Clients&FriendsMemo

Crime in the Time of Covid-19: The Progress of UK White-Collar Investigations and Trials During Lockdown

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Regulators and enforcement agencies in the United Kingdom, while not immune to the effects of the Covid-19 pandemic, have proved to be relatively adaptable with a continued appetite for enforcement. As their counterparts in the United States, there is an emphasis on facilitating the government's efforts to stabilise the market, and provide guidance for businesses and individuals while being vocal about a zero-tolerance policy for any pandemic-related fraud. There has been a unanimous emphasis on companies reviewing their compliance measures to ensure they effectively ward against new risks that may be brought by market conditions or operational changes. While there is no cohesive policy regarding enforcement, and delays are likely to plague all ongoing investigations, there does not seem to be a sizeable discontinuance of matters or a change in expectations. Depending on the regulatory or enforcement body involved, this may be a window of opportunity for companies and individuals to gain some clarity in relation to their role in and the overall direction of any investigation. Included below is a roundup of current enforcement actions by a number of agencies enforcing against economic crime, and potential areas of future scrutiny.

Financial Conduct Authority

The FCA has been at the forefront of responding effectively to the current crisis, publishing guidelines and advice in relation to a number of matters to instruct businesses and protect consumers. While the focus will be on the short-term functioning of the market and the treatment of customers, the FCA has taken every opportunity to reiterate that it will continue to investigate compliance issues and that enforcement actions should be expected to continue as usual. The Business Plan 2020-21 acknowledges the effects of the crisis, but also it reiterates that fraud will continue to be an enforcement priority.

A number of statements confirm that compliance expectations will not be lowered; instead, firms will be required to adapt their systems and controls to adequately address the new risks. The FCA has warned that it is "*actively reviewing the contingency plans of a wide range of firms*," including an assessment of "*operational risks*," with an expectation that "*firms [are] to take all reasonable steps to meet their regulatory obligations*".

The FCA has amended some of its rules to enable firms to try to help businesses and consumers affected by the pandemic, but has also reminded firms at every turn that failure to adhere to its guidance in relation to Principle 6 of the Principles for Businesses ("*A firm must pay due regard to the interests of its customers and treat them fairly.*") may well result in enforcement action. For example, in the consumer credit and SME loan space, it is expected that the regulator will apply particular scrutiny to the treatment of borrowers experiencing financial difficulty as a result of the pandemic.

While no one senior manager at a regulated firm is required to oversee the coronavirus response, firms are expected to allocate responsibilities in a way that effectively manages risks. Responsibilities are likely to be mapped back to the Senior Managers Regime [(see also our Clients & Friends memo regarding lending to small and medium-sized enterprises and responsibilities for senior managers)]. The FCA has highlighted market abuse as a continuing high-risk area and requires firms to "*take all steps to prevent* [against] *market abuse*," which may include paying more attention to compliance measures with "*enhanced monitoring, or retrospective reviews*." Finally, anti-money laundering compliance is also expected to continue as normal with some innovative suggestions for verifying a client's identity, including requesting they submit "*selfies*" or videos, or seek verification by a third party such as a lawyer. This guidance has been supported by the issuance of direct requests to banks for continued improvement and action.

Other statements also have been backed up by action. A large investigation of 14 financial institutions and multiple individuals in relation to allegations of tax fraud, by dividend stripping trades, in a number of European jurisdictions is continuing. The cumulative value of the fraud is estimated to be in excess of €50 billion and, while the regulator has been relatively quiet about the issue, media reports indicate the matters are close to conclusion and decisions regarding action will be taken imminently. Additionally, the latest warning notice made against an individual alleged to have engaged in market abuse was issued as recently as 19 March 2020, indicating fair warning has been given for firms and individuals alike to expect increased scrutiny by the regulator in the near future.

Crown Prosecution Service

As the key public agency conducting criminal prosecutions in England and Wales, the CPS has provided the Covid-19 Interim CPS Charging Protocol which acknowledges the difficulties a jury trial poses during this crisis and categorises large, complex investigations that have been ongoing as lower priority during the pandemic. The CPS has indicated that enforcement of Covid-19-related fraud will be a matter of priority; however, prosecution of other fraudulent activity will not decline but instead may be referred directly to the Crown Court and, in order to clear up some of the backlog it may implement, "*a virtual specialist fraud court*,"

While criminal cases are on hold, in particular those dealing with complex fraud, matters affecting a defendant's legal position are not, most recently through the Court of Appeal judgment in *Barton & Booth v The Queen* [2020] EWCA Crim 575, whereby the Court confirmed the test for criminal dishonesty from *Ivey v Genting Casinos (UK) Ltd t/a Crockfords*

