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The Practitioner's Guide to Global Investigations

Editors
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In this half-year update to the second edition of *The Practitioner's Guide to Global Investigations*, the editorial team have approached the panel of expert authors to bring readers up to date with significant changes in the investigations landscape. The first part of this update covers developments in the United States and the United Kingdom and includes contributions from in-house practitioners. In these jurisdictions, the focus on privilege in internal investigations remains intense, the protection of whistleblowers is high on the European agenda and the implications of the General Data Protection Regulation are as yet untested. The second part of this update covers jurisdiction-specific developments around the world.

We are also delighted to announce the addition of Ama A Adams of Ropes & Gray in Washington, DC, and Tara McGrath of Clifford Chance in New York to the US editorial team as co-editors for the third edition of *The Practitioner's Guide to Global Investigations*, to be published in January 2019.

The update opens with a discussion piece with Mark Steward, Director of Enforcement and Market Oversight at the UK Financial Conduct Authority, regarding enforcement priorities in the post-financial crisis era.

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Regulation in the post-financial crisis era: An evolution in UK financial sector enforcement?

Introduction

The times they are a-changing, and so is the UK's Financial Conduct Authority's attitude to enforcement. On 21 March the FCA published a consultation paper entitled 'Our Approach to Enforcement'. It signals a notable shift in how the FCA's regulatory objectives will be used to serve what it views as the UK public interest. Giving a first-hand view on what this evolution will look like, Mark Steward, the FCA's Director of Enforcement and Market Oversight spoke to *Practitioner's Guide* Co-Editor Eleanor Davison of Fountain Court Chambers. Touching on Mr Steward's observations in relation to increased reporting and Enforcement's approach to investigations – including the FCA's hopes of driving corporate culture change by acknowledging demonstrations of good culture through its enforcement behaviour – Eleanor summarises their conversation below.

Reporting

The FCA has noted a general uptick in reporting, which is occurring earlier and has increased by up to 70 per cent under the EU Market Abuse Regulation (MAR), with its requirements in relation to suspicious transaction and order reporting (STOR). Suspected activities such as 'attempted manipulation' and 'attempted insider dealing' fall within its scope. This increased reporting has led to a greater volume of data being assessed by the surveillance team and in turn generates more investigative leads.

Investigations

An internal restructure within the FCA's Enforcement division (Enforcement) has ensured a more efficient and consistent way of dealing with investigations across teams, reportedly speeding up the fact-finding stage by about 20 per cent, with the focus on getting to the bottom of what has occurred quickly, rather than becoming engaged in a process more akin to pre-action discovery. Investigations will be opened where there are reasonable grounds to suspect that serious misconduct causing harm has occurred rather than waiting until a *prima facie* case has been established.

Central to the message from the consultation paper, and reinforced by Mr Steward in conversation, is the notion that firms should not wait for an investigation to end before acting appropriately to remediate harm. Proactive conduct from firms and individuals to address harm will be considered to demonstrate integrity, and considerable weight will be attached to such action when the decision about what enforcement action to take is considered.

This theme is developed further in relation to sanction, where those who address the harm caused and co-operate with the agency may, in exceptional circumstances, not be subject to penalties. Timely and effective redress or restoration prior to the conclusion of enforcement action demonstrate key changes in corporate culture that the FCA is seeking to foster. Such an approach will necessitate firms and individuals having an early insight into the nature and severity of misconduct detected.

Changing corporate culture through enforcement remains at the heart of recent policy statements and speeches. The recent speech of FCA Chief Executive Andrew Bailey demonstrates the FCA's view that 'a firm's culture emerges in large part from inputs that are its responsibility.'[1] This is the evolution of the FCA's approach, one that

1 Andrew Bailey, Chief Executive of the FCA, at the Transforming culture in financial services conference, 19 March 2018, available at: https://www.fca.org.uk/news/speeches/transforming-culture-financial-services.

puts the responsibility squarely on firms to ensure their own house is in order, with the FCA's Supervision division (Supervision) and Enforcement both supporting and requiring that firms 'own' their corporate culture and manage risk accordingly.

Mr Steward refers to Vanquis Bank as an example of the approach being pursued by Enforcement, seeking to create clear incentives for firms to make redress voluntarily rather than waiting for the FCA to force them to take action. On 22 August 2017, Vanquis Bank confirmed that it was co-operating with an investigation by the FCA into the sale of one of its credit card add-on products: the repayment option plan (ROP). Six months later, on 27 February 2018, the FCA published a final notice announcing the results of its investigation.

The FCA found that Vanquis's sale of the ROP had breached Principles 6 and 7 of the FCA's Principles for Businesses, failed to treat customers fairly or pay due regard to their information needs. The FCA imposed a financial penalty of £1.976 million and Vanquis was required to make a further £11.876 million payment in restitution to customers affected by the breaches. Vanquis also agreed to pay £168.781 million in voluntary restitution to all customers who purchased the ROP before the FCA assumed responsibility for consumer credit activities on 1 April 2014. These voluntary payments dated as far back as 2003, when the product was first introduced.

The FCA noted that Vanquis co-operated proactively with its investigation, which enabled both a constructive working relationship and expedited the investigation. As the final notice makes clear, the benefit for the company in co-operating was the strength of the mitigation it could then advance. The FCA cited the remedial steps taken on the bank's own initiative, including voluntary restitution, and considered that these steps balanced out the aggravating features that were apparent in the case. As a consequence, no uplift was applied to the fine.

Conclusion

The Enforcement and separate Supervision consultations closed on 21 June. Both 'approach documents' asked whether they set out the FCA's approaches to supervision and enforcement clearly and whether there are other issues that could benefit from further clarification. The final 'approach documents' will be published later this year.

Part I

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Global Investigations: The UK, US and In-house Perspectives

The DOJ's Corporate Enforcement Policy: An upgraded Pilot Program

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On 29 November 2017, Deputy Attorney General Rod Rosenstein publicly applauded the Department of Justice (DOJ) FCPA Pilot Program (Pilot Program), which incentivised voluntary self-disclosure of misconduct, as a 'step forward in fighting corporate crime.'[1] Noting that in the 18 months during which the Pilot Program was in effect, the DOJ's FCPA Unit received 30 voluntary disclosures, compared with 18 in the previous 18-month period, Rosenstein announced that the DOJ would be incorporating a revised FCPA Corporate Enforcement Policy into the United States Attorneys' Manual.

The revised Corporate Enforcement Policy continues the DOJ's efforts to encourage voluntary self-disclosure and co-operation and largely mirrors the Pilot Program, but with several enhancements:

- The Corporate Enforcement Policy creates a rebuttable presumption, which may be overcome by 'aggravated circumstances' related to the nature and seriousness of the offence, that the DOJ will grant a declination when a company satisfies the requirements for voluntary self-disclosure, co-operation and remediation. In contrast, the Pilot Program provided that the DOJ would 'consider' a declination for companies that met these requirements. The DOJ issued seven public declinations under the Pilot Program, a trend likely to continue under the Corporate Enforcement Policy.
- Where a corporation voluntarily self-discloses conduct, but the DOJ finds aggravating circumstances compelling an enforcement action, the DOJ will recommend a 50 per cent reduction off the low end of the Sentencing Guidelines fine range.
- A company that does not make a voluntary disclosure but otherwise meets all of the requirements of the new Corporate Enforcement Policy is still eligible for co-operation credit in the form of a 25 per cent reduction off the low end of the Sentencing Guidelines fine range.
- The Corporate Enforcement Policy provides specific guidance on the criteria for evaluating a corporate compliance programme, while also noting that the criteria may vary based on the size and resources of an organisation. Factors listed in the policy include culture of compliance, compliance resources, the quality and experience of compliance resources, independence and authority of the compliance function, effective risk assessments and risk-based approach, compensation and promotion of compliance employees, compliance-related auditing, and compliance reporting structure.
- On 1 March, the DOJ announced that it would apply the Corporate Enforcement Policy as non-binding guidance in criminal cases outside the FCPA context. In light of this recent development, the Enforcement Policy provides valuable guidance to corporations as they investigate misconduct and contemplate voluntary disclosure.

Notably, the Corporate Enforcement Policy also continues the DOJ's emphasis on individual accountability. Like the Pilot Program, in order to receive credit for voluntary disclosure, companies must disclose all relevant facts regarding individuals involved in the misconduct. In his announcement of the policy, Mr Rosenstein reiterated this emphasis, remarking that 'corporate liability is vicarious; it is only derivative of individual liability.'[2] Mr Rosenstein

1 See 'Deputy Attorney General Rosenstein Delivers Remarks at the 34th International Conference on the Foreign Corrupt Practices Act, available at: https://www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-34th-international-conference-foreign.

2 Id.

further indicated that the DOJ expects the policy will increase voluntary disclosures, enhancing the DOJ's 'ability to identify and punish culpable individuals.'

Read the authors' chapter on 'Self-Reporting to the Authorities and Other Disclosure Obligations: The US Perspective' in GIR's *The Practitioner's Guide to Global Investigations* **here**.

US Supreme Court clarifies whistleblower protection for securities violations

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On 21 February, the Supreme Court resolved a US federal appellate circuit split by unanimously holding that an employee must report suspected securities law violations to the US Securities and Exchange Commission (SEC) to qualify as a whistleblower entitled to protection from retaliation under the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank).[1] Dodd-Frank's anti-retaliation protections do not extend to employees who only report concerns internally to their employer.

In 2010, Congress passed Dodd-Frank, which, among other things: (1) provides for the payment of monetary awards under certain circumstances to whistleblowers whose tips to the SEC lead to its recovery of more than US$1 million; and (2) prohibits employers from retaliating against whistleblowers who provide information to the SEC, participate in SEC investigations or actions, or make disclosures that are required or protected by other securities laws, including the Sarbanes-Oxley Act of 2002. Dodd-Frank included a directive to the SEC to promulgate rules implementing the whistleblower provisions of the statute. Although the statute explicitly defined a whistleblower as 'any individual who provides . . . information relating to a violation of the securities laws *to the Commission*,'[2] the SEC nevertheless passed Rule 21F-2, which said that Dodd-Frank's definition of a whistleblower only applied to the monetary award portion of the statute, and that it was inapplicable to the anti-retaliation provisions.

In subsequent litigation about whether employees who reported concerns internally but not to the SEC were covered by Dodd-Frank's anti-retaliation provisions, a circuit split ensued, with some courts deferring to the SEC's interpretation of the Dodd-Frank whistleblower provisions. The Supreme Court resolved this split of authority in *Digital Realty Trust v. Somers*, concluding that because Dodd-Frank's anti-retaliation provision was unambiguous in its definition of whistleblower, *Chevron*[3] deference to the SEC's contrary view adopting a more expansive interpretation of the statute was not warranted. Therefore, the Supreme Court held, individuals who fail to report potential securities law violations to the SEC are not protected by Dodd-Frank's anti-retaliation provision.

