Global Investigations Review

The Practitioner's Guide to Global Investigations

Second Edition

Editors
Judith Seddon, Clifford Chance
Eleanor Davison, Fountain Court Chambers
Christopher J Morvillo, Clifford Chance
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GIR

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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.

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

It will be published annually as a single volume and is also available online, as an e-book and in PDF format.

The volume

This book is in two parts.

Part 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 approach and thought processes of those who are at the cutting edge of this work, on the basis that others can learn much from their approach, and there is a read-across to the position elsewhere.

Part I is then complemented by Part II's granular look at the detail of various jurisdictions, highlighting among other things where they vary from the norm.

Online

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

The publisher would like to thank the editors for their exceptional energy and vision in putting this project together. Together we welcome any comments or suggestions from readers on how to improve it. Please write to us at:
co-publishing@globalinvestigationsreview.com.

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The history of the global investigation

Over the past decade, the number and profile of multi-agency, multi-jurisdictional regulatory and criminal investigations have risen exponentially. Naturally, this global phenomenon exposes corporations and their employees to greater risk of potentially hostile encounters with foreign law enforcement authorities and regulators than ever before. This is partly owing to the continued globalisation of commerce, as well as the increasing enthusiasm of some prosecutors to use expansive theories of corporate criminal liability to extract exorbitant penalties against corporations 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, both direct and collateral, for individuals and businesses are of unprecedented magnitude.

The guide

To aid practitioners faced with the myriad and often unexpected challenges of navigating a cross-border investigation, this book brings together for the first time the perspectives of leading experts from across the globe.

The chapters that follow in Part I of the guide cover in depth the broad spectrum of the law, practice and procedure applicable to cross-border investigations in both the United Kingdom and United States. Part I tracks the development of a serious allegation (whether originating from an internal or external source) through its stages of development, considering the key risks and challenges as matters progress; it provides expert insight into the fact-gathering stage, document preservation and collection, witness interviews, and the complexities of cross-border privilege issues; and it discusses strategies to successfully resolve cross-border probes and manage corporate reputation throughout an investigation.

In Part II of the book, local experts from national jurisdictions respond to a common 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 law and practice evolved. For this second edition we have revised the chapters to reflect recent developments. In the United Kingdom, some eagerly awaited English court decisions have raised significant legal privilege implications, and new corporate offences related to tax evasion have been introduced. In the United States, despite a new administration, the FCPA's enhanced enforcement project – the Pilot Program – has been extended. We have also included substantive chapters covering extraterritoriality considerations from both the US and UK perspectives. Further, Part II now covers 16 jurisdictions, including China and Nigeria, and we expect subsequent editions to have an even broader jurisdictional scope.

The Practitioner's Guide to Global Investigations has been designed for external and in-house legal counsel; compliance officers and accounting practitioners who wish to benchmark their own practice against that of leaders in the fields; and prosecutors, regulators and advisers operating in this complex environment.

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Judith Seddon, Eleanor Davison, Christopher J Morvillo, Michael Bowes QC, Luke Tolaini
November 2017
London and New York

Part I

Global Investigations in the United Kingdom and the United States

28

Extraterritoriality: The UK Perspective

Tom Epps, Mark Beardsworth and Anupreet Amole[1]

28.1 Overview

English criminal law applies to all persons who come within the territory of England and Wales. In addition, there are now a number of mechanisms that enable UK authorities to investigate and prosecute offences committed overseas.

In the context of economic crime, the past three decades have seen a sustained legislative policy of extending the jurisdiction of the UK authorities. For certain economic crimes, authorities may bring prosecutions in the United Kingdom notwithstanding that all the relevant criminal conduct occurred overseas. The most obvious example is the Bribery Act 2010 (the Act), which we discuss further below. In line with the United Kingdom's extension of its jurisdictional reach, the authorities have increased their coordination and co-operation with other countries' prosecutors. Recent examples of that growing co-operation include the investigation into Rolls-Royce by the US, UK and Brazilian authorities,[2] and the secondment of a US Department of Justice prosecutor to the Serious Fraud Office (SFO) and the Financial Conduct Authority. The trend towards greater cross-border information sharing and coordinated investigations is likely to continue in accordance with ongoing domestic and international obligations.[3] This

1 Tom Epps and Mark Beardsworth are partners, and Anupreet Amole is counsel at Brown Rudnick LLP.

2 An investigation that resulted in the company agreeing a deferred prosecution agreement with the SFO in January 2017. The company also reached separate agreements with both the United States Department of Justice and Brazil in relation to the same conduct. The agreements imposed a combined £671 million in fines on Rolls-Royce.

3 For example, the Common Reporting Standard (formally the Standard for Automatic Exchange of Financial Account Information) is an OECD initiative aimed at hindering tax evasion and money laundering. By May 2017, over 100 countries had committed to join the CRS.

chapter provides an overview of the extraterritorial aspects of UK law regarding economic crime.

The Bribery Act 2010 28.2

In overview, the Act came into force on 1 July 2011 and created offences of (1) offering, promising or giving a bribe and (2) requesting, agreeing to receive or accepting a bribe either in the United Kingdom or abroad, in the public or private sectors, more specifically:

- sections 1 and 2 – bribing another person (active bribery) and being bribed (passive bribery);
- section 6 – bribery of a foreign public official; and
- section 7 – failure of commercial organisations to prevent bribery.

Each of the above offences has extraterritorial application, as outlined below.

