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The Practitioner's Guide to Global Investigations

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Since the fourth edition of the Practitioner's Guide was published in January, notable UK judgments and a change to US prosecutorial guidance, not to mention authorities' reaction to the pandemic, have caught our editors' attention. For this newsletter, they have identified the most significant recent developments in the transatlantic investigations space and asked a series of experts to report on them.

The newsletter opens with a piece by one of the Guide's editors, Judith Seddon of Ropes & Gray, updating readers on how enforcers in the United Kingdom have responded to the challenges the coronavirus has created. Some authorities have reacted quickly to keep their cases on track, while looking out for new examples of misconduct enabled or provoked by the crisis; others, weighed down by prior inefficiencies, have been less agile. The second article is written by Susannah Cogman of Herbert Smith Freehills along with Nicholas Purnell QC of Cloth Fair Chambers. Their piece reviews the record-breaking DPA with Airbus and considers the lessons companies seeking a settlement can draw from it, including encouraging confirmation for companies that all is not lost for companies that initially fail to self-report. Our third update, written by *Practitioner's Guide* co-author Amanda Raad, also of Ropes & Gray, shifts our focus to the United States, and recent guidance from the Department of Justice on how prosecutors evaluate a company's compliance programme – and whether it is taken seriously and actually works – when deciding whether to start an investigation, bring charges or settle. In our fourth article, co-authors Kelly Hagedorn and Robert Dalling of Jenner & Block in London look back on a bad setback for the National Crime Agency, which saw unexplained wealth orders relating to £80 million of private property they had obtained being discharged by a judge who also upbraided the agency for failings in its investigation.

We hope readers find this newsletter, which should be read alongside the fourth edition, informative and insightful. The developments described below have a bearing on many other chapters in the *Practitioner's Guide*, links to which are included below.

The fifth edition is being fully revised and expanded to include new substantive topics and to provide comprehensive primers on the law of internal and government investigations in several jurisdictions not featured in the current edition of Volume II.

The publisher invites readers to send in their comments on this newsletter and the fourth edition of *The Practitioner's Guide to Global Investigations* to david.samuels@lbresearch.com.

Crackdown during lockdown: enforcement by UK authorities during covid-19

Judith Seddon

Ropes & Gray LLP

As the UK lockdown eases, enforcement authorities are beginning to move from crisis management to something resembling their pre-pandemic roles. As with so many aspects of life over recent months, much remains uncertain about how conduct will be investigated during the crisis, how and when enforcement authorities will take action, and whether previously established norms in relation to criminal investigations and proceedings will be replaced or reshaped.

In addition to causing huge disruption, the crisis has tested authorities' abilities to progress ongoing investigations and proceedings, to adapt ways of working and to shift their focus to address new priorities. Some have done so nimbly and effectively. For others, the crisis has highlighted pre-existing inefficiencies. This article rounds up the approaches UK enforcement authorities have taken to date and looks at what corporates and individuals who are already, or may become, the subjects of investigations may expect in the near future.

Criminal investigations and proceedings

Covid-19 has given rise to new workstreams for criminal investigators and prosecutors, and has forced them urgently to re-order priorities as their resources and the ability of courts to progress cases have been severely curtailed.

The Interim Charging Protocol formulated jointly by the Crown Prosecution Service (CPS) and National Police Chiefs Council at the end of March gives guidance about 'what new offences are fed into the system and how those offences are progressed'. The Interim Case Review Guidance produced by the CPS on 14 April directed prosecutors to carefully review whether to initiate or continue prosecutions in the current climate, and to bear in mind the 'expanding pipeline of cases waiting to be heard'. It directs prosecutors to treat the covid-19 pandemic as a 'change in circumstances' under paragraph 3.6 of the Code for Crown Prosecutors,[1] suggesting that in some cases prosecutors may decide to discontinue proceedings or offer no evidence, offer an out-of-court disposal, or accept a guilty plea to some, but not all, charges or to a less serious offence. Both these documents make it clear that the criminal justice system cannot cope with the current volume of cases. Notwithstanding that the Interim Case Review Guidance states that '[i]n the majority of cases, there will be no impact at all, and the public interest will lie with continuing the prosecution', the overarching message clearly has the potential to undermine public confidence in the criminal justice system.