Read the authors' chapter on 'Whistleblowers: The US Perspective' in GIR's *The Practitioner's Guide to Global Investigations* **here**.

1 *Digital Realty Trust, Inc. v. Somers*, No. 10-1276, 583 U.S. ___ (2018).

2 15 U.S.C. § 78u-6 (emphasis added).

3 *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984). A court may not substitute its own interpretation of an implicit legislative delegation to an administrative authority for the authority's reasonable interpretation of the statute.

Extending the FCPA Corporate Enforcement Policy to other misconduct

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Deciding whether to self-disclose is one of the most difficult determinations that a company has to make when it is faced with allegations of misconduct.

In November 2017, the US Department of Justice announced that, in view of the success of the Pilot Program, it would be transformed from a 12-month 'pilot' (which began in April 2016 and was extended on a temporary basis) to a permanent component of the US Attorneys' Manual, as part of the Corporate Enforcement Policy. To date, the DOJ has reported eight declinations under the initiative.[1]

On 1 March, the DOJ's Criminal Division announced that it will apply the Corporate Enforcement Policy as 'nonbinding guidance' in criminal cases outside the FCPA context.[2] In announcing this policy change, Acting Assistant Attorney General John Cronan and Chief of the Securities and Financial Fraud unit, Benjamin Singer, touted the example of a recent settlement with Barclays PLC in which they applied the principles of the Corporate Enforcement Policy. As the DOJ explained, Barclays apparently self-reported that, through 'its employees and agents, [it had] misappropriated confidential information provided to Barclays by HP [Hewlett-Packard Company] in regard to FX options and spot transactions, and deceived HP about the nature of its trading, in violation of duties to HP'.[3] The DOJ noted that, among other things, Barclays made a 'timely, voluntary self-disclosure', conducted a 'thorough and comprehensive investigation', offered its 'full cooperation', including providing 'all known relevant facts about the individuals involved in or responsible for the misconduct', made enhancements to its compliance programme, and fully remediated the issues.[4] As a result, the DOJ declined to prosecute Barclays, although the bank had to pay a combined US$12.9 million in restitution to HP and disgorgement of its profits from the alleged scheme. By contrast, Singer mentioned the settlement with HSBC Holdings PLC, which recently agreed to pay US$101.5 million in penalties and disgorgement after a similar front-running investigation. According to Singer, HSBC failed to self-report the misconduct.

Read the authors' chapter on 'Co-operating with the Authorities: The US Perspective' in GIR's *The Practitioner's Guide to Global Investigations* **here**.

1 The DOJ has announced declinations under the FCPA Pilot Program and Corporate Enforcement Policy in relation to: (1) Nortek, (2) Akamai Technologies; (3) Johnson Controls; (4) HMTC LLC; (5) NCH Corporation; (6) Lindie North America; (7) CDM Smith; and (8) Dun & Bradstreet. See: https://www.justice.gov/criminal-fraud/pilot-program/declinations (last accessed 3 May 2018).

2 Remarks by John Cronan, the Acting Assistant Attorney General and the Principal Deputy Assistant Attorney General for the Criminal Division, and Benjamin Singer, Chief of the Fraud Section's Securities and Financial Fraud Unit at the American Bar Association's 32nd Annual National Institute on White Collar Crime (1 March 2018).

3 See Letter from Benjamin D. Singer, U.S. Dep't of Justice Criminal Division, to Alexander J. Willscher & Joel S. Green, Counsel for Barclays PLC (28 February 2018), available at https://www.justice.gov/criminal-fraud/file/1039791/download.

4 Id.

Attorney General Sessions influences prosecution policy with revisions to USAM

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Consistent with his memorandum of 10 May 2017,[1] which directed that 'prosecutors should charge and pursue the most serious, readily provable offense', Attorney General Jeff Sessions has continued to exert his influence at the Department of Justice (DOJ) through revisions to the US Attorneys' Manual.[2]

In February, the DOJ amended the section of the US Attorneys' Manual dealing with 'Principles of Federal Prosecution' to reflect AG Sessions's policy that federal prosecutors must pursue the most serious offences that carry the most substantial guidelines sentence.[3] This wording replaced language that encouraged prosecutors to select charges based on an individualised assessment of how particular charges fit the specific facts and circumstances of a case, taking into account the defendant's conduct. The current section reads that there may be circumstances in which a prosecutor may conclude that a strict application of the new charging policy is not warranted and an exception may be justified. In those cases, as with any other request for an exception to policy, prosecutors must obtain permission from a United States Attorney or Assistant Attorney General (or appropriate designee), and must document in the case file the reasons for deviating from the policy.

Along similar lines, multiple references throughout the section were revised to downplay the ability of federal prosecutors to make charging decisions. Language that allowed prosecutors to avoid bringing charges that carried mandatory minimum prison sentences was also deleted. However, while provisions that discouraged the use by prosecutors of additional charges remained intact, the section was edited in a way to emphasise that this was due to efficiency concerns and not as a limit on prosecutorial discretion.[4]

Read the authors' chapter on 'Individual Penalties and Third-Party Rights: The US Perspective' in GIR's *The Practitioner's Guide to Global Investigations* **here**.

1 Jeff Sessions, Attorney General, US Department of Justice, Department Charging and Sentencing Policy (10 May 2017), available at https://www.justice.gov/opa/press-release/file/965896/download.

2 United States Attorneys' Manual, US Department of Justice, available at https://www.justice.gov/usam/united-states-attorneys-manual.

3 Id. at § 9-27.300.

4 Id. at § 9-27.320.

English courts wrestle with privilege questions over corporate investigation documents after ENRC decision

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The last six months or so have seen three important cases consider the application of litigation privilege to documents arising out of internal investigations, in the shadow of the highly controversial decision in *The Director of the Serious Fraud Office v. ENRC*.[1]

In *Bilta & Ors v. RBS & Anor*,[2] the High Court's Chancery Division was concerned with the status of documents created during an internal investigation carried out by RBS's solicitors, relating to a tax dispute with Her Majesty's Revenue & Customs (HMRC). The documents included transcripts of interviews with employees and ex-employees. The documents had come into existence following HMRC sending RBS a letter that claimed there were sufficient grounds to deny RBS a certain amount of input tax. Bilta and various other claimants subsequently sought disclosure of these documents, which was resisted by RBS on the basis that they were subject to litigation privilege.

The Court held that the documents were indeed protected by litigation privilege. As to whether litigation could be said to be reasonably in contemplation at the time the documents came into existence, the sending of HMRC's letter was considered significant. This marked a 'watershed moment' and was likened to a letter before claim in civil litigation. From this point on it was highly likely that litigation between RBS and HMRC would follow. The requirement that the documents were brought into existence for the sole or dominant purpose of conducting litigation was satisfied as the interviews were being conducted primarily to provide RBS with material to challenge HMRC's assessment. RBS may also have hoped to dissuade HMRC from proceeding, but this was only a subsidiary purpose subsumed into the dominant purpose. Sir Geoffrey Vos, Chancellor of the High Court, stressed the need for a 'realistic' and 'commercial' view of the facts and said that RBS was not spending large sums on legal fees in the hope that HMRC would be dissuaded from issuing an assessment.

In *R (for and on behalf of the Health and Safety Executive) v. Paul Jukes*,[3] following a fatality at work, solicitors instructed by the employer concerned carried out an investigation. A statement was obtained from the appellant Mr Jukes, a former manager, as part of the internal investigation, when the HSE had begun its investigation but before it commenced proceedings. Over a year later the appellant was interviewed by the HSE and police and was later convicted of a health and safety offence. At his trial, the prosecution relied on the statement he had given to the company's solicitors.

Mr Jukes appealed, partly on the basis that the trial judge had been wrong to allow the prosecution to rely on the statement, as it was protected by privilege. The Court of Appeal did not accept this argument. There was no evidence that anybody within the company knew when the statement was made what the company's and the HSE's investigations would unearth, such that it could be said that litigation (i.e., a prosecution by the HSE) was reasonably in contemplation. The statement was not, therefore, protected by litigation privilege. In any event, even if the document had been privileged, it would have been the company's privilege and not the appellant's: Mr Jukes would have been unable to rely on it for his own benefit.

1 [2017] EWHC 1017 (QB).
2 [2017] EWHC 3535 (Ch).
3 [2018] EWCA Crim 176.

The two decisions helpfully illustrate the importance of the facts of the case. Although both relate to the treatment of documents arising from internal investigations where litigation subsequently took place, there are key differences that, although subtle, have a significant effect on the availability of litigation privilege. In *Bilta*, the relevant documents had come into existence after a significant development in the proceedings, following which RBS could for the first time reasonably contemplate litigation. *Jukes* (and *ENRC*), however, related to matters that arose at a much earlier stage when concerns existed and inquiries were being carried out, but not enough information was available to predict with any accuracy what would follow.

Litigation privilege in the context of internal investigation interviews has also recently been considered by the High Court. In *R (on the application of AL) v. SFO*,[4] a judicial review was brought against the SFO for failing to pursue an anonymised company, XYZ Ltd, for non-compliance with its deferred prosecution agreement (DPA),[5] whose terms require the company to disclose to the Serious Fraud Office (SFO) all information and material in its possession that is 'not protected by a valid claim of legal professional privilege or any other applicable legal protection'. In contrast to the approach taken by the SFO in *ENRC*, it had accepted oral summaries of the internal investigation interviews and did not seek to exercise its powers under section 2 of the Criminal Justice Act 1988 to compel provision of the full notes.

Before self-reporting to the SFO, the company's lawyers had conducted a number of internal investigation interviews. XYZ's legal team refused to hand over the notes, instead agreeing with the SFO to provide oral summaries, which were then transcribed. The DPA was reached and three individuals were charged with criminal offences. The applicant, a defendant in the criminal proceedings and a former senior employee interviewed as part of the internal investigation, had previously applied to the Crown Court for an order under section 8 of the Criminal Procedure and Investigations Act 1996 for disclosure of the notes, which was refused on the grounds that they were not in the SFO's possession. Further attempts by the SFO to obtain the notes were unsuccessful and a decision was taken not to pursue them further.

The SFO's position in defending the judicial review was that there was no need to obtain the interview notes because XYZ's claims of privilege were 'not obviously wrong',[6] and that it had exercised legitimate prosecutorial discretion in accepting the oral proffers.

