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February 1, 2018

# 2017 YEAR-END UNITED KINGDOM WHITE COLLAR CRIME UPDATE

To Our Clients and Friends:

Those with operations in the United Kingdom, especially in the financial services or regulated sectors, will have been very aware during the course of this year of the flood of new legislation imposing significant and varied compliance obligations: the *Policing and Crime Act 2017* (the "PCA") changing the nature of financial sanctions enforcement; the *Criminal Finances Act 2017* (the "CFA"), introducing new offences of failing to prevent the facilitation of tax evasion, and changing the suspicious activity report regime; the *European Union Financial Sanctions (Amendment of Information Provisions) Regulations 2017* ("IPR 2017") imposing a reporting obligation on lawyers, accountants, tax advisers, casinos, estate agents and others regarding breaches of financial sanctions; the *Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017* (the "2017 AML Regulations") implementing the EU's Fourth Money Laundering Directive and significantly changing the face of anti-money laundering compliance for those in the regulated sector.

Coupled with this new wave of regulation has been another year of substantial enforcement by a range of regulators and prosecutors, for a wide variety of offences. These enforcement actions are discussed below in the relevant sections.

The year has also seen significant developments from the courts. Most notably this can be seen in the High Court decision on privilege in *SFO v ENRC* which is discussed below and will, unless overturned, have significant implications for the conduct of internal investigations relating to the UK. In addition, given the large number of offences which require the prosecution to prove dishonesty, the fundamental change to the test for dishonesty in the Supreme Court decision of *Ivey v Genting Casinos (UK) Limited* [2017] UKSC 67 will have repercussions for a vast number of prosecutions in years to come.

A U.S. decision from this year is also likely to have repercussions in the UK. In the case of *United States v Allen et al.*, No. 16-898 (2nd Circuit, July 19, 2017) , it was held that evidence constituting compelled testimony from a FCA compelled interview in the UK could not be used by the prosecution. This judgment is likely to have significant impact on the cross-border co-operation between the U.S. and UK authorities.

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## 1. Developments Relating to Financial Crime Generally

***New Economic Crime Unit for the UK***

In December 2017, the Home Secretary, the Hon. Amber Rudd, announced the creation of a new national economic crime centre within the National Crime Agency (the "**NCA**"). According to the Home Secretary the new centre will be tasked with coordinating the national response to economic crime "*backed by greater intelligence and analytical capabilities*". This is part of a wider package of measures which are designed to "*ensure the UK is a hostile environment for cases of fraud, bribery, corruption and money laundering*".

The Home Secretary also announced that the Government will introduce legislation that will enable the NCA to directly the task the Serious Fraud Office ("SFO") to "*target the worst offenders*". This may be unnecessary, as section 5(5) of the *Crime and Courts Act 2013* already permits the Director General of the NCA to direct the performance of tasks by the police force, although this power has never been used. Other than the idea that it would be at the NCA's direction, rather than just the Director General, it is unclear how this new legislation is a change from the current position where the SFO is already the primary investigating and prosecuting agency for the most serious financial crime.

The Government claims that the SFO will continue to act as an independent organisation, supporting the multi-agency response led by the NCA, but there is room to question how the SFO can be expected maintain its independence when acting under the direction of the NCA.

***The 2017 money laundering and terrorist financing National Risk Assessment ("NRA")***

In October 2017, the UK published its second risk assessment setting out the threats posed to the UK by money laundering and terrorist financing.

The first NRA was published in 2015 and set out the areas where action was needed to combat money laundering and terrorist financing. In response, in 2016, the Government released an action plan which set out planned reforms to the AML regime: reform given effect by the CFA and 2017 AML Regulations which change both the suspicious activity report regime and the compliance regime.

The key findings of the 2017 assessment are that:

- high-end and cash-based money laundering remain the greatest areas of money laundering risk to the UK;
- professional services remain vulnerable as money launderers look to disguise the origin of their funds; and
- cash remains the favoured method for terrorists to move funds out of the UK.

As regards the financial services sector, the 2017 NRA found that overall the sector remained at high risk of money laundering. The report provides separate assessments for retail banking, wholesale banking, capital markets, and wealth management. In summary, retail banking was identified as being at a high risk of money laundering due to the increasing speed and volume of transactions together with a widespread criminal intent to exploit retail banking products, although the NRA noted that controls are more developed in retail banking than other areas. In wholesale banking and capital markets, the risk of money laundering was found to be high due to the risks of large sums being laundered through capital markets and the relative lack of controls. Wealth management was also found to be high risk due to its exposure to the proceeds of political corruption and tax evasion and regulatory concerns.

### ***Privilege***

As reported in our last update, regulators continue to take an aggressive stance on privilege and two important judgments over the past year demonstrate this. The judgments of Hildyard J in the *RBS Rights Issue Litigation* [2016] EWHC 3161 (Ch) ("*RBS*") and Andrews J in *Serious Fraud Office v Eurasian Natural Resources Corporation Limited* [2017] EWHC 1017 (QB) ("*SFO v ENRC*") have cast doubt over the scope of litigation privilege and in particular its availability in the context of criminal and regulatory investigations.

#### ***SFO v ENRC***

The *SFO v ENRC* judgment is one of the most notable cases of 2017 as it is likely to have wide repercussions on how companies conduct investigations and argue privilege.

The case involved an investigation by the SFO into the activities of Kazakh mining company ENRC, now owned by Eurasian Resources Group. The opening of the investigation followed a period of dialogue between the SFO and ENRC, during which ENRC was reporting to the SFO. The investigation focused on allegations of fraud, bribery and corruption.

As part of its investigation, the SFO sought to compel the production of documents (including interview notes and factual updates) that had been prepared by ENRC's lawyers during the course of an internal investigation. Assertions of both legal advice privilege and litigation privilege were made in respect of the documents sought by the SFO. All assertions of privilege, save for a limited legal advice claim in respect of a narrow group of documents, failed.

We reported on this decision and its implications in our 2017 UK White Collar Crime Mid-Year Alert. Since then there have been two further developments.

In October 2017, the High Court granted ENRC leave to appeal and on November 21, 2017 the Law Society applied for permission to intervene in the appeal. The Law Society has expressed concern throughout the case over the impact of the case on privilege. Joe Egan, president of the Law Society, made a statement that the decision has "*profound implications for when and how companies and their employees are protected by privilege*" and believed that it may discourage companies from self-reporting.

#### *RBS Rights Issue*

In *RBS*, the claimants sought disclosure of notes recording interviews with current and former employees of RBS. The interviews were conducted by in-house and outside counsel as part of two internal investigations carried out by the bank. RBS sought to withhold disclosure of the interview notes on different bases, including that they were subject to legal advice privilege, that they were "lawyers' privileged working papers", or that the English Court should apply U.S. law which recognises the notes as privileged. The High Court rejected these arguments and held that the notes of interviews were not privileged.

### ***The Regulators and Prosecutors***

#### *Serious Fraud Office*

In the May 2017 Conservative election manifesto, it was pledged to integrate the SFO into the NCA and Crown Prosecution Service ("CPS"). Following that party failing to maintain its Parliamentary majority (albeit remaining in government), there have been no further statements since then and this pledge appears to have been quietly dropped and replaced with the above-mentioned plan from the Home office for the Economic Crime Unit.

The SFO has faced criticism this year particularly over LIBOR-related prosecutions. These include the collapse of the trial against two ex-traders, **Stylianos Contogoulas** and **Ryan Michael Reich**, who were accused of rigging the LIBOR rate. As discussed in more detail in the Fraud section below, the SFO has also faced criticism over Saul Haydon Rowe, the SFO's expert witness who provided evidence in many LIBOR trials, and who admitted to texting friends during the trials to ask for help understanding some of the banking terms. At least one former trader is currently requesting permission to appeal a 2016 conviction for manipulating the LIBOR rate with the argument that the evidence of Mr Rowe as the SFO's expert witness was unreliable.

The other key development for the SFO is that David Green QC is shortly to end his term as Director. Applications from those wishing to replace him close on February 5, 2018, and it is expected that the new Director will be in office in April.

### *Financial Conduct Authority ("FCA")*

This year the FCA has collected significantly more in fines than it did in 2016. In 2017, the cumulative value of fines imposed was more than £225 million in comparison with £22 million in 2016. The figure for 2017 is, however, smaller than the total fines collected in each of 2013, 2014 and 2015.

An enforcement action by the FCA since our last update resulted in a £34.5 million fine levied in October 2017 against **Merrill Lynch International** in relation to exchange traded derivative transactions. This was the first enforcement action based on allegations of the non-reporting of details of trading instruments since the *European Markets Infrastructure Regulation* reporting requirements were introduced in 2008 to help improve transparency and help regulators understand the risks banks faced. Merrill Lynch cooperated with the FCA.

In the same month, the FCA also fined **Rio Tinto PLC** £27 million under the Disclosure and Transparency Rules (see further below).

As noted in our 2017 Mid-Year UK White Collar Crime Alert, in January 2017 the FCA fined **Deutsche Bank** £163 million over AML controls (see further below).

### *Prudential Regulation Authority ("PRA")*

In 2017 the PRA imposed just one fine. On February 9, 2017 the PRA fined a global investment bank £17.85 million and its related company £8.925 million for "*failing to be open with the PRA*".

This lack of openness lay in the fact that the companies involved "*did not inform the PRA*" about an enforcement actions being taken by the New York Department of Financial Services "*until after the DFS' public announcement*". It is important to stress that this was the only misconduct complained of and which generated this significant fine.

As stated by the PRA "*Where a firm operates across multiple jurisdictions, the PRA expects it to be organised such that, when issues arise concerning its operations in one jurisdiction which may impact on other jurisdictions, the regulatory responsibilities of the firm as a whole are appropriately considered*".

The lessons for companies with multiple regulators are clear; the PRA (and the same applies to the FCA) expects to be told in advance about any regulatory enforcement against a company taking place around the world.

### ***Continued use of DPAs***

As reported in our 2017 Mid Year UK White Collar Crime Alert, the SFO secured one DPA in 2015, one in 2016, and two in the first half of 2017: Rolls Royce PLC in January 2017 and then Tesco PLC in April 2017. The agreement with Rolls Royce PLC is especially notable as under the terms of the DPA, Rolls Royce agreed to pay £497.25 million. See also our 2017 Year-End DPA and NPA Alert.

The SFO's General Counsel has said in a published speech that the SFO will only use DPAs if it believes a company is unlikely to reoffend and has been proactive in cooperating. The continued use and promotion of DPAs is an indication that the SFO and other government bodies are using and intend to continue to use the new powers made available by recent legislation.

As discussed below in relation to sanctions offences under the PCA, and the new failure to prevent tax evasion offences under the CFA, the DPA regime is being extended to other offences as and when they are enacted.

### ***Modern Slavery Act***

As reported in the 2016 Year End UK White Collar Crime Update, the UK government published its *Modern Slavery Act Review* in July 2016, covering the first 12 months of the *Modern Slavery Act 2015*. The government did not publish a further review in 2017. However, in October 2017, the Home Office issued updated guidance on compliance with the 2015 Act. Under the Act, a commercial organization carrying on a business, or part of a business, in the UK and having a minimum £36 million annual global turnover was already required to publish on its website an annual statement explaining the steps taken to ensure that slavery and human trafficking are not taking place in any of its supply chains or in any part of its business. The October 2017 guidance now encourages smaller organizations to produce the statements voluntarily. The new guidance also recommends that the statements should cover the organization's internal anti-trafficking policy, due diligence measures in monitoring supply chains, and anti-trafficking training for staff, among other items. The guidance requests that organizations keep public archives of their annual statements to allow the public to compare statements between years and monitor the progress of the organization over time.

On December 15, 2017, the National Audit Office published a report analyzing the government's strategy to tackle modern slavery, noting that the Home Office had limited means of tracking the strategy's progress and highlighting shortcomings in the national referral mechanism used for identifying victims. The report found that there had been 80 prosecutions for 155 offences in 2016.

### ***Paradise Papers***

In November 2017, over 13 million documents were leaked, mostly related to the law firm Appleby. These documents revealed the tax and other arrangements of a large number of individuals and corporations.

Although there has been media criticism of some of the high-profile individuals involved and calls for legislation on offshore arrangements to be reformed, one of the most notable aspects of the leak is that the response within the UK has been reasonably muted, especially in comparison to the reaction to the Panama Papers leak which we reported in our 2016 Year-End UK White Collar Crime Alert. The Panama Papers leak resulted in a Panama Papers Taskforce being set up and the FCA contacting 64 firms to establish their links with the Panama law firm at the centre of the controversy. In contrast, the UK's response to the Paradise Papers has been so muted that in November 2017, more than 30 Members of the European Parliament issued a letter which criticized the British government for failing to take any action against the offshore tax industry following the disclosures in the Paradise Papers.

One possible reason why public reaction to the Paradise Papers has been so limited is that most of the schemes revealed were lawful. In addition, it appears many of the public figures named were not directly involved in organising these arrangements and the public may simply be losing interest following coverage of Lux Leaks in 2014, and Swiss Leaks and the Panama Papers both in 2015. Nonetheless, companies will continue to be conscious of how aggressive tax avoidance schemes and use of offshore tax jurisdictions, even if legal, can cause adverse headlines.

It is, however, likely that the Paradise Papers provided significant impetus to the EU's publication of its black and grey lists of tax havens, as discussed in the Tax section below.

***Brexit***

The *Sanctions and Anti-Money Laundering Bill* (the "Sanctions Bill") is the first piece of Brexit legislation to be brought before the House of Lords. The Bill aims to allow the UK government to continue to comply with the current UN sanctions regime post Brexit, as well as imposing and enforcing sanctions. The Bill was introduced to the House of Lords on October 18, 2017, had its second reading on November 1, 2017 and is currently at the committee stage. For more information, please see the Sanctions section below.

## 2. Bribery and Corruption

Without question the key development for 2017 was the DPA entered into with Rolls-Royce. The company was required to pay over £500 million in fine, disgorgement and costs. Underneath that headline story two other companies have been found guilty of corruption and 27 individuals have been convicted of bribery or corruption offences. Moreover, press reports indicate that DPA negotiations between the SFO and Airbus on another substantial resolution are currently in progress.

***UK anti-corruption strategy for 2017 to 2022***

On December 11, 2017, the Department for International Development and the Home Office published the UK anti-corruption strategy for 2017 to 2022. The cross-government anti-corruption strategy provides a framework to guide UK government action to tackle corruption. The strategy lists six priorities and goals focused on reducing the threat to the UK's national security including instability caused by corruption overseas; increasing the UK's prosperity at home and abroad; and enhancing public confidence in domestic and international institutions. The six priorities are as follows:

1. Reduce the insider threat in high-risk domestic sectors
2. Strengthen the integrity of the UK as an international financial centre
3. Promote integrity across the public and private sectors
4. Reduce corruption in public procurement and grants
5. Improve the business environment globally
6. Work with other countries to combat corruption

The strategy notes that in the present Parliamentary session, a draft bill will be published for the establishment of a public register of beneficial ownership of overseas legal entities where they own or purchase property in the UK, or participate in central government contracts. With this strategy the government intends to strengthen the dialogue between law enforcement agencies and Companies House as well as the central registers of UK Overseas Territories and Crown Dependencies to ensure that law enforcement can more effectively use information contained in PSC (people with significant control) registers, registers of taxable relevant trusts and registers of company beneficial ownership information. In respect of goal 2, the government will consider the findings of its Call for Evidence of corporate criminal liability made in January 13, 2017 and consult, if appropriate, although this commitment is lacklustre.

