Business Crime Quarterly

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Welcome

Summer should be the time to take it easy. Not so, it seems, for the enforcers and regulators of business crime. In this edition of Business Crime Quarterly we report on a number of convictions for fraud and corruption, particularly in the UK, where the approval of the second deferred prosecution agreement has given useful pointers on how the use of this tool might develop. The Serious Fraud Office will be pleased with its recent success against Libor manipulators and is continuing its practice of investigating both individuals and the company they represent whenever possible. Libor prosecutions are set to take place in the U.S. too, underlining the global nature of the scandal. The European Union has published its enhanced package to tackle money laundering and terrorist financing and, following the Anti-Corruption Summit held in London in May, over 40 countries have pledged to promote integrity, transparency and accountability in the fight against corruption.

However, developments have not all been one way. In Europe, elements of enforcement procedures in France and Belgium are being amended following the declaration by courts there that existing processes were unconstitutional. The decision in a high-profile bribery case in Hong Kong is being appealed. Recent reports on the operation of the processes to tackle anti-money laundering in both Australia and the UK have suggested recommendations to improve the efficiency and efficacy of the countries' respective regimes - a timely development, given that data from Australia suggests that financial crime there is on the increase.

Satindar Dogra
Partner

Global news

Global anti-corruption summit highlights transparency and cooperation

Increased transparency and international cooperation were two of the main themes to emerge from the UK government's Anti-Corruption Summit, held in London on 12 May 2016. Representatives from over 40 countries, along with six major international and regional organisations, came together to discuss the damage caused by global corruption and commit to a series of measures aimed at tackling the problem. In a communiqué issued at the end of the day, countries across the globe set out their commitment to promote integrity, transparency and accountability in the fight against corruption. Each attending country also published its own statement of the actions it will take domestically.

We have published a client note on the Anti-Corruption Summit, available here.

UK: EY's 14th Global Fraud Survey focusses on the need for increased corporate response

Ernst & Young's annual global fraud survey for 2016, published in April 2016, highlights transparency and third-party risk, the international regulatory regime, an increased emphasis on whistleblowing and the consequences for individuals of corporate misconduct as among the main issues facing businesses today.

Threats such as the rise of cyber crime, terrorist financing and recent disclosures relating to the misuse of offshore jurisdictions have increased the pressure on both governments and companies to tackle fraud, bribery and corruption issues. The situation in emerging markets is particularly acute, with over half of survey respondents in such countries reporting that they thought corruption was endemic there. One fifth of respondents in developed markets believe it is widespread in their countries too, resulting in an overall of 39% of respondents considering that bribery and corruption occur regularly in their country, up 1% from last year. A perceived lack of effectiveness on the part of governments when it comes to prosecuting corruption was noted by 70% of respondents in Brazil, 56% in Eastern Europe and 56% in Africa. While governments in these countries may be willing to prosecute, they are not often successful.

It is therefore unsurprising that the survey also found that 36%of CFOs said they could justify unethical behaviour to meet financial targets. Overall, one in ten respondents said they would make a cash payment to secure business in an economic downturn, although in the Far East the number was significantly higher, with one in four being prepared to do so.

Across the globe, board members and senior executives are facing increased personal scrutiny, through developments such as the Yates memorandum in the US, enforcement against individuals by the US DoJ and SEC and the first prosecution by the UK SFO of individuals under the Bribery Act 2010 in respect of corporate misconduct. 49%

of respondents considered that the board of their companies needed to understand their businesses better if they were more effectively to safeguard against bribery and corruption–related risks.

The full report is available to download from EY's website, here.

European Commission publishes its anti-money laundering package

On 5 July 2016 the European Commission published its anti-money laundering package, aimed at strengthening the fight against terrorist financing. The package comprises (i) a legislative proposal to review the Fourth Anti-Money-Laundering Directive ('AMLD IV') (here); (ii) a legislative proposal to review the Directive for Administrative Cooperation as regards access to anti-money-laundering information (here); and (iii) a Communication on further measures to enhance transparency and the fight against tax evasion and avoidance (here). These proposals are the first initiatives implementing the Commission's Action Plan of February 2016.

> "Banks will be expected to carry out enhanced due diligence on financial flows from these countries."