Although the application was quashed on the grounds that alternative remedies in the Crown Court were available, a number of criticisms were made of the SFO's approach. The court observed that the SFO's disclosure obligations in criminal trials required it to seek production of interview notes from companies, and as a result the SFO must not readily accept a failure to do so. It disagreed with the SFO's claim to have a broad discretion to decide whether to compel production, and found it should have done so as it needed to protect the defendant's right to a fair trial. Mr Justice Green described the provision of summaries as an alternative as 'highly artificial'[7] and questioned the SFO's decision not to take a more robust stance, noting that it had not provided a satisfactory answer.

The SFO was similarly criticised for its failure to challenge the assertion of privilege and require the notes in circumstances where it believed the material not to be privileged. Even if the assertion of privilege could be made out (which, in light of recent case law, was not supported) by providing oral summaries, the privilege had been waived. The Court found that the SFO had not considered whether the oral proffers might be protected by a waiver of privilege limited to disclosure to the SFO (because it had not considered the issue of waiver at all), but held that even limited waiver would have required transmission of the underlying documents to the defendants, since this was squarely in contemplation and was an integral part of the process being undertaken. The judgment also noted

4 [2018] EWHC 856 (Admin).

5 *SFO v. XYZ Ltd* (Case No. U20150856).

6 *AL* at para. 7.

7 Ibid. at para. 26.

the lack of consideration by the SFO whether to require XYZ to waive privilege over the notes, given its contractual duty to co-operate under the DPA.

The approach taken by the SFO in this case is in stark contrast to the active pursuit of interview notes in *ENRC*. The observations made by the High Court will no doubt encourage the SFO to take a robust approach to the disclosure of interview notes and be much less likely to accept oral summaries in future. The case acts as a reminder of the restrictive interpretation being applied by the courts when it comes to privilege and notes of interviews, and provides further consideration for companies and their lawyers conducting interviews and negotiating with the SFO.

The treatment of *ENRC* in these three cases is noteworthy, as lawyers await with anticipation the Court of Appeal's consideration of the case, which commenced on 3 July. Sir Geoffrey Vos C in *Bilta* interpreted *ENRC* as a fact-specific case that did not have the wider application the claimants were attempting to rely on: 'one cannot simply apply conclusions that were reached on one company's interactions with the SFO in the very different context of another company's interactions with HMRC.'[8] In *AL* however, the Court (Lord Justice Holroyde and Mr Justice Green) was of the view that '*ENRC* and *RBS* followed well-established principles laid down in *Three Rivers*',[9] implying that Mrs Justice Andrews had adopted an already established approach to the scope of privilege. In *Jukes*, the rationale for the decision reached was similar to that in *ENRC*, with reference made to Andrews J's observation that 'Criminal proceedings cannot be reasonably contemplated unless the prospective defendant knows enough about what the investigation is likely to unearth, or has unearthed, to appreciate that it is realistic to expect a prosecutor to be satisfied that it has enough material to stand a good chance of securing a conviction.'[10] It is of particular significance that this endorsement comes from an appellate court, given that the Court of Appeal began hearing the *ENRC* challenge this week.

Read the authors' chapter on 'Witness Interviews in Internal Investigations: The UK Perspective' in GIR's *The Practitioner's Guide to Global Investigations* **here**.

8 *Bilta* at para. 59.

9 *AL* at para. 122.

10 *Jukes* at para. 23, repeating Andrews J's observations in *ENRC* at para. 160.

Forensic accounting: Artificial intelligence promises a brave new world while executive misconduct tells a sad old story

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Forensic accounting has existed for about as long as the accounting discipline itself. However, the past few years have seen advances in forensic accounting that enhance our ability to detect fraud and corruption. One such advance is the addition of artificial intelligence to our forensic toolbox. Our most recent advances come in the form of computer-assisted review of books and records, journal entries, payroll, emails and similar data. Courts and regulators have become accustomed to these state-of-the-art methodologies. Forensic accountants are relying on these tools to succeed where they have failed in the past. Our experience as investigators is helping us to develop the machine that will serve us. Expect advances in computer-assisted forensic tools to continue in terms of both speed and effectiveness. We simply are unaware of what the limit may be.

From a subject-matter perspective, the last several months have brought a more mundane investigative topic to the forefront. The cyber investigations continue, as do the large corruption investigations and the occasional massive bank fraud and Ponzi scheme probes, but so many investigations of late seem to focus on poor behaviour by executives, including harassment, and travel and entertainment (T&E) abuse. These transgressions present several complications to organisations caught up in these controversies. There is immense pressure – as there should be – to investigate quickly and to remediate properly. The moral and reputational impact of doing nothing or acting too slowly in a 'Me Too' environment can be devastating to the organisation. From a financial controls perspective the organisation must consider the other consequences of bad behaviour. Forensic accountants and investigators are familiar with the concept of fencing in the wrongdoing. Instances of bad behaviour, even non-financial or immaterial T&E transgressions often indicate a lack of discipline and an unwillingness to play by the rules. When this behaviour comes from the top, a tone may permeate through the ranks and the organisation may have deeper problems than appear on the surface. These investigations, which are becoming more common, present challenges to stakeholders, directors, auditors and regulators.

Read the author's chapter on 'Forensic Accounting Skills in Investigations' in GIR's *The Practitioner's Guide to Global Investigations* **here**.

Second Circuit confirms US statute can apply to trading on foreign exchanges

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Since publication of the second edition of *The Practitioner's Guide to Global Investigations*, the US Court of Appeals for the Second Circuit recently clarified the scope of the Commodities Exchange Act's (CEA) extraterritorial reach in *Myun-Uk Choi v. Tower Research Capital LLC*, a case addressing whether after-hours trades that were ordered in Korea, matched on CME Globex in Illinois and then cleared and settled in Korea were domestic transactions.[1] The Second Circuit reaffirmed its prior decision in *Loginovskaya* that the CEA applies to purchases on foreign exchanges when title passes or irrevocable liability is incurred within the United States.[2] Applying this test to the trades at issue, the Second Circuit ruled that these were domestic transactions because irrevocable liability occurred upon matching, when the parties entered into a binding contract that could not be unilaterally revoked.[3]

Read the authors' chapter on 'Extraterritoriality: The US Perspective' in GIR's *The Practitioner's Guide to Global Investigations* **here**.

1 886 F.3d 229, 231–32 (2d Cir. 2018).
2 Id. at 234–35.
3 Id. at 236.

DOJ encourages coordination among agencies imposing penalties

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During a speech on 9 May, Deputy Attorney General Rod Rosenstein announced a new Department of Justice (DOJ) policy to discourage the 'piling on' of multiple penalties by the DOJ and foreign and domestic agencies, in relation to the investigation of the same corporate misconduct.[1]

Mr Rosenstein said that the policy, which has since been incorporated into the US Attorneys' Manual at Section 1-12.100, will guide the DOJ's decisions as to the size of financial penalties in future investigations. He laid out four key features of the new policy.

The first principle, which Mr Rosenstein described as a reminder and reaffirmation of existing policy, holds that the federal government should not use its criminal enforcement authority for any reason other than the

1 See 'Deputy Attorney General Rod Rosenstein Delivers Remarks to the New York City Bar White Collar Crime Institute', available at https://www.justice.gov/opa/speech/deputy-attorney-general-rod-rosenstein-delivers-remarks-new-york-city-bar-white-collar.

investigation and prosecution of a possible crime. Mr Rosenstein specifically pointed to the impermissibility of using the threat of criminal prosecution solely as leverage over a company in negotiating a civil settlement.

Second, the policy calls for internal coordination among DOJ components when those components are investigating the same corporate misconduct. According to Mr Rosenstein, such coordination should be directed toward avoiding disproportionate punishment and achieving an overall equitable result.

Third, the policy calls for coordination between DOJ attorneys and other federal, state, local and foreign enforcement authorities when the DOJ and other entities are investigating the same corporate misconduct.

Finally, the new policy articulates certain factors to be used in determining whether the imposition of multiple penalties would serve the interests of justice. Those factors include (1) the egregiousness of the wrongdoing; (2) statutory mandates regarding penalties; (3) the risk of delay in finalising a resolution; and (4) the adequacy and timeliness of a company's disclosures and co-operation with the DOJ.

Mr Rosenstein characterised the new policy as in line with the DOJ's efforts to combat white-collar crime by promoting the transparent, consistent, and efficient investigation and resolution of cases. Improved coordination, Mr Rosenstein said, will incentivise companies to self-report wrongdoing and advance the DOJ's goal of deterring corporate misconduct by holding culpable individuals accountable.

Implications

The potential for 'piling on' in corporate resolutions has been a long-standing concern. The DOJ's recognition of the issue and creation of a policy to address it appear to be a step in the right direction. At the same time, the practical import of this new policy remains to be seen and a number of key questions are unresolved. First, in light of the policy, will the DOJ begin seeking lesser financial penalties, or will it continue to seek the same penalties but offer more credit to offset settlements with other enforcement agencies? Second, how will prosecutors decide the appropriate amount of any offset or discount where other agencies impose penalties for the same conduct? Third, will other agencies reciprocally adhere to the policy so that penalties are proportionally reduced across agencies, or will the DOJ unilaterally reduce its own penalties?

Read the authors' chapter on 'Negotiating Global Settlements: The US Perspective' in GIR's *The Practitioner's Guide to Global Investigations* **here**.

High Court dicta on interview notes should make employees think twice before fully co-operating in internal investigations . . .

James Carlton, Sona Ganatra and David Murphy

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The role and rights of employees in the context of corporate investigations are increasingly under the spotlight in the United Kingdom.

As well as the string of case law considering the privileged status of employee interview notes, the recent case of *R (on the application of AL) v. SFO*[1] highlights the difficulties that may be faced by employees who are interviewed as witnesses in the context of an investigation and then later charged for misconduct. The case is important as it is the first time the SFO has prosecuted an employee for an offence in relation to which the corporate employer (known as XYZ) had already concluded a DPA. The employee (as a defendant in the criminal proceedings) had sought disclosure from the SFO of the notes of interviews conducted by the employer and its legal advisers during the course of an internal investigation. When the SFO failed to obtain copies of the notes from XYZ and the Crown Court judge did not order their disclosure, pursuant to the Criminal Procedure and Investigations Act 1996, the employee commenced judicial review proceedings. The High Court dismissed the petition, but it was particularly critical of the SFO's failure to obtain the full interview notes and so fulfil its disclosure obligations to the employee. Although, the comments made in the case are *obiter*, it is an important reminder to those representing employees to consider the appropriateness of full co-operation with the employer from the outset. It will also be interesting to see how the SFO develops its practices in relation to DPAs generally following this case.

Read the authors' chapter on 'Employee Rights: The UK Perspective' in GIR's *The Practitioner's Guide to Global Investigations* **here**.

1 [2018] EWHC 856 (Admin).