[2017] UKSC 67 leaving the *Ghosh* test to be considered a legal relic. *Ghosh* required that: (i) the conduct complained of be found dishonest by the objective standards of ordinary, reasonable and honest people; and (ii) the defendant *realise* that an ordinary honest person would regard the behaviour as dishonest. The Ivey test strips out the subjective second limb and replaces it by enquiring: (i) what the defendant's actual state of knowledge or belief was, based on the facts; and (ii) whether the conduct was dishonest based on the standards of ordinary decent people. Subjective judgment in relation to the defendant's experience and intelligence will now be considered to be wrapped up in the fact-finding, first limb of the test. It is unclear whether, and to what extent, previous defences such as market practice or other standards will be considered, therefore making it more straightforward to prosecute. Furthermore, the test for dishonesty is a crucial issue in a number of complex criminal investigations, particularly those with allegations of conspiracy to defraud, certain corporate criminal offences that consider the "failure to prevent" and the Fraud Act 2006. This change will therefore require corporations to implement more risk-based, preventative compliance policies with consideration given to changing public opinion as to what would constitute dishonesty.

Serious Fraud Office

In contrast, the SFO has provided little public information regarding how ongoing matters will progress. Except for stating that it no longer will be able to engage with any paper correspondence, the SFO has yet to make any other announcements. It is, however, clear that investigations and related litigation will continue, albeit with some delay. ENRC's High Court proceeding questioning the use of certain evidence by the SFO continued via a virtual hearing last week. Mr Justice Waksman ruled that the SFO would need to consider to what extent its investigation incorporated information that ENRC has alleged was disclosed to the regulator during unauthorised meetings with the company's former lawyer at Dechert. Progress is also being made in other SFO investigations, including changing the status of individuals involved with an ongoing investigation. The SFO is not currently conducting compulsory section 2 interviews, and it has issued a handful of such notices demanding information during the lockdown. While the agency seems particularly affected by the lockdown, it will need to find a way to progress interviews and actively seek out new investigations. Defence counsel are therefore expected to be ready to progress all aspects of ongoing investigations.

Delays in the justice system have been highlighted by the adjournment of one of the biggest ongoing corruption trials at the end of March. The criminal trial of three Unaoil/SBM executives brought by the SFO in relation to allegations of conspiring to make corrupt payments for certain Iraqi oil contracts was adjourned for almost two months. Evidence in the matter was concluded; however, closing submissions and jury deliberation were outstanding. The trial resumed this week at the London Central Criminal Court with social-distancing measures in place. A number of smaller court venues are also being assessed to determine whether it will be possible to resume other jury trials in the near future. Currently the courts are looking to conclude ongoing cases and adjourn all non-urgent work. While the Unaoil trial will go some way toward determining the feasibility of an ongoing trial being heard in the new environment, the challenge for the Court system will be whether complex new trials can be brought with social-distancing measures in place.

Other criminal proceedings that have been postponed include the three-week extradition hearing of Julian Assange, which was due to begin on 18 May 2020. The hearing is unlikely to be heard before September of this year at the earliest. Mr. Assange was deemed to be a flight risk and therefore was denied bail in March. Additionally, the 16-week fraud trial of Jonathan Denton, the former finance partner at a law firm alleged to be involved in running a fraudulent investment scheme valued at approximately £21 million, also has been postponed, after commencing in January this year, until January 2021.

This hiatus may be an opportunity to engage the SFO and get clarity on a case-by-case basis as to the position of individuals and companies and next steps that will allow for defence counsel to prepare for the flurry of future requests likely to be made when the lockdown is over.

National Crime Agency

The NCA has echoed its commitment to work with other government and private-sector partners to enforce against fraud as criminals seek to capitalise on the pandemic.

Prior to the pandemic and up until last month, the NCA was actively pursuing and defending unexplained wealth orders ("**UWOs**") to target the flow of "dirty money," one of its strategic priorities per the Annual Plan 2020-21. After defending an appeal in February of this year, the NCA saw a dismissal of three UWOs. The judgement by Justice Lang in *NCA v Baker* [2020] *EWHC (Admin)* reiterated that UWOs are only one instrument, with "*relatively limited purpose*", that can be used by law enforcement to combat the proceeds of crime. This raised some debate as to the likelihood of future use.