The Commission has identified a number of third countries it considers to have strategic deficiencies in the area of anti-money laundering or countering terrorist financing. The list, published on 19 July 2016, comprises the nine states already identified by the Financial Action Task Force as deficient (namely, Afghanistan, Bosnia and Herzegovina, Guyana, Iraq, Lao PDR, Syria, Uganda, Vanuatu and Yemen), with the addition of Iran and North Korea. Banks will be expected to carry out enhanced due diligence on financial flows from these countries.

In addition, following revelations in the Panama Papers that certain tax advisors and financial intermediaries had played a central role in facilitating tax evasion, the Commission has commenced work on measures to create "effective disincentives for those that promote and enable aggressive tax planning". A consultation will be opened in Autumn to gather stakeholders' feedback on the issue.

Although AMLD IV originally required member states to transpose the directive into national law by 26 June 2017, the Commission has been urging early implementation and member states are now expected to implement its provisions by the end of 2016.

Cases and investigations

Belgium: Criminal settlement regime declared unconstitutional

The Belgian criminal settlement regime (*"transaction pénale / minnelijke schikking in strafzaken"*) currently permits the public prosecutor to enter into a settlement with a defendant, even after the case has been referred to a judge. Upon conclusion of such a settlement and once it has been established that all formal requirements of the settlement have been satisfied, the judge seized of the case is obliged to close the procedure.

This purely formal review was declared unconstitutional by the Belgian Constitutional Court in a judgment of 2 June 2016 in case 83/2016, on the ground that the judge could not properly assess the settlement concluded. The Constitutional Court considered this a breach of the legality principle, the right to a fair trial and the principle of judicial impartiality. It also stressed that, to properly protect the rights of the defendant, the judge seized should substantially verify that the settlement was entered into voluntarily by the defendant and that he was provided with all required information, so that he could fully understand the content and the consequences of the settlement. A mere formal review by the judge in that respect is not sufficient.

While declaring certain aspects of the settlement regime unconstitutional, the Constitutional Court also confirmed the constitutionality of other aspects of this regime. The fact that the decision to conclude a settlement is at the sole discretion of the public prosecutor and that a defendant is never entitled to a settlement have, for instance, been confirmed not to breach the defendant's fundamental rights. Also, the Constitutional Court has not challenged the procedure whereby a settlement agreement is concluded by the public prosecutor and a defendant before the case is referred to a judge.

To avoid jeopardising criminal settlements entered into prior to its ruling, the Constitutional Court has declared that the provisions now declared unconstitutional will remain in force until the publication of the court's ruling in the Belgian State Gazette. All criminal settlements previously entered into therefore remain valid. However, the Minister for Justice has announced that the relevant provisions of the Code of Criminal Procedure will be amended as soon as possible to address the Constitutional Court's ruling.

The case is available on the Constitutional Court's website in French, here and in Dutch, here.

Hong Kong – Top court to examine "sweetener" doctrine for misconduct in public office offence: must the prosecution prove an identifiable benefit was derived from a corrupt payment?

In the latest development of one of the most high-profile bribery prosecutions in Hong Kong's history, in which a former Chief Secretary of the Hong Kong government, a property tycoon, a former company executive and a former Hong Kong Stock Exchange official were convicted and jailed for various bribery and misconduct in public office offences, the Court of Final Appeal has indicated that it will hear the four defendants'

appeals on a question of law, the substance of which bears resemblance to an issue which was recently examined by the US Supreme Court in the corruption prosecution of former Virginia Governor, Bob McDonnell.

The question of law which forms the basis of the appeals is "whether in the case of a public officer, being or remaining favourably disposed to another person on account of pre-office payments, is sufficient to constitute the conduct element of the offence of misconduct in public office?" The defence had argued unsuccessfully before the Court of Appeal in an earlier appeal that: (i) the prosecution must prove a specific or generic breach of duty by the former Chief Secretary to favour the tycoon's business as a result of the payments; and (ii) a person's disposition only concerned his state of mind and, therefore, "favourable disposition" in itself could not constitute "conduct" to support a charge of misconduct in public office.