. . . and underscores the need for employers to give warnings

Jessica Parker and Andrew Smith

Corker Binning

The subject of an internal interview should have always been warned of the risk that notes of an interview with their employer's lawyer may be handed over to prosecuting authorities. Since the comments made by Mr Justice Green in *R (on the application of AL) v. SFO*, this has been elevated from a risk to a near certainty, especially in cases where their employer is co-operating with a view to securing a DPA.

Read the authors' chapter on 'Representing Individuals in Interviews: The UK Perspective' in GIR's *The Practitioner's Guide to Global Investigations* **here**.

DOJ enforcement policy and the Kokesh ruling strengthen companies' hand

Rita D Mitchell

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The FCPA Corporate Enforcement Policy and its expanded applicability

On 29 November 2017, the DOJ announced 'a revised FCPA Corporate Enforcement Policy' (Corporate Enforcement Policy), which has been incorporated into the United States Attorneys' Manual. Under the Pilot Program, companies that co-operated, remediated and voluntarily self-disclosed were eligible for the 'full range of potential mitigation credit', including a declination of prosecution (as well as disgorgement) or a reduction of 'up to 50 percent below the low end of the applicable US Sentencing Guidelines fine range'.

The Corporate Enforcement Policy varies from the Pilot Program in ways that are more favourable to companies that qualify for mitigation credit. First, the policy establishes a presumption that, 'absent aggravating circumstances', a company will receive a declination if it 'has voluntarily self-disclosed misconduct in an FCPA matter, fully cooperated, and timely and appropriately remediated'. Second, if a company has met the self-disclosure, co-operation, and remediation criteria, but 'aggravating circumstances' prevent a declination, the DOJ will recommend 'a 50 percent reduction off of the low end of the US Sentencing Guidelines'. The Pilot Program afforded the DOJ greater discretion in recommending reductions of 'up to 50 percent'. The Corporate Enforcement Policy also describes factors the DOJ will take into account in evaluating the effectiveness of a company's compliance programme.

On 1 March, the DOJ's Criminal Division announced that it would also consider the Corporate Enforcement Policy as guidance in other criminal cases. As a result of this decision, companies being investigated for offences other than FCPA violations, such as money-laundering or fraud, may be able to obtain declinations from the DOJ based on self-reporting, co-operation and remedial measures.

Aftermath of the Supreme Court's Kokesh v. SEC decision

In last year's *Kokesh v. SEC* decision, the Supreme Court held that disgorgement is a penalty and therefore subject to the five-year statute of limitations applicable to any 'action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise' under 28 U.S.C. § 2462.[1] This decision invalidated the SEC's practice of seeking disgorgement beyond that five-year limitation period.

Since *Kokesh v. SEC* was decided in June 2017, defendants have relied on the decision to challenge the SEC's statutory authority for seeking disgorgement at all, arguing that as a penalty, disgorgement is not within the court's equitable powers.[2] Most notably, in late October 2017, a class action lawsuit was filed, *Jalbert v. SEC*, seeking the recovery of almost US$15 billion collected by the SEC as disgorgement.[3]

Read the author's chapter on 'Fines, Disgorgement, Injunctions, Disbarment: The US Perspective' in GIR's *The Practitioner's Guide to Global Investigations* **here**.

1 *Kokesh v. SEC*, 137 S. Ct. 1635, 1639 (2017).

2 See, e.g., *SEC v. Jammin Java Corp.*, 2017 WL 4286180, at *3 (C.D. Cal. 14 September 2017) (rejecting defendant's contention that 'because the imposition of a penalty is not within the Courts' traditional equity powers, *Kokesh* should be construed so as to eliminate the disgorgement remedy altogether').

3 Class Action Complaint, *Jalbert v. SEC*, Case No. 1:17-cv-12103-FDS, Dkt. No. 1 (26 October 2017).

Crown Prosecution Service still not sharing SFO's appetite for DPAs

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Freshfields Bruckhaus Deringer

As noted in Chapter 9 of the second edition of *The Practitioner's Guide to Global Investigations*, the Serious Fraud Office (SFO) considers as 'a significant mark of cooperation a company's decision' to waive privilege over notes of witness interviews. Nonetheless, the SFO has, in certain instances, entered into a deferred prosecution agreement (DPA) with a company that has not provided notes of first-account interviews and has been satisfied to receive oral summaries instead. One such example is the DPA with the anonymised XYZ, although a recent decision will influence the SFO's approach in future.

In *R (on the application of AL) v. SFO*,[1] a former employee of XYZ Ltd, now a defendant in related criminal proceedings, brought a claim for judicial review to challenge the SFO's decision not to require production of witness interview notes.

The High Court ultimately dismissed the claim as the claimant had not exhausted all available remedies before the Crown Court. However, the Court also made plain its view that the SFO had not complied with its duty, as a prosecuting authority, to take further steps to obtain witness interview notes from the company so that they may be disclosed in the criminal proceedings against the individual in accordance with the defendant's right to a fair trial under Article 6 of the European Convention on Human Rights.

In response to this case, the SFO will likely take a more robust stance towards companies who claim privilege over interview notes and is unlikely to agree to accommodate alternative arrangements, such as oral summaries. Separately, the SFO may also view claims of privilege that do not have a robust legal basis as a sign of non-cooperation, which could affect a company's ability to obtain (or retain) a DPA.

UK Bribery Act 2010

In a separate development, the adequate procedures defence in section 7 of the Bribery Act 2010 was tested for the first time in a case prosecuted by the Crown Prosecution Service (CPS), *R v. Skansen Interiors Ltd*,[2] in March. The corporate defendant – which was by then dormant – was convicted, following a trial. It had demonstrated notable co-operation having investigated and self-reported conduct to the police that may not otherwise have come to light and had co-operated fully with the police and CPS. However, a DPA was not offered. The judge questioned why a prosecution was being brought against a dormant company against whom it was agreed that no financial penalty could be imposed and where the only sentence could be an absolute discharge. The status of the company, and a desire to send a deterrent message appear to have been the reasons: the CPS said that the public interest test for a prosecution was satisfied so that a message could be sent to others in the industry and they had decided that no ongoing benefit could be achieved by a DPA. The SFO has brokered four DPAs to date, while the CPS has agreed none. This case reminds us that a DPA is by no means an inevitable outcome for a company faced with bribery allegations – particularly with agencies other than the SFO – even where co-operation exists.

Read the authors' chapter on 'Co-operating with the Authorities: The UK Perspective' in GIR's *The Practitioner's Guide to Global Investigations* **here**.

1 [2018] EWHC 856 (Admin).

2 Southwark Crown Court, March 2018.

Europe proposes legislation to facilitate cross-border production and preservation, while the SFO faces a battle to use its power to compel production overseas

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Section 2 notices

Although the territorial scope of these powers has not as yet been determined by the courts, the Serious Fraud Office (SFO) has often sought to use its powers under section 2 of the Criminal Justice Act 1987 (CJA 1987) to compel the production of documents held overseas. In April, US oil engineering and construction firm KBR sought to challenge the extraterritorial reach of section 2 and launched a judicial review of the SFO's decision to issue a section 2 notice on the US parent company in connection with its bribery investigation of its UK subsidiary.[1]

In its challenge, KBR argued that the SFO had acted unlawfully in exceeding its powers under the CJA 1987 because Parliament had not intended section 2 notices to apply extraterritorially. Furthermore, the company contended that the SFO had sought to use its section 2 powers to avoid having to comply with its obligations under its mutual legal assistance treaty with the United States. In its defence, the SFO argued that Parliament had clearly intended for section 2 to have extraterritorial effect because limiting its application to this jurisdiction alone would render the United Kingdom unable to properly investigate its own citizens and companies.

Although the High Court is yet to rule on KBR's application, the court has indicated that (1) it will not accept that section 2 has open-ended jurisdictional scope and (2) the SFO will need to prove a sufficient connection between the United Kingdom and an overseas company for that company to be caught by a section 2 notice requesting data held overseas.

European Commission proposals on the production and preservation of electronic evidence

On 17 April, the European Commission published its proposal[2] for EU-wide laws 'to make it easier and faster for police and judicial authorities to obtain the electronic evidence'[3] required to investigate, prosecute and convict those responsible for serious crimes. If passed into legislation, the Commission's proposed Regulation and Directive will supplement the investigative tools currently available to authorities in EU Member States. The proposals appear to have been motivated by general frustration with existing mutual legal assistance procedures, which are frequently bedevilled by significant delays. In addition, the Commission seeks to address the legal uncertainty and conflicting obligations that have stemmed from the current fragmented approach of Member States to obtaining electronic evidence.

The proposed Regulation will introduce binding European production and preservation orders. A European production order would enable a judicial authority in one Member State to obtain electronic evidence directly from a service provider or its legal representative in another, which would be obliged to respond within 10 days, and within six hours in cases of emergency. A European preservation order would allow a judicial authority in one Member State to request that a service provider in another preserve specific data in view of a subsequent request to

1 *KBR Inc v. Director of the SFO* (2018), available at https://www.sfo.gov.uk/?s=kbr&lang=en.

2 Proposal for a Regulation of the European Parliament and of the Council on European Production and Preservation Orders for Electronic Evidence in Criminal Matters COM/2018/225 final – 2018/0108 (COD).

3 http://europa.eu/rapid/press-release_IP-18-3343_en.htm.

produce that same material through mutual legal assistance, a European investigation order or a European production order.

Such orders would only be issued if a similar measure is available for the same criminal offence in a comparable domestic situation in the issuing Member State. Orders to produce subscriber and access data can be issued for any criminal offence, whereas the order for producing transactional or content data may only be issued for certain offences. Each type of order can be served on providers of electronic communication services, social networks, online marketplaces, other hosting service providers and providers of internet infrastructure such as IP addresses and domain name registries.

The Commission's proposals would also oblige service providers to designate a legal representative within the European Union. The representatives would be responsible for ensuring that all providers that offer services in the European Union are subject to the same obligations, even if their headquarters are in a third country.

Given the intrusive nature of the powers proposed, the Regulation specifies a number of conditions and safeguards to guarantee privacy, data protection and the right to judicial redress. For example, the proposal applies only to stored data and does not encompass real-time interception of telecommunications. In addition, personal data covered by this proposal will be protected and may only be processed in accordance with the EU's General Data Protection Regulation.

Notably, the Regulation moves away from the concept that the location of data storage is the determining factor for jurisdiction. Instead, it requires the production or preservation of data regardless of where it is stored (1) if the data relates to the services of a provider offering services (social network, cloud hosting, etc.) to customers within the European Union and (2) if the data is required for criminal proceedings for which the issuing authority is competent. Where companies find themselves in a conflict-of-law situation because the country where data is stored forbids them from handing it over to a foreign authority, they will be able to challenge the seizure request. In principle, however, the proposal in its current form demonstrates a desire to significantly strengthen the extraterritorial reach of each EU Member State in criminal investigations.