The UK Government also made a commitment to establish a new Ministerial Economic Crime Strategic Board chaired by the Home Secretary. The new Minister for Economic Crime will have oversight of anti-corruption.

***<u>Enforcement: concluded bribery/corruption enforcement against corporations</u>***

***F.H. Bertling Limited***

In our 2016 Year-End UK White Collar Crime Alert, we reported that the SFO had announced charges against **F.H. Bertling Limited**, and seven individuals (**Peter Ferdinand, Marc Schweiger, Stephen Emler, Joerg Blumberg, Dirk Jürgensen, Giuseppe Morreale,** and **Ralf Peterson**) relating to an alleged conspiracy to "*bribe an agent of the Angolan state oil company, Sonangol, to further F.H. Bertling's business operations in that country*".

On September 26, 2017 the SFO announced that it had secured convictions against F.H. Bertling Limited and six of the individuals for conspiracy to make corrupt payments, contrary to section 1 of the *Criminal law Act 1977* and section 1 of the *Prevention of Corruption Act 1906*. Mr Ferdinand was acquitted by a jury at Southwark Crown Court on September 21, 2017. Of those convicted, Mr Morreale and Mr Emler pleaded guilty to the charges on September 1, 2016 and Mr Blumberg, Mr Petersen (now deceased), Mr Jürgensen and Mr Schweiger pleaded guilty on March 17, 2017. On August 1, 2017, F.H. Bertling

Limited also pleaded guilty. One of the individual defendants, Mr Ferdinand was acquitted on September 21, 2017.

The conduct complained of was stated by the SFO as being a payment of $250,000 to secure a contract. Unusually, F.H. Bertling has issued its own press release disputing this, stating that "*the payment was made to a third party in Angola to enable release of a payment for work contractually done by the former subsidiary and to protect the livelihoods of its employees in the country*". To the extent that F.H. Bertling's account is correct, then these convictions are all for the making of facilitation payments. This would be the first such conviction, and would underline the oft-stressed point that English law does not allow any exception for facilitation payments.

On October 20, 2017 three of the individuals were sentenced, fined and disqualified as company directors. Mr Blumberg, Mr Jürgensen and Mr Schweiger were each given 20-month sentences, suspended for 2 years, a £20,000 fine, payable within 3 months and disqualification from being company directors for 5 years. F.H. Bertling Limited, Mr Morreale and Mr Emler will be sentenced following the conclusion of connected proceedings against F.H. Bertling relating to alleged improper payments relating to North Sea oilfields (as reported in our 2017 Mid-Year UK White Collar Crime Alert) for which the trial is scheduled in September 2018.

***Rolls-Royce***

As we reported in detail in our 2017 Mid-Year UK White Collar Crime Alert, on January, 17 2017 **Rolls-Royce PLC** ("Rolls-Royce") entered into the UK's most significant deferred prosecution agreement ("DPA") to date, following its approval by Lord Justice Leveson. The resolution represents the largest ever criminal enforcement action against a company in the UK following an extensive four-year investigation by the SFO. The investigation concerning the conduct of individuals remains ongoing.

Under the terms of the DPA, Rolls-Royce agreed to pay £497.25 million (comprising disgorgement of profits of £258.17 million and a financial penalty of £239.08 million) plus interest, as well as the SFO's costs of the investigation amounting to approximately £13 million.

In November 2017, three ex-employees of Rolls-Royce's former Energy division, **James Finley, Keith Barnett** and **Louis Zuurhout** pleaded guilty to bribery and corruption offences in the United States District Court for the Southern District of Ohio Eastern Division. **Andreas Kohler**, who worked for an international engineering consulting firm instructed by Rolls-Royce's former customer in Kazakhstan also entered a guilty plea. A further individual, **Petros Contoguris**, who worked as an intermediary for Rolls-Royce was indicted. In its November press release, the SFO stated that it provided significant assistance to the U.S. authorities throughout the course of their investigation. The individuals involved all held significant roles within Roll-Royce or firms connected with the company:

- Mr Finley was a Vice President and Global Head of Sales of Rolls-Royce's Energy Division.
- Mr Barnett was a Regional Director of Rolls-Royce's Energy Division.
- Mr Zuurhout was a Sales Manager of Rolls-Royce's Energy Division.

- Mr Kohler was a Director of an international engineering consulting firm which worked for Rolls-Royce's former customer in Kazakhstan.

- Mr Contoguris acted as an intermediary of Rolls-Royce in Kazakhstan.

***Alandale Rail***

On July 24, 2017, **Alandale Rail Limited** ("Alandale") was convicted of one count of making corrupt payments contrary to section 1 of the *Prevention of Corruption Act 1906*. The case was not prosecuted by the SFO, but by the Specialist Fraud Division of the CPS, following an investigation by the British Transport Police.

The scheme involved two directors, **Kevin McKee** and **John Zayya** of Alandale making corrupt payments to the senior manager of a joint venture (**Innocent Obiekwe**) that oversaw the award of contracts in relation to the upgrade of Farringdon railway station in London. After improperly obtaining the contract, the three then colluded in manufacturing false invoices to enable Alandale to recover the cost of its bribes. When the scheme started to be uncovered, the bribes continued to be paid through an intermediary (**William Waring**). Nobody involved self-reported and the conduct was only uncovered after a whistleblower came forward from within Alandale.

The two directors of Alandale, the recipient of the bribes, and the intermediary all pleaded guilty and were sentenced. The bribe-paying directors received 12 months and 2 years respectively. Following a trial at Blackfriars Crown Court the bribe recipient was sentenced to 12 months in jail, and the intermediary was sentenced to 2 years. Alandale itself was convicted and fined £25,000.

These sentences appear more lenient than might have been expected based on the usual application of the sentencing guidelines, which require that the base number used for calculating the fine for a corporation guilty of bribery or corruption is the gross profit from the contract obtained as a result of the offending. The application of this guideline would appear to have suggested a the base figure for Alandale's fine of £5.2 million. This would then be increased or decreased depending on the presence of aggravating or mitigating circumstances, with a lowest fine available of 20 percent of the base figure. As Alandale did not plead guilty, the availability of maximum mitigation is unlikely to have been available. In addition, the Sentencing Guidelines also require a convicted company to have its profits disgorged from an improperly obtained contract. No such order was made in respect of Alandale.

It is unclear why the Sentencing Guidelines, which should be binding, may not have been followed in this case, or why the prosecution do not seem to have sought permission to appeal the sentence. In any event, it would be wrong for companies to assume that this case is anything other than a notable outlier.

***Enforcement: concluded bribery/corruption prosecutions of individuals***

There were **27 individuals** convicted of bribery or corruption offences in 2017. This is more than in any other year in the last decade. These were all prosecuted by the Crown Prosecution Service, but investigated by different parties. Eight of these convictions were investigated by the SFO, seven by the City of London Police, and the rest investigated by a mixture of the British Transport Police, Thames

Valley Police, the Crown Prosecution Service, Leicestershire Police, and Avon and Somerset Police. Ten of the convictions have been discussed above, and a further nine were discussed in detail in our 2017 Mid-Year UK White Collar Crime Alert.

With custodial sentences ranging up to 15 years, 2017 has also seen the longest ever custodial sentence for bribery and corruption offences.

***World Bank tenders***

As reported in our 2017 Mid-Year United Kingdom Alert, the trial of health equipment consultant Wassim Tappuni took place on July 13, 2017, and was sentenced to six years' imprisonment at Southwark Crown Court on September 22, 2017. Mr Tappuni received £1.7 million in bribes from 12 medical supply companies that had submitted tenders for projects with World Bank, which had engaged Mr Tappuni as an independent medical procurement consultant. The value of these contracts is estimated at £43 million.

***Buckingham Palace works contracts***

**Bernard Gackowski** pleaded guilty to conspiracy to make corrupt payments in relation to the Buckingham Palace works bribery scandal which we reported on in our 2016 Year End United Kingdom White Collar Crime Alert. He was given a 10-month sentence suspended for two years and ordered to do 200 hours of unpaid work. In sentencing the judge accepted he was a "broken man" who assisted in, but did not benefit from, the wrongdoing.

***Payments for confidential information***

On June 6, 2017 **Androulla Farr** was given a suspended custodial sentence for taking a corrupt benefit valued at £2000. The benefit was a holiday and it was in return for Farr providing confidential information relating to an adoption. Other than an example of the appetite of the UK authorities to prosecute low-value bribery, the case is only otherwise noteworthy as being a rare instance of a prosecution under the *Public Bodies Corrupt Practices Act 1889*.

Five individuals were all convicted under the *Bribery Act* in relation to payments for confidential insurance information. **Underhill**, **Clarke**, and **Bowen** all worked for an insurance company and were bribed with £7,000 by **Sajaad Nawaz** and **Shaiad Nawaz** to release over 700 pieces of confidential information. The investigation was carried out by the City of London Police Insurance Fraud Enforcement Department. All but Shaiad Nawaz pleaded guilty. All five were sentenced on August 25, 2017 and were given suspended custodial sentences ranging from 6 months to 12 months.

***"Right to Buy" Bribery Scheme***

Recently, valuations officer **Desmond Tough**, who worked for the Valuation Office Agency in Aberdeen admitted eight counts of bribery at Aberdeen Sheriff Court on November 23. Mr Tough told people looking to buy a home under the 'Right to Buy' legislation that in return for a sum of cash, he would lower the price. A sentencing hearing is awaited, although the Sheriff has warned that a custodial sentence is likely. Mr Tough was the twenty-third individual convicted under the *Bribery Act*.

***Enforcement: ongoing investigations and prosecutions***

The UK prosecuting agencies are conducting a large number of ongoing bribery and corruption investigations. We will not list all of those here, but only those where there have been significant developments during the course of 2017.

**[Withheld]**

***ENRC***

As demonstrated by the *SFO v ENRC* judgement, the investigation into ENRC is continuing, but as yet no charging decision has been made.

***Unaoil – Other Companies Involved***

The SFO is continuing its investigation into Unaoil for suspected bribery, corruption and money laundering offences after allegations of bid-rigging in the oil and gas industry were made against Unaoil and its directors, employees and agents. The investigation, which has been ongoing since March 2016, now includes a number of other companies involved with Unaoil.

As we reported in our 2017 Mid-Year UK White Collar Crime Alert, the SFO commenced related investigations in **ABB Limited** and **Amec Foster Wheeler** in February and July respectively.

Additionally, British oil services company **John Wood Group** confirmed in their prospectus of May 23, 2017 that they have been conducting their own investigation into their past dealings with Unaoil.

***Unaoil – KBR***

Engineering company **KBR Inc**, is also under SFO investigation in relation to Unaoil's activities. The investigation, which was announced on April 28, 2017, sparked a federal securities class action suit against KBR in the Texas Federal Court.

***Unaoil – Petrofac***

The SFO announced on May 12, 2017 that it was also investigating ***Petrofac PLC*** for bribery and corruption offences connected with Unaoil. Petrofac suspended its Chief Operating Officer, Marwan Chedid, almost immediately on May 25, 2017, and saw its Chairman Rijnhard van Tets announce on December 14, 2017 his intention to resign at Petrofac's May 2018 annual meeting.

***Unaoil – SBM Offshore and Individuals Charged***

As reported in our 2017 Year-End FCPA Update SBM Offshore recently settled its FCPA enforcement matter, in which the FCPA were investigating allegations against SBM Offshore of bribery offences in

Iraq, amongst other countries. The alleged bribery in Iraq involved the use of Unaoil as an intermediary to pay bribes to foreign officials in Iraq to secure contracts.

To this end, four individuals have been charged in relation to the investigation into Unaoil. The SFO announced on November 16, 2017 that **Ziad Akle** and **Basil Al Jarah** were both charged with conspiracy to make corrupt payments, contrary to section 1(1) of the *Criminal Law Act 1977* and section 1 of the *Prevention of Corruption Act 1906*. Akle, Unaoil's territory manager for Iraq, and Al Jarah, Unaoil's Iraq partner, conspired to make corrupt payments to secure the award of contracts in Iraq to SBM Offshore. Saman Ahsani, Unaoil's commercial director and son of the head of Unaoil, Ata Ahsani, will also be charged, subject to an extradition request to Monaco.

On November 30, 2017 the SFO announced that it had charged two further individuals, both executives at SBM Offshore, for their role in the alleged corrupt dealings between Unaoil and SBM Offshore between June 2005 and August 2011. **Paul Bond**, former SBM Offshore senior sales manager, and **Stephen Whiteley**, former vice president with SBM Offshore and Unaoil's general territories manager for Iraq, Kazakhstahn and Angola, were charged with conspiracy to make corrupt payments contrary to section 1(1) of the *Criminal Law Act 1977* and section 1 of the *Prevention of Corruption Act 1906*.

#### *Unaoil – Judicial Review*

Unaoil also brought judicial review proceedings against the SFO, arguing that the steps taken by the SFO to raid Unaoil's premises in Monaco were unlawful. As we reported in our 2017 Mid-Year UK White Collar Crime Alert, the High Court rejected this claim in *R (on the application of) Unaenergy Gropup Holding Pte Limited & others v The Director of the Serious Fraud Office* [2017] EWHC 600. This is consistent with the British courts' long-standing circumspection regarding judicial review proceedings challenging decisions taken by prosecutors in the course of their prosecutions.

#### *British American Tobacco*

On August 1, 2017, the SFO confirmed that it is investigating **British American Tobacco PLC** ("BAT"), its subsidiaries and associated persons in connection with allegations it has paid bribes in several African states in attempts to influence regulation of the tobacco industry in the region.

#### *Rio Tinto group*

The SFO announced on July 24, 2017 that it was launching an investigation into the **Rio Tinto** group, its employees and anyone associated with its conduct of business in the Republic of Guinea.

#### *Tower Hamlets Planning Permission Bribery Allegations*

Allegations of bribery have been made this December against Tower Hamlets based businessman **Abdul Shukur Khalisadar.** Khalisadar was recorded demanding a £2 million "*premium*" from property developers in exchange for guaranteeing planning permission for a £500 million project to build two skyscrapers on the Isle of Dogs. The allegations, first made in 2016 were passed on to the Serious Fraud Office and National Crime Agency after an independent external investigation.

### *Chemring Group PLC and Chemring Technology Solutions Limited*

On January 19, 2018, the SFO announced it was opening a criminal investigation into Chemring Group PLC and its subsidiary Chemring Technology Solutions Limited. The SFO further stated that this followed a self-report by Chemring and that the investigation was "*into bribery, corruption and money laundering*". Chemring's own press release notes that the investigation concerns two contracts, the most recent of which was obtained in 2011.