It remains to be seen whether the Court of Final Appeal will agree with the trial court and the Court of Appeal's ruling that the acceptance by a public officer of a "general sweetener" is sufficient to constitute misconduct in public office and the law does not require that any particular favour be specifically identified. The appeal hearing is set to take place on 9 and 10 May 2017.

"This underlines the importance of adequate procedures to address third party risk."

UK: SFO secures second Deferred Prosecution Agreement

On 11 July 2016 Sir Brian Leveson approved a deferred prosecution agreement ("DPA") between the Serious Fraud Office ("SFO") and XYZ Limited ("XYZ"), whose identity has not yet been made public pending potential individual prosecutions. This was only the second approval of a DPA by a UK court, even though DPAs have been available as an enforcement tool for approximately two and a half years.

As with the first DPA in November 2015, the case involved a breach of section 7 of the Bribery Act 2010. Agents acting on behalf of XYZ, a SME operating in the steel sector, were found to have been paying bribes to secure contracts in foreign countries totalling £17 million over an eight year period. Adequate policies and procedures were not in place to prevent such conduct. In fact, the misconduct was only uncovered as a result of the implementation of a global compliance programme by XYZ's US parent in 2011.

A number of interesting points arise from this case.

> Once the issues had been identified by an internal investigation, XYZ acted quickly to self-report the misconduct to the SFO (within two or three months). It then provided significant and full assistance to the SFO investigation.

> Oral summaries were again given of interview accounts with senior management.

> The judge had to work hard under the Sentencing Guidelines to find a way of passing a financial penalty which would not bankrupt the company. The misconduct had been lengthy and systemic, giving rise to allegations of corporate conspiracy and not merely a failure to prevent bribery. Under the Guidelines, such conduct could have resulted in a fine of several million pounds, way beyond what XYZ could afford to pay. In the end Sir Brian Leveson imposed a fine of only £325,000, together with an order for disgorgement of gross profits of approximately £6,200,000. The US parent agreed to contribute nearly £2 million of this sum, reflecting a proportion of the dividend payments it had innocently received from XYZ.

> It provides a classic illustration of third party risk. Each of the 28 instances of bribery involved an intermediary. Indeed, in many cases it was at the instigation of the intermediaries that the bribes were offered and/or paid. This underlines the importance of adequate procedures to address third party risk, in particular around due diligence when engaging agents, securing appropriate contractual protections, and ensuring ongoing review of relationships.

We have published a client note considering the case in more detail, here.

UK: SFO investigates bribery allegations at Monaco oil group

On 19 July 2016 the SFO confirmed that it is conducting a criminal investigation into allegations of allegations bribery, corruption and money laundering concerning Unaoil, a Monaco-based oil services group. Following a series of raids earlier this year by the Monegasque authorities at the headquarters of Unaoil in Monte Carlo, documents and emails have now been passed to the SFO in the UK.

The allegations, which first arose in the Australian media, relate to wider claims that bribes have been paid to foreign officials to secure contracts for western oil companies in Iraq, Libya, Syria and Kazakhstan.

Unaoil vehemently denies the allegations, claiming it is a victim of criminal extortion. It has instructed lawyers to commence legal action against Fairfax Media, the Australian group that first published the allegations, in relation to "the malicious and damaging allegations negligently published by these media organisations and repeated by other media organisations globally", which it claims has resulted in damage of over $100m. It is also filing a criminal complaint with law enforcement in Monaco "in relation to the theft of company data.

The SFO's short press release is available here.

UK: Company and seven individuals charged with bribery

The SFO has charged freight and logistics company F.H. Bertling Limited and seven individuals with conspiracy to bribe an agent of the Angolan state oil company, Sonangol. The company is a UK-based subsidiary of the German-headquartered Bertling Group. It and the seven individuals are all charged with one count of making corrupt payments, contrary to section 1 of the Prevention of Corruption Act 1906. They have all been summoned to appear at Westminster Magistrates Court on 4 August 2016.

The alleged activity took place between January 2005 and December 2006, hence the charge being under the 1906 Act and not the Bribery Act 2010, which only applies to conduct occurring after 1 July 2011. The SFO has been investigating the matter since September 2014 but the enquiry has only just been disclosed publically.

The SFO's press release is available here.