Inevitably, the already enormous backlog of criminal cases has grown. On 23 March all new jury trials were suspended, pending consideration of measures to ensure the safety of all court users. The recommencement of jury trials (at only a handful of designated courts) has eased some immediate difficulties by enabling ongoing or scheduled cases to progress. For example, the trial of three former oil executives at Unaoil, one of the first trials to be suspended mid-proceeding, recommenced in early May, relocating to the Central Criminal Court from Southwark Crown Court, currently shut. Social distancing was achieved by counsel and jury swapping places, with only one defendant in the dock, and the other two participating by telephone, due to health issues.

1 The relevant part of para. 3.6, Code for Crown Prosecutors reads: 'Prosecutors review every case they receive from the police or other investigators. Review is a continuing process and prosecutors must take account of any change in circumstances that occurs as the case develops. . . . Prosecutors and investigators work closely together, but the final responsibility for the decision whether or not a case should go ahead rests with the CPS.'

However, the partial recommencement of trials means that only a fraction of jury trials that were in train pre-pandemic are now taking place, increasing the backlog and, inevitably, leading to calls for some form of suspension or abrogation of jury trials, or indeed the use of virtual jury trials.[2] Scotland's First Minister proposed the suspension of jury trials for 18 months as well as diluting rules of evidence, before the proposals were withdrawn following significant opposition.[3] In England and Wales there have been calls for a form of 'jury waiver' system, whereby a defendant could waive their right to be heard by a jury, and opt instead for a judge-only trial, similar to the system that exists in many Australian states.[4] More recently, the Lord Chief Justice has said that consideration should be given to limiting the availability of jury trial for offences triable 'either way', that is, before a jury or a magistrate's court. He said, 'A possibility that I believe is worthy of consideration by policymakers is to legislate to enable, for a short time, the disposal of either-way trials in the Crown Court by a judge sitting with two magistrates.'[5]

In terms of investigations, while the Serious Fraud Office (SFO) issued an announcement on 7 May stating that it continues to pursue lines of enquiry in ongoing investigations and to examine referrals and other 'pre-investigation' matters, there have been delays to cases not least arising from the SFO's reluctance to use video-conferencing options for interviews. Of course, even before the pandemic, case progression was subject to significant delays. The SFO's announcement on 2 June that it has introduced measures to improve its efficiency and effectiveness is a welcome one. Measures include having in place a 'digital strategy' for seized material (to ensure, among other things, that material seized is proportionate) and publishing a monthly bulletin 'to collect and publicise new innovative ways of working and best practice guidelines drawn from case learning'.[6]

Meanwhile HM Revenue and Customs, whose resources have been required to administer economic rescue packages, indicated in mid-April that it was pausing certain compliance investigations. Which of those included criminal inquiries, and whether or when these investigations will be re-commenced, has not yet been made clear.

The National Crime Agency has taken the lead on tackling some of the immediate criminality arising from the outbreak (for example scams relating to testing and personal protective equipment). In its role as the United Kingdom's Financial Intelligence Unit, it has recognised the growing prevalence of covid-19 related criminality and consequent money laundering, assigning a designated code to covid-19 related suspicious activity reports.

Financial services

The Financial Conduct Authority has had to respond quickly and decisively to the outbreak. It has made frequent and rapid changes to consumer-protection rules (particularly for financial services consumers deemed to be high-risk). It fired shots across the bows of firms that may be inclined to seek to use the crisis to secure favourable revisions to rules, indicating in March that it would take such approaches into account at a later date when assessing firms' cultures.

On occasions, it has used the Senior Managers and Certification Regime to exert leverage over firms, but it has not indicated the types of 'reasonable steps' it has expected Senior Managers to take during such abnormal times. Although it has recognised the practical difficulties faced by firms and their senior executives in dealing with the pandemic, it is expected that the subsidence of the emergency phase will lead an extensive reviews of firms' preparedness and the actions of their executives, which could lead to heightened enforcement activity in due course.

2 JUSTICE, 'JUSTICE COVID-199 Response', available at https://justice.org.uk/our-work/justice-covid-19-response/.

3 Geoffrey Robertson, 'Coronavirus has stopped trials by jury, and that's not necessarily a bad thing' (*The Guardian*, 26 April 2020), available at https://www.theguardian.com/commentisfree/2020/apr/26/coronavirus-judges-trial-by-jury-justice.

4 Ibid.

5 'Limits on jury trials may be needed says LCJ' (*Law Society Gazette*, 16 June 2020), available at https://www.lawgazette.co.uk/law/limits-on--jury-trials-may-be-needed-says-lcj/5104649.article.

6 Serious Fraus Office, 'Response to HMCPSI Case Progression Review – October 2019', available at https://www.sfo.gov.uk/download/response-to-hmcpsi-case-progression-review-october-2019/.