Read the authors' chapter on 'Extraterritoriality: The UK Perspective' in GIR's *The Practitioner's Guide to Global Investigations* **here**.

English court deliberations on privilege and disclosure could have far-reaching effects for global settlements

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ENRC appeal

On 3 July the Court of Appeal in England began hearing an appeal against the decision in *The Director of the Serious Fraud Office v. ENRC*,[1] arising from the SFO's ongoing ENRC investigation, which concerns the scope of legal professional privilege (LPP). The first-instance judge had applied a strict approach to litigation privilege and rejected ENRC's claim to privilege, deciding that litigation was not in reasonable contemplation, despite the

1 [2017] EWHC 1017 (QB).

relevant documentation having been created as part of an internal investigation conducted while an SFO criminal investigation was anticipated. The judge stated that contemplation of an SFO investigation did not necessarily equate to contemplation of a prosecution; a prosecution only becomes a real prospect once it is discovered that there is some truth in the allegations or some material to support them.

The first-instance judge also endorsed a restrictive view of who is the 'client' for the purposes of legal advice privilege.

It is hoped that the Court of Appeal, will provide greater clarity on the proper application of LPP, particularly regarding when LPP can be successfully asserted over documents produced by lawyers as part of an internal investigation. The ruling may have various implications for global settlements, not least because a company's decisions on whether it can and should withhold materials from enforcement agencies on the basis of LPP can create tension between the parties.

High Court considers SFO obligations of disclosure

Meanwhile in *R (on the application of AL) v. SFO*[2] the High Court in England considered the SFO's disclosure obligations in the context of a criminal trial of individuals following entry into a deferred prosecution agreement (DPA). AL's application centred on his request to the SFO to disclose notes taken by the lawyers of anonymised corporate XYZ during interviews of senior employees (including AL), conducted during an internal investigation carried out before XYZ decided to self-report to the SFO. The corporate refused to disclose the notes of the interviews on the grounds of LPP and instead provided the SFO with 'oral proffers'. The SFO took no action against XYZ to force disclosure of the original interview notes. The High Court criticised the use of oral proffers as an alternative to the provision of original documentation, noting that the process followed was 'highly artificial' and expressing surprise that the SFO did not robustly demand the written summaries, which it considered not to be privileged, in light of the *ENRC* decision.

The judgment is likely to result in the SFO adopting a more robust approach to challenging LPP claims, especially in circumstances where a corporate is obliged to co-operate with the SFO under the terms of a DPA but withholds documents without providing a convincing justification. It also raises the prospect that, in multi-agency settlements, there might be a divergence of approach between agencies who are content to receive oral proffers (e.g., the US Department of Justice, which regularly accepts them) and those which are not.

Tesco deferred prosecution agreement

The details of the DPA between the SFO and Tesco Stores Limited,[3] the United Kingdom's fourth DPA, remain private, as the case is still subject to reporting restrictions pending the prosecution of three former Tesco executives. The first trial of the three Tesco executives was abandoned on 5 February, following one of the defendants suffering a heart attack. A retrial has been set provisionally for 3 September.

Read the authors' chapter on 'Negotiating Global Settlements: The UK Perspective' in GIR's *The Practitioner's Guide to Global Investigations* **here**.

2 [2018] EWHC 856 (Admin).

3 SFO press release, 10 April 2017, 'SFO agrees deferred prosecution agreement with Tesco', available at: https://www.sfo.gov.uk/2017/04/10/sfo-agrees-deferred-prosecution-agreement-with-tesco/.

Whistleblower Protection in Europe: A new law?

Steve Young

Banque Lombard Odier & Co Ltd

The European Commission is proposing a new Directive to strengthen whistleblower protection.[1] The Commission has highlighted the recent scandals such as the Panama Papers and the ongoing Cambridge Analytica revelations to show that whistleblowers play an important part in uncovering unlawful activities that damage the public interest and welfare of European citizens and society. The new Directive will guarantee a high level of EU-wide protection for whistleblowers.

Currently protection of whistleblowers is fragmented across the EU – only ten EU countries (France, Hungary, Ireland, Italy, Lithuania, Malta, Netherlands, Slovakia, Sweden and the United Kingdom) have comprehensive laws protecting whistleblowers. This uneven protection across the EU can undermine the level playing field needed for the internal market to function properly and for businesses to operate in a healthy competitive environment.

It is proposed that all companies with more than 50 employees or with an annual turnover of over €10 million set up internal procedures to handle whistleblowers' reports. The new law will establish safe channels for reporting both within an organisation and to public authorities, and ensure the confidentiality of the identity of the whistleblower.

Under the proposed Directive, a whistleblower is granted protection when reporting on breaches of EU rules in the areas of: public procurement, financial services, anti-money laundering and counter-terrorist financing, product safety, transport safety, environment protection, nuclear safety, public health, food and feed safety, animal health and welfare, consumer protection, protection of privacy and personal data, and security of network and information systems. It also applies to breaches of EU competition rules, and breaches of corporate tax rules or arrangements whose purpose is to obtain a tax advantage that defeats the object or purpose of the applicable corporate tax law.

The Directive will also place an obligation on competent national authorities to establish external reporting channels and to follow up on reports. EU Member States must identify the authorities, with dedicated professionally trained staff, that will be charged with receiving and following up on reports, and within three months (six months for complex cases) giving feedback to the reporting person.

The new law obliges Member States to prohibit any form of retaliation and to provide for effective, proportionate and dissuasive penalties against those who take retaliatory measures against whistleblowers. If whistleblowers do suffer retaliation, the new law provides for a set of measures to protect them, including legal advice free of charge, remedial measures such as interim relief to halt ongoing retaliation, for example workplace harassment, no liability for disclosing information imposed by contract law (gagging clauses) and protection in judicial proceedings. In legal actions taken against the whistleblower, such as defamation or breach of secrecy, whistleblowers will be able to rely on the new EU law as a defence.

This new directive will considerably strengthen the overall whistleblowing regime within the European Union and, once implemented in Member States, provide strong protections for those who blow the whistle.

Read the author's chapter on 'Whistleblowers: The In-house Perspective' in GIR's *The Practitioner's Guide to Global Investigations* **here**.

1 European Commission Press Release Database, Whistleblower protection: Commission sets new, EU-wide Rules, Brussels, 23 April 2018.

UK and US powers to compel disclosure of documents from overseas remain far from certain

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In the United Kingdom, section 2 of the Criminal Justice Act 1987 gives the Serious Fraud Office (SFO) powers to serve a notice on companies or individuals compelling them to produce documents relevant to an SFO investigation.

The English courts have not decided whether the extraterritorial application of the section 2 powers require a company to disclose relevant documents it holds outside the United Kingdom. SFO practice has varied over time. More recently, the SFO has adopted a more expansive interpretation of its powers in international cases.

In October 2017, as part of a GIR Live exchange, former SFO Director David Green responded to criticism of the SFO's approach to section 2 by welcoming litigation on its extraterritorial reach 'in the right circumstances, brought at the right time'.[1] And, indeed, on 17 April 2018, the High Court heard the ongoing judicial review challenge of *KBR v. Director of the SFO*.[2] The SFO had served a section 2 notice compelling KBR to provide data that had been archived on its US servers, but had initially been held in the United Kingdom. KBR argued that Parliament 'had not intended section 2 notices to have extraterritorial application.' The SFO responded that a narrow interpretation would mean that the SFO is 'less able to investigate matters under its remit'.[3] Judgment is currently awaited, which should clarify this important point around the SFO's exercise of its section 2 powers.

The United States has seen similar uncertainty in relation to the power that law enforcement possesses to order the production of documents across borders. For several years, practitioners had watched as Microsoft's challenge to a law enforcement subpoena wound its way through the US courts. Although *US v. Microsoft* made its way to the United States Supreme Court, the Court ultimately determined the case had become moot as a result of recently enacted legislation.[4] Specifically, on 23 March, President Donald J Trump signed a US$1.3 trillion appropriations bill which was ultimately passed by Congress.

That 2,232-page spending measure included a bill called the 'Clarifying Lawful Overseas Use of Data' or CLOUD Act.[5] Passage of the CLOUD Act resolved the issue that was before the US Supreme Court in *US v. Microsoft* – the Stored Communications Act now explicitly applies to data held by US communications and cloud providers regardless of location.[6] Other providers of the CLOUD Act, however, may significantly alter how non-US law enforcement officials seek and obtain electronic communications and data in the hands of US cloud service providers.

Read the authors' chapter on 'Production of Information to the Authorities' in GIR's *The Practitioner's Guide to Global Investigations* **here**.

1 Roger Hamilton-Martin, 'David Green on section 2 judicial review: "Bring it on"', *Global Investigations Review*, vol. 5, Issue 4, p. 26.

2 *KBR Inc v. Director of the SFO* (2018), available at https://www.sfo.gov.uk/?s=kbr&lang=en.

3 Waithera Junghae, *Global Investigations Review*, (17 April 2018) 'KBR fights SFO on extraterritorial application of section 2 notices', available at https://globalinvestigationsreview.com/article/1168056/kbr-fights-sfo-on-extraterritorial-application-of-section-2-notices.

4 https://www.supremecourt.gov/opinions/17pdf/17-2_1824.pdf.

5 A copy of the CLOUD Act is available at https://www.congress.gov/115/bills/hr4943/BILLS-115hr4943ih.pdf.

6 Indeed, just days after the CLOUD Act was passed the DOJ abandoned its original warrant and served a new warrant for the same data. The DOJ asked the Supreme Court to vacate and remand the case for dismissal because it was now moot, and Microsoft agreed, though the Court has not yet issued a ruling.

First interview notes do not attract legal professional privilege, court suggests

Bankim Thanki QC, Tamara Oppenheimer and Rebecca Loveridge

Fountain Court Chambers

In our Chapter 'Privilege: The UK Perspective' in the second edition of *The Practitioner's Guide to Global Investigations*, we explored some of the difficulties concerning legal professional privilege in the context of interviews of potential witnesses, in relation to both legal advice privilege and litigation privilege. We referred to the decision of Mrs Justice Andrews in *Director of the SFO v. ENRC*,[1] in which the High Court adopted a restrictive interpretation of the 'client' for the purposes of legal advice privilege and considered the requirements, for the purpose of litigation privilege, that: (1) litigation must be commenced or in contemplation; and (2) the relevant document or documents must have been created for the dominant purpose of that litigation.[2]

The position in relation to legal professional privilege and witness interview notes was the subject of recent consideration in *R (on the application of AL) v. SFO*.[3] That case concerned notes of interviews of four senior executives of a company (interviewees). The notes were created by lawyers appointed by the company conducting a review for the purpose of advising the company whether to self-report to the Serious Fraud Office (SFO), which subsequently entered into a deferred prosecution agreement (DPA) with the company but brought criminal proceedings against one of the interviewees. That individual (the claimant in *AL*) sought disclosure of the interview notes from the SFO, who refused the request on the grounds that the notes were not in its possession (the notes not having been obtained from the company prior to conclusion of the DPA), and the company was refusing to provide them on grounds of legal professional privilege. The SFO refused to bring proceedings against the company to require production of the notes and the claimant brought judicial review proceedings to challenge that refusal.