UK: Securency director found guilty of making corrupt payments to foreign official

The former director of business development of Securency International Pty Ltd, Peter Chapman, has been found guilty of bribing a Nigerian official to win orders to supply polymer substrate, used in the manufacture of banknotes, following a five week trial at Southwark Crown Court. The Australian citizen was convicted on four counts of making corrupt payments totalling approximately £143,000 but acquitted of two other counts. He was sentenced to 30 months in prison for each count, to run concurrently, on 12 May 2016, the same day as the Global Anti-Corruption Summit was taking place in London. The presiding judge, Judge Michael Grieve, said in passing sentence that, "corruption, particularly of foreign government officials, is a very serious global problem as the anti-corruption summit in London highlights." In fact, due to time already served, Chapman will serve the remainder of his sentence on licence.

Chapman's defence had tried to have the trial stopped, arguing that the then Prime Minister David Cameron's overheard comments to the Queen that Nigeria was "fantastically corrupt" may influence the jury, who were still deliberating their verdict at the time. Judge Grieve did not halt the case but gave the jury a strongly worded direction that they should "completely ignore" Mr Cameron's comments on Nigeria.

The case was brought by the SFO in co-operation with the Nigerian Economic and Financial Crimes Commission and the Central Authority of Nigeria and followed a joint investigation by the SFO and the Australian Federal Police into Securency's activities.

The SFO's press release is available here.

UK: Traders and submitters guilty of Libor manipulation receive lengthy jail sentences

On 29 June 2016 three of the six former Barclays Bank employees on trial in London for alleged US$ Libor fixing were convicted of conspiracy to defraud by manipulating the Libor setting process between June 2005 and September 2007. Three of the men were convicted after an 11-week trial, with the jury finding that they had acted dishonestly. However, in evidence, the defendants had claimed that managers were aware of and condoned the conduct.

A fourth defendant had already pleaded guilty in October 2014. The jury failed to reach verdicts on the remaining two defendants, who will now face a retrial commencing in February next year.

The individuals were sentenced to terms of imprisonment of between six and a half years and two years and nine months, and have or will be ordered to pay costs and/or confiscation orders. In passing sentence HHJ Leonard QC said that the culpability of the defendants was high and their behaviour showed "an absence of integrity."

The SFO will be hoping the convictions will bolster its reputation after the earlier acquittal of six defendants charged with manipulating Yen Libor following a trial in January 2016. A further six individuals will go on trial for the alleged manipulation of EURIBOR on 4 September 2017.

The SFO's press release on conviction, with links to the history of the case, is available here. The agency's press release on sentencing is available here.

6 defendants

1 pleaded guilty
3 found guilty
2 face retrial

U.S.: Two former Deutsche Bank employees indicted on fraud charges in connection with LIBOR manipulation

On May 31, 2016, two former Deutsche Bank traders were indicted by a federal grand jury in the Southern District of New York for their alleged roles in a scheme to manipulate the U.S. Dollar ("USD") London InterBank Offered Rate ("LIBOR"). The defendants, one of whom is based in New York and the other in London, are charged with one count of conspiracy to commit wire fraud and bank fraud and nine counts of wire fraud.

LIBOR was an average interest rate calculated based upon submissions from a panel of 16 banks, including Deutsche Bank. According to the indictment, in order to increase Deutsche Bank's profits on derivatives contracts tied to the USD LIBOR, the defendants allegedly asked colleagues to submit false and fraudulent LIBOR contributions consistent with the traders' or the bank's financial interests, rather than the true costs of borrowing.

In addition to the two Deutsche Bank traders, the U.S. Department of Justice ("DOJ") has charged 13 other individuals as a result of its ongoing investigation into the alleged LIBOR manipulation. Three of those individuals have pleaded guilty, two have been convicted at trial and the charges against the others are pending.

The prosecution is part of efforts by President Obama's Financial Fraud Enforcement Task Force and shows the DOJ's continued focus on holding individuals accountable alongside financial institutions. The investigation that led to the defendants' indictments was assisted by the cooperation of both domestic and foreign agencies, including the U.S. Commodity Futures Trading Commission's Division of Enforcement, the U.K. Financial Conduct Authority, and the U.K. Serious Fraud Office.

A copy of the DOJ's press release may be read here.