Offences under sections 1, 2 and 6 28.2.1

UK prosecutors may pursue an offence under sections 1, 2 or 6, even where no act or omission forming part of that offence took place in the United Kingdom. This is the position provided that:

- a person's acts or omissions outside the United Kingdom would form part of such an offence if they had occurred in the United Kingdom;[4] and
- the person has a 'close connection with the United Kingdom'.[5]

A 'close connection with the United Kingdom' is defined in the Act and includes British citizens and UK companies.[6]

Considering a hypothetical example helps to demonstrate this broad jurisdictional scope of the Act. Assume that one Mr John Smith was born and raised in the United Kingdom, and, following university, he moved to live and work in Latin America. While Mr Smith has lived overseas for, say, 10 years, he has retained British citizenship. Mr Smith is a business consultant in the oil and gas sector, and one of his key clients is an energy company based in India. Assume also that Mr Smith bribed a person in, say, Mexico, and did so in the course of his services to the Indian company, and in so doing he intended that he would obtain or retain business (in Mexico) for the Indian company. Even where none of Mr Smith's conduct made any contact with the United Kingdom, he would be at risk of criminal prosecution in the United Kingdom because he was a British citizen

4 Section 12(2)(b).

5 Section 12(2)(c).

6 Section 12 (4). A person has a close connection with the United Kingdom if, and only if, the person was one of the following at the time the acts or omissions concerned were done or made: a body incorporated under the law of any part of the United Kingdom, a British overseas territories citizen, a British national overseas, a British overseas citizen, a person who under the British Nationality Act 1981 is a British subject, a British protected person under the British Nationality Act 1981, an individual ordinarily resident in the United Kingdom, or a Scottish partnership.

at the time of the offence, and therefore had a 'close connection' to the United Kingdom as defined by section 12(3) of the Act. In practice, of course, a prosecutor would need to consider carefully whether proceedings against Mr Smith would ultimately be in the public interest both in itself and as part of a wider prosecution strategy against others; in this case, for example, the Indian company if it had been carrying on business in the United Kingdom.[7]

28.2.2 Corporate offence under section 7

This offence is committed by a 'relevant commercial organisation' if a person associated with the organisation (an associated person)[8] bribes another person intending to obtain or retain business, or an advantage in the conduct of business, for the organisation. In those circumstances, the organisation's only defence to the strict liability offence is to show that it had 'adequate procedures' in place designed to prevent bribery on its behalf.[9]

A 'relevant commercial organisation' includes a company or partnership (wherever incorporated) that carries on any part of its business in the United Kingdom. On the basis of information in the public domain currently, the courts are yet to consider a case where it is disputed that a commercial organisation indicted under section 7 was carrying on business within the United Kingdom.[10] Until the courts hear argument on that specific point, practitioners continue to refer to the Ministry of Justice guidance regarding the corporate offence. That guidance recommends a 'common sense approach' and notes that a 'demonstrable business presence' is required. Neither having the company's shares listed on the London Stock Exchange nor having a UK subsidiary would necessarily mean that a foreign company is carrying on business for the purposes of section 7 of the Act.[11]

For a high-profile application of the concept of an associated person, the case of *Sweett Group PLC*[12] (2015), the SFO's first corporate conviction under

7 Note that pursuant to section 14 of the Act, if a section 1, 2 or 6 offence was committed with the 'consent or connivance' of a 'senior officer' of a body corporate, or a person purporting to act in such a capacity, the senior officer (and the body corporate) is guilty of an offence.

8 An 'associated person' is defined in the Act as a person who performs services for or on behalf of the company in any capacity (i.e., an employee, agent or subsidiary), which is to be determined by reference to all the relevant circumstances and not merely the nature of his or her relationship with the company. It is worth bearing in mind that a section 7 offence will be committed only if the associated person intended to obtain or retain business or an advantage in the conduct of business for the relevant organisation.

9 Section 7 of the Act. Although 'adequate procedures' is not defined in the Act, the Ministry of Justice's guidance (March 2011) broadly outlines what businesses need to demonstrate to mount a successful 'adequate procedures' defence, for example proper risk-assessment procedures, due-diligence protocols and top-level commitment.

10 The section 7 offence is in addition to, and does not displace, liability that might arise under the Act where the commercial organisation itself commits an offence by virtue of the common law 'identification' principle. For more information on the common law 'identification principle' see the Introduction of this book.

11 Ministry of Justice Guidance to the Bribery Act 2010 (March 2011), paras. 34-36.

12 See https://www.sfo.gov.uk/cases/sweett-group/.

section 7 is instructive. The defendant, a UK company, was found liable for the bribery of a non-UK national in the United Arab Emirates by a Sweett Group subsidiary in Cyprus (Cyril Sweet International Limited); the bribe being paid to secure a contract relating to construction of a £63 million hotel in Dubai. On the facts, the court was satisfied that Sweett's subsidiary was an 'associated person' under the Act, and that the bribes were intended to obtain an advantage in the conduct of business for Sweett. The company pleaded guilty, and a financial penalty totalling £2.25 million was levied against it.[13]

It is irrelevant whether the acts or omissions forming part of the section 7 offence took place in the United Kingdom or elsewhere.[14] Therefore, it is possible for either of the following scenarios to form the factual basis for a section 7 offence:

- any business formed or incorporated in the United Kingdom, where the bribery is conducted entirely outside the United Kingdom by an associated person who has no connection with the United Kingdom and who is performing services outside the United Kingdom; and
- any business formed or incorporated outside the United Kingdom, but that carries on part of its business in the United Kingdom, where the bribery is conducted entirely outside the United Kingdom by an associated person who has no connection with the United Kingdom and who is performing services outside the United Kingdom.

