UWOs since commencement.

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

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

28 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).

29 Under the Criminal Finances Act 2017, Part 1 ss.1–9, which amends POCA s.362.

30 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.

against the respondent to the order or whether the respondent is located in the United Kingdom or another jurisdiction.[31]

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.[32]

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.[33] 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.[34] 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.

A second UWO against a respondent considered to be involved in serious crime followed on 24 July 2019 against six properties worth around £3.2 million

31 As of August 2021 and according to publicly available information, only the NCA has applied for UWOs.

32 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 Criminal Finances Act 2017 (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.

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

34 *National Crime Agency v. Hajiyeva* [2020] EWCA Civ 108. 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.

in total belonging to a woman believed to be associated with criminals involved in paramilitary activity and cigarette smuggling.[35]

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.

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.[36] 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.[37] 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.[38]

30.1.4 Confiscation orders

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

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

36 POCA, s.362E.

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

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

defendant was said to be living a 'criminal lifestyle'.[39] 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.[40] The FCA secured £1.9 million in confiscation orders on 11 May 2018, as part of Operation Tabernula,[41] and £2.2 million in confiscation orders in May 2017, as part of Operation Cotton.[42]

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 the case of Jolan Saunders, whose default prison sentence of 3,236 days (just under nine years) was activated after he failed to pay a confiscation order of £5,262,301.03, despite the SFO showing evidence of £4.5 million in hidden assets emanating from his fraud.[43]

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*,[44] the Supreme Court held that the calculation of reductions in default terms should not take into consideration accrued interest. 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.'[45]

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39 Pursuant to POCA, s.75, '(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'.

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

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

42 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).

43 https://www.sfo.gov.uk/2021/08/02/london-fraudster-jailed-for-failing-to-pay-confiscation-order/ (last accessed 22 August 2021).

44 [2018] UKSC 2.

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

In accordance with the decision in *R v. Waya*,[46] prosecutors should ensure that the confiscation is proportionate, which entails an assessment of the ability of the defendant to pay the order in full.

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'.[47]

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 alia*, an order requiring the defendant to disclose where assets are kept, an order appointing a receiver and an order restraining assets.[48]

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.[49]

46 [2012] UKSC 51.

47 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).

48 See Senior Courts Act 1981, s.37(1).

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

In both a magistrates' court[50] 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.

Disqualification orders 30.1.6

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'.[51]

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*,[52] must have some relevant factual connection with the management of the company.

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

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.[53]

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

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

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

52 [2008] EWCA Crim 394.

53 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 (ss.16 to 19B); the Access to Justice Act 1999; the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (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.

FCA's Annual Business Plan for 2021/22, which illustrates that tackling financial crime, including fraud, 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'.[54] 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[55] to make senior managers more responsible and accountable for their actions.[56]

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.[57]

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.[58] DEPP 6A sets out its policy in relation to imposing 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.[59] No equivalent

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

55 '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 commenced 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.

56 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.

57 Other sanctions available to the FCA include varying or cancelling a firm's permission under the FSMA, Part 4A; 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.

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

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

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.[60]

The scope of the rights conferred by section 393(4) was reconsidered in *Macris v. FCA*.[61] On 22 March 2017, the majority of the Supreme Court 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 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.

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

61 [2015] EWCA Civ 490; [2017] UKSC 19.

Appendix 1

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Elizabeth Robertson is a partner in Skadden's government enforcement and white-collar crime group in London. She advises on multi-jurisdictional business crime and regulatory matters around the world. Ms Robertson has played a role in many of the most important criminal and regulatory investigations in the United Kingdom over the past 20 years, giving her significant understanding of the priorities of the UK prosecuting authorities such as the SFO, the FCA, HMRC and the Competition and Markets Authority. She has particular experience in corruption, money laundering, economic sanctions and criminal tax cases. Ms Robertson has also advised on criminal cartel matters, and regularly assists with governance and compliance issues as well as proceedings brought by professional and regulatory bodies. She has successfully defended clients on enforcement actions brought by multiple agencies and responded to coordinated dawn raids in the UK and overseas. Ms Robertson also has experience in ancillary matters such as extradition and mutual legal assistance and applying to Interpol for access to information or for information to be amended or deleted.

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