## ***SFO: expected trial dates***

The SFO has recently published its court dates. Court dates of note include:

- the confiscation hearing taking place on March 19, 2018 for **Peter Chapman**, sentenced to 30 months' imprisonment for corrupt payments to a Nigerian official to secure contracts for polymer for Securrency PTY Ltd.
- the trial of **Michael Sorby** and **Adrian Leek**, former director and sales manager of **Sarclad Limited**, a technology products company, is due to take place on April 3, 2018.
- The second trial of **F.H. Bertling** and individual defendants is scheduled to commence on September 10, 2018.
- More about each of these enforcements can be found in our 2017 Mid-Year United Kingdom White Collar Crime Alert, and, for Jolan Saunders, Spencer Steinberg and Michael Strubel, our 2016 Year-End United Kingdom White Collar Crime Alert.

## ***International co-operation***

### *Chad – Caracal Energy*

On January 23, 2017, the Court of Appeal found in favour of the SFO in an appeal brought by **Ikram Mahamat Saleh** against a property freezing order relating to the proceeds from the sale of shares in **Caracal Energy Inc** (formerly **Griffiths Energy**), a Canadian oil and gas company, totalling over £4.4 million. In the run up to Griffith's flotation on the London Stock Exchange, due diligence exercises revealed that the company had paid bribes to Chadian government officials in order to gain access rights to two of the country's oil blocks. With knowledge of the impending deal, Saleh, the wife of former Deputy Chief of Mission for Chad in Washington DC, bought shares in Griffith's for a nominal amount. In 2013, Griffiths Energy pleaded guilty to corruption charges in Canada.

The property freezing order was granted in the UK in July 2014 by Mr Justice Mostyn in respect of the proceeds from the sale of 800,000 Caracal shares. Saleh first challenged the order in the High Court in July 2015, arguing that an order made by a Canadian Court in 2014 precluded the SFO from claiming that the money in question was recoverable under the UK's Proceeds of Crime Act 2002 ("POCA"), because the order stipulated that the proceeds from the sale were not criminal and the order was in rem. Mrs Justice Andrews found that the order of the Canadian Court did not have this effect and upheld the property freezing order.

Saleh appealed against the decision to the Court of Appeal, maintaining the argument that the SFO was not able to enforce the property freezing order without contravening the order of the Canadian Court. The SFO's case for upholding the freezing order was based on the argument that Saleh, had acquired the shares as a part of a series of corrupt transactions involving companies and personnel linked to the **Chadian Embassy** in Washington DC.

The Court of Appeal ruled that the order of the Canadian Court did not bind the SFO. If the order was to preclude the SFO from pursuing a property freezing order in the UK, this would be *"inconsistent with the statutory regime established by POCA"*. Furthermore, the Court of Appeal observed that "*the Canadian Order was plainly not the product of a decision-making process, in which the relevant facts were considered and weighed, in which the relevant principles of law were set out and applied to the facts found, and from which a conclusion was reached*." Thus, although the wording of the order gave the impression that it was made on the assessment of the merits of the case and an order in rem, "*on a proper analysis it was neither."* Accordingly, the Court of Appeal upheld the confiscation order against Saleh.

### *Angola – NCA investigation*

It has been reported that the NCA is investigating, and has frozen, some $500m transferred from the Angolan Central Bank to a London bank account in the last days of the presidency of José Eduardo dos Santos in late 2017. An NCA spokesperson is quoted as confirming an investigation "*a case of potential fraud against the Angolan government*".

### *Cas-Global and former Norwegian official*

As reported in our 2017 Mid-Year United Kingdom White Collar Crime Alert, the City of London police is co-operating with anti-corruption investigators in the U.S., Nigeria and Norway in relation to an investigation into the UK company **Cas-Global.** The investigation is in relation to an alleged bribe paid by Cas-Global to a Norwegian official, **Bjorn Stavrum**, as part of the sale of seven decommissioned naval vessels from 2012 onwards. It is alleged that Mr Stavrum was paid to assist Cas-Global to disguise the real destination of the vessels from the Norwegian authorities. The vessels were being sold to a former Nigerian guerilla, **Government Ekpemupolo**. The joint investigation with the Norwegian authorities has led to the arrest of Mr Stavrum and three British nationals.

On May 16, 2017 Mr Stavrum was convicted by a Norwegian court, and sentenced to four years and eight months jail.

### *Antigua's Minister of Tourism arrested in the UK*

On October 23, 2017, **Asot Michael**, Antigua's Minister of Tourism, was arrested in the UK upon disembarking a British Airways flight. The NCA has stated that Mr Michael was questioned in connection with an NCA investigation into bribes paid by a U.K. national for business contracts in the

Caribbean. Mr Michael was released under investigation with no conditions imposed, however, the NCA stated that they cannot rule out the possibility of criminal charges in due course.

***Croatia – Ivica Todoric***

On November 7, 2017, the Metropolitan Police Extradition Unit arrested **Ivica Todoric** under a Euriopean Arrest Warrant raised by Croatia. Mr Todoric's extradition is for him to face charges of fraud and corruption in Croatia.

***France – Alexandre Djouhri***

**Alexandre Djouhri** was arrested at Heathrow Airport on January 7, 2017 and remanded in custody after a hearing at Westminster Magistrates' Court. The French-Algerian businessman was arrested by officers from the Metropolitan Police acting on a European arrest warrant issued by French authorities for fraud and money laundering offences. Djouhri was allegedly the "middleman" money broker in a multi-million pound corruption scandal with ex-French president Nicolas Sarkozy and late Libyan dictator Colonel Gaddafi.

***Arrests in the UK re cricket corruption/spot-fixing***

The NCA arrested three men in February 2017 for bribery offences related to the ongoing investigation into spot-fixing in international cricket. As reported in our 2017 Mid-Year United Kingdom White Collar Crime Alert the men were released on bail pending further enquiries from the NCA, with one man having his passport confiscated until the NCA concludes its enquiries.

These arrests followed from reports on February 10, 2017 that two cricketers from the Pakistan Super League had been provisionally suspended by the Pakistan Cricket Board's anti-corruption unit for spot-fixing. Since the arrests a further six players have been suspended from the Pakistan Super League.

## 3. Fraud

As we reported in our 2017 Mid-Year United Kingdom White Collar Crime Alert, the first half of 2017 saw the SFO engaged in high profile investigations against Tesco and Airbus. The second half of the year has seen the trial of former directors of Tesco, significant charges against former board members of an ex-FTSE 250 company and a significant fine brought by the FCA for breach of the disclosure and transparency rules. The English courts have also re-considered the jury instruction to be given in criminal cases in which dishonesty must be proved. The new test simplifies the law and is likely to make it easier for prosecutors to successfully prosecute these offences.

***Enforcement: SFO***

***Afren PLC***

Following an investigation launched in June 2015, on September 27, 2017 the SFO brought money laundering and fraud charges against the former CEO and CFO of Afren PLC ("Afren"), **Osman**

**Shahenshah**, and **Shahid Ullah**, an oil and gas exploration company. It was reported that the defendants set up a fraudulent scheme whereby an offshore company they controlled distributed "excessive payments" received from $400 million worth of business deals with a Nigerian partner of Afren. Shahenshah and Ullah were charged with two counts of fraud by abuse of position and two counts of money laundering.

Afren had been a FTSE 250-listed company prior to its collapse in 2015. The company's administrators have also brought civil damages claim of over $500 million against Shahenshah and Ullah, alleging that their fraudulent activities assisted in the collapse of the company.

***LIBOR***

There have been no further trials in connection with LIBOR since our 2017 Mid-Year United Kingdom White Collar Crime Alert. However, as we reported in that update, lawyers for convicted traders **Jonathan Mathew** and **Alex Pabon** challenged the evidence of **Saul Haydon Rowe**, an expert prosecution witness whose expertise was called into question during Mr. Reich's re-trial. Rowe was a key witness for the SFO; he testified in four of the Libor trials, giving evidence on trading concepts such as short-term interest rates, and assisted with decoding the heavily jargon-filled and abbreviated communications between traders. On November 13, 2017, The Telegraph reported that the families of three convicted Libor traders had requested the Justice Select Committee (a standing Committee of the House of Commons) to investigate the SFO's selection of Mr. Rowe as an expert. Complaints are now also being raised in relation to a psychiatric expert used by the SFO.

On November 24, 2017, Pabon sought permission in a hearing before the Court of Appeal to appeal his conviction on the basis of Rowe's credibility which his lawyers argued was compromised when he texted friends during breaks in his testimony for help to understand some of the banking terms referred at the trial. At the hearing, Lord Justice Gross described himself as being *"deeply troubled"* by this matter. The SFO acknowledged that Rowe – who received £400,000 to appear as an expert witness for SFO during the Libor trial – had failed to act with integrity. Mr. Pabon's appeal will likely impact on the other Libor-related trials in which Rowe also acted as expert witness.

***Tesco***

Three former directors of Tesco Stores Limited ("Tesco") were each charged on August 3, 2017 with one count of fraud by false accounting and one count of fraud by abuse of position. **Christopher Bush** (former UK managing director), **Carl Rogberg** (former UK finance director), and **John Scoulter** (former UK commercial director) pleaded not guilty to the charges on the same day. The trial of these three former Tesco executives began on 25 September 2017 at the Southwark Crown Court. This follows Tesco entering into a DPA in principle with the SFO in March 2017 (see our 2017 Mid-Year United Kingdom White Collar Crime Alert for more information).

At trial, the SFO's lawyer alleged that the Tesco directors had knowingly tried to conceal the real profits of Tesco by way of *"conniving and manipulating figures*". The charges against the former Tesco directors can carry prison sentences of up to 10 years.

### ***Enforcement: FCA***

#### ***Tom Hayes***

On November 8, 2017, the FCA published a statement about the Decision Notice it issued on October 28, 2016 banning **Tom Hayes**, the former trader convicted in connection with LIBOR manipulation, from performing any regulated activity in the financial services industry. The FCA reached the view that Hayes is not *"a fit and proper person as a result of his conviction for conspiracy to commit fraud."* Hayes, who is currently serving an 11 year prison sentence for LIBOR rigging, subsequently appealed the Decision Notice to the Upper Tribunal, which heard the matter on September 25, 2017. The Upper Tribunal decided to grant a stay in favour of Hayes while his case is reviewed by the **Criminal Cases Review Commission** ("CCRC"). The CCRC accepted his application earlier in 2017, and Hayes is expected to argue that he was deprived of a fair trial due to his Asperger's Syndrome, and to dispute evidence given by the expert witness Saul Rowe.

#### ***Neil Danziger and Arif Hussein***

On January 8, 2017, the FCA fined **Neil Danziger**, a former trader, £250,000 in relation to Yen LIBOR manipulation between 2007 and 2010, and banned him for performing any function in relation to regulated financial activity. Mr Danziger disputes the findings, and may seek to challenge the Final Notice. Another trader, **Arif Hussein**, banned for over allegations of LIBOR manipulation is currently challenging the FCA's decision. That case is ongoing.

### ***City of London Police and Crown Prosecution Service***

On October 18, 2017, **Robert Waterman**, a businessman sentenced to six years imprisonment for a VAT fraud, was ordered to return over £3 million to the taxpayer after pleading guilty to cheating the public revenue, money laundering, furnishing false documents, operating a company while a banned director and absconding while on bail. Waterman was sentenced following an investigation conducted by HMRC which found that he had created a fake trade in computer memory sticks, whereby he claimed to be exporting memory sticks to Dubai through his company, enabling him to wrongfully claim almost £5 million in VAT repayments. However, there were in fact no memory sticks, and Waterman was merely creating fake invoices and posting empty parcels. According to the Crown Prosecution press release, Waterman is now expected to sell his assets to raise the funds to pay the £3 million.

On July 21, 2017, **Mohammed Muj Meah Chaudhari, Suraiya Alam** and **Victoria Sherrey** were sentenced for conspiracy to defraud after stealing over £1.1 million from the Home Office. Through the scheme, they were able to benefit from grants from the Solidarity and Management of Migration Flows European Integration Fund by claiming that their firms were helping with the social, cultural and economic integration of foreign nationals in the UK. Chaudhari was sentenced to seven years imprisonment and disqualified as a director for 15 years, and Alam and Sherrey were sentenced to 12 months jail, disqualified for two years and each ordered to undertake 100 hours of unpaid work.

***Ivey v Genting Casinos***

As previewed in the Introduction to this alert, the key question in many criminal cases is whether the defendant was dishonest. Until recently, the jury instructions in English criminal trials asked the jury to consider the test laid down in 1982 in the case of *R v Ghosh* [1982] EWCA Crim 2. In that case, Ghosh was a medical consultant who falsely claimed fees for a surgical operation he did not carry out himself. He was found to have acted contrary to sections 15(1) and 20(2) of the *Theft Act 1968* by attempting to execute a cheque and obtain money through deception. In its judgment, the Court of Appeal set out the following two limb test for assessing whether a person is dishonest:

- The first limb is objective, and asks whether the act in question is dishonest by the standards of a reasonable and honest person.
- If the answer is yes, the second subjective limb asks whether the defendant himself realized that his actions would be regarded as dishonest by a reasonable and honest person.

The test used for dishonesty in civil proceedings follows the objective test set out in *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 and *Barlow Clowes International Limited v Eurotrust International Limited* [2005] UKPC 37, which determines dishonest conduct by applying *"the [objective] standards of ordinary decent people*" to a person's "*actual state of….knowledge or belief*". Unlike in *Ghosh*, the civil test for dishonesty does not require a defendant to appreciate that his conduct was dishonest.

On October 25, 2017, the UK Supreme Court handed down its judgement in the case of *Ivey v Genting Casinos* [2017] UKSC 67. Effectively the Court did away with the second limb of the *Ghosh* test, and thus brought the civil and criminal tests for dishonesty into line. The landmark decision marks a significant change in the law relating to dishonesty, and is likely to simplify the prosecution of acquisitive offences by applying only an objective, and therefore more easily applicable, test.

The case related to Mr Phil Ivey, a gambler, who claimed to have won a total of £7.7 million playing Punto Banco (described below) at **Crockford's Casino** in Mayfair, London. The casino refused to pay out these winnings because it believed that he cheated, and Ivey issued proceedings for breach of contract in order to recover his winnings. Ivey used a technique called "edge sorting", where a person seeks to identify minor differences that appear on playing cards as a result of the manufacturing process and using this knowledge to increase the chances of success. Ivey feigned superstition and asked the dealer to arrange the cards in a certain way to help him to see the edges of the cards to enable him to identify the values. The casino denied liability essentially arguing that Ivey had cheated.

Ivey denied that his conduct amounted to cheating as cheating necessarily requires an element of dishonesty, which he claims he did not fully satisfy. On October 8, 2014, following trial, the English High Court found in favour of the casino and held that Ivey's "*play on this occasion amounted in law to cheating"* because he gave himself an advantage, by using the dealer as an "*innocent agent"* when he knew that she did not understand the consequences of her actions. Ivey subsequently appealed the decision, and his appeal was dismissed by the Court of Appeal.