Money laundering offences under Part 7 of POCA 2002 28.3

Money laundering has a broad meaning under UK law. The money laundering regime is designed to tackle the routes through which the proceeds of criminal activity are handled. The principal offences are found in sections 327 to 329 of the Proceeds of Crime Act 2002 (POCA), being:

- concealing, disguising, converting, transferring or removing from the United Kingdom, any criminal property (section 327);
- entering or becoming concerned in arrangements that one knows or suspects facilitate the acquisition, use, etc., of criminal property (section 328); and
- acquiring, using or possessing criminal property (section 329).

Property is 'criminal property' if it represents a person's benefit from criminal conduct; in turn, 'criminal conduct' is conduct that either is an offence in the United Kingdom or would be an offence if it had taken place within the United Kingdom.[15] Although the prosecution must adduce evidence of a predicate offence from which the proceeds of crime emanate, a prosecutor need not prove the type of predicate offence in every instance. Instead, the prosecutor will need to provide the court with detailed particulars explaining why the property that is the subject of the money laundering offence should be regarded as criminal in origin, and that

13 This figure comprised a £1.4 million fine, a confiscation order of £850,000 and an order for costs to the SFO of £95,000.

14 Section 12(5) Bribery Act 2010.

15 Section 340(2) and (3) POCA 2002.

evidence should be sufficiently potent to demonstrate that the only reasonable inference is that the property arose from criminality.

In the case of *R v. Anwoir* and others[16] the appellants were convicted of a number of money laundering offences under section 328 of POCA. They appealed on the basis that the prosecution should have been required to prove at least the class or type of criminal conduct involved in generating the criminal property. Allowing the appeal in part, the court held that there were two ways it could be proven that property had derived from crime. One was by showing that it derived from conduct of a specific and unlawful nature. The second method was by evidence of the circumstances in which the property was handled that gave rise to the irresistible inference that it could only have been derived from crime.[17]

The location of the underlying criminal conduct is immaterial. Instead, the pertinent issue is whether the conduct would constitute a criminal offence in the United Kingdom had it occurred here. This principle was confirmed by the Court of Appeal in 2014 in the case of *R v. Rogers*,[18] which served to emphasise the wide scope of the money laundering regime. Mr Rogers, a UK citizen resident in Spain, permitted money generated by a fraudulent scheme in the United Kingdom to be paid into a Spanish bank account that he controlled, and allowed another person, the scheme's principal, to withdraw money from that account. Mr Rogers was convicted under section 327(1)(c) POCA of converting criminal property. He subsequently appealed against that conviction, arguing that the court did not have jurisdiction to hear Part 7 offences against a non-UK resident where the relevant conduct occurred entirely outside the United Kingdom.

In dismissing the appeal, the court expressly considered the wording of section 340(11)(d) POCA, that money laundering is an act that would constitute an offence under sections 327, 328 or 329 if done in the United Kingdom, and concluded that the language clearly indicated that Parliament had intended for the Part 7 offences to be extraterritorial in effect. The court went on to state that, even if they were wrong on that interpretation of the statute, the modern approach to jurisdiction required 'an adjustment to the circumstances of international criminality', noting that '[t]he offence of money laundering is *par excellence* an offence that is no respecter of national boundaries. It would be surprising indeed if Parliament had not intended the Act to have extra-territorial effect (as we have found it did).'[19]

In light of this extraterritorial effect, the court was able to establish a sufficient jurisdictional nexus to try Mr Rogers on the basis that the acts that led to the property becoming criminal property for the purposes of POCA plainly took

16 *R v. Anwoir* [2008] EWCA Crim 1354.

17 This case has since been applied by the Court of Appeal in *R. v. Anwar (Nasar)* [2013] EWCA Crim 1865.

18 [2014] EWCA Crim 1680. This case was applied in *Jedinak v. Czech Republic* [2016] EWHC 3525 (Admin) and followed in *Sulaiman v. France* [2016] EWHC 2868 (Admin).

19 *R v. Rogers* (Bradley) *and others* [2014] EWCA Crim 1680 (*per* Treacy LJ) at p. 1026, paras. 52 and 54.

place, and had an impact on victims, in the United Kingdom, and that the laundering of the proceeds by Mr Rogers in Spain was directly linked to those acts in the United Kingdom. The court added that this was:

> *not a case where the conversion of criminal property relates to the mechanics of a fraud which took place in Spain and which impacted upon Spanish victims. In those circumstances our courts would not claim jurisdiction. But in this case when the significant part of the criminality underlying the case took place in England, including the continued deprivation of the victims of their monies, there is no reasonable basis for withholding jurisdiction . . . .*[20]

The court's decision in *Rogers* makes plain that UK persons based overseas, including, for example, professional legal or tax advisers, face the risk of criminal liability in the United Kingdom for money laundering offences committed wholly overseas.

There exists a limited exception described as the 'overseas conduct defence'. A person will not be liable under sections 327 to 329 if:

- he or she knew or reasonably believed that the relevant criminal conduct occurred abroad; and
- that relevant criminal conduct was not, when it took place, unlawful under the criminal law of that other country.[21]

The 'overseas conduct defence', however, does not apply to conduct that (despite being legal under local law) would constitute an offence punishable by a maximum sentence of imprisonment over 12 months in the United Kingdom if it had occurred in the United Kingdom.[22] In practice, therefore, most cases (e.g., bribery, corporate fraud, tax evasion) relevant to readers will remain squarely within the wide extraterritorial scope of POCA.