One of the issues that arose was whether the company's assertion of privilege in respect of the notes was 'not obviously invalid' (as the SFO contended – a somewhat ironic position, perhaps, given the SFO's stance in *ENRC*). On this issue, the High Court found that the law as it stands today is settled and that 'privilege does not apply to first interview notes'.[4] The Court considered the test for litigation privilege, as set out in *Three Rivers 6*,[5] and applied in *ENRC*, and more recently by the Court of Appeal in *R v. Jukes*.[6] On the basis of those authorities, Mr Justice Green (giving the judgment of the Court) remarked that he could see 'much force' in a submission that interview material obtained for the purpose of deciding whether there is evidence of a breach of the law is too remote from the conditions for the application of privilege set out in *Three Rivers 6* and applied in *ENRC*. It was noted that the SFO had not ever addressed the merits (or otherwise) of the points raised by the company's solicitors in support of the claim to privilege – the SFO's assertion that the claim to privilege was 'not obviously invalid' was a matter of bald assertion.

The *dicta* of the Court in *AL* concerning privilege are *obiter*, since the claim for judicial review was dismissed on the ground that the High Court was not the appropriate forum in which the dispute ought to have been litigated. The Court did not consider the applicability of legal advice privilege or the 'client' question, which was the subject

1 [2017] EWHC 1017 (QB).

2 See Bankim Thanki QC, Tamara Oppenheimer and Rebecca Loveridge, 'Privilege: The UK Perspective' in Seddon, Davison, Morvillo, Bowes and Tolaini (eds), *The Practitioner's Guide to Global Investigations* (Second edn., 2018), at Sections 35.3.2.2, 35.4.2, 35.4.3.

3 [2018] EWHC 856 (Admin).

4 Ibid. at para. 105.

5 [2004] UKHL 48.

6 [2018] EWCA Crim 176.

of detailed consideration in *The RBS Rights Issue Litigation*[7] and *ENRC*, apparently treating the issue as primarily one of litigation privilege. Most strikingly, the Court appears to have deduced from those decisions that there is a general principle that legal professional privilege does not apply to first interview notes, without the need to consider the arguments about legal advice privilege and lawyers' working papers, or the specific factual context in which the notes were created, including whether litigation could be said to be in reasonable contemplation at that time and what the dominant purpose of the creation of the notes was. Further, it appears that the Court was not taken to, among other cases, the recent decision in *Bilta (UK) Ltd v. RBS*[8] in which Sir Geoffrey Vos, Chancellor of the High Court, remarked on the tension between *Re Highgrade Traders*[9] and *ENRC* and found that certain transcripts of interviews with key RBS employees and ex-employees of which *Bilta* sought disclosure *were* subject to litigation privilege.

Ultimately, in *AL* it appears that, as a result of the unusual facts from which the proceedings arose, the Court was in the unsatisfactory position of having to consider the issue of privilege in circumstances where the SFO had put forward no positive case as to why the relevant notes were (or might be) privileged. The Court's conclusions on that issue, which are in any event *obiter*, should therefore be treated with caution.

Read the authors' chapter on 'Privilege: The UK Perspective' in GIR's *The Practitioner's Guide to Global Investigations* **here**.

7 [2016] EWHC 3161 (Ch).
8 [2017] EWHC 3535 (Ch).
9 [1984] BCLC 151.

SFO official welcomes new powers to investigate unexplained wealth

Richard Sallybanks and Ami Amin

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The Criminal Finances Act 2017, amending the Proceeds of Crime Act 2002 (POCA 2002), enables law enforcement agencies to apply for an unexplained wealth order (UWO) in the High Court. A UWO requires a person to explain, within a specified time, what interest he or she has in specified property and how it was obtained, even where the date of acquisition pre-dates the coming into force of POCA 2002.

The UWO regime has been welcomed by law enforcement agencies to assist in the United Kingdom's fight against its reputation as a safe haven for illicitly acquired assets. In a speech given by Camilla de Silva, Joint Head of Bribery and Corruption at the SFO, on 16 March 2018, she described UWOs as a new investigative tool that 'will make it harder to hide the proceeds of crime' and said that the SFO was 'confident we will make use of the power at the right time with the right case.'[1] However, to date, the only UWO that has been made public was obtained by the NCA, apparently against a politician from Central Asia and in respect of two properties in London and the south-east of England worth £22 million (which were made subject to simultaneous IFOs). At the time that this UWO was obtained, the head of economic crime at the NCA commented that UWOs 'enable the UK

1 SFO Speech, Camilla de Silva, Joint Head of Bribery and Corruption, speaking at ABC Minds Financial Services conference on 15 March 2018, available at https://www.sfo.gov.uk/2018/03/16/camilla-de-silva-at-abc-minds-financial-services/.

to more effectively target the problem of money laundering through prime real estate in London and elsewhere.'[2] Practitioners will watch with interest whether the UK's investigative agencies avail themselves of this new tool in a way that matches the rhetoric that has surrounded its introduction.

Read the BCL Solicitors chapter on 'Individuals in Cross-Border Investigations or Proceedings: The UK Perspective' in GIR's *The Practitioner's Guide to Global Investigations* **here**.

2 NCA press release, 28 February 2018, 'NCA secures first unexplained wealth orders', available at: http://www.nationalcrimeagency.gov.uk/news/1297-nca-secures-first-unexplained-wealth-orders.

Supreme Court rules whistleblowers must report to SEC to benefit from anti-retaliation protection under Dodd-Frank

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On 21 February, the US Supreme Court unanimously ruled that individuals are not covered by the anti-retaliation provision of the Dodd-Frank Act unless they have provided information regarding a violation of law to the US Securities and Exchange Commission.[1]

The respondent, Paul Somers, had filed a claim of whistleblower retaliation under Dodd-Frank, alleging that he was terminated for reporting suspected securities law violations to senior management. Digital Realty moved to dismiss Mr Somers's claim on the basis that he did not qualify as a whistleblower because he never reported any alleged violations to the SEC.

The Dodd-Frank Act defines a 'whistleblower' as a person who provides 'information relating to a violation of the securities laws to the Commission'.[2] The Dodd-Frank Act's anti-retaliation provision protects a whistleblower in three situations, including when he or she makes disclosures that are required or protected under the Sarbanes-Oxley Act of 2002. Sarbanes-Oxley includes several provisions regarding internal reporting of securities laws violations. In interpreting this provision, the SEC issued Rule 21F-2, which expressly allows an individual to gain anti-retaliation protection as a whistleblower without providing information to the SEC.

The District Court denied Digital Realty's motion to dismiss, and the Ninth Circuit affirmed. In particular, the Ninth Circuit found the statutory scheme ambiguous and held that the SEC's Rule 21F-2 warranted *Chevron* deference.[3]

In reversing the Ninth Circuit's decision, the Supreme Court unanimously held that the anti-retaliation provision must be interpreted in accordance with the statute's definition of a whistleblower. Because this definition was 'clear and conclusive' and 'Congress [had] directly spoken to the precise question at issue,'[4] *Chevron* deference to

1 *Digital Realty Trust, Inc. v. Somers*, No. 10-1276, 583 U.S. ___ (2018).

2 15 U.S.C. § 78u-6.

3 *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984). A court may not substitute its own interpretation of an implicit legislative delegation to an administrative authority for the authority's reasonable interpretation of the statute.

4 *Digital Realty Trust, Inc. v. Somers*, No. 16-1276, 583 U.S. ___ (2018).

the SEC's Rule was not appropriate. The Court reasoned that this interpretation was in line with Dodd-Frank's core objective of prompting reporting to the SEC.

The Court's decision settles a circuit split between the Second and Fifth Circuits on the issue. The Ninth Circuit had followed the Second Circuit's decision in *Berman v. Neo@Ogilvy*,[5] holding that a whistleblower need not report a securities law violation to the SEC. The Second Circuit concluded that the tension between the definition of 'whistleblower' and the protection provided by Dodd-Frank's anti-retaliation provision was sufficiently ambiguous to warrant *Chevron* deference to the reasonable interpretation of the SEC. In contrast, the Fifth Circuit held in *Asadi v. G E Energy*,[6] that employees must provide information to the SEC to avail themselves of the anti-retaliation safeguard. The Fifth Circuit held that Congress defined a whistleblower unambiguously and rejected the SEC's more expansive interpretation of that term.

Read the authors' chapter on 'Employee Rights: The US Perspective' in GIR's *The Practitioner's Guide to Global Investigations* **here**.

5 *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145 (2d Cir. 2015).

6 *Asadi v. G.E. Energy (USA), LLC*, 720 F.3d 620 (5th Cir. 2013).

Is voluntary disclosure to authorities outside the EU caught by the GDPR?

Femi Thomas and Tapan Debnath

Nokia Corporation

From 25 May, Article 48 of the General Data Protection Regulation (GDPR) restricts the ability of companies to transfer information out of the EU for the purpose of responding to orders or requests of foreign courts or authorities. Under the article, personal data can only be transferred outside the EU to respond to, for example, law enforcement or regulatory subpoena or production orders, or court orders for disclosure, through the mutual legal assistance treaty route or other provision of the GDPR. As the application of Article 48 is yet to be examined by the courts, it is unclear whether voluntary disclosure to the authorities is covered by Article 48.[1]

For the reasons set out elsewhere in this update, companies are likely to find that oral proffers of internal investigation interviews are no longer accepted by UK authorities.

Read the authors' chapter on 'Production of Information to the Authorities: The In-house Perspective' in GIR's *The Practitioner's Guide to Global Investigations* **here**.

1 See, for example, David J Kessler, Jamie Nowak and Sumera Khan, 'The Potential Impact of Article 48 of the GDPR on Cross Border Discovery from the United States', The Sedona Conference Journal, volume 17, 2016.

Part II

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Global Investigations around the World

China: Amended competition law and a new anti-corruption watchdog

Kyle Wombolt and Anita Phillips

Herbert Smith Freehills

Since publication of the second edition of *The Practitioner's Guide to Global Investigations*, there have been two key legislative and regulatory developments, as highlighted below.