The question before the Supreme Court was whether Ivey had "*cheated*" within the meaning of section 42 of the *Gambling Act 2005*, and if so, whether that meant Ivey had breached an implied term of the contract with the casino that he would not cheat. The criminal standard was applied because, following the reasoning of the Court of Appeal, the Supreme Court considered that a breach of the implied term would only occur if the statutory offence of cheating had occurred. In examining this, it considered the *Ghosh* test and identified a number of issues. In particular the second limb was criticized on the grounds that it has the effect that "*the more warped the defendant's standards of honesty are, the less likely it is that he will be convicted of dishonest behavior."* The Supreme Court found the test to be confusing and "*difficult to apply"*, and unnecessarily inconsistent with the objective definition of dishonesty in civil cases. On that basis, the Supreme Court effectively abolished the second limb of the test, and Ivey's appeal was dismissed as he was found dishonest according to the objective standard and thus to have "cheated" within the meaning of section 42 of the *Gambling Act*.

Although strictly *obiter*, *Ivey* will almost certainly be followed. This will effect crimes in which the prosecution must prove that the defendant acted dishonestly. As just one example, the offence of fraud by false representation under the *Fraud Act* requires that the defendant:

- make a false representation;
- dishonestly;
- while knowing that the representation was or might be untrue or misleading; and
- with the intent to make a gain for himself or another.

In light of *Ivey*, defendants will not be able to rely on their own subjective belief in their own honesty to contest allegations of fraud by false representation.

***SFO: expected trial dates***

The SFO has recently published its court dates. Court dates of note include:

- the confiscation hearings on March 19, 2018 and April 19, 2018 for **Jolan Saunders**, **Spencer Steinberg** and **Michael Strubel**, each convicted of conspiracy to defraud, inducing wealthy individuals to invest sums into a business the trade if which was significantly below the levels portrayed to potential investors; and
- the trial of **David Ames** on 7 January 2019, chairman of the Harlequin Group, charged with fraud by abuse of position for pensions fraud (note in the 2017 Mid-Year Alert the trial date was reported as taking place on 18 September 2018.)

## 4. Tax

With the introduction of the new failure to prevent tax evasion offences under the *CFA*, we have included for the first time this year a new section in our alert dedicated to the enforcement of tax evasion offences and related legislative developments.

***<u>Criminal Finances Act: new failure to prevent the facilitation of tax evasion offences</u>***

The Criminal Finances Act 2017 came into force on September 30, 2017, and introduced two new corporate offences of failure to prevent the facilitation of tax evasion.

The first of these offences is the UK tax evasion offence which is committed where a person acting in the capacity of someone associated with the corporate facilitates (or partnership) the fraudulent evasion of UK tax. The second offence relates to foreign tax, and is committed where a corporate's "*associated person*" facilitates the fraudulent evasion of foreign tax, so long as that facilitation is an offence both in the UK and in the foreign jurisdiction.'

It is a defence to either offence for the corporate to show that it had in place reasonable prevention procedures designed to prevent the facilitation of tax evasion.

The jurisdictional reach of these offences is very wide. For the UK offence the only required nexus to the UK is that it is UK tax which is evaded. Conduct committed entirely outside the UK by non-UK nationals for the benefit of a non-UK company will still be subject to the jurisdiction of the UK courts. For the foreign offence the required nexus is that the corporate is either a UK company, carries on a business or part of a business in the UK, or the facilitation in question took place wholly or partly in the UK.

HMRC published guidance on September 1, 2017 on the CFA, which covers amongst other things the six guiding principles that should inform the prevention procedures put in place by corporate persons. These include:

i. Risk assessment

ii. Proportionality of risk-based prevention procedures

iii. Top level commitment

iv. Due diligence

v. Communication (including training)

vi. Monitoring and review

For more detail on the CFA and the HMRC Guidance, please refer to our detailed client alert: "*UK Criminal Finances Act 2017: New Corporate Facilitation of Tax Evasion Offence: Act now to secure the reasonable prevention procedures defence*".

***European Union tax haven Black List and Grey List***

In the wake of the Panama Papers, Pierre Moscovici, the European Commissioner for Economic and Financial affairs, urged in April 2016 for more stringent EU tax laws on non-cooperative jurisdictions, and/or EU member states to draw up with a common list of tax havens to be blacklisted. Following its research, the European Commission published in September 2016 a list of 92 jurisdictions outside the European Union that would be contacted for screening. On February 1, 2017, EU member states sent a letter to those 92 jurisdictions to notify them that they would be screened for possible inclusion in a "*blacklist*" of tax havens. The letter emphasized that the jurisdiction had been selected "*based on a set of objective indicators (such as strength of economic ties with the EU, financial activity, and stability factors)*". At the time, the list of 92 countries contacted was not made available to the public.

On 21 February 2017, European Union finance ministers agreed on criteria first proposed in November 2016 to appropriately screen tax-free jurisdictions outside the European Union. The three main criteria for assessments consisted of: tax transparency, fair taxation, and a commitment to implement OECD measures on taxation. A jurisdiction was at risk of being placed on a black or grey list of non-cooperative tax regimes if it failed to meet the criteria. The EU finance ministers announced that they would publish the list of tax havens that failed to meet the criteria by the end of 2017.

On December 5, 2017, the EU published its Black List which comprises the following 17 jurisdictions: American Samoa, Bahrain, Barbados, Grenada, Guam, Macao, The Marshall Islands, Mongolia, Namibia, Palau, Panama, St Lucia, Samao, South Korea, Trinidad & Tobago, Tunisia, and the United Arab Emirates. Another 47 jurisdictions were put on a grey list as a recognition of their commitment to reform their tax laws as soon as possible to meet EU standards. Since the list's initial publication, the EU officials have now accepted assurances from Barbados, Grenada, Macao, Mongolia, Panama, South Korea, Tunisia, and the United Arab Emirates as to tax reform commitments and so these jurisdictions have been removed from the Black List and added to the Grey List. Countries can stay off the list as long as they implement common reporting standard which would require them to share banking information of individuals who are not their own citizens. While acknowledging that the list represented "*substantial progress*" and an "*important step forward*", Moscovici warned that it remained "*an insufficient response to the scale of tax evasion worldwide*". Moscovici emphasized the need to discuss appropriate sanctions for jurisdictions on the list.

The EU finance ministers will convene in 2018 to adopt sanctions for non-compliant countries. Such sanctions may include prohibitions to conduct business with jurisdictions on the blacklist. In addition a decision on 8 Caribbean jurisdictions severely hit by hurricanes during 2017 has been delayed until February 2018.

For more detail see our client alert: "Black and Grey: The EU publishes its lists of Tax Havens".

***Enforcement: concluded prosecutions relating to tax fraud***

Like the **Panama Papers**, the Paradise Papers have attracted mass media focus on issues of offshore investments and tax avoidance. However, there has been no official UK enforcement action following the Paradise Papers leak. In response to questions to her during the annual CBI conference in London, the Prime Minister refused to commit to an introduction of a public register that would ensure greater transparency with respect to ownership in offshore companies and trusts. Theresa May also did not commit to opening a public inquiry into tax avoidance as she had been encouraged to do by various Labour shadow ministers. However, as described below, there have been a number of concluded prosecutions relating to tax fraud in 2017.

***Convictions over £100 million tax fraud***

On November 10, 2017 following a ten year investigation by HMRC, six men (**Michael Richards**, **Robert Gold**, **Rodney Whiston-Dew**, **Evdoros Demetriou**, **Jonathan Anwyl**, and **Malcolm Gold**) were jailed for their participation in an "*audacious and cynical*" scheme that defrauded investors of over £100 million. Mr Gold had pleaded guilty, but the other defendants were all convicted after a contested trial. Over 730 investors signed up to the scheme, believing that an initial £20,000 investment in research and reforestation projects in Brazil and China would entitle them to claim £32,000 in tax relief. The scheme was structured so that a number of companies were incorporated around the world, including in offshore jurisdictions, and each company was marketed as being independent of the other. In reality, the companies were all controlled by the defendants, who used the entities to cycle cash between them so as to give the illusion of lending. The scheme was marketed to be larger than it actually was, and the purpose of it was to deceive HMRC into granting tax relief totalling £107 million when it otherwise would not have been due. The men were found guilty of conspiracy to cheat the public revenue, and were handed custodial sentences. Mr Gold who pleaded guilty was sentenced to 20 months' jail. The other defendants were sentenced to 11 years, 11 years, 10 years, 6 years and 5 and a half years respectively.

***A pensioner claiming he was a 'spy' stole £1.6 million in tax***

**Raymond Thomas**, a company director, told his friends and family that he was a spy working for the U.S. Department of Homeland Security and was required to work abroad, when in fact he was travelling to various properties he owned in France, Germany and Spain, which were entirely funded from the proceeds of a large-scale VAT fraud. Thomas claimed that he made key components for military drones, which he did through a company, and he complained to the Prime Minister as a "*desperate measure*" to obtain funds withheld by HMRC, alleging that he "*worked fiercely and patriotically in the protection of the citizens of this country."* Following an investigation, the company was found to be a sham, and Thomas had created various false invoices to support fraudulent VAT refund claims. Thomas admitted to VAT fraud, money laundering and producing false documents, and was sentenced to 56 months in prison on November 1, 2017.

***Robert Waterman***

As discussed above in the Fraud section on October 18, 2017, **Robert Waterman**, a businessman, was sentenced to six years' imprisonment for a VAT fraud, and ordered to return over £3 million to the taxpayer after pleading guilty to cheating the public revenue, amongst other offences.

## 5. Financial and Trade Sanctions

The year 2017 saw very significant legislative developments in the UK regarding financial and trade sanctions, but little by way of enforcement activity. We cover these developments in detail, and also the new sanctions on Venezuela and Mali, and provide a summary of the current state of the fast-moving North Korean sanctions.

For the UK's response to President Donald Trump's de-certification of the Iran Nuclear deal, please refer to our client alert "Trump Decertifies the Iran Deal, Creating Both new Uncertainties and potentially unexpected clarity".

### ***Legislative developments***

#### ***Policing and Crime Act 2017 and accompanying guidance***

Part 8 of the *Policing and Crime Act 2017*, which came into force on April 1, 2017, strengthened the UK's sanctions enforcement by increasing the maximum custodial sentence for violating sanctions rules from two to seven years. Additionally, it expanded the list of offences amenable to a DPA, giving the NCA and Office of Financial Sanctions Implementation ("OFSI") more scope to offer DPAs (which can still only be entered into by the SFO and CPS) and impose Serious Organised Crime Prevention Orders.

Importantly, it also gives OFSI the power to impose, as an alternative to criminal prosecution and by reference to the civil standard of proof, monetary penalties for infringements of EU/UK sanctions. OFSI can impose penalties of either £1 million or 50% of the value of the breach, whichever is greater. The lower evidential burden to impose the new civil penalties means that OFSI need only be satisfied on the balance of probabilities that a person (legal or natural) acted in breach of sanctions and knew or had reasonable cause to suspect they were in breach.

The Act also addresses the delay between the United Nations Security Council adopting a financial sanctions resolution and the EU adopting an implementing regulation, which can take over a month. OFSI can adopt temporary regulations to give immediate effect to the UN's resolutions, as if the designated person were included in the EU's consolidated list. OFSI put this power into practice in June of this year by adding a militia leader, **Hissene Abdoulaye**, to its consolidated list of Central African Republican sanctions targets, before the EU had done so.

Businesses relying on a version of the EU's consolidated list prepared by the European Union, or by a member state other than the United Kingdom, may miss fast-track listings done by the UK in this manner. The UK has also enacted the *Policing and Crime Act (Financial Sanctions) Overseas territories) order 2017* to extend these short-term fast-track listings to its offshore financial centres of Cayman, British Virgin Islands and Turks and Caicos.

In a number of interviews this year, OFSI head Rena Lalgie has given further indications of how the body will enforce sanctions compliance. According to Ms. Lalgie, "*voluntary disclosure will be an important part of determining the level of any penalties that might be imposed*". OFSI has already said that companies that voluntarily come forward will see reductions in fines of up to 50% in "serious" cases and 30% in the "most serious" cases.

Ms. Lalgie also made the following noteworthy comments:

OFSI's enforcement action has focused on

> *"preventing and stopping non-compliance and ensuring compliance improves in the future". The agency has used its information powers numerous times to "require companies which haven't complied to tell [OFSI] how they intend to improve their systems and controls in future". Any continuing sanctions non-compliance could lead to criminal prosecution, with fines "fill[ing] the gap between prevention and criminal prosecution".*

The most important actions a company can take to avoid violating sanctions rules are to "*know [its] customers and promote active awareness among relevant staff of high-risk areas*". Ms. Lalgie believes that a company also ought to know what sanctions are in place in the countries in which it does business and have appropriate, up-to-date procedures that are regularly monitored and understood by staff.

In April 2017, and after a public consultation, OFSI published its final *Guidance on the new financial sanctions framework* providing detailed guidelines relating to the imposition of the new civil monetary penalties. For further information about the consultation, please see our 2016 Year-End United Kingdom White Collar Crime Alert.

The final OFSI *Guidance on monetary penalties* was also published in April 2017. It provides a detailed overview of OFSI's approach to investigating potential breaches, as well as the penalty process and procedures for review and appeal. Of note are the following key points from the guidance:

- Penalties can be imposed on natural or legal persons, meaning that separate penalties could be imposed on a legal entity and the officers who run it, if the officer consented to or connived in the breach, or the breach was attributable to the officer's negligence;
- OFSI will regularly publish details of all monetary penalties imposed, including by reference to the name of the person or company in breach, and a summary of the case; and
- Under sections 147(3)-(6) of the *Policing and Crime Act 2017*, decisions to impose a penalty can be reviewed by a government minister and then by appeal to the Upper Tribunal.

In OFSI's "*penalty matrix*", factors which may escalate the level of penalty imposed include the direct provision of funds or resources to a designated person, the circumvention of sanctions, and the actual or expected knowledge of sanctions and compliance systems of the person or business in breach.

Voluntary and materially complete disclosure to OFSI is a mitigating factor that may reduce the level of penalty imposed by up to 50%.

***The European Union Financial Sanctions (Amendment of Information Provisions) Regulations 2017***

On August 8 2017, the European Union Financial Sanctions (Amendment of Information Provisions) Regulations 2017 (the "IPR 2017") came into force. Before the IPR 2017, financial services firms had a positive reporting obligation to notify HM Treasury of any known or suspected breach of financial sanctions, and to notify any known assets of those subject to financial sanctions. Failure to notify constituted a criminal offence. The IPR 2017 extends this reporting regime to:

(a) auditors;

(b) casinos;

(c) dealers in precious metals or stones;

(d) estate agents;

(e) external accountants;

(f) independent legal professionals;

(g) tax advisers; and

(h) trust or company service providers.

OFSI has claimed in its *Guidance* (at 5.1.1) that all companies and individuals have a positive reporting obligation, but this is based on wording in the relevant EU regulations not implemented into English law. As such, the IPR 2017 represents a significant expansion of the scope of the financial sanctions reporting obligations in the UK. Moreover, this extension of the reporting obligation regime is specific to the UK – there is no EU equivalent. It should be noted that trade sanctions are on the whole excluded from this reporting regime, with the focus mostly on those included in the Consolidated List or the separate Ukraine List.