Civil recovery orders

Separately, the civil recovery regime set out in POCA[23] enables UK prosecutors to seek orders from the High Court to recover property that either is or represents property obtained through unlawful conduct. As applications for civil recovery orders and property freezing orders are determined through civil, not criminal, proceedings before the High Court, the evidential burden is the balance of probabilities. The High Court may issue such an order against any person or property wherever domiciled or situated, if there is or has been a connection between the

20 *R v. Rogers (Bradley) and others* [2014] EWCA Crim 1680 (*per* Treacy LJ) at pp. 1026–1027 at para. 55.

21 Sections 327(2A), 328(3) and 329(2A) POCA 2002.

22 The Proceeds of Crime Act 2002 (Money Laundering: Exceptions to Overseas Conduct Defence) Order 2006.

23 Part 5 of POCA 2002.

facts of the case and any part of the United Kingdom.[24] Combined with the wide jurisdictional scope of the definition of 'unlawful conduct',[25] civil recovery orders are a powerful and attractive tool in the hands of UK prosecutors. While foreign courts did not traditionally recognise the enforceability of these orders against assets in their jurisdictions, a relatively recent case saw the United Kingdom's National Crime Agency (NCA) succeed in persuading the Luxembourg court to enforce an order against a UK person's bank accounts in that jurisdiction.[26] This was the first time that a foreign court had enforced a civil recovery order, permitting the NCA to recover unlawful property held entirely outside the United Kingdom. It remains to be seen whether other jurisdictions will take a similarly collaborative approach to UK civil recovery efforts overseas.

28.4 Tax evasion and the Criminal Finances Act 2017[27]

The Criminal Finances Act 2017 has introduced a new corporate offence focused on tax evasion. As with the Bribery Act's corporate offence, this represents another significant departure from the traditional 'directing mind' identification doctrine for corporate criminal liability under English law.

See Chapter 1

Part 3 of the Criminal Finances Act 2017 creates two new corporate offences of failure to prevent the facilitation of tax evasion. The offences are modelled on section 7 of the Bribery Act 2010 and apply to both domestic and overseas tax evasion. The new offences are:

See Section 28.2.2

- failure to prevent the facilitation of UK tax evasion offences (section 45): a company or partnership is guilty of an offence if a person commits a UK tax evasion facilitation offence when acting in the capacity of a person associated with that company or partnership;[28] and
- failure to prevent the facilitation of foreign tax evasion offences (section 46): a company or partnership is guilty of an offence if at any time a person commits a foreign tax evasion facilitation offence when acting in the capacity of a person associated with that company or partnership, and any of the following conditions is satisfied:

24 Section 282A POCA 2002, inserted by section 48 of the Crime and Courts Act 2013 following the UK Supreme Court decision in *Perry v. SOCA* [2012] UKSC 35. Section 282A and Schedule 7A POCA have retrospective effect – see paragraph 7(7) of Schedule 7A POCA.

25 Defined as (1) conduct within the United Kingdom that is unlawful under UK criminal law or (2) conduct outside the United Kingdom that is unlawful in that other country and would have been unlawful in the United Kingdom, had it occurred here. This is, therefore, a dual criminality test. The recent insertion of a new section 241A POCA 2002 (by section 13 of the Criminal Finances Act 2017) adds 'gross human rights abuse or violation' to the definition of unlawful conduct for the purposes of Part 5 POCA (civil recovery). This is the United Kingdom's introduction of the concept of targeting assets owned by those involved in repressive regimes anywhere in the world; this follows the approach in the United States to a statute known as the Magnitsky Act of 2012.

26 *National Crime Agency v. Azam* [May 2015], District Court of Luxembourg.

27 This Act received Royal Assent on 27 April and came into force on 30 September 2017.

28 The UK tax offence will be investigated by Her Majesty's Revenue and Customs (HMRC), with prosecutions brought by the Crown Prosecution Service.

- the relevant body is incorporated or formed in the United Kingdom;
- the relevant body carries on business or part of a business in the United Kingdom; or
- any conduct constituting part of the foreign tax evasion facilitation offence took place in the United Kingdom.[29]

If the offence took place outside the jurisdiction, however, UK prosecutors must still prove to the criminal standard that both the taxpayer and the associated person committed an offence. The prosecutor will also need to prove dual criminality of the conduct. The offences consist of three component parts. First, the prosecution must prove criminal evasion by a taxpayer; and there must have been dishonest[30] facilitation of tax evasion by an associated person. Where these two components are satisfied, the relevant body is criminally liable (unless it can show that it had 'reasonable preventative procedures' in place, or that it was unreasonable to expect the company to have had such procedures in place).