Antitrust and consumer protection

The Competition and Markets Authority (CMA) has communicated proactively throughout the crisis. It has given comfort that it will not take enforcement action in respect of temporary coordination between firms (provided it is appropriate and necessary, in the public interest, to the benefit or wellbeing of consumers and lasts no longer than necessary). Correspondingly, it has made clear that enforcement action will follow to address the areas it has identified as priorities (namely event, holiday accommodation and childcare provision). It has already commenced investigations to address more than 60,000 complaints received from consumers.

Resource constraints have led it to suspend some larger investigations, but none are expected to be permanently discontinued as the result of the outbreak.

Data protection and privacy

On 15 April, the Information Commissioner's Office (ICO) set out its regulatory stance during the covid-19 emergency,[7] promising 'an empathetic and pragmatic approach' to its statutory function. It said that it would continue to act proportionately in deciding whether to take regulatory action 'taking into account the particular challenges being faced at this time'. On 5 May, the Information Commissioner published a blog post setting out how the ICO has reshaped its priorities for the coming months.[8] The Commissioner explained that the ICO has three primary areas of focus: (1) protecting the public interest; (2) enabling responsible data sharing; and (3) monitoring intrusive and disruptive technology. More specifically, the ICO is actively identifying and taking action against those seeking to use or obtain personal data unlawfully during covid-19, when many are especially vulnerable to financial or other loss; and its work is also aligned to the priority of shaping proportionate surveillance, for example contact tracing, testing and other emerging surveillance issues. Operationally, while some ICO projects are being paused, it continues to deal with complaints and investigate data breach reports.

Covid-19's legacy

In the same way the pandemic has forced the health service to rethink how healthcare is delivered (through the use of video consultations for example), it presents opportunities for the criminal justice system to modernise and become fitter for purpose. Apart from a greater ability to work remotely and with more agility, the legacy of covid-19 should be a better use of artificial intelligence and technology to progress investigations and proceedings, including trials. There is likely to be a greater willingness to consider whether previously regarded 'fundamental rights' (such as trial by jury) should be moderated or recast. The use of deferred prosecution agreements (DPAs), facilitating and expediting the process of investigating and sanctioning corporate criminal activity, is likely to continue – but again, the process for arriving at DPAs needs to be more efficient.

Whatever else, given the already bulging pipeline of cases and the likely spike in fraud and corruption cases post-pandemic, there will be an urgent need, and pressure on regulators, prosecutors, judges and the defence bar, to embrace reform of the criminal justice system.

FURTHER READING

Read the 'Introduction', by Judith Seddon, Eleanor Davison, Christopher J Morvillo, Michael Bowes QC, Luke Tolaini, Ama A Adams and Tara McGrath in GIR's *The Practitioner's Guide to Global Investigations*.

7 Information Commissioner's Office, 'The ICO's regulatory approach during the coronavirus public health emergency', 15 April 2020, available at https://ico.org.uk/media/about-the-ico/policies-and-procedures/2617613/ico-regulatory-approach-during-coronavirus.pdf.

8 Elizabeth Denham, Information Commissioner, 'Blog: Information Commissioner sets out new priorities for UK data protection during COVID-19 and beyond', 5 May 2020, available at https://ico.org.uk/about-the-ico/news-and-events/news-and-blogs/2020/05/new-priorities-for-uk-data-protection-during-covid-19-and-beyond/.

Airbus DPA underlines that an initial self-report may not be necessary, but company receives a jumbo-sized fine

Susannah Cogman (Herbert Smith Freehills LLP) **and Nicholas Purnell QC** (Cloth Fair Chambers)

In January, Dame Victoria Sharp, the President of the Queen's Bench Division, approved the deferred prosecution agreement (DPA) between the Serious Fraud Office (SFO) and Airbus SE, the ultimate parent company of the Airbus Group, in Southwark Crown Court.[1] Under the DPA, Airbus was required to pay nearly €991 million to the SFO – more than the combined total of all previous financial settlements under UK DPAs.

The DPA brought the SFO's joint investigation with the French National Financial Prosecutor (PNF) into Airbus to a close, and it was coordinated with a judicial public interest agreement (CJIP) to resolve investigations in France and parallel settlements with the US justice and state departments, resulting in an agreement to pay, across jurisdictions, more than €3.5 billion.