As set out in the Explanatory Memorandum to the Regulations, this development occurred without a public consultation, impact assessment, or parliamentary scrutiny. The failings of the system as currently enacted are best seen by way of a comparison with the money laundering reporting obligations.

In the field of AML:

- the maker of a *bona fide* suspicious activity report is protected by statute from liability for any loss or damage flowing from the SAR;
- there is a defence to any breach if the party has followed its regulator's guidance;
- there is a defence of "reasonable excuse" for failing to make a SAR;

- there is an architecture for reporting, first within an organisation and then for an MLRO who has personal criminal liability if they fail to report; and

- there is an exception to the obligation to make a SAR for lawyers and accountants, auditors or tax advisers, if the information came from the client – the so-called "privileged circumstances" exception.

None of the certainty that comes with a clear reporting hierarchy is found in the IPR 2017, and none of these protections are present either. Most notably this may have an unintended chilling effect on companies seeking legal assistance in the conduct of an internal investigation. As they stand the IPR 2017 would require a company's lawyers to report to OFSI any suspected breach of sanctions, thus robbing the client of the possibility of gaining any credit by self-reporting. Given that OFSI's own guidance stresses the benefits of self-reporting, the IPR 2017 only serve to undermine this policy objective.

It remains to be seen whether the government will revise the IPR 2017 to take account of these failings.

***Sanctions and Anti-Money Laundering Bill 2017***

On October 18, 2017 a new *Sanctions and Anti-Money Laundering Bill* was introduced in the House of Lords, which aims to provide a legislative framework for the imposition and enforcement of sanctions after Brexit. Currently much of the UK Government's authority to impose and enforce sanctions flow from the *European Communities Act 1972*. The proposed bill would give the Government authority to impose and implement sanctions by way of secondary legislation to comply with its obligations under the United Nations Charter and to support its foreign policy and national security goals.

The *European Union (Withdrawal) Bill 2017-19* (the "Bill") which will give effect to Brexit, will freeze the current sanctions regimes and underlying designations on the date of the UK's exit from the EU. The sanctions regime in place would quickly become out of date, and absent new legislation the UK would be unable to amend or lift the existing sanctions. The *Sanctions and Money Laundering Bill* seeks to provide the mechanism to resolve this issue.

The proposed legislation has been through two readings before the House of Lords and is currently at the Committee Stage with the Report Stage scheduled for 15 and 17 January.

Part I of the Bill as originally introduced provided the power to impose sanctions, giving an appropriate Minister, defined as the Secretary of State or the Treasury, the power to make "*sanctions regulations*" for a variety of purposes including:

- compliance with a UN obligation;

- compliance with another international obligation;

- to further the prevention of terrorism in the UK or elsewhere;

- in the interests of national security;
- in the interests of international peace and security; or
- to further a foreign policy objective of the UK government.

In the process of going through the House of Lords further bases for imposing sanctions have been added to the current draft of the Bill. These are:

- promote the resolution of armed conflicts or the protection of civilians in conflict zones;
- promote compliance with international humanitarian and human rights law;
- contribute to multilateral efforts to prevents the spread and use of weapons and materials of mass destruction; and
- promote respect for human rights, democracy, the rule of law and good governance.

The absence of "*misappropriation*" as a basis for sanctions is notable, when that is the basis for the current EU sanctions against Egypt and Tunisia and some of those against Ukraine. Another absence is an express reference to cyber sanctions. As discussed in our 2017 Mid Year United Kingdom White Collar Crime Update, earlier in 2017 the EU proposed sanctions as one of a panoply of responses to organised cyber attacks. In the case of human trafficking, as mentioned further below, there have been a number of recent proposals to impose such sanctions. It is possible that some of the broad rubrics such as *"protection of civilians in conflict zones*" or "*human rights law*" or "*international peace and security*" will be extended to cover such sanctions.

"*Sanctions regulations*" are defined as regulations which impose financial, immigration, trade, aircraft, or shipping sanctions, and expanded upon in clauses 2 to 6 of the Bill. In its comments on the Bill the House of Lords' Constitution Committee has raised concerns in relation to the breadth of powers afforded to Ministers under the sanctions provisions, including in particular the power to create new forms of sanctions. The Bill is currently the subject of significant debate and it is not yet clear what final form it will take.

The sanctions authorised by the Bill take a variety of forms. Financial sanctions can be imposed by way of asset freezes, and by the placement of restrictions on the provision of financial services, funds, or economic resources in relation to designated persons, persons connected with a prescribed country, or persons meeting a particular description. A person who is the subject of a travel ban may be refused leave to enter or to remain in the UK. Trade sanctions can prevent activities relating to target countries or to target specific sectors within those countries. Aircraft and shipping sanctions can have a variety of impacts, including preventing particular craft from entering the UK's airspace or waters.

Designated persons can include individuals, corporations, and organisations and can be identified by name or by description. The Bill enables Ministers to set out in regulations how designation powers are to be exercised.

The Bill also includes provision for Ministers to create exceptions to any prohibition or requirement imposed by the regulations, or to issue licences for prohibitions imposed by the regulations not to apply.

Clause 16 is worthy of mention for, as explained in the accompanying Explanatory Notes, it provides a mechanism for a yet-further expansion of the obligatory reporting regime to all individuals and companies. Whether this provision survives parliamentary scrutiny, and the requirement to protect the right to a fair trial, will remain to be seen.

Chapter 2 sets out the Bill's provisions on revocation, variation and review of designations of persons under the Bill. The Bill provides that a designation may be varied or revoked by the Minister who made it at any time, and that at any time a designated person may request that the Minister vary or revoke the designation. However, after such a request, no further request may be made unless it relies on new grounds or raises a significant matter which has not previously been considered by the Minister. The Bill also requires periodic review of designations by the appropriate Minister every three years. Where a designated person has been identified by a UN Security Council Resolution, they may ask the Secretary of State to use his or her best endeavours to have their name removed from the UN list. These provisions have attracted criticism, as they would appear to detract from the existing procedural safeguards available in relation to EU sanctions, which include an entitlement to challenge before the Courts. Similarly, the existing EU regime allows for review of designations every six to twelve months.

Although the Bill adopts certain definitions from EU Sanctions measures, it also provides that new sanctions regulations may make provision as to the meaning of other concepts. This may give rise to a divergence in the interpretation of sanctions legislation between the UK and the EU, which could increase uncertainty and the burden of those charged with compliance with multiple sanctions regimes.

***Criminal Finances Act 2017 – "Magnitsky sanctions"***

The CFA amended POCA to include a "Magnitsky amendment". This expands the definition of "*unlawful conduct*" for the purposes of civil recovery orders under Part 5 of POCA to include human rights abuses and applies to those who profited from or materially assisted in the abuses. The amendment is modelled on the U.S. Magnitsky Act. These amendments to the CFA came into effect on January, 31 2018.

***EU cyber security sanctions***

The possibility of cyber sanctions has already been mentioned. The Council of the European Union announced in late June that it would be prepared to impose sanctions against "*state and non-state actors*" as part of a broader policy response to malicious cyber activity. The imposition of sanctions is one element within what the EU is describing as its "*cyber diplomacy toolbox*". The Council has published Conclusions on a Framework for a Joint EU Diplomatic Response to Malicious Cyber Activities, which clarifies the policy objectives behind this development:

"*The EU affirms that measures within the Common Foreign and Security Policy, including, if necessary, restrictive measures, adopted under the relevant provisions of the Treaties, are suitable for a Framework for a joint EU diplomatic response to malicious cyber activities and should encourage cooperation,* *facilitate mitigation of immediate and long-term threats, and influence the behavior of potential aggressors in a long term*".

As yet no such sanctions have been imposed.

***Human Trafficking Sanctions***

At the recent G20 meeting in Germany, the EU tabled a proposal for the United Nations to designate people and entities for human trafficking. This proposal was rejected by both the Russians and the Chinese. As two permanent members of the UN Security Council there appears little prospect for the time being of UN sanctions in this sphere.

Nonetheless, in late November 2017, France's ambassador to the UN, François Delattre, called for the UN Security Council to impose sanctions on persons implicated in the slave trade of African refugees and migrants crossing through Libya. An emergency Security Council session was held to discuss the possibility of such sanctions, but no resolution resulted. We will continue to watch for developments in this area.

***New and revised sanctions regimes***

A number of new sanctions regimes have been imposed by the EU and its member states during 2017.

***Mali***

On September 28, 2017, Council Decision (CFSP) 2017/1775 implemented UN Resolution 2374 (2017), which imposes travel bans and assets freezes on persons who are engaged in activities that threaten Mali's peace, security or stability. Interestingly, the imposition of this regime was requested by the Malian Government, due to repeated ceasefire violations by militias in the north of the country. Affected persons will be determined by a new Security Council committee, which has been set up to implement and monitor the operation of this new regime, and will be assisted by a panel of five experts appointed for an initial 13-month period. As yet no one has been designated under the Mali sanctions.

***Venezuela***

On November 13, 2017, in the wake of severe political turmoil in Venezuela, most notably gubernatorial elections plagued by electoral irregularities, the EU imposed an arms embargo on the country, as well as introducing a legal framework for the imposition of travel bans and asset freezes against persons involved in the non-respect of democratic principles or the rule of law and human rights violations (Council Regulation (EU) 2017/2063 and Council Decision (CFSP) 2017/2074). In its conclusions on Venezuela, the Council noted that these measures would be implemented in a "*gradual and flexible manner and can be expanded"*, but can also be reversed "*depending on the evolution of the situation in the country*". On January 22, 2018 through Regulation 2018/88, the EU designated seven Venezuelan officials as the first, but perhaps not the last, to be sanctioned under these measures.

On November 15, 2017, the UK passed the Venezuela (European Union Financial Sanctions) Regulations 2017, which came into force on December 6, 2017, to implement these new measures.

***North Korea***

2017 was an eventful year in the Korean peninsula. Given the ballistic missile and nuclear testing it is unsurprising that sanctions regimes against North Korea have been steadily strengthened over the past 12 months. The relevant UK/EU/UN developments are set out below.

On June 2, the UN Security Council designated a further four entities and 14 officials subject to travel bans and asset freezes, including Cho Il U, believed to be the Director of North Korea's overseas espionage operations and foreign intelligence collection.

In early August, the UN Security Council unanimously passed Resolution 2371 (2017), which introduced fresh sanctions against North Korea, including: (i) a full ban on coal, iron and iron ore (which, at $1 billion, is estimated to represent about a third of North Korea's export economy); (ii) the addition of lead and lead ore to the banned commodities subject to sectoral sanctions; (iii) a ban on seafood exports from North Korea; and (iv) the expansion of financial sanctions by prohibiting new or expanded joint ventures and cooperative commercial entities with the DPRK.

Demonstrating the significant developments seen to North Korean sanctions in 2017, in August the EU consolidated its existing North Korean sanctions into Council Regulation 2017/1509, a move deemed necessary in view of the numerous amendments that had been made to the previous Council Regulation 329/2007. It also issued an updated decision, Council Decision (CFSP) 2017/1512, amending Council Decision (CFSP) 2016/849, to reflect these changes.

The UN Security Council duly imposed Resolution 2375 (2017) on September 11, 2017, which includes: (i) a ban on textile exports (North Korea's second-biggest export at over $700m per year); (ii) limits on imports of crude oil and oil products to the amount imported by the exporting country in the preceding year; (iii) a prohibition against all joint ventures or cooperative entities or the expansion of existing joint ventures with North Korean entities or individuals; and (iv) a ban on new visas for North Korean overseas workers. These measures were watered down from the original restrictions called for by the U.S., so as to ensure that Russia and China would not veto the proposals. The U.S. had initially sought a total prohibition on exports of oil into North Korea, stricter restrictions on North Koreans working in foreign countries, enforced inspections of ships suspected of carrying UN sanctioned cargo, and a complete asset freeze against Kim Jong-Un.

In November, the EU further imposed additional restrictions via Council Regulation (EU) 2017/2062, which: (i) broadened the ban on investment of EU funds in or with North Korea to all economic sectors; (ii) reduced the permissible amount of personnel remittances to North Korea from €15,000 to €5,000; and (iii) at the Council's invitation to review the existing list of luxury goods subject to import/export bans, published a new list, which covers everything from caviar, cigars and horses to artwork, musical instruments and vehicles.

Finally, rounding off the year, the UN imposed Resolution 2397 (2017) on December 22, which *inter alia*: (i) strengthens the measures regarding the supply, sale or transfer to North Korea of all refined petroleum products, including diesel and kerosene, and reduced to 500 million barrels per 12-month period the permitted maximum aggregate of refined petroleum product exports to North Korea; (ii) limits the supply, sale or transfer of crude oil by Member States to the DPRK to 4 million barrels or 525,000 tons per 12-month period; (iii) expands sectoral sanctions by introducing a ban on North Korean exports of food and agricultural products, machinery, electrical equipment, earth and stone, wood and vessels, as well as a prohibition against the sale of North Korean fishing rights; (iv) introduces a ban on the supply, sale or transfer to North Korea of all industrial machinery, transportation vehicles, iron, steel and other metals; (v) strengthens the ban on providing work authorizations for North Korean nationals by requiring Member States to repatriate all income-earning North Koreans and all North Korean government safety oversight attachés monitoring North Korean workers abroad by 22 December 2019; and (vi) strengthens maritime measures by requiring Member States to seize, inspect and freeze any vessel in their ports and territorial waters for involvement in banned activities.

As North Korea's missile and nuclear programmes show no signs of being halted, we expect that the international community will continue to expand the restrictive measures imposed against North Korea in the coming year. Indeed already in 2018, the EU has designated a further 17 North Korean individuals through Regulation 2018/87.

### ***Trade and export controls***

#### ***Judicial reviews: boycotts and arms exports***

Two judicial reviews concerning trade and sanctions have made their way to the High Court this year. These were discussed in detail in our 2017 Mid-Year United Kingdom White Collar Crime Alert, and we refer readers to the discussion there.

### ***Export Control Order: amendments***

The Export Control Organisation ("ECO") has twice amended the *Export Control Order 2008* this year, as set out in one notice to exporters in February and another in July.

The amending orders make a number of changes to both the main order itself and Schedule 2, which sets out the military goods, software and technology that are subject to export controls. These updates reflect changes made to the EU Common Military List that must be incorporated into UK export control rules to honour its commitment to the international non-proliferation regime.

The main changes made in February are to the definitions of "*library*", "*spacecraft*" and "*software*", changes to ML1 (note on deactivation) and text revisions to ML9, ML13, ML17 and ML21. The national control (PL5017) within this schedule has also been deleted (on equipment and test models). The main changes made in July include amendments to the definitions of "*airship*", "*laser*", "*lighter-than-air vehicles*", "*pyrotechnics*" and "*software*" and changes to ML1, ML8 and ML10.

***Amendments to the UK Strategic Export Control Lists***

On December 16, 2017, the Export control Joint Unit of the Department for International Trade published a revised set of *UK Strategic Export Control Lists* to give effect to EU Regulation 2017/2268. For detail of the changes see the EU's notice here.