A 'relevant body' is a company or a partnership, wherever it may be incorporated or formed.[31] A 'person associated' with the relevant body is an employee, an agent or any other person performing services for or on behalf of that relevant body.[32] Again, this is broadly comparable to the concepts within section 7 of the Bribery Act. Section 46 of the Criminal Finances Act 2017 provides that a company or partnership that carries on business in the United Kingdom will commit an offence if a 'person associated' with it commits a 'foreign tax evasion facilitation offence', unless the company or partnership had reasonable procedures in place to prevent the facilitation offence. A foreign tax evasion facilitation offence means conduct that amounts to:

> *an offence under the law of a foreign country . . . relates to the commission by another person of a foreign tax evasion offence under the law of that country, and . . . would, if the foreign tax evasion offence were a UK tax evasion offence, amount to a UK tax evasion facilitation offence . . . .*[33]

The UK government recently published guidance on the meaning of reasonable preventative procedures.[34] The guidance states that those procedures should be informed by the same six guiding principles as those expected by the Bribery Act model. The six principles are proportionality, top level/board level commitment, risk assessment, due diligence, training and communication, and monitoring/

29 Section 46(2).

30 In the sense of *R v. Ghosh* [1982] EWCA Crim 2.

31 Section 44(2) and (3)

32 Section 44(4).

33 Section 44(6).

34 Tackling tax evasion: Government guidance for the corporate offences of failure to prevent the criminal facilitation of tax evasion, HM Revenue and Customs, 1 September 2017, available at https://www.gov.uk/government/consultations/tackling-tax-evasion-a-new-corporate-offence-of-failure-to-prevent-the-criminal-facilitation-of-tax-evasion.

review. Companies doing business in the United Kingdom should consider carefully how to prepare their own reasonable preventative procedures to address the risk of associated persons facilitating tax evasion.

28.5 Financial sanctions

While they are driven by geopolitical issues, international sanctions have direct practical and legal consequences for businesses of all shapes and sizes. The use of international sanctions has grown over recent years, particularly in relation to the military conflicts in Ukraine and Syria. In fact, this continues a trend that began in modern times with the United Nations' Oil-for-Food Programme regarding Iraq after the Gulf War of 1991. At the time of writing, the United Kingdom applies financial sanctions in 27 separate programmes, targeting governments and terrorist groups such as the governments of Burundi, North Korea and Syria, and the Taliban, ISIL and Al-Qaida.

Financial sanctions restrict the provision of financial services, or access to global capital markets, or both. More specifically, those restrictions can include bans on investments in a particular country, or the denial of banking relationships. Trade sanctions restrict the trading of certain products or commodities (e.g., arms, oil and diamonds) from targeted countries (e.g., Iran, Russia and Syria); and control the export of certain products (e.g., military or dual-use items) to targeted countries. A recent decision by the European Court of Justice, which upheld the EU sanctions against Russia regarding its annexation of Crimea in 2014, demonstrates the rationale in practice:

> *Contrary to what is claimed by Rosneft, there is a reasonable relationship between the content of the contested acts and the objective pursued by them. In so far as that objective is, inter alia, to increase the costs to be borne by the Russian Federation for its actions to undermine Ukraine's territorial integrity, sovereignty and independence, the approach of targeting a major player in the oil sector, which is moreover predominantly owned by the Russian State, is consistent with that objective and cannot, in any event, be considered to be manifestly inappropriate with respect to the objective pursued.*[35]

For the purposes of this chapter, we focus on financial sanctions.[36] The UK legal framework regarding financial sanctions is not contained in any one particular

35 *PJSC Rosneft Oil Company v. Her Majesty's Treasury and Others*, Case C-72/15, 28 March 2017 at 147.

36 For trade sanctions, see the Export Control Act 2002 (and the related Export Control Order 2008) and the Customs and Excise Management Act 1979. The Customs and Excise Management Act 1979 imposes criminal liability where a person exports goods from the United Kingdom 'when the exportation or shipment is or would be contrary to any prohibition or restriction for the time being in force'. The Export Control Order 2008 imposes those restrictions. The ECO 2008 specifies a three-tier categorisation of goods, with Category A products including items designed for torture; Category B includes arms and ammunition; Category C being items that have a dual civil/military use. See Part 4 and Schedule 1 of the ECO 2008. Trade sanctions apply

statute. Instead, the United Kingdom uses secondary legislation to implement various sanctions programmes made by each of the United Nations Security Council and the European Union. At the same time, the United Kingdom may also issue domestic financial sanctions under certain specific statutes, such as the Terrorist Asset-Freezing Act 2010.[37] The specific restrictions imposed by any one set of financial sanctions (e.g., those relating to Russia's involvement in Ukraine) will vary in each case. Those advising businesses concerned about liability should carefully review the text of the specific statutory instrument, and the underlying EU regulation, in each case. Broadly, however, UK financial sanctions impose criminal liability for a person who:

- makes funds or economic resources available, whether directly or indirectly, to a designated person;
- deals with funds or economic resources belonging to or controlled by a designated person; or
- acts in a way, whether directly or indirectly, to circumvent the relevant financial sanction prohibitions.[38]

Financial sanctions also carry positive reporting obligations for financial services firms. Where a firm detects relevant information, for example that a customer or counterparty is a designated person, the firm must notify the Office of Financial Sanctions Implementation (OFSI), which is part of HM Treasury.[39]

While the jurisdictional scope of UK financial sanctions is broad, they do require some element of UK nexus. The sanctions apply to:

- anybody present in the United Kingdom, namely all persons (natural and legal) 'who are within or undertake activities within the UK's territory'; and
- all UK nationals and all UK legal entities (including branches, and the UK subsidiaries of foreign companies), wherever they may be in the world and irrespective of where their activities occur.[40]

In recent guidance, the OFSI emphasised that establishing a UK nexus would be determined by the facts in each case, and that it would not seek to 'artificially bring something within UK authority that does not clearly and naturally come under it'.[41] This may provide some degree of comfort to foreign businesses with no UK footprint.

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to (1) anybody present in the UK, i.e., all persons (natural and legal); (2) all UK subjects anywhere in the world; and (3) any legal entity incorporated under UK law.