U.S.: Supreme Court limits application of RICO to injuries outside the United States

On June 20, 2016, the U.S. Supreme Court issued a 4-3 decision in *RJR Nabisco Inc. v. The European Community* holding that a plaintiff may not assert a private cause of action under the Racketeer Influenced and Corrupt Organizations Act ("RICO") unless it can prove that it suffered injury inside the U.S. as a result of the alleged foreign conduct. Notably, however, the "domestic injury" limitation to private causes of action does not apply to suits initiated by the U.S. government.

The Court's ruling overturns a 2014 decision by the United States Court of Appeals for the Second Circuit. The decision was reached by only seven Justices due to the fact that Justice Sotomayor, who sat previously on the Second Circuit, did not participate in the case, and because of the U.S. Senate's failure to approve President Obama's Supreme Court nominee, Merrick Garland, after Justice Scalia's death this year.

The case was brought by the European Union and 26 of its member states who accused RJR Nabisco and several associated companies of being part of a cigarette smuggling enterprise that deprived them of billions of dollars in customs and tax revenues.

> "The Court's decision strongly reinforces the presumption that U.S. laws generally do not apply to foreign conduct unless there is a clear indication to the contrary."

The Court also held that whether RICO's substantive prohibitions apply to predicate acts occurring in foreign countries depends on whether the predicate acts apply extraterritorially. Under the Court's decision in *Morrison v. National Australia Bank Ltd.*, there is a presumption that laws do not apply extraterritorially in the absence of a clear indication to the contrary in the statute. The Court noted that while certain predicate acts under RICO evidence their extraterritorial application – e.g., the assassination of government officials and hostage taking – "[t]he inclusion of some extraterritorial predicates does not mean that all RICO predicates extend to foreign conduct." Thus, lower courts will be required on a case-by-case basis to determine whether the predicate acts at subject in a particular action apply extraterritorially.

The Court's decision has been long awaited and provides greater clarity – if not necessarily assurance – to defendants who may face potential RICO liability for foreign conduct. While the "domestic injury" limitation significantly limits the universe of private plaintiffs who can sue on the basis of foreign conduct, the Court has signaled that RICO does, at least in some contexts, apply extraterritorially. In which instances RICO applies extraterritorially is not always clear, however, and will be left to future cases to decide. Nevertheless, the Court's decision strongly reinforces the presumption that U.S. laws generally do not apply to foreign conduct unless there is a clear indication to the contrary, which is a potential boon to defendants facing liability for foreign conduct under any U.S. law, not just RICO.

A copy of the Court's decision is available here.

Policy and practice

> “Overall, the guidance places more discretion in the SFO’s court than was previously the case.”

Australia: Financial crime is on the increase and new funding is being set aside to fight it

Data suggests that financial crime in Australia is on the increase. AUSTRAC has reported a fivefold increase in reporting on suspicious transactions in Australia over the past five years and the deputy chief executive of AUSTRAC hast stated that the daily reporting rate is ‘growing exponentially’.

To combat this increase, more funding is being earmarked to fight financial crime. On 23 April 2016, the Australian government announced that $15 million would be invested in the Australian Federal Police (“AFP”) and specialist agencies to expand foreign bribery investigation teams. These funds are intended to be used to expand the Fraud and Anti-Corruption Centre, which is a multi-agency initiative hosted by the AFP and includes representatives from the Australian Securities and Investments Commission, the Australian Tax Office, the Australian Crime Commission and AUSTRAC.

UK: SFO issues new guidance for conduct of section 2 interviews

On 6 June 2016, the Serious Fraud Office (“SFO”) published new operational guidance for the conduct of interviews under section 2 of the Criminal Justice Act 1987. Under this provision, the SFO can compel a person or entity to provide information to them for the purpose of an investigation, usually by way of interview, or require them to produce material, pursuant to a “section 2 notice”. Where a person or entity does not comply with such a notice, or if they are found to have given false or misleading information at interview, they can be prosecuted.

The guidance now published differs in some material respects from that previously contained in the SFO’s Operational Handbook, in particular, in setting out when witnesses being interviewed pursuant to a section 2 notice will be entitled to be accompanied by a legal representative and who that representative may be. Separate guidance has been issued for SFO staff, individuals to be interviewed and lawyers accompanying them. Overall, the guidance places more discretion in the SFO’s court than was previously the case.