The facts in *NCA v Baker* were unique in that after the UWOs were issued on an *ex parte* basis, "*extensive information about purchase and transfer of the properties, their registered owners, and the [ultimate beneficial owners]*" was provided by the respondent. The NCA did not consider the information adequate, which resulted in an appeal to discharge the orders. Justice Lang considered the information provided and made some significant findings that will likely guide future applications for UWOs. The judgement confirmed that UWOs were considerably intrusive as they required a respondent to make statements and disclose potentially confidential financial matters, with criminal liability attaching to any false or misleading statements. There was therefore an increased need to limit situations in which UWOs were used. Justice Lang restated the need for a sound evidentiary basis, including the NCA being required to evaluate whether evidence provided was genuine and capable of being verified and, if so, to conduct a "*fair-minded evaluation*" of any new information. Additionally, in an unprecedented statement in the context of the proceeds of crime, the Court acknowledged that there were lawful reasons for using offshore vehicles, including "*privacy, security* [and] *tax mitigation*," which should not be discounted in an investigation.

The NCA has announced that it will appeal the decision; however, no submissions have been made as of yet. Due to the exceptional circumstances in this dismissal, and with the current focus being on pandemic-related crime, UWOs may be used less frequently in the near term.

However, it is unlikely that the agency will significantly curtail the use of its powers to apply for UWOs.

Another less publicized yet widely used tool to restrict the use of proceeds of crime is the Account Freezing Order ("**AFO**"). On 23 April 2020, the Metropolitan Police announced AFOs against 25 bank accounts holding in excess of €1.9 million. The investigation is said to have started in 2018 and centred around members of an organised crime network based in Italy using UK incorporated companies to launder money. After securing an AFO, law enforcement may then investigate and apply for a Forfeiture Order. This may be granted in the absence of a criminal conviction, but simply if, on the balance of probabilities, the account represents monies intended to be used in criminal conduct, or are the proceeds of crime.

Administrative proceedings in relation to proceeds of crime, including determining timetables, orders regarding disclosure of information, etc., may take place virtually. While it is not necessary for a defendant to be present at a confiscation hearing, it is desirable for this to be the case. The Coronavirus Act 2020, as it temporarily amends the Crime and Disorder Act 1998, allows for a defendant to attend confiscation hearings virtually. Furthermore, virtual hearings can be made public and not be in contravention of common law principles or Article 6 of the European Convention on Human Rights ("right to a fair trial"). It is therefore possible that prosecutions in relation to the proceeds of crime will be less affected than other criminal trials during this time.

Her Majesty's Revenue and Customs

HMRC has taken the strategic decision to concentrate its resources to help businesses and individuals through the current economic uncertainty. As a result, HMRC has written to a number of individuals and companies currently under investigation to inform them that it will not require further information or press for responses at this time. In some cases, investigations have been suspended. Some individuals have heard that their tax enquiries have been discontinued. HMRC, together with its counterparts in enforcement, has reiterated its commitment to fighting economic crime and it is unlikely this temporary hiatus will continue for the medium to long term.

Some investigations may be settled pursuant to Code of Practice 9. This is possible in certain circumstances where HMRC suspects a fraud has occurred but believes it would be more beneficial to resolve the issue as a civil rather than criminal matter. This will likely be limited to cases where there is little evidence and will remain a matter of discretion. However, given the current crisis, an immediate financial settlement may seem more attractive in certain cases as opposed to a resource-consuming complex criminal investigation.

HMRC is encouraging companies that are not under investigation to focus their resources on ensuring compliance, particularly on ensuring that books and records are kept accurate and up to date, and has indicated this is a likely area to come under significant scrutiny at a later date. In particular losses will need to be accounted for and financial institutions will need to consider how they account for non-performing assets. The risk for corporations also has been

heightened since the introduction of corporate liability pursuant to the Criminal Finances Act 2017.

Office of Sanctions Implementation

While OFSI was not known previously for its imposition of large monetary penalties, it would seem the fourth time is a charm, as OFSI recently announced a financial penalty of £20.47 million to be levied against Standard Chartered Bank for breaching sectoral sanctions imposed against Russia by the EU that, in turn, are applicable in the UK. The sanctions were in place since 2014 and prohibit EU persons from making loans or credit available to certain Russian banks and associated entities. Standard Chartered Bank voluntarily disclosed a series of 102 loans made to Denizbank, which was a majority-owned subsidiary of Sberbank (a sanctioned entity). There was a slim exemption for 32 of the transactions; however, the remaining loans with an estimated value of over £266 million were in breach, and 21 of those (accounting for approximately £97 million) were issued after HM Treasury received its powers to issue monetary penalties. These were considered the "*most serious*" used in the assessment of the final penalty. The fine was reduced for a cooperation and voluntary disclosure, and further reduced upon ministerial review. The main takeaways from the enforcement action include the value OFSI places on "*prompt and complete voluntary disclosure*," a requirement for firms to understand the details of different types of sanctions, including the scope of any exemptions, and the need for a compliance program to be effective in practice. It would also seem that firms will benefit from applying for ministerial review, as this is the second matter where it has been requested and was proven successful in reducing the overall penalty.

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