37 The other relevant UK statutes, which also take a broad jurisdictional approach, are the Counter Terrorism Act 2008 and the Anti-Terrorism, Crime and Security Act 2001.

38 Office of Financial Sanctions Implementation, *Financial Sanctions: Guidance*, April 2017, page 8. The maximum term of imprisonment was recently increased from two to seven years – see sections 144 and 145 of the Policing and Crime Act 2017 (PCA 2017).

39 Office of Financial Sanctions Implementation, Guidance, August 2017, p. 62.

40 Office of Financial Sanctions Implementation, Financial Sanctions: Guidance, April 2017, p. 7.

41 Office of Financial Sanctions Implementation, Monetary penalties for breaches of financial sanctions – Guidance, August 2017, p. 12.

Until recently, enforcement options were limited, taking the form of either an official warning letter from HM Treasury or full criminal proceedings by a prosecutor. The Policing and Crime Act 2017, effective from 3 April 2017, introduced a wider range of enforcement options, specifically (1) making sanctions offences eligible for consideration for a deferred prosecution agreement;[42] (2) making sanctions offences eligible for (civil) Serious Crime Prevention Orders under the Serious Crime Act 2007;[43] and (3) empowering the OFSI to impose (civil) financial penalties.[44] These developments are all consistent with the general trend in UK law since the Bribery Act 2010 came into effect towards increased enforcement against companies, including for misconduct overseas.

28.6 Information sharing powers under the Criminal Finances Act

As demonstrated by several recent enforcement actions, the UK authorities have increased their sharing of information with counterparts around the world. That coordination is developing further. The Criminal Finances Act 2017 includes certain amendments to POCA, the effect of which will be to enhance the information flow to the UK authorities (specifically, the NCA in the first instance),[45] and most importantly for the purpose of this chapter, to facilitate the NCA's assistance of law enforcement bodies overseas.

28.7 Conspiracy

Readers will be familiar with cases involving suspected or alleged conspiracies to commit substantive offences. When considering conspiracy in the economic crime context, practitioners should be aware of the interplay between (1) common law conspiracy to defraud, (2) the conspiracy offence in section 1A Criminal Law Act 1977, and (3) the Fraud Act 2006, whose extraterritorial reach is specified by the Criminal Justice Act 1993 (as amended).

42 Section 150 of PCA 2017.

43 Section 151 of PCA 2017.

44 Section 146 of PCA 2017.

45 Section 10 of the Act serves to extend the moratorium period for investigations into suspicious activity reports (SARs) and provides the NCA with new powers to request information from regulated companies. Under this section, a 'senior officer' of a relevant authority can apply to the crown court for an extension of the current seven-working-day moratorium period for SARs. If the application is granted, the court can extend the moratorium period for no more than a further 186 days. The court will only be in a position to grant an extension of 31 days at a time, with the relevant authority being required to continue to make further applications for additional extensions should it be deemed necessary. This will enable the court to exercise judicial scrutiny over the relevant authorities. If an application is refused by the court, the relevant authority has a further 31 calendar days in which it can investigate and either take action to freeze the funds or give its consent to proceed with the transaction.

Common law conspiracy to defraud 28.7.1

The leading case defines a conspiracy to defraud as an agreement 'to deprive a person dishonestly of something which is his or to which he is or would be or might be entitled' or 'by dishonesty to injure some proprietary right'.[46]

Common law conspiracy to defraud is one of the very few remaining common law conspiracy offences, section 5 of the Criminal Law Act 1977 having replaced all others with a general statutory offence. The rationale for its retention despite the statutory offences introduced by the Fraud Act 2006 was that the common law offence was broad (as indicated by the definition above), and therefore allowed prosecutors to roll several offences into a smaller number of indictments than would otherwise be required to prosecute multiple examples of fraudulent conduct, and present a single cogent narrative to the court, without needing to charge, and evidence, several separate statutory offences.[47] Statute has made clear that a person charged with conspiracy to defraud may be liable irrespective of whether he or she became a co-conspirator in England or whether any act in relation to the conspiracy occurred in England.[48]

Statutory conspiracy to commit offences abroad 28.7.2

The Criminal Justice Act 1987 provides that a prosecutor may pursue common law conspiracy to defraud even in circumstances where the substantive offence would be covered by a specific statute.[49] However, in many cases, ranging from *Innospec Limited*[50] in 2010 to the recently announced indictment (in June 2017) of Barclays Bank regarding Qatar, the SFO has relied on section 1(1) of the Criminal Law Act 1977 to bring charges of conspiracy to commit offences.[51]

In 1998, the Criminal Law Act 1977 was amended to provide expressly for a discrete offence of conspiracy to commit criminal offences outside the

46 *Scott v. Metropolitan Police Commissioner* [1975] AC 819 at 840F.

47 See the Attorney General's Guidance on use of the common law offence of conspiracy to defraud, (2007), and the Ministry of Justice Post-Legislative assessment of the Fraud Act 2006 (June 2012).

48 Section 3(2) Criminal Justice Act 1993.

49 Section 12 Criminal Justice 1987, which retained the offence at common law of conspiracy to defraud – see section 5(2) Criminal Law Act 1977.

50 The charge against Innospec Ltd was that between February 2002 and December 2006, the company, through various agents, engaged in systematic and large-scale corruption of senior government officials of Indonesia to secure contracts for the supply of a fuel additive, tetraethyl lead (TEL). The corrupt behaviour took the form of bribes, totalling approximately US$8 million. The seriousness of the corruption was aggravated by the fact that Innospec Ltd's behaviour was aimed at blocking legislative moves to ban TEL, owing to environmental and public health concerns. The company pleaded guilty to conspiracy contrary to section 1 of the Criminal Law Act 1977 and was fined $12.7 million.