We have published a more detailed client note outlining the main aspects of the guidance, available here.

U.S.: SEC continues increased scrutiny of private equity funds

On May 12, 2016, Andrew Ceresney, the Director of the U.S. Securities and Exchange Commission’s (“SEC”) Division of Enforcement, delivered a speech in which he signaled that private equity (“PE”) funds will continue to come under increased scrutiny from the SEC.

Since the launch in October 2012 of the SEC's "Presence Exam Initiative," which examined many PE advisers and identified numerous alleged deficiencies, the SEC has uncovered a number of issues that it believes warrant increased scrutiny of PE funds. Those issues are broadly classified into the following three categories: (1) breach of fiduciary duty related to undisclosed fees and expenses, (2) the manner in which expenses are allocated by fund managers across various funds and vehicles, and (3) undisclosed conflicts of interest. Mr Ceresney noted that the SEC has now brought eight enforcement actions relating to PE advisers and stated that recent SEC actions against PE firms should "send a clear signal to industry participants that their practices must comport with their fiduciary duty and disclosures in their fund organizational documents."

According to Mr Ceresney, the SEC's focus on PE funds has helped "significantly increase" transparency and has "prompted real change for the benefit of investors." Since 2014, Mr Ceresney noted, many advisers have revised their Form ADV filings "to more fully disclose their fee and expense practices." Further, "certain private equity advisers have taken affirmative steps to change their fee and expense practices and bring them in line with their organizational documents." We recommend that PE fund sponsors review their activities and disclosure practices with a particular focus on activities that the SEC has targeted and may target in the future in light of its stated objective.

Linklaters published a client alert on the subject of Mr Ceresney's speech, available here. A copy of Mr Ceresney's speech may be read here.

U.S.: Maria Vullo Confirmed as Superintendent of New York Department of Financial Services

On June 15, 2016, Maria Vullo was confirmed by the New York State Senate to serve as the Superintendent of the New York State Department of Financial Services ("DFS"), which regulates more than 1,500 insurance companies and nearly 1,600 banking and other financial institutions. It often works alongside law enforcement and regulatory agencies at the federal, state and local levels, as well as internationally. Ms Vullo has served as Acting Superintendent since February, when she was nominated by Governor Andrew Cuomo.

Ms Vullo is replacing Benjamin Lawsky, who served as DFS' inaugural Superintendent after its formation in 2011 through the merger of New York State's banking and insurance departments. After Mr Lawsky announced in 2015 that he would leave his position, Anthony Albanese served as Interim Superintendent before Ms Vullo's appointment. Mr Lawsky pursued an aggressive enforcement agenda, securing more than $6 billion in settlements from financial institutions in just four years. This established the DFS as an important regulator but also at times drew criticism because of the DFS' willingness to obtain settlements by breaking rank with other enforcers and by threatening to pull the state licenses of significant institutions.

Prior to joining DFS, Ms Vullo was a litigation partner at Paul, Weiss, Rifkind, Wharton & Garrison LLP, where she led civil, criminal, and regulatory investigations before courts and governmental authorities across the country. She also served as Executive Deputy Attorney General for Economic Justice Division in the Office of the New York State Attorney General, under then Attorney General Andrew Cuomo.

"As Superintendent," Ms Vullo said, "I am committed to strengthening New York's status as the financial capital of the world, protecting consumers, and ensuring that everyone follows the law." Ms. Vullo has commended Mr. Lawsky for putting the DFS "on the map" and has reaffirmed the commitment of the agency to pursue serious misconduct, but at the same time has stated: "I'm not Clint Eastwood. When they asked me if I'm the new sheriff I told them I don't wear boots." It will be worth observing over the coming months how, if at all, the enforcement priorities and tactics may shift under Ms. Vullo.

A copy of the DFS' press release may be read here.