***Case law***

***Bank Mellat and v HM Treasury***

There have been new developments in the longstanding litigation between **Bank Mellat**, Iran's largest private bank, and HM Treasury. As reported in our 2014 Year-End Sanctions Alert, Bank Mellat commenced an action in 2014 against the British Government, claiming almost £2 billion (approx. $3.13 billion) in damages. This followed the UK Supreme Court's quashing of sanctions imposed on the bank under the Financial Restrictions (Iran) Order 2009 (SI 2009/2725) in connection with allegations that it had links to the Iranian nuclear program (as detailed in our 2013 Mid-Year Sanctions Alert). This action continues to make its way through the courts; in August, Males J sitting in the Commercial Court ([2017] EWHC 2409 (Comm)) made an order regarding how disclosure of documents should be carried out.

Separately, Bank Mellat has also taken numerous steps to have restrictions imposed on it under the Financial Restrictions (Iran) Order 2011 (SI 2011/2775) and the Financial Restrictions (Iran) Order 2012 (SI 2012/2904) set aside. By an application notice issued in April 2014, HM Treasury sought the court's permission to withhold disclosure of certain closed material on which it relied in defence of the claim. In November 2014, in *Bank Mellat v HM Treasury* [2014] EWHC 3631 (Admin), the UK High Court held that the essence of allegations justifying designation of a person in a sanctions regime must be disclosed to that person, even where national security concerns prevent full disclosure. This was subsequently upheld by the Court of Appeal ([2015] EWCA Civ 1052). The case was then remitted to the Administrative Court to consider whether HM Treasury had met the required standard of disclosure in proceedings with Bank Mellat.

On November 24, 2017, Justice Holroyde handed down a closed judgment determining that certain material may continue to be withheld, but other information must be disclosed. The open judgment considered only the relevant principles applied in determining these issues, without going into the specifics of the materials in question.

***Enforcement***

***Limited enforcement activity in UK***

In our 2017 Mid-Year United Kingdom White Collar Crime Alert, we noted the one publicly-known instance of a company which has self-reported to OFSI, **Computer Sciences Corporation** ("CSC"). According to an SEC filing in February 2017 CSC submitted an initial notification of voluntary disclosure to both the U.S. Treasury's Office of Foreign Assets Control ("OFAC") and

OFSI. The disclosure concerned possible breaches of sanctions law relating to insurance premiums and claims data by Xchanging, a company that CSC had recently acquired.

There continues to be little information in the public domain regarding enforcement activity by OFSI, although in responding to a Freedom of Information request by Law360, OFSI has confirmed that it has opened 125 investigations since it commenced operations in early 2016, and that 60 of these involved financial services firms regulated by the FCA or the PRA.

This should not be mistaken for a torrent of upcoming enforcement actions. At a recent event hosted by the English Law Society, a representative from OFSI confirmed that the vast majority of the breaches OFSI was investigating were very minor, and that 97% of the known breaches would not be pursued through any sort of enforcement action.

It may, therefore, be some time before we are able to report on significant enforcement activity by OFSI.

In stark contrast to this UK position, a significant number of EU member states have concluded or undertaken sanctions enforcement actions during 2017. This includes fines imposed by the regulator in Latvia, multiple investigations and prosecutions in Holland, as well as an insurance-sector investigation; an investigation and corporate raids regarding alleged breaches of Syrian sanctions in France and Belgium, an investigation in Lithuania regarding Crimean sanctions, and the seizure of goods of Crimean origin in Italy. The details of these enforcement actions can be found in our *2017 Year-End Sanctions Alert*.

## 6. Anti-Money Laundering

2017 has not been short of developments. Legislative activity continued apace against the backdrop of the UK's withdrawal from the EU and the UK government's Action Plan for Anti-Money Laundering and Counter-Terrorist-Finance. 2017 saw the implementation of several significant legislative developments intended to strengthen the tools available to UK authorities to detect and prosecute financial crime and substantially change the UK's money laundering landscape: the CFA, the 2017 AML Regulations, and the *Sanctions and Anti-Money Laundering Bill*, which is currently under review by the House of Lords.

Enforcement activity has continued with the FCA imposing the largest ever fine for anti-money laundering ("AML") controls failings and a Solicitor's Disciplinary Tribunal decision against Clyde & Co LLP, providing a reminder to the legal profession of the importance of AML risk controls. While 2017 has also seen setbacks in the English Courts for the NCA and the City of London Police, the "laundromat" money laundering schemes revealed by new leaks of confidential banking records, as well as other high profile investigations by the FCA, has reinforced AML enforcement as a major regulatory priority.

### ***New economic crime centre***

In December 2017, a new economic crime audit by the UK government suggested that £90 billion is laundered in criminal proceeds through the UK each year. In response, the Government unveiled plans to create a new national economic crime centre with a key focus to clamp down on money laundering. As a unit of the NCA, the centre will reportedly be tasked with coordinating a national response among the agencies that tackle money laundering and fraud and with increasing the confiscation of criminal proceeds.

In addition, the Government published its anti-corruption strategy, which sets out the Government's anti-corruption priorities, both domestic and international, and establishes a long-term framework for tackling corruption up to 2022.

One of the government's six priorities under the strategy is to "*Strengthen the integrity of the UK as an international financial centre*" (see page 35), which it says will require: i) "*Greater transparency over who owns and controls companies and other legal entities*"; ii) "*Stronger law enforcement, prosecutorial and criminal justice action*"; iii) "*Further enhanced anti-money laundering and counterterrorist financing capability*"; and iv) "*Stronger public-private partnership, to share information and improve targeting of those who pose greatest risk".*

***Criminal Finances Act 2017***

The CFA became law on April 27, 2017. As outlined in our 2017 Mid-Year United Kingdom White Collar Crime Alert, the CFA amends POCA, which forms the basis for the UK's anti-money laundering regime.

***Suspicious activity reporting regime***

Sections 10, 11 and 12 of the CFA will bring in a number of changes to the Suspicious Activity Reports ("SARs") regime.

At present, "*regulated sector"* entities seeking a defence to a principal money laundering offence must disclose knowledge or suspicion of money laundering to the NCA by way of a SAR. Whilst a transaction cannot proceed without risk of committing an offence under POCA if the NCA refuses consent, the NCA is deemed to have consented if it does not notify the company that consent is refused within seven working days, or if it notifies the company within seven working days that consent is refused, but takes no further action after a further 31 calendar days (the "*moratorium period*"). Section 10 amends POCA so as to allow the NCA to apply for an extension to the moratorium period up to a total of 186 days, so long as certain conditions as to the speedy and efficient conduct of their investigation are met.

Section 11 of the CFA explicitly allows companies in the regulated sector to voluntarily share otherwise confidential client information where the disclosing company is asked to share the information by the NCA, or when one company makes a request of another for information relating to money laundering prevention. A condition of sharing such information is that the sharing party must be satisfied that "*the disclosure of the information will or may assist in determining any matter in connection with a suspicion that a person is engaged in money laundering*". That information sharing may result in a joint SAR which, if made in good faith, will be treated as satisfying any requirement to make disclosure on the part of the persons who jointly make the report.

Under section 12, the NCA will now have the option of seeking a "*further information order*" against the entity that either filed the SAR, or which is an entity in the regulated sector, to compel the provision of further information to assist the NCA in its enquiries. The NCA can also seek such an order when giving effect to a request for mutual legal assistance from a foreign country.

***Unexplained Wealth Orders***

The CFA also introduces unexplained wealth orders ("UWOs"), which may be used to require those suspected of corruption (individuals or companies) to explain the origin of certain assets. The NCA, CPS, FCA, SFO and HMRC will all be able to apply for a UWO by making an application to the High Court. On January 30, 2018, David Green QC told an audience in London that the SFO is looking for cases to start to utilize this new power: "*We have been combing through all existing case work and intelligence and have matters of interest that might transmogrify*".

For more detail on the changes to the SARs regime and UWOs, please see our 2017 Mid-Year United Kingdom White Collar Crime Alert.

***2017 AML Regulations enter into force***

As outlined in detail in our 2017 Mid-Year United Kingdom White Collar Crime Alert, the *Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017* (the "Regulations") entered into force on June 26, 2017. The draft regulations were laid before Parliament on June 22, 2017 and then entered into force only one business day later, giving firms very little time to prepare for their implementation.

Overall, the Regulations are more prescriptive and require a firm's responsible person to carry out a risk assessment for potential exposure to money laundering and terrorist financing. A person is required to keep a record of the steps taken to conduct the risk assessment, unless it is told by its supervisory authority that this is not necessary. The responsible person must then establish and maintain policies, controls and procedures based on that risk assessment, and make sure that relevant employees are made aware of the law relating to money laundering and terrorist financing and regularly given training in how to recognize and deal with transactions and other activities which may give rise to such risks.

The Regulations also introduced new and more prescriptive customer due diligence ("CDD") requirements. CDD measures must be applied to new business relationships as well as existing ones where there are doubts as to the veracity or adequacy of documents previously obtained for verification purposes. Simplified due diligence is available in fewer circumstances than under the old regulations: a relevant person needs to consider both customer and geographical risk factors in deciding whether simplified due diligence is appropriate; firms can no longer automatically apply only simplified CDD requirements in certain circumstances.

Enhanced CDD measures will need to be applied in relation to any transaction of business relationship with a person established in a "*high risk third country*", currently Afghanistan, Bosnia and Herzegovina, Iran, Iraq, Laos, North Korea, Syria, Uganda, Vanuatu and Yemen, to which on December 13, 2017 were added Tunisia, Trinidad & Tobago and Sri Lanka. Additional situations in which Enhanced CDD measures are required include cases in which the relevant person determines that a customer or potential customer is a PEP or a family member of a known close associate of a PEP, in which the relevant person discovers that a person has provided false or stolen identification, in which a transaction is complex and unusually large, or there is an unusual pattern of transactions and the transactions have no apparent legal or economic purpose.

On September 19, 2017, the Legal Sector Affinity Group published draft guidance on complying with the new 2017 AML Regulations. Legal sector regulators will take into account whether a professional has complied with this guidance when they are assessing professional conduct and acting as a supervisory authority. The Legal Sector Affinity Group are in the process of obtaining approval from HM Treasury for this guidance. Once HM Treasury approval is obtained, the court is required to consider compliance with this guidance in assessing whether a person committed an offence or took all reasonable steps and exercised all due diligence to avoid committing the offence.

***Sanctions and Anti-Money Laundering Bill***

On October 18, 2017, the UK government introduced the Sanctions and Anti-Money Laundering Bill into Parliament and published Explanatory Notes. For AML purposes, the function of the Bill is to give the UK government the power to update existing provisions on anti-money laundering and terrorist financing, upon the exit of the UK from the EU. Clause 41 of the Bill gives the appropriate Minister a legal power to introduce regulations for the purposes of detecting, investigating or preventing money laundering and terrorist financing and to implement the international standards set by the Financial Action Task Force, of which the UK is a member. Ministers may also pass secondary legislation to amend the 2017 AML Regulations once the *European Communities Act 1972* no longer applies. The Bill itself does not impose any new AML-related requirements.

***FCA final guidance on treatment of PEPs for AML purposes***

On July 6, 2017, the FCA published its finalised guidance (FG17/5) on the treatment of PEPs in connection with the Regulation. The FCA notes that firms should only treat these in the UK who hold "*truly prominent positions*" in the UK as PEPs, and that "*as such it is unlikely in practice that a large number of UK customers should be treated as PEPs*". The guidance also sets out the FCA's view as to what will constitute an indicator that a PEP poses a "lower" or *"higher*" risk. For more detail, see our 2017 Mid-Year United Kingdom White Collar Crime Alert.

***FCA anti-money laundering annual report for 2016/17***

On July 5, 2017, the FCA published its AML annual report for 2016/17. The report reiterates that financial crime and AML remains one of the FCA's key priorities for 2017/18, and that the FCA continues to develop its AML supervision strategy. This includes the Systematic Anti-Money Laundering Programme, a programme of regular, thorough scrutiny that covers 14 major retail and investment banks operating in the UK with higher risk business models or strategic operations, and a programme of regular AML inspections for a group of other high risk firms that present higher financial crime risk.

HM Treasury also announced that the FCA will become responsible for monitoring the AML supervision carried out by professional bodies such as the Institute of Chartered Accountants in England and Wales. A new Office for Professional Body AML Supervision will operate within the FCA, and will be funded by a new fee on the professional body supervisors.

In October 2017, the FCA published consultation papers on how the fees for the new Office for Professional Body AML Supervision (OPBAS), which will directly oversee the 22 accountancy and legal professional body AML supervisors in the UK, should be distributed. For more detail, see our 2017 Mid-Year 2017 Mid-Year United Kingdom White Collar Crime Alert. The OPBAS regulations will take effect on January 18, 2018.

***Bitcoin and cryptocurrencies***

On December 4, 2017, it was reported that the UK Government was looking to step up regulation of bitcoin amid concerns criminals were using cryptocurrencies to launder money and avoid taxes. Stephen Barclay, economic secretary to Britain's Treasury, told parliament in a notice dated November 3, 2017—but only later reported by media—that the proposed amendments would "*bring virtual currency exchange platforms and custodian wallet providers into Anti-Money Laundering and Counter-Terrorist Financing regulation*".

***Case law***

***Merida Oil Traders, Bunnvale and Ticom Management [2017] EWHC 747 (Admin)***

On April 11, 2017, the High Court ruled, on an application for judicial review in *R (on the application of Merida Oil Traders Limited & others v Central Criminal Court & others*, that City of London Police had exceeded its power under POCA in seizing U.S.$ 21 million from **Merida Oil Traders, Bunnvale and Ticom Management** (and **Intoil SA**, which was not party to the judicial review) as part of a money laundering investigation.

During the course of the investigation, the City of London Police invited a broker to create cheques for closing balances payable to Merida, Bunnvale, Ticom and Intoil, then applied to the Central Criminal Court for a production order requiring the broker to produce the cheques, which they then seized. The High Court held that that the statutory requirements for making production orders were not met, in that the production of the cheques was not of substantial value to a money laundering investigation. The purpose of an investigation, whatever its subject matter, was to find out information with a view to taking some action or decision, whereas production of the cheques was sought so that they could be seized and detained as cash.

The High Court held that the cheques were unlawfully seized and that the City of London Police had abused their power under POCA. Merida, Bunnvale, Ticom and Intoil did not choose to hold their money in cash, and the cheques, which were classified as cash, only existed because the City of London Police had arranged with the broker – without the claimants' knowledge or consent – for the cheques to be created. Had the cheques not been created, they could not have been seized. Instead, they would have had to seek a restraint order or a property freezing order.  For more detail, see our 2017 Mid-Year United Kingdom White Collar Crime Alert.

***National Crime Agency v N and Royal Bank of Scotland PLC ("RBS") [2017] EWCA Civ 253***

As discussed in our 2017 Mid-Year United Kingdom White Collar Crime Alert, on April 7, 2017, the Court of Appeal handed down judgment in an appeal brought by the NCA against RBS and an authorised payment institution referred to only as "N".  Mr Justice Barton had made interim orders allowing RBS to continue operating the accounts of N, even after the NCA had asked for RBS to freeze the accounts and return the funds to N.  This was based on the NCA's suspicion that the balance of the account constituted criminal property.  The NCA appealed against the interim orders, on the basis that the only appropriate mechanism was the statutory procedure set out in POCA.