51 In *R v. Turner*, *Kerrison, Papachristos and Jennings* in 2014 (and the subsequent appeal *SFO v. Papachristos and Kerrison* [2014] EWCA Crim 1863), four former executives of Innospec were convicted and imprisoned for conspiracy offences in relation to their roles in bribing state officials in Indonesia and Iraq in order to secure contracts from the governments of those countries for the supply of products produced by Innospec Ltd.

jurisdiction.[52] By section 1A of the Act, a conspiracy may involve the doing of an act in a place outside England and Wales that constitutes an offence in that other jurisdiction. The purpose of section 1A was to extend existing UK law, and to give the English courts extraterritorial jurisdiction in relation to a conspiracy (1) partly formed or carried out in England and Wales, and (2) where the object was the commission of a foreign offence (where there is an equivalent offence in England and Wales). This section only applies, however, where four nexus conditions are satisfied:

- pursuit of the agreed conduct would involve an act by one or more of the parties outside the United Kingdom;
- that act is an offence under local law in that other country;
- that the agreement would be a conspiracy (within section 1(1) CLA 1977) but for the fact that the offence would not be an offence triable in England and Wales if committed in accordance with the parties' intentions; and
- a party to the agreement, whether directly or via an agent, did anything in England and Wales regarding formation of the agreement before its formation, became a party to it in England and Wales, or did or omitted anything in England and Wales pursuant to the agreement.[53]

Where those conditions are satisfied, the prosecutor may pursue conspiracy charges under section 1A, referring to the offence as being a conspiracy to commit the underlying substantive offence (e.g., drug trafficking or people smuggling)[54] but for the fact that it was not triable in England and Wales.[55]

Similarly, the Fraud Act 2006 has expressly broad extraterritorial application.[56] Put simply, where any element of a statutory fraud offence[57] occurs within England and Wales, the court will have jurisdiction to try a defendant whether or not he or she was in the jurisdiction at any material time, and whether or not he or she was a British citizen at the time.

28.7.3 Inchoate offences

Separately, practitioners should not overlook the inchoate offences of encouraging or assisting others in the commission of offences. The Serious Crime Act 2007 includes statutory inchoate offences (under sections 44 to 46) of encouraging or assisting the commission of offences; these have extraterritorial application in certain circumstances.[58]

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52 Inserted by the Criminal Justice (Terrorism and Conspiracy) Act 1998, section 5.

53 Section 1A(1) to (5), Criminal Law Act 1977.

54 Respectively, *R v. Welsh (Christopher Mark)* [2015] EWCA Crim 1516, and *R v. Sophia Patel* [2009] EWCA Crim 67.

55 Section 1A(6), Criminal Law Act 1977.

56 Part 1 of the Criminal Justice Act 1993 as amended by the Fraud Act 2006 (schedule 1)

57 Being fraud by false representation (section 2), fraud by failing to disclose information (section 3), or fraud by abuse of position (section 4 Fraud Act 2006).

58 Through operation of section 52 of, and the conditions specified in Schedule 4 to, the Serious Crime Act 2007.

Where a person within England and Wales knows or believes that what is anticipated might occur wholly or partly in a place outside the jurisdiction, he or she will be liable under the Serious Crime Act 2007 if the anticipated offence would be triable in England if it were committed abroad or the anticipated conduct would amount to an offence under the local law of that other state.[59] Where that person is also outside the jurisdiction at the time of encouraging or assisting the anticipated offence, he or she will be liable under sections 44 to 46 if he would otherwise be triable within England and Wales, for example on the basis of his or her British citizenship.[60]

Mutual legal assistance and the extraterritorial authority of UK enforcement agencies 28.8

Mutual legal assistance (MLA) allows a state to seek co-operation from another state in the investigation or prosecution of criminal offences via a formal letter of request. MLA is generally used when the enquiries require coercive means.[61]

Much of the cross-border co-operation between authorities is informal, relying on established liaison relationships, whether directly between states or through organisations such as Interpol and Europol.[62] MLA is generally not appropriate if the material can be obtained directly via law enforcement co-operation for intelligence purposes or if the material otherwise is admissible in that form. Police-to-police or agency-to-agency co-operation can be extremely helpful to conduct negotiations for the voluntary transmission of documents and evidence and even to secure bail in advance of a voluntary surrender of a suspect.

The framework governing the United Kingdom's approach to MLA is contained in a number of instruments, primarily the Crime (International Co-operation) Act 2003 (CICA), the European Convention on Mutual Legal Assistance in Criminal Matters 2000, and various bilateral and multilateral treaties (for example, with the United States in 1994, with Brazil in 2005 and with

59 Paragraphs 1 and 2 of Schedule 4, Serious Crime Act 2007.

60 For a recent discussion of this extraterritorial application, see the judgments in *R (Khan) v. Foreign Secretary*, regarding allegations that British intelligence officers committed offences under sections 44 to 46 of the SCA when they passed location information to agents of the United States Government for use in missile strikes by drone aircraft targeting individuals in Pakistan. *R (Khan) v. Secretary of State for Foreign and Commonwealth Affairs* [2014] EWCA Civ 24; and at first instance at [2012] EWHC 3728 (Admin). Ultimately, however, the claim did not continue because the court refused permission to proceed as the case would inevitably risk judicial condemnation of the actions of a foreign sovereign state.