Legislation and regulation

344
pages of primary legislation

309
pages of legislative rules

Australia: Report on the Statutory Review of the Anti-money Laundering and Counter-terrorism Financing Act 2006 and associated rules and regulations

On 29 April 2016, the long-awaited report (the "Report") on the Statutory Review of the Anti-money Laundering and Counter-terrorism Financial Act 2006 (the "AML/CTF Act") and the associated Rules and Regulations was publicly released. The Report made 84 recommendations, each of which has been strongly endorsed by Australia's financial intelligence agency, AUSTRAC. The Australian Bankers' Association has also indicated its support for the recommendations.

The Report identified opportunities to minimise red tape and simplify the AML/CTF Act. Key recommendations include widening the scope of the law to cover new technologies and payment systems, adopting the technology neutrality principle and reducing the burden associated with complying with customer due diligence obligations. The call to simplify the AML/CTF Act and associated Rules and regulations is welcome – the legislation currently spans 344 pages of primary legislation and 309 pages of legislative rules. The Report also recommended that AUSTRAC adopt a proactive and systematic approach to granting exemptions and provide guidance and templates to facilitate a streamlined and simplified application process.

The Government will consider the recommendations of the Report before announcing its response. Further industry consultation is expected.

Australia: Commonwealth Government agrees to extend AML laws to digital currency

On 5 May 2016, the Australian government released its response to the Senate Economic References Committee Report on digital currency and indicated its preliminary support for the extension of Australia's anti-money laundering laws to convertible digital currency exchanges. Under the proposal, convertible digital currencies will be included within the definition of 'e-currency' in the Anti-Money Laundering and Counter-Terrorism Financial Act 2006 ("AML/CTF Act") (by expanding the current definition to include convertible digital currencies not backed by a physical 'thing').

This follows recommendations made by the Senate Economics Reference Committee and the Report on the Statutory Review of the AML/CTF Act (detailed above). The Government's response noted that this extension would be consistent with action taken in the UK and Canada and is in line with guidance issued by the Financial Action Task Force. It is anticipated that the proposal will assist providers of digital currency exchange services to demonstrate to the satisfaction of their banks that their businesses do not pose an unacceptable level of risk. The proposal will also help ensure that obligations under Australia's AML/CTF regime are technology neutral.

> The proposed new general offence would extend at least to misconduct such as money laundering and fraud.

France: Market abuse: reform of the sanctioning procedure

Until now, in France, both companies and individuals could be liable to enforcement action in respect of the same offence of market abuse by both the French Financial Markets Authority ("FFMA"), on the grounds of a "breach" (*manquement*) and the criminal courts, on the grounds of an "offence" (*délit*).

On 18 March 2015, the French Constitutional Council (*Conseil Constitutionnel*) ruled that this dual system was unconstitutional. As a result, a new bill was enacted on 21 June 2016.

The new bill implements a guiding mechanism between the FFMA and the French National Financial Public Prosecutor. These two authorities shall now consult each other to determine, within two and a half months, the most effective way to commence proceedings, based on the seriousness of the facts. Should they disagree, the Paris Court of Appeals General Prosecutor will have the power finally to determine the matter.

Moreover, the new bill toughens penalties for market abuse offences, by:

- increasing the maximum term of imprisonment from two to five years
- increasing the maximum amount of the fine from 1.5 to 100 million euros for individuals and from 7.5 to 500 million euros for legal entities, and
- providing that market abuse committed by an organised group is now punishable by a 10 year prison sentence.

It also creates a new criminal offence of encouraging or recommending transactions relating to financial instruments on the basis of insider information.

UK: Government to consult on expansion of corporate criminal liability to "failure to prevent economic crime"

In a press release published to coincide with the Global Anti-Corruption Summit held in London on 12 May 2016, the UK Ministry of Justice has announced that it is intending to consult on whether to extend the corporate criminal offence of "failing to prevent" beyond bribery and tax evasion to other economic crimes, such as money laundering and fraud. Currently, commercial organisations can be held criminally liable under section 7 of the Bribery Act 2010 for bribery offences carried out by associated persons for the benefit of the organisation, if there were no adequate procedures in place to prevent such misconduct occurring. A similar proposal has also been proposed in respect of failing to prevent the criminal facilitation of tax evasion, (detailed below).