The legal framework for civil bribery and IP-related offences like passing off, false advertising and trademark infringement was updated in January 2018. The amended Anti-Unfair Competition Law (AUCL) represents a mixed bag for corporates, with some revisions representing a subtle widening of offences, while others narrow their exposure. In terms of civil bribery, the scope of prohibited activity is now slightly broader, the categories of bribe recipients include state as well as private entities and individuals, and vicarious liability for acts of employees is expressly presumed. However, transaction counterparties are excluded from the categories of bribe recipients and demand-side bribery is no longer addressed. Overall, the AUCL confers enhanced enforcement powers on administrative authorities and increases civil and administrative penalties for unfair competition. The authorities wasted no time deploying the new law, with fresh investigations concerning alleged passing off and false advertising commencing immediately in January. Recent statements from China's State Intellectual Property Office have highlighted China's enhanced IPR regime, in part thanks to the updated AUCL. To date, published cases invoking the new law have all concerned trademark infringement. We await enforcement of the amended civil bribery provisions.

In terms of China's regulatory framework, various announcements were made at the 13th National People's Conference, including the creation of the powerful National Supervision Commission (NSC). This merges China's Communist Party's anti-graft watchdog, the Central Commission for Discipline Inspection, with other anti-graft departments, including the Ministry of Supervision. The NSC will monitor misconduct by China's 90 million Communist Party members but also managers of state-owned enterprises, hospitals, educational and cultural institutions, sports organisations and provincial and local government organs. This places an additional 60 million people under the organisation's remit. The NSC has been granted wide-ranging powers including rights to interrogate, detain (up to six months without charge), freeze assets and search premises. Although multinational companies will not fall directly under the NSC's purview, there is an increased risk that companies will become caught up in NSC investigations targeting the business dealings of state-owned entities and individuals. Companies should remain mindful of the heightened anti-corruption environment when investing in or setting up operations in China, particularly interactions with public officials and managers of state enterprises or bodies. The NSC represents the high watermark of President Xi Jinping's five year anti-corruption campaign, and there will no doubt be an uptick in surveillance and investigations in light of its creation. Recent figures indicate that in the last five years, almost 200,000 corruption and bribery cases involving over 250,000 individuals have been heard. Over US$150 million is estimated to have been recovered to date by the Chinese authorities.

Read the authors' chapter on 'China' in GIR's *The Practitioner's Guide to Global Investigations* **here**.

France: DPAs à la française on the rise

Stéphane de Navacelle, Sandrine dos Santos and Julie Zorrilla

Navacelle

French legislation was recently amended to reflect a strong will to increase the efficiency of prosecutions in white-collar crime, mirroring mechanisms existing in US and UK statute.

Internal investigations in France have started to penetrate the French legal and corporate culture under the influence of the practices of companies and authorities in the United States and the United Kingdom. This leads to new challenges in terms of attorney–client privilege, notably in that professional secrecy does not apply between lawyers and employees during their interviews.

This new vision of the necessity to fight against financial misconduct is also portrayed by the extraterritorial reach of the Sapin II law. This provides that French law is applicable to offences of corruption of foreign public officials committed abroad by French persons, French residents and foreign entities with all or part of their economic activity based in France, without having to comply with all the usual extraterritoriality requirements – dual-criminality, a complaint from the victim or a formal complaint from the state.

Sapin II stresses the imperative for companies to have anti-corruption compliance programmes by the establishment of a new anti-corruption agency (AFA) with monitoring and sanctioning mandates. Within the framework of the recent anti-corruption compliance programme, Sapin II also has extraterritorial reach in that it applies to foreign entities exercising their economic activity on French territory.

2018 has seen the beginning of a more frequent use of judicial public interest agreements. These agreements were implemented by the 2016 Sapin II law and are more or less the French equivalent of a DPA. Under the spotlight however, their weaknesses become somewhat apparent.

Two more judicial public interest agreements have been signed with the Nanterre Public Prosecutor's office, by Set Environnement and Kaefer Wanner, prosecuted for corruption on 14 and 15 February, respectively. These agreements enable a company to negotiate a fine without facing the reputational burden of a trial. They compel Set Environnement and Kaefer Wanner to pay a public interest fine of €800,000 and €2.71 million, respectively, and follow a compliance programme of 18–24 months to ensure the existence and implementation of policies and procedures for the detection and prevention of corruption. Société Générale signed the most recent judicial public interest agreement with the National Financial Prosecutor on 24 May, which was approved by the Paris Court on 4 June. This agreement ends investigations relating to transactions with Libyan counterparties, including the Libyan Investment Authority (LIA) and suspicions of corruption of foreign public officials, and compels the bank to pay a public interest fine of €250 million. Société Générale must also establish an anti-corruption programme that will be closely monitored by the AFA for two years to ensure the quality and effectiveness of the preventive measures . Société Générale will bear the costs of the monitorship up to €3 million. The bank has also signed a joint deferred prosecutions agreement with the US Department of Justice for the LIA and LIBOR cases and an order with the Commodity Futures Trading Commission on the LIBOR case.

The appearance of such mechanisms begs the question of whether foreign authorities, namely the United Kingdom's and United States', will view them as strict enough on corporations. For instance, under judicial public interest agreements the gains made through a company's misconduct are not confiscated, instead a fine proportionate to the gain is levied. Parallel settlements by foreign entities may therefore be initiated to compensate for this perceived leniency, putting the principle of *ne bis in idem* in peril. Also, the PNF has yet to demonstrate its ability to lead a major international anti-corruption case alone and achieve settlement; the implementation of Sapin II is still in its early phases but the AFA and PNF are very much on board.

Double-jeopardy protection has also been curtailed on an international level by a recent decision of the French Supreme Court on 14 March, whereby Article 14.7 of the International Covenant on Civil and Political Rights enshrining the principle of *ne bis in idem* for unique facts within the same jurisdiction is not applicable in the case of prior convictions in foreign jurisdictions.

These measures contribute to building a strong legislative framework to combat financial crime that, however, needs to be put into practice.

Read the authors' chapter on 'France' in GIR's *The Practitioner's Guide to Global Investigations* **here**.

India: Fugitive Economic Offenders Ordinance, 2018

Srijoy Das, Disha Mohanty and Harsahib Singh Chadha

Archer & Angel

Over the past year, numerous cases relating to misappropriation, fraudulent transactions and other white-collar crimes have been unearthed in India. Most of these cases have involved high-level executives of large corporations, who fled the country prior to charges being filed to avoid prosecution. This has led to the Indian government tabling the Fugitive Economic Offenders Ordinance, 2018 (Ordinance), which came into force on 21 April and provides various measures to deter fugitive economic offenders from evading the process of law in India by remaining outside the jurisdiction of the Indian courts.

The Ordinance defines a 'fugitive economic offender' as an individual against whom a warrant for arrest (in relation to specific offences as provided by the Ordinance, including but not limited to fraud, forgery, counterfeiting, corruption, money laundering, insider trading) is issued by any court in India, who has left India with an intention to avoid criminal prosecution; or being abroad, refuses to return to India to face criminal prosecution. Further, 'proceeds of crime' have been defined as any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to specific offences as provided in the Ordinance or the value of any such property, or where such property is taken or held outside the country, then the property equivalent in value held within the country or abroad.

The Ordinance provides for the following:

- US$15 million threshold: Only those cases where the total value involved in the offence is US$15 million or more will be within the purview of the Ordinance.
- Attachment of property: The respective authorities may, with prior permission of the Special Court, attach any property owned by the fugitive economic offender in India or abroad for 180 days from the date of attachment.
- Declaration of fugitive economic offenders: Where the authorities have a valid apprehension that an individual is an economic offender, and is likely to flee the country, they may, through a Special Court petition, have such person declared a fugitive economic offender under the Ordinance, subject to production of relevant documentation.
- Subsequent to declaration as a fugitive economic offender, the Special Court may order the proceeds of crime in India or abroad, whether or not such property is owned by the fugitive economic offender and any other property or *benami* (transactions where persons who pay for property do not buy it in their own name) property in India or abroad, owned by the fugitive economic offender to be confiscated by the central government.

Until a robust Fugitive Economic Offender Bill is passed by the Parliament, the Ordinance aims to be an effective tool for preventing economic offenders from fleeing the country.

Read the authors' chapter on 'India' in GIR's *The Practitioner's Guide to Global Investigations* **here**.

New Zealand: Judicial guidance on compelled production of information

Polly Pope, Kylie Dunn and Emmeline Rushbrook

Russell McVeagh

The ability of New Zealand's financial markets regulator to disclose information obtained through a compulsory notice was recently considered by the High Court. The Financial Markets Authority (FMA) had compelled information from a bank and wished to disclose it to investors in a failed company. The FMA's reasons for doing so were to obtain additional information from those investors and to enable the investors to evaluate the merits of legal action. (The High Court discounted the first of these reasons as non-operative.) In addition, the FMA has a statutory power to 'stand in the shoes' of investors and bring a claim on their behalf. The FMA wanted to disclose the information to enable it to decide whether to take such a step.

The bank successfully judicially reviewed the FMA's decision to disclose the information to investors. Justice Fitzgerald in the High Court held that the basic principle is that the disclosure of information acquired by compulsion ought only be done if reasonably necessary to achieve the relevant statutory purposes. Here, disclosure was not reasonably necessary for the FMA to decide whether to bring a claim on behalf of investors. Further, the FMA's main objective is public rather than private. The investors' interests were private, and, as such, the investors did not have a 'proper interest' in receiving the information.

Read the authors' chapter on 'New Zealand' in GIR's *The Practitioner's Guide to Global Investigations* **here**.

Nigeria: Enforcement against Yahoo Boys brings little cheer for victims

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Sofunde, Osakwe, Ogundipe & Belgore

'Nigerian scams' have been with the world for decades now. They have evolved from unsolicited faxes sent out in the 1980s and 1990s to spam email. Evidence of the success of people engaged in this activity is to be found in Nigeria's large cities, such as Lagos and Abuja, where young men (they are, in the main male) can be seen enjoying lavish lifestyles, driving exotic cars and spending remarkable amounts of money on entertainment and such. All this being done with no evident source for the income used to enjoy such lifestyles. The Economic and Financial Crimes Commission (EFCC), the Nigerian agency charged with enforcing laws aimed at combating economic crimes, regularly endeavours to disrupt the activities of these people, known in Nigeria as 'Yahoo Boys', and

celebrated in a 2008 hip hop hit 'Yahooze', to which even former US Secretary of State Colin Powell was pictured dancing at the Royal Albert Hall in London. Recently, as part of these efforts to disrupt the activities of Yahoo Boys, the EFCC reportedly conducted a raid outside a popular Lagos nightclub, where it was claimed more than 12 suspected internet fraudsters were arrested and a number of cars seized.