The Court of Appeal did not agree with the NCA's submission that Mr Justice Burton had no jurisdiction to make the orders that he did.  The court's jurisdiction to grant interim relief was not ousted by the money-laundering provisions of POCA.  However, it accepted the NCA's alternative submission that the statutory procedure under POCA was highly relevant to the court's discretion.  It could not be displaced

> *"merely on a consideration of the balance of convenience as between the interests of the private parties involved.  The public interest in the prevention of money laundering as reflected in the statutory procedure has to be weighed in the balance and in most cases is likely to be decisive".*

The Court of Appeal, therefore, overturned Mr Justice Burton interim orders.  The judgment is a fairly extreme example of the deference the courts will have with law enforcement agencies – requiring as it did the forced closure of bank accounts outside the statutory regime.

***Ikram Mahamat Saleh v Director of the Serious Fraud Office [2017] EWCA Civ 18***

On January 23, 2017, the Court of Appeal gave judgment in an appeal brought by **Mrs Saleh** against the SFO.  That appeal concerned a Property Freezing Order in respect of £4.4 million is discussed above in the Bribery and Corruption section.

***R v Otegbola & ors [2017] EWCA Crim 1147***

On July 7, 2017, the Court of Appeal denied an application for permission to appeal in *R v Otegbola & others* ruling, in the absence of evidence that the proceeds in question were criminal property, that the prosecution was nonetheless permitted to rely on an inference—arising out of the way that the funds were moved and transferred between the defendants' accounts—that the funds could only have been the proceeds of crime.

The applicants, **Olaluwa Otegbola, Oluboukola Otegbola** and **Vivian Baje** had been convicted of converting criminal property contrary to section 327(1) of POCA.  The three defendants were convicted of having transferred £39,650 between their bank accounts between December 29, 2011 and April 6, 2012, knowing that the funds constituted criminal property. The evidence showed that the money was received into an account held by Mrs Otegbola trading as Checed Enterprise, then transferred between the applicants' bank accounts over the course of a few days. The prosecution presented the jury with a schedule of the payments between the applicants' bank accounts, but did not present any evidence about the transactions leading to the initial payments to Checed Enterprise. After the three defendants were arrested, they provided differing explanations for the transactions, including that the transactions had been loans to Ms Baje, but were unable to explain why the alleged loans had been repaid on the same day or into a different account. The prosecution relied on *R v Anwoir* [2008] 2 Cr App R 36 and argued that the Crown could prove that property had been derived from a crime either by proving that it derived from conduct of a specific kind that was unlawful, or by presenting evidence of the way in which the property was handled that gave rise to the irresistible inference that the property could only be derived from crime.

The Court of Appeal agreed that the prosecution was entitled to rely on the principle set out in *Anwoir*, and observed that the sums transferred were substantial when compared with the income and business turnover of the accused, that the schedule of transfers established that the way the funds had been dealt with was highly unusual, and that the defendants' explanations were inadequate.

### ***Enforcement***

#### ***Deutsche Bank AG***

As noted in our 2017 Mid-Year United Kingdom White Collar Crime Alert, on January 30, 2017, the FCA issued a final notice against **Deutsche Bank AG** ("Deutsche Bank") for failing to maintain an adequate AML control framework during the period between January 1, 2012 and December 31, 2015. Deutsche Bank was fined £163,076,224. This is the largest FCA financial penalty in relation to AML controls.

#### ***HSBC***

On February 21, 2017, it was reported that the FCA was investigating **HSBC** over potential breaches of money laundering rules after concerns raised in 2016 by the bank's compliance monitor.

#### ***Clyde & Co LLP***

On April 12, 2017, the Solicitors Disciplinary Tribunal ("SDT") gave judgment in respect of allegations made against the international law firm **Clyde & Co LLP** and three of its partners, and held that both Clyde & Co and the partners in question committed breaches of accounting and money laundering rules. Two key money laundering allegations were made: (i) that the firm had become involved, as escrow agent, with a fraudulent scheme, and that by unintentionally becoming involved had lent the scheme credibility; and (ii) a number of breaches of money laundering rules, including by allowing their client account to be used as a banking facility. The Tribunal also noted that there had been a systemic failure by the firm to have proper procedures in place to ensure that residual balances on files were returned to clients in a timely manner at the end of a retainer. The SDT imposed a fine of £50,000 on

Clyde & Co, and £10,000 each on the three individual partners. For more detail, see our 2017 Mid-Year United Kingdom White Collar Crime Alert.

***Russian Laundromat money laundering scheme***

In our 2017 Mid-Year United Kingdom White Collar Crime Alert, we reported that the NCA was considering whether information published by *The Guardian* would result in an investigation into the role of British banks in the "*Russian Laundromat*" money laundering scheme that moved U.S.$ 20.8 billion out of Russia between January 2011 and October 2014 using a complex global web of companies and banks.

*The Guardian*'s analysis of banking records suggested that 17 British banks had processed nearly U.S.$ 740 million in funds involved in the "*Russian Laundromat*" money laundering scheme. Each of the 17 banks has issued a statement to the effect that they had anti-money-laundering controls in place and would cooperate with law enforcement.

***"Azerbaijan Laundromat" money laundering scheme***

In early September 2017, leaked confidential banking records led to a report by the Organized Crime and Corruption Reporting Project ("OCCRP") about the "*Azerbaijan Laundromat*" scheme, a U.S.$ 2.9 billion operation which ran between 2012 and 2014—with on average U.S.$ 3 million channelled by certain public figures out of Azerbaijan every day and into four offshore-managed UK companies. The scheme was reportedly designed by Azerbaijan's ruling elite to provide a fund to bribe European politicians, launder money and fund luxury purchases.

The funds are thought to have come from companies linked to Azerbaijan's president, **Ilham Aliyev**, state ministries and the **International Bank of Azerbaijan**. The cash was transferred into four offshore-managed UK entities, and then spent in the UK, Germany, France, Turkey, Iran and Kazakhstan.

The UK entities that handled the cash were **Hilux Services** and **Polux Management**, both incorporated as Scottish Limited Partnerships in Glasgow, and **Metastar Invest** and **LCM Alliance**, both Limited Liability Partnerships registered in Birmingham and Potters Bar, respectively.

Some UK MPs have urged the government to open an inquiry into the scheme and the involvement of UK entities demanding "*a full investigation to see that dirty money has not been used to buy influence in the UK*".

***Gupta family and HSBC / Standard Chartered***

In October 2017, the FCA announced that it was investigating financial ties between **HSBC PLC** and **Standard Chartered PLC** and the **Guptas** – a wealthy family accused of buying influence with South Africa's President Jacob Zuma – after former cabinet minister Lord Hain passed a list of transactions to the chancellor warning of their "*possible criminal complicity*" on September 25, 2017. Lord Hain had alleged in the House of Lords that as much as £400 million of illicit funds from South Africa may have been "*transnationally laundered*".

The chancellor asked UK enforcement agencies the SFO, NCA and FCA to investigate the matters, and on October 12, 2017 the FCA said that it had been in contact with the two banks. The FBI has also launched an investigation with respect to U.S. links to the Guptas.

On November 3, 2017 HSBC announced that it had closed bank accounts held by "front companies" associated with the Guptas. Standard Chartered was also reported to have said that it was "*not able to comment on the details of client transactions but can confirm that following an internal investigation accounts were closed by us in 2014*".

Lord Hain was reported to have confirmed to the House of Lords on December 12, 2017, that the FCA was being assisted directly by a whistleblower supplying information from South Africa. During his speech to the House of Lords, Lord Hain also suggested that two other banks *"be given [a] red flag warning to check their exposure to Gupta money laundering – both direct and indirect"*.

***Offshore enforcement***

***Guernsey – investigation of Standard Chartered***

On October 5, 2017, it was reported that a U.S.$ 1.4 billion money transfer between **Standard Chartered's** Guernsey and Singapore offices was under investigation by the Guernsey Financial Services Commission, in partnership with the Monetary Authority of Singapore, in connection with possible movement of assets shortly before new tax transparency rules were implemented.

The bank is reported to have conducted an internal investigation and self-reported to regulators after employees raised questions in 2016 about the timing of the transactions, whether the bank had undertaken adequate "*know your client*" due diligence and whether the source of customers' funds had been properly vetted.

***Jersey – Gisele Le Miere***

In February 2017, the former Managing Director and Money Laundering Reporting Officer of Jordans Trust Company Jersey was banned from any future work in any business licensed to conduct financial services business in Jersey following accusations of fraud and money laundering relating to a £200,000 film investment fund she oversaw. The Jersey Financial Services Commission concluded that **Gisele Helene Le Miere** had provided inaccurate information to the Jordans Board of Directors and Compliance Committee and had ignored several red flags relating to a non-Jersey incorporated company which ultimately received investor money from the fund.

***Bermuda - Sun Life Financial Investments (Bermuda)***

On February 27, 2017, the **Bermuda Monetary Authority** announced that it had imposed civil penalties including a U.S.$ 1.5 million fine on **Sun Life Financial Investments (Bermuda) Limited** ("Sun Life"), as well as restricting Sun Life's Investment Business Licence for failing to apply appropriate CDD measures such as applying Enhanced Due Diligence when appropriate, monitoring ongoing business relationships and maintaining appropriate risk-sensitive policies and procedures.

## 7. Competition / Antitrust

2017 was a significant year for enforcement, with the CMA and FCA opening new investigations into a variety of industries and finalising a number of investigations. The CMA also had success before the Competition Appeal Tribunal, with its steel tanks decision being upheld upon appeal. The UK's class actions regime for private enforcement, on the other hand, saw the rejection of the first class action to follow on from an OFT infringement decision, casting something of a shadow over the regime.

At the European level, on 23 January 2018 the EU imposed a fine of €997 million on computer chip manufacturer Qualcomm in respect of allegations of anti-competitive behavior. Qualcomm has said it intends to appeal.

Please note that the CMA also took enforcement action in 2017 in the consumer protection sphere, which falls outside the scope of our review.

### *Enforcement*

#### *Cleanroom services*

On December 14, 2017, the CMA fined 2 suppliers of "cleanroom" laundry services for a market sharing agreement whereby they agreed not to compete for each other's allocated territories and customers. The CMA imposed a financial penalty of £510,118 on **Micronclean Limited** and of £1,197,956 on **Berendsen Cleanroom Services Limited**.

#### *Transport Sector (airports)*

On December 7, 2017, the CMA launched an investigation into suspected breaches of competition law in respect of facilities at airports. At this point, no further information regarding the scope of the investigation is available.

#### *Pharmaceuticals*

As reported in the 2017 Mid Year UK White Collar Crime Update, in March 2017, the CMA issued a statement of objections to **Concordia** and **Actavis UK**, alleging that the companies signed agreements under which Actavis UK incentivized Concordia not to enter the market with its own competing version of hydrocortisone tablets.

In a separate investigation regarding hydrocortisone tablets, the CMA had in December 2016 provisionally found that Actavis UK had breached competition law by charging excessive prices to the NHS for the tablets following a 12,000% price rise over the course of several years. On August 9, 2017, the CMA issued a statement of objections to **Intas Pharmaceuticals Limited** and **Accord Health Limited**, which acquired Actavis UK in January 2017, alleging that Actavis UK continued to charge excessive prices for the tablets and proposing to find the parent companies jointly and severally liable for the alleged infringements from their period of ownership.

On November 21, 2017, the CMA also announced that it had provisionally found that Concordia had breached competition law by using its dominant position to charge excessive and unfair prices in relation to the supply of liothyronine tablets in the UK.

***Consumables***

On August 9, 2017, the CMA announced that it had closed its investigation into a suspected abuse of a dominant position of **Unilever PLC** in the market for single-wrapped ice cream in the UK. The CMA's investigation considered whether the company had abused a dominant position by offering deals or prices for impulse ice cream to retailers in the UK which were likely to have an exclusionary effect, in particular by means of promotional deals under which the company supplied to retailers single-wrapped ice cream products free of charge or at a reduced price if they purchased a minimum number of single-wrapped ice cream products. The CMA found that Unilever's promotional deals were unlikely to have had an exclusionary effect.

***Sports Equipment Industry***

As reported in our 2016 Year End UK White Collar Crime Update, in June 2016 the CMA had issued a statement of objections to **Ping Europe Limited** ("Ping") alleging that it had breached competition law by operating an online sales ban in respect of golf clubs. On August 24, 2017, the CMA issued an infringement decision and imposed a £1.45 million financial penalty on Ping, directing that it bring the online sales ban to an end. An appeal against the decision was launched by Ping on October 27, 2017, and the main hearing is set to take place in May 2018.

***Building and Construction Industry***

As reported in our 2016 Mid Year UK White Collar Crime Update, the CMA confirmed in March 2016 that it had commenced criminal proceedings against **Mr Barry Cooper** for the criminal cartel offence, following an investigation into the supply of precast concrete drainage products. On September 15, 2017, the CMA announced that Mr Cooper had been sentenced to 2 years' imprisonment suspended for 2 years, made the subject of a 6-month curfew order and disqualified from acting as a company director for 7 years.

The CMA's related civil investigation into whether businesses have infringed competition law is ongoing.

***Online price comparison websites***

As reported in the 2017 Mid Year UK White Collar Crime Update, in March 2017 the CMA published its interim report on its year-long market study into digital comparison tools ("DCTs").

On September 26, 2017, the CMA published its final report. Although the CMA's study found that DCTs help consumers shop around by making it easier to compare prices, it issued the following recommendations:

1. sites should be clear about how they make money, how many deals they display and how results are ordered;

2. sites should be clear on how personal information is protected; and

3. it should be made as easy as possible for consumers to make effective comparisons or use different sites.

The CMA also announced that it had opened an investigation into suspected breaches of competition law on the part of one site through the use of most favored nation ("MFN") clauses in relation to home insurance prices. The use of such clauses came to the CMA's attention as part of its general investigation into DCTs.

***Live auction platform services***

In November 2016, the CMA launched an investigation into suspected breaches of competition law by **ATG Media**, the largest provider of live online auction platforms in the UK. The investigation related to suspected anti-competitive agreements or concerted practices, and suspected abuse of dominance, and in particular suspected exclusionary and restrictive pricing practices, including MFN provisions in respect of online sales. On June 29, 2017, the CMA published its decision to accept final commitments from ATG Media to refrain for five years from:

1. obtaining exclusive deals with auction houses;

2. preventing auction houses getting a cheaper online bidding rate with other platforms for their bidders through MFN clauses; and

3. preventing auction houses from promoting or advertising rival live online bidding platforms in competition with ATG Media.

***Leisure Industry***

Having alleged in December last year that rules enforced by the **Showmen's Guild of Great Britain** in the travelling fair sector breach competition law by protecting existing Guild showmen from competition, on October 26, 2017 the CMA announced its decision to accept binding commitments from the Guild to change certain of its rules in order to address the CMA's competition concerns, and to therefore close the investigation. In particular, the changes address the CMA's concerns that the Guild's rules restrict members from competing with one another to organize or attend fairs or from setting up new fairs in competition with existing fairs.