The UK DPA concludes[2] the SFO's investigation with respect to orders and sales of aircraft in five jurisdictions. The agreed statement of facts describes the conduct underlying the corresponding counts of 'failure to prevent bribery', contrary to section 7 of the Bribery Act 2010 (UKBA), between 1 July 2011 and 1 June 2015.

Setting aside the headline-grabbing level of the financial penalties, there are a number of features of interest in the case, which we discuss in overview in this article.

Jurisdictional scope of the 'failure to prevent' offence

This is the first UK DPA entered into with a foreign-incorporated entity.

The 'failure to prevent' offence created by section 7 of the UKBA applies not only to UK-incorporated companies but also, *inter alia*, to bodies corporate (wherever incorporated) which carry on a business, or part of a business, in the United Kingdom. Understandably, the question of what 'carrying on part of a business' in the country entails has been an area of lively debate since the UKBA's enactment.

The Ministry of Justice's 'adequate procedures' guidance, issued pursuant to section 9 of the UKBA, suggests that 'having a UK subsidiary will not, in itself, mean that a parent company is carrying on business in the United Kingdom, since a subsidiary may act independently'. The guidance notes, however, that this is ultimately a matter for the court.

In the *Airbus* case, it appears that the parties agreed that Airbus did carry on business in the United Kingdom on the basis that Airbus SE had two UK subsidiaries, and those companies were subject, through intermediary holding companies, 'to the strategic and operational management of Airbus SE'. While the point was presumably not argued (as it was not disputed), Sharp P commented that 'it follows from these facts, and indeed is common ground', that Airbus SE was subject to section 7.

No doubt there were factors that fed into Airbus's strategic decision to accept UKBA jurisdiction (and which are not apparent from the judgment), but, in the absence of further clarification, this is significant. There is clearly scope for a narrower reading of section 7, and the *Airbus* case will likely be referenced by the SFO to support a claim to jurisdiction in future matters where a culpable parent is located outside the United Kingdom.[3]

1 *Director of the Serious Fraud Office v. Airbus SE*, 31 January 2020, Case No. U20200108.

2 Other than in relation to the SFO's separate investigation into Airbus's subsidiary, GPT (Special Project Management) Ltd, which remains ongoing.

3 Similarly, it appears that Airbus accepted US jurisdiction for some violations with a relatively limited US nexus (but in line with previous assertions of the scope of US jurisdiction by US prosecuting authorities).

International co-operation

A second feature of the case was the extent of international co-operation between the prosecuting authorities, each of which took responsibility for specific geographic regions or customers.

A joint investigation team agreement (JITA) – which is novel in the DPA context – was entered into between the SFO and PNF. It seems that one reason for this was to ensure access to relevant information that the SFO would otherwise have been unable to receive because of the French blocking statute prohibiting certain disclosures of information by French persons in foreign proceedings. The PNF also took primacy over a number of aspects of the case.

The extent of international co-operation, the steps taken to facilitate compliance with local law (and the particularly thorny issue of the blocking statute) and to avoid overlap between investigations (by 'dividing up' the conduct) shown in this case will be welcomed by companies.

Self-reporting

Airbus was found to have co-operated with the SFO to 'the fullest extent possible' in respect of self-reporting, despite getting off to a slow start.

From late 2013, Airbus had identified concerns in relation to its processes for the engagement of 'business partners', and started to address these in 2014. In 2015, Airbus conducted a review of declarations regarding business partners in previous applications for export credit finance to government body UK Export Finance (UKEF), which led to reports to UKEF in early 2016. These reports were contractually required, but were made 'on the understanding that the information could be shared with other relevant UK agencies'. Subsequently, UKEF notified Airbus that it would contact the SFO, and encouraged Airbus to do so. Both UKEF and Airbus reported to the SFO in April 2016.

Sharp P acknowledged that the 'true catalyst' for the self-report to the SFO was the dialogue with UKEF, but noted that Airbus had identified 'red flags' to UKEF when Airbus knew that UKEF considered itself obliged to report corruption. Sharp P also took 'self-reporting' to encompass all subsequent self-reports that were of a high-quality and brought significant wrongdoing to light. This is similar to the approach taken in *Rolls-Royce*, where there was no initial self-report, but the company subsequently disclosed information that was 'far more extensive (and of a different order) than what may [otherwise] have been exposed'.[4]

The result is a growing body of cases suggesting that a DPA may be available in the absence of an initial self-report, providing there is sufficiently extensive subsequent co-operation and ongoing reporting of 'new' misconduct. Further, a report to a body that it is known will pass information to the SFO may attract some 'co-operation credit'.