Although this action by the EFCC is commendable, it would appear that the vast majority of the victims of such fraud are frequently unable to recover their lost funds. This is not the result of any inefficiency on the part of the law enforcement agencies. It is, rather, a consequence of the victims tending to reside outside Nigeria, and having been, individually, defrauded of relatively small sums of money. The victims have not lost sufficient sums to justify the costs of seeking recovery in civil actions. They are also unable to seek recovery by way of post-conviction forfeiture orders against the perpetrators because, to secure a conviction, the victims are usually required to come to Nigeria to give evidence. For most victims, who tend to be ordinary people transferring funds either to invest in fake enterprises, or to assist 'romantic partners' they met online, and who may have got into financial difficulties and require loans, the costs of travel to Nigeria are usually unaffordable.

Therefore, while reported raids may make it look as if the EFCC is achieving results, most, if not all, of the suspects arrested will escape prosecution, owing to insufficient evidence to secure a conviction if, as is usually the case, their victims were outside Nigeria. The victims will therefore remain unable to obtain recovery of lost money.

Collective action facilitated by the EFCC could conceivably resolve the injustice.

Read the authors' chapter on 'Nigeria' in GIR's *The Practitioner's Guide to Global Investigations* **here**.

Singapore: There's only 1MDB, but there are many investigations under way

Mahesh Rai

Drew & Napier LLC

1MDB investigations

The 1MDB investigations are still the highest-profile investigations under way in Singapore.

Following the conviction of 4 ex-employees of BSI Bank for varying offences ranging from failure to report suspicious transactions to forgery and cheating, the Singapore police are now examining Goldman Sachs's role in the 1MDB deals and its links with Malaysian financier Low Taek Jho.

The police's initial interviews with current and former Goldman Sachs employees involved in the 1MDB bond offerings were conducted in October 2017. Investigators have said that the bank itself is not the focus of the investigation, and neither Goldman Sachs's current nor its former employees have been publicly accused of criminal offences or charged in relation to the 1MDB investigations.

In March 2017, prior to the police investigations, MAS issued Tim Leissner (a former director of Goldman Sachs Singapore who was the lead banker in the 1MDB bond deals) with a prohibition order barring him from the financial industries in Singapore for 10 years.

To date, no other individuals from Goldman Sachs have been implicated as a result of the investigations by MAS and the police.

Petrobras corruption case

In December 2017, the US Justice Department announced that Keppel Offshore & Marine had agreed to pay US$422 million under a deferred prosecution agreement (DPA) to resolve investigations by authorities in the United States, Brazil and Singapore into a massive corruption scandal involving Brazil's state-run oil company, Petrobras, and Keppel, a Singapore company listed on the mainboard of the Singapore Exchange.

According to US court documents, Keppel paid US$55 million in bribes between 2001 to 2014 to Petrobras officials and the Workers Party of Brazil, the governing party for the majority of that time.

The bribes were paid to secure 13 contracts with Petrobras and Sete Brasil Participações SA, a Brazil company that commissioned a fleet of rigs for Petrobras's use.

On 23 December 2017, the Singapore authorities issued a conditional warning to Keppel. Singapore authorities have stated that this was issued in lieu of prosecution for corruption offences and was part of the global resolution under the DPA.

Under the conditional warning, Keppel committed to certain undertakings to pay a total of about US$105.6 million to Singapore within three years from the date of the warning, less any penalties paid to the Brazilian authorities during that period.

The payments represented part of the total criminal fine to be paid by Keppel under the DPA.

In February, several former key executives of Keppel were arrested in connection with the Singapore authorities' investigation into the corruption scandal.

The investigations in respect of the individuals involved are ongoing.

On 13 March, three months after the conditional warning was issued to Keppel, deferred prosecution agreements were introduced in Singapore through the Criminal Justice Reform Act. However, DPAs have not been used in Singapore to date.

Read the author's chapter on 'Singapore' in GIR's *The Practitioner's Guide to Global Investigations* **here**.

United Kingdom: KBR, XYZ and DPIAs

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Pinsent Masons LLP

Unaoil

In April, the criminal investigation by the Serious Fraud Office (SFO) into Unaoil and companies connected with it faced a further challenge by way of a judicial review brought by KBR, which challenged the legitimacy of the SFO's use of a notice issued under section 2(3) of the Criminal Justice Act 1987 to compel the production by a US company of material held by that company overseas. The notice was served on the company through a company officer, who was in the United Kingdom to attend a meeting with the SFO, but resided and worked in the United States. Judgment is awaited at the time of writing.

In November 2017 the first charges were brought in relation to the Unaoil investigation. Four individuals including Basil Al Jarah, Unaoil's Iraq partner, and Ziad Arkle, Unaoil's territory manager for Iraq, were charged with conspiracy to make corrupt payments to secure the award of contracts in Iraq to SBM Offshore. In May, Mr Al Jarah and Mr Arkle were charged with additional charges of making corrupt payments to secure the award of a contract in Iraq for Leighton Contractors Singapore PTE Ltd.

SFO v. XYZ

In April, in *R (on the application of AL) v. SFO*[1] the High Court in England considered the SFO's disclosure obligations in the context of a criminal trial of individuals following the entry by XYZ Limited into a DPA in July 2016. The SFO refused to seek the disclosure of the notes of an internal investigation carried out by XYZ, accepting XYZ's assertion that they were privileged. AL sought a judicial review of the Crown Court's decision not to order disclosure. Although the High Court declined jurisdiction for the application, it stated that the initial notes of interview would not be privileged, in the light of the *ENRC* decision and that the SFO and the Crown Court had reached the wrong decision. The SFO was criticised for not seeking the notes from XYZ in the course of its investigation and for relying instead on 'oral proffers'.

Consequently, when conducting internal witness interviews in internal investigations in the United Kingdom, companies should be mindful that: (1) privilege claims over interview notes are no longer likely to be accepted as a matter of course; (2) failure to provide interview notes is likely considered un-cooperative; and (3) prosecuting authorities are likely to take steps to compel the production of interview notes.

Data protection

Since the introduction of the General Data Protection Regulation on 25 May it has been mandatory to conduct data protection impact assessments (DPIAs) before undertaking data processing activities which are 'likely to result in a high risk to the rights and freedoms of natural persons'.

In practical terms, the DPIA process will mean that before undertaking an internal investigation, or indeed any processing of data, the nature and scope of the investigation should be considered and documented, including (1) an assessment of the necessity and proportionality of the investigation; (2) risks to individuals' privacy, rights and freedoms that may arise; and (3) any steps that will be taken to mitigate or eliminate those risks.

Read the authors' 'United Kingdom' chapter in GIR's *The Practitioner's Guide to Global Investigations* **here**.

1 [2018] EWHC 856 (Admin).

United States: Will recent DOJ policy changes lead to more voluntary disclosures?

Michael P Kelly

Hogan Lovells

During the Trump administration, the United States Department of Justice (DOJ) has tried to incentivise voluntary disclosures of misconduct by corporations. Deputy Attorney General Rod Rosenstein has led the initiative, announcing a series of changes to internal DOJ policies designed to provide greater transparency and predictability to the DOJ's exercise of its prosecutorial discretion.

In November 2017, Rosenstein announced the FCPA Corporate Enforcement Policy, which succeeded the FCPA Pilot Program, and explains when and how the government expects to give credit to companies for voluntary self-disclosures, full co-operation, and timely and appropriate remediation in foreign bribery cases. This policy sets forth benefits that the DOJ will confer on companies who meet its 'rigorous criteria'. The most important benefit

is a general 'presumption' that the DOJ will decline to bring criminal charges against those companies. If a criminal resolution is necessary, the DOJ Criminal Division's Fraud Section will (1) seek a 50 per cent reduction off the low end of the fine range set forth in the federal sentencing guidelines; and (2) not require the appointment of a monitor if the company had an effective compliance programme.

In March, senior officials in the DOJ's Criminal Division stated that the principles of the FCPA Corporate Enforcement Policy might apply in other types of cases. As proof, these officials pointed to a declination that it recently gave to Barclays PLC in a fraud and market manipulation case.

In May, Rosenstein announced a policy against the 'piling on' of penalties in parallel or joint investigations or proceedings arising from the same misconduct. Under this policy, when multiple DOJ offices are involved in parallel investigations, DOJ attorneys 'should' coordinate with each other to avoid 'unnecessary imposition' of duplicative fines, penalties and forfeitures. When foreign or state law enforcement authorities are investigating the misconduct, DOJ attorneys 'should also endeavor, as appropriate' to consider fines, penalties and forfeitures imposed by the other authorities.

Will these policy changes make a difference to companies on the fence about whether to make voluntary disclosures? For some companies, it might. There can be powerful reasons to make voluntary disclosures, and the existence of a clear written roadmap and policies by the DOJ may reduce the uncertainties.

Other companies will view a voluntary disclosure as requiring a leap of faith, notwithstanding the policy changes. The Justice Department's policy changes were incorporated into the US Attorneys' Manual, but that does not provide any substantive rights to companies. The DOJ has an incentive to show that it is following its policies, but it still retains a wide amount of discretion. No court is likely to restrict that discretion because the DOJ has issued a series of non-binding policies.

And there are a number of traps that can ensnare companies hoping to rely on the policies. Did the company fail to voluntarily disclose the misconduct? Will the DOJ accuse the company of not co-operating with its investigation? Will the DOJ view the company's remediation efforts as inadequate or insincere? Was executive management involved in the misconduct? Did the company make a significant profit from the misconduct? Will the DOJ conclude that the company's compliance programme was ineffective? If any of these answers are yes, there is a significant risk that the company will not receive the full – or potentially any – benefits of the FCPA Corporate Enforcement Policy.

Similarly, there may be situations where companies will not benefit from DOJ's policy against the 'piling on' of penalties in parallel cases arising from the same misconduct. Will the DOJ argue that the different enforcement proceedings are not dealing with the same misconduct? Will the DOJ argue that higher penalties are warranted because of the egregiousness of the company's misconduct? Or that higher penalties are necessary to vindicate the interests of justice in a particular case?

These are the types of questions that can make a company hesitate before making voluntary disclosures. Many of these questions involve nuanced issues of subjective judgment, where reasonable minds can disagree. It may be unclear in many circumstances whether the benefits of a voluntary disclosure will outweigh the costs. Because of that uncertainty, many companies will continue to struggle with the question of voluntary disclosures even after the DOJ's policy changes.

Read the authors' 'United States' chapter in GIR's *The Practitioner's Guide to Global Investigations* **here**.

Launch Event

GIR

Global Investigations Review

Photos from the launch party of the second edition of GIR's *The Practitioner's Guide to Global Investigations*. The event was held at the Law Society of England and Wales on Chancery Lane in London.

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