***Asset Management Industry***

On September 14, 2017, the FCA confirmed its decision to make a Market Investigation Reference to the CMA following its market study of investment consultancy and fiduciary management services. It also confirmed that it was rejecting the package of undertakings in lieu offered by three of the largest investment consultants, as it could not be confident that it would provide a solution to the adverse effects of competition identified. This is the first time that the FCA has made such a reference to the CMA. The CMA published an issues statement on September 21, 2017 and is carrying out investigative steps. A provisional decision is expected in July 2018.

On November 29, 2017, the FCA issued a statement of objections to four asset management firms, **Artemis Investment Management LLP**, **Hargreave Hale Limited**, **Newton Investment Management Limited** and **River & Mercantile Asset Management LLP**, accusing them of breaching competition law by colluding on stock market flotations in 2014 and 2015. The FCA alleged that the four firms shared information about the price they intended to pay for shares in two IPOs before prices had been officially set, when they should have been competing for the shares. The companies face a fine up to 10% of their worldwide turnover in a particular market if they are found to have breached competition rules.

***Insurance Industry***

In April 2017, the FCA launched an antitrust investigation into the aviation insurance sector with dawn raids on several of the largest firms. In October 2017, it was confirmed that the investigation of at least three of the firms had been taken over by the European Commission. The Commission stated that the proceedings concerned the exchange of commercially sensitive information between competitors in relation to aviation insurance, as well as possible coordination between competitors.

Following this, on November 8, 2017, the FCA launched a full market study into the wholesale insurance-broking market, stating concern that broker behaviour may be restricting competition, and citing a desire to ensure that the market is functioning in the interests of a diverse range of consumers.The FCA aims to publish an interim report in autumn 2018.

***EURIBOR***

As reported in the 2016 Year End UK White Collar Crime Update, the SFO issued criminal proceedings against 11 individuals accused of manipulating EURIBOR, and on January 11, 2016, they were charged with conspiracy to defraud. On May 24, 2017, the SFO announced that the trial of six of the former traders who had been charged was to be postponed until January 2018.

***<u>Litigation</u>***

***Steel Tanks Industry***

As reported in the 2016 Year End UK White Collar Crime Update, in December 2016, the CMA found that **Balmoral**, a supplier of galvanized steel water tanks, along with three other businesses, had breached competition law by taking part in an exchange of competitively-sensitive information on prices and pricing intentions. Balmoral did not take part in the main price–fixing cartel which the CMA investigated separately, but was fined £130,000 for taking part in the unlawful information exchange which amounted to a concerted practice.

In February 2017, Balmoral challenged the CMA's finding, their decision to impose the fine, and the amount of that fine, but on October 6, 2017, the Competition Appeal Tribunal dismissed the appeal. The Tribunal unanimously determined that Balmoral's conduct was an infringement, and that the fine was appropriate and there was no basis for criticizing its imposition or its amount.

On December 13, 2017, the Competition Appeal Tribunal refused permission to appeal to the Court of Appeal on the basis that none of the appeal grounds had any real prospect of success and there was no other compelling reason for granting permission to appeal. The Tribunal also ruled that the CMA was entitled to costs.

***Pharmaceuticals (Pfizer and Flynn Pharma)***

As reported in the 2017 Mid-Year UK White Collar Crime Update, in February 2017, **Pfizer**, the manufacturer of phenytoin sodium, and **Flynn Pharma**, its distributor, appealed a CMA decision which found that they had charged excessive and unfair prices for the drug, and which fined them £84.2 million and £5.2 million respectively. This appeal was heard by the Competition Appeal Tribunal between October 30, 2017 and November 24, 2017, and judgment has been reserved.

***Pay for Delay appeal (Merck KGaA v CMA)***

In February and March 2017, the CAT heard the appeal against the CMA's Seroxat "pay for delay" infringement decision. That decision concerned the settlement entered into by Merck's subsidiary, Generics (UK) Limited ("GUK"), in 2002 to end ongoing patent litigation with pharmaceutical originator company GlaxoSmithKline PLC ("GSK") relating to paroxetine, which is supplied in the UK as Seroxat, an antidepressant medicine. The CMA found that the settlement infringed the competition rules by inducing GUK to desist, during the term of the Settlement, from continuing its efforts to enter the UK paroxetine market independently of GSK, and thereby from offering independent generic competition against GSK.

***Mobility Scooter class action (Dorothy Gibson v Pride Mobility Products Limited)***

In March 2017, the Competition Appeal Tribunal rejected the application by proposed class representative, Ms Gibson, for an opt-out collective proceedings order to combine follow-on actions for damages arising from a decision of the Office of Fair Trading in March 2014 which had found that Pride Mobility Products and each of eight retailers selling its mobility scooters had infringed the Chapter I prohibition by entering into agreements or concerted practices whereby the retailers would not advertise certain models of Pride scooters online at prices below the recommended retail price set by Pride. The CAT gave permission for Ms Gibson to file and serve a draft amended claim form, but proceedings were abandoned in May 2017. This was followed in July 2017 by the rejection of the second class action application, an action brought on behalf of consumers against the European Commission's infringement decision against Mastercard.

***<u>Brexit – House of Lords competition inquiry</u>***

On July 21, 2017, the House of Lords EU Internal Market Sub-Committee launched an inquiry into the impact of Brexit on UK competition policy. The stated focus of the inquiry was to explore: (i) opportunities and challenges in re-shaping UK competition policy post-Brexit; (ii) the implications of Brexit for the application and enforcement of competition law in the UK; (iii) whether UK authorities have the capacity and resources to cope with additional responsibilities and a greater caseload; (iv) potential state aid obligations in any UK-EU free trade agreement; and (v) future cooperation between the UK and the EU on investigations and enforcement actions.

The Sub-Committee received a number of written responses to its call for evidence, including from the CMA and the CAT. Those responses addressed a number of key issues, including (i) consistency of interpretation as between UK and EU competition law; (ii) conduct of parallel competition law investigations; and (iii) cooperation between the UK authorities and the European Commission in terms of enforcement. The Sub-Committee concluded its hearing of oral evidence in November 2017, and is expected to publish its report in early 2018.

## 8. Market abuse and Insider Trading and other Financial Sector Wrongdoing

***<u>FCA Enforcement: insider dealing</u>***

As we reported in our 2017 Mid-Year United Kingdom White Collar Crime Alert, the FCA's 2016/17 Enforcement Performance Account, indicated that as at March 31, 2017 the FCA had 122 market abuse cases open. Despite this, the latter half of 2017 has been quiet in terms of criminal enforcement for insider dealing with the FCA bringing no new cases and securing no new convictions.

Since 2008, when the FCA secured its first conviction for insider dealing the agency has secured over 30 convictions for insider dealing, a crime that had not been prosecuted by the authority prior to 2008. Prior to 2008, the FSA (the FCA's predecessor) had relied on civil enforcement powers under *Financial Services and Markets Act 2000* ("FSMA") to sanction those accused of market abuse.

***Fabiana Abdel-Malek and Walid Anis Choucair***

In our 2017 Mid-Year United Kingdom White Collar Crime Alert, we reported that Ms **Abdel-Malek** and Mr **Choucair** had been charged with five counts of insider dealing, contrary to section 52(2)(b) and 52(1) of the *Criminal Justice Act 1993* following a joint investigation between the FCA and the NCA.

The alleged insider dealing took place between June 3, 2013 and June 19, 2014. In that period, it is alleged that Mr Choucair used inside information that was passed to him by Ms Abdel-Malek to trade certain stocks realising a profit of almost £1.4 million.

***Manjeet Mohal and Reshim Birk***

In our 2015 Year-End United Kingdom White Collar Crime Alert, we reported that the FCA had charged **Manjeet Singh Mohal** and **Reshim Birk** in respect of offences of insider dealing, contrary to sections

52(1) and 52(2)(b) of the *Criminal Justice Act 1993*. The offences related to the passing on, in 2012, of insider information relating to a takeover of Logica PLC by CGI Holdings (Europe) Limited. That information had come into Mr Mohal's possession during his employment at Logica. Mr Mohal passed on that information to his neighbour, Reshim Birk, and another individual. Reshim Birk made a profits in excess of £100,000 by trading on the basis of that inside information.

Mr Mohal and Mr Birk were sentenced on January 13, 2017. Mr Mohal was sentenced to 10 months' imprisonment suspended for two years, together with 180 hours of community work. Mr Birk was sentenced to 16 months' imprisonment suspended for two years, together with 200 hours of community work.

***Interactive Brokers (UK)***

On January 25, 2018, the FCA announced a fine of £1,049,412 against Interactive Brokers (UK) in relation to allegations of failings in its post trade systems and controls concerning the identification and reporting of suspicious transactions in relation to insider dealing.

***One Call Insurance Services Limited and John Radford***

On January 26, 2018, the FCA announced fines of £684,000 against Once Call Insurance Services Limited, and £468,600 against Mr Radford who was the company's CEO and majority shareholder. In addition, the company has been prohibited from charging renewal fees to customers for 121 days which is expected to cost the company some £4.6 million. The failings alleged in the Final Notice relate to poor controls over client money with the company inadvertently using client funds for its working capital.

***Civil enforcement for market abuse***

***Tesco PLC and Tesco Stores Limited***

We reported in detail on the final notice issued by the FCA against **Tesco Stores PLC** and **Tesco Stores Limited** for market abuse contrary to section 118(7) FSMA in our 2017 Mid-Year United Kingdom White Collar Crime Alert. As we noted, this was the first time the FCA has used its powers under section 384 of FSMA to require a listed company to pay compensation for market abuse. The compensation scheme, administered by KPMG opened on August 23, 2017.

***Paul Axel Walker***

On November 22, 2017 the FCA issued its final notice against **Paul Axel Walter** for engaging in market abuse under section 118(5) of FSMA. Mr Walter, an experienced bond trader at a global investment bank, was fined £60,090 for placing misleading bids and quotes on six Dutch State Loans ("DSL") in July and early August of 2014 on an inter-dealer platform.

In 11 instances, Mr Walter had placed high bid quotes on DSLs that he had intended to sell, artificially causing others traders who were tracking his quotes to raise their bids in response to this. He would then cancel his bid and sell the loan at a higher price. On one instance Mr Walter had placed a low offer quote on a DSL that he was selling and, when other DSL sellers lowered their offer prices in response, cancelled his quote and purchased the DSLs at a lower price. Mr Walter used the anonymity offered by the platform to seek to avoid being attributed to the false bids that he had made.

Although Mr Walter did not make any personal profit from his market abuse, and neither intended to commit market abuse nor foresee its consequences, the FCA stated that given his experience as a trader, his conduct constituted a serious failure to act in accordance with the standards reasonably expected of market participants.

***Damian Clarke***

In our 2017 Mid-Year United Kingdom White Collar Crime Alert we reported that **Damian Clarke**, a former equities trader at an international investment bank pleaded guilty to seven charges of insider trading. As previously reported, Mr Clarke was sentenced to two years in jail and barred by the FCA from performing any function related to a regulated activity.

On July 24, 2017 Southwark Crown Court made a confiscation order for £350,000 against Mr Clarke, a figure which exceeded the profit generated through the insider trades he pleaded guilty to. The FCA successfully argued that Mr Clarke's offences were such that he led a "*criminal lifestyle*" and had benefitted from general criminal conduct. As a consequence the Court was entitled assume that profits made from other, non-indicted trading within a defined period were generated as a by-product of his insider trading and should be repaid. This illustrates the draconian nature of sections 75(2) and 10 of the *Proceeds of Crime Act 2002*, which provide for wide ranging assumptions to be made about the origins of a defendant's property if he is found to have benefitted from general criminal conduct. These provisions will be engaged if specific offences have been committed, including certain money laundering offences or if the offence of which the defendant has been convicted forms part of a course of criminal conduct or was committed over a period of six months, and the defendant has benefitted by at least £5,000. It is for the defence to disprove these assumptions.

***Tejoori Limited***

On December 14, 2017 the FCA imposed its first fine on an AIM company for late disclosure of inside information under Article 17(1) of the Market Abuse Regulation (Regulation 596/2014) ("MAR"). **Tejoori Limited** ("Tejoori"), a self-managed, closed-ended investment company was fined £70,000 for failing to disclose the sale of shares it held to another company for no initial consideration. While press releases were made by both the purchaser and the company whose shares were transferred, neither made reference to Tejoori or the amount of consideration paid to Tejoori.

Tejoori's failure to disclose this information led to market speculation on the purchase price paid to Tejoori, causing Tejoori's share price to rise by 38% over two days on August 22 and 23, 2016. When the London Stock Exchange contacted Tejoori's nominated advisor to enquire about the sudden rise in its share price, Tejoori denied selling its shares and denied holding inside information. Tejoori had been obliged to transfer its shares following exercise of "drag-along" rights by the majority shareholders and would only receive a payment for its shares under an earn-out provision in the share purchase agreement. Tejoori misunderstood this and believed, erroneously, that it would not be obliged to transfer its shares unless it received consideration under the earn-out. When, on August 24, 2017, Tejoori eventually released an announcement confirming the nature of the share sale, its closing share price fell 13%.

Tejoori notified the FCA of its breach of Article 17(1) of MAR and cooperated with the FCA's investigation, and therefore qualified for a 20% discount on the ultimate fine.

***EU developments***

*Garlsson Real Estate SA, in liquidation, and others v Commissione Nazionale per le Società e la Borsa (Consob)* (Case C-537/16)

On 12 September 2017, Advocate General Campos Sanchez-Bordona ("AG") handed down an opinion concerning the extent to which the principle of double jeopardy ("*ne bis in idem*") applies when the laws of a member state permit the imposition of both administrative and criminal penalties in relation to market abuse. The AG's opinion confirms that when administrative sanctions under the Market Abuse Regulation (Regulation 596/2014) ("MAR") are sufficiently onerous to be criminal in nature, a criminal prosecution for substantially the same conduct under the Directive on Criminal Sanctions for Market Abuse (2014/57/EU) ("CSMAD") would engage Article 50 of the EU Charter, which sets out the principle of double jeopardy. The AG opined that member states must, "*establish appropriate procedural mechanisms to prevent the duplication of proceedings and ensure that a person is prosecuted and punished only once in respect of the same acts*".

Although the opinion is advisory in nature, it foreshadows a potential divergence in the Court of Justice of the European Union ("CJEU") approach to double jeopardy from that of the European Court of Human Rights ("ECtHR"). In *A and B v Norway* [2016] ECHR 987, the ECtHR found that the double jeopardy protection would not be infringed where two proceedings were integrated and sufficiently connected in time and substance.

The UK is a signatory to the EU Charter, but not to Article 4 of Protocol No. 7 (the relevant provision of the ECHR). Accordingly, the potential difference in the approaches taken by the CJEU and ECtHR will require careful monitoring.

Firms should be aware that CSMAD applies to trading on an EU regulated market that is conducted from the UK. This will remain the case following the UK's exit from the EU.

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