61 While MLA is used for gathering and exchanging information, and requesting and providing assistance in obtaining evidence located abroad, extradition is the legal process by which an individual is transferred from one state to another for the purposes of being tried or serving a sentence already imposed. The Extradition Act 2003 sets out the UK extradition legal framework

62 For example, see the NCA website regarding its international co-operation. For a discussion of the European arrest warrant, see chapter 17 on individuals in cross-border investigations.

India in 1995). The UK Home Office Central Authority[63] is primarily tasked with receiving, and acceding to, MLA requests.[64]

Outgoing MLA requests (i.e., those from the United Kingdom to a foreign state) seeking evidence must be issued by a court or a designated prosecuting authority.[65] The MLA request can only be issued if it appears to the court or designated prosecuting authority that: an offence has been committed or there are reasonable grounds for suspecting that an offence has been committed; or proceedings in respect of the offence have been instituted by the designated prosecuting authority or the offence is being investigated.[66] The request must relate to the obtaining of evidence for use in the proceedings or investigation.[67] The defence can also apply for an MLA request once criminal proceedings have begun.[68] The usual policy for central or executing authorities is to keep the MLA request confidential and not to share its content beyond government departments, agencies, the courts or enforcement agencies.[69]

Evidence obtained from or by the United Kingdom pursuant to an MLA request cannot be used for any purpose other than that specified in the request without consent of the foreign authority.

Individuals or companies that are the subject of a request from a foreign authority, whether formal or informal, should ensure that they do not disclose material that is legally privileged, and ensure they take all appropriate steps to protect their rights under UK law, including as to the privilege against self-incrimination. For example, one method of MLA to foreign states is to compel witnesses to attend court.[70] However, a witness cannot be compelled to give evidence where he or she could not otherwise be compelled to testify under either UK law or that of the requesting state.[71]

Furthermore, in the appropriate case, there is scope for judicial review of the UK authorities' response to a letter of request (LOR) from a foreign authority. The recent decision of the High Court in *R (on the application of Soma Oil and Gas Ltd) v. Director of the SFO*[72] makes clear that judicial review challenges to investigation decisions by authorities should be very rare, and only pursued in

63 If the request relates to tax and fiscal customs matters, the competent authority is HMRC.

64 There are exceptions such as EU freezing orders for property, which need to be sent directly to the relevant UK prosecuting authority.

65 The Director and any designated member of the Serious Fraud Office, the Financial Conduct Authority and the Bank of England are examples of designated prosecuting authorities.

66 Section 7(5), CICA 2003.

67 Section 7(2)), CICA 2003.

68 Section 7(1)(b) and (3)(c), CICA 2003.

69 In *Blue Holdings (1) Pte Ltd and another v. National Crime Agency* [2016] EWCA Civ 760, the appellant succeeded in inspecting an MLA request from the US Department of Justice to the National Crime Agency following the court's balancing exercise between the right to inspect a document in proceedings and an enforcement authority's claim to confidentiality.

70 Section 15 CICA 2003.

71 Schedule 1 CICA 2003.

72 [2016] EWHC 2471.

exceptional circumstances.[73] However, it does remain open to individuals subjected to a LOR to seek protection; the court noted that '[a] balance must be struck between the public interest in international cooperation in investigating and prosecuting serious crime and the rights of the individual . . . . Though such challenges are not at all to be encouraged . . . they would dovetail well with the statutory and treaty regime *provided* their focus was upon compliance with the CICA and treaty conditions for the making of a LOR.'[74]

In cases of concurrent or overlapping jurisdiction, prosecutors are encouraged to meet with their counterparts from overseas to discuss the relevant factors, such as the location and interests of witnesses and whether the prosecution can be appropriately split into separate cases. Where a case touches on issues of US jurisdiction, which has wide extraterritorial application, the UK prosecutor will need to consider the Attorney-General's long-standing agreement with the US Department of Justice, and the related guidance (January 2007), which requires consultation and regular liaison from the outset of a relevant investigation.

Within the European Union, issues of concurrent jurisdiction are handled by Eurojust, the role of which is to stimulate and facilitate co-operation in the investigation of serious cross-border crime, particularly organised crime. With the UK government now in negotiations for Britain's exit from the EU, the UK authorities will no doubt be seeking to negotiate for continued co-operation between jurisdictions to allow for effective liaison with their European counterparts.

73 *R (on the application of Unaenergy Group Holdings Pte Ltd and others) v. Director of the SFO* [2017] EWHC 600 (Admin) at para. 34 (iii) (*per* Gross LJ).

74 Ibid. at 35 (original emphasis).

Appendix 1

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Tom has substantial experience representing those facing investigations brought by all major UK enforcement agencies, particularly with international investigations. He is engaged on seven matters identified by the Serious Fraud Office as among its most significant investigations.

He frequently advises companies and senior individuals facing sensitive investigations and regulatory issues and is often called on to assist suspects, whistleblowers and witnesses in fraud and corruption cases. Tom also advises corporate clients on anti-corruption systems and controls.

Tom is a former committee member and law reform officer for the London Criminal Courts Solicitors' Association (LCCSA), and a member of the Association of Regulatory and Disciplinary Lawyers (ARDL) and the International Chamber of Commerce (ICC). He has lectured to professional and commercial organisations including the British Bankers' Association and is an established speaker on the UK white-collar crime conference circuit.

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