The proposed new general offence would extend at least to misconduct such as money laundering and fraud and possibly other forms of economic crime, such as false accounting. However, it will be unclear until the consultation is published this summer how the offence will be framed and its scope. It is probable that liability will be balanced by some form of "adequate procedures" defence, akin to that already available for failing to prevent bribery and currently proposed for the new offence of failing to prevent the criminal facilitation of tax evasion, leading to commercial organisations again having to review their policies and procedures to ensure compliance with the requirements.

We have published a client note on the Anti-Corruption Summit which includes details of the proposed "failure to prevent offence", available here.

UK: Proposed new corporate criminal offence of failing to prevent tax evasion

The UK government is consulting on the proposed new corporate offence of failing to prevent the criminal facilitation of tax evasion. The proposed offence would be included in a new Criminal Finances Bill, aimed at tackling corruption, money laundering and tax evasion. Businesses will be concerned to assess the implications of the proposal, whether they would be caught by the scope of the new offence and, if so, what measures they can take to protect themselves from potential liability.

Linklaters has published a briefing note looking at the proposed new offence, the

potential “reasonable prevention procedures” defence and the practical considerations for businesses, available here.

UK: Home Affairs Committee finds widespread problems in tackling money laundering and corruption

The UK Parliamentary Home Affairs Committee (“HAC”) has been considering the operation of the Proceeds of Crime Act 2002 and the effectiveness of the UK’s regime for recovering the proceeds of crime. On 15 July 2016 it published its report, proposing changes to the processes for reporting suspicious activity (“SAR”) and the recovery of assets.

The report concludes that “there are deep and widespread problems in tackling money laundering and corruption, from detection to prosecution and recovery”. Among the main concerns were poor supervision and enforcement.

In particular the report found that the recovery of proceeds of crime was often carried out by members of the legal profession who lacked sufficient interest and skill in the work. It suggests that more use could be made of the private sector in asset recovery, working in tandem with a properly resourced National Crime Agency.

“There are deep and widespread problems in tackling money laundering and corruption, from detection to prosecution and recovery.”

To address concerns that the SAR regime is a ‘futile and impotent weapon in the global fight against money laundering and corruption’, the report proposes a number of changes, including the establishment of a specialist ‘confiscation court’ to deal with complex confiscation hearings and the overhaul of the systems used to track confiscated and seized assets.

The report also proposes the automatic freezing of assets as soon as the alleged criminal becomes aware of the investigation, together with the confiscation of the passport of any criminal subject to a confiscation order. To increase the accuracy and effectiveness of orders, provisions to compel defendants to engage with confiscation hearings should be introduced and a separate offence of failing to pay a confiscation order should be created.

The report is the first step in any change to legislation and some of the proposals, such as the automatic freezing of assets, will have to be considered carefully to ensure defendants’ rights are protected. However, the government’s recent Action Plan and anti-corruption summit of May 2016 emphasised its intention to clamp down on corruption. The effective enforcement of the money laundering regime will be seen as a top priority in buffering London’s reputation as a leading financial centre.

The report is available here.

Other news

Client event held: DPAs and the Bribery Act – a view from the prosecutors

On 26 May 2016 we held a client event discussing topical themes in business crime enforcement.

The event was conducted as a panel discussion, moderated by Satindar Dogra. The panel consisted of

> Sir Edward Garnier QC, former UK Solicitor General and ex Member of Parliament. Sir Edward was responsible for developing the DPA regime as Solicitor General and was prosecuting counsel in the Standard Bank case, in which the UK's first ever DPA was agreed

> Ben Morgan, Joint Head of Bribery & Corruption at the Serious Fraud Office

> Adam Lurie, Linklaters partner in Washington DC and formerly a U.S. Department of Justice white-collar prosecutor and a lawyer for the U.S. Congress. Adam acted for Standard Bank in the US arm of the proceedings

> Doug Tween, Linklaters partner in New York and head of our U.S. cartel and government investigations practice.

The discussion focussed on:

> corporate criminal liability and the use of DPAs in settling corporate wrongdoing – lessons to be learnt from recent UK cases, in particular the Standard Bank case

> cross-border assistance in investigations and the development of mutual co-operation between international regulators

> a comparison of the UK and US approaches to enforcement

> observations arising from the International Anti-corruption Summit held in London on 12 May 2016.

A full note of the discussion is available here.

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