This must be right: there does not appear to be any reason in principle why self-reporting should outweigh all other factors in assessing whether a DPA should be available. Companies should, however, bear in mind that all DPA judgments to date emphasise the importance of early, proactive, self-reporting; and the decision to open DPA negotiations remains at the discretion of the SFO.

The 'interests of justice': co-operation and compliance

The court must assess whether a DPA is in the interests of justice; Sharp P's view was that it was, notwithstanding a level of criminality she described as 'grave'.

Factors in favour of a DPA included Airbus's self-reporting, its subsequent co-operation, its status as 'a changed company' and the potential disproportionate collateral impact of a criminal prosecution.

4 *Serious Fraud Office v. Rolls-Royce plc (1) and Rolls-Royce Energy Systems Inc (2)*, 17 January 2017, Case No. U20170036.

Sharp P refers to 24 matters demonstrating the level of Airbus's co-operation. These cover a broad range of activity, and some appear to reflect usual investigation management practices (e.g., the collection and de-duplication of documents from custodians, or the use of predictive coding in document review) – perhaps suggesting an attempt to categorise as much conduct as possible as 'co-operation'. Other more informative items include presentations to the SFO about the company's internal investigation; coordination regarding interviews (including the provision of interviewee 'first accounts'); updating the SFO on further identified activity of concern; and, the 'unprecedented' acceptance of UKBA jurisdiction.

The Crown Court reaffirmed the importance of corporate compliance reform when determining whether a DPA is in the interests of justice. The nature of Airbus's reform included independent compliance reviews and the restructuring of its ethics and compliance leaderships and functions. A further step was Airbus's significant reduction in the use of external consultants across the group.

Risk of debarment

A substantial factor in favour of the DPA was the company's risk of debarment from public contracting in the event of a successful prosecution. Sharp P recognised that debarment would affect thousands of Airbus employees, its share price and suppliers. The judgment noted a report that the company's debarment could decrease the GDP of the United States, the United Kingdom, France, Germany and Spain by over €100 billion.

This approach is different to that suggested by Mr Justice William Davis in the *Serco Geografix* DPA, in which he expressed reservations about placing weight on the risk of mandatory debarment to support a DPA, on the basis that this would arguably involve the court in making a quasi-political decision. It should be recognised, however, that Sharp P distinguishes (perhaps finely) between the two cases and between the risk of mandatory debarment in the United Kingdom (considered in *Serco Geografix*) and the risk of discretionary debarment in the United Kingdom (relevant in *Airbus*, since a section 7 offence triggers only discretionary debarment), coupled with either mandatory or discretionary debarment in other jurisdictions.

Calculation of the financial penalty

Airbus's total financial settlement of nearly a billion euros under the DPA comprises mainly disgorgement, a very sizeable financial penalty and the SFO's costs.[5]

The 'normal' starting point for corporate fines in bribery cases is the gross profit derived from the relevant conduct, to which a harm multiplier is applied. In this case, however, the Crown Court agreed that such an approach would not be just and proportionate, particularly given the anticipated penalties in the non-UK investigations. Therefore, in a complex series of calculations, broadly speaking the starting point was calculated by using the average gross profit across a number of jurisdictions and, after application of harm multipliers, a DPA/co-operation discount of 50 per cent was applied.

The calculations are a further example of what appear to be 'scientific' sentencing guidelines being applied flexibly, to achieve a result the parties and the court consider proportionate. Though this may achieve a just result in a particular case, it continues to introduce additional uncertainty in the level of fine to which any particular offending may give rise.

5 Assessed as disgorgement in the amount of €585,939,740; a financial penalty of €398,034,571 and costs of €6,989,401.

FURTHER READING

Read the Herbert Smith Freehills and Cloth Fair Chambers chapter on 'Negotiating Global Settlements: The UK Perspective ', by †Rod Fletcher and Nicholas Purnell QC in GIR's *The Practitioner's Guide to Global Investigations*.

See also in *The Practitioner's Guide* the chapters on:

- 'Self-Reporting to the Authorities and Other Disclosure Obligations: The UK Perspective', by Judith Seddon, Amanda Raad, Sarah Lambert-Porter, Chris Stott and Matthew Burn
- 'Co-operating with the Authorities: The UK Perspective', by Ali Sallaway, Matthew Bruce, Ben Morgan and Nicholas Williams
- 'Fines, Disgorgement, Injunctions, Debarment: The UK Perspective', by Kelly Hagedorn, Robert Dalling and Matthew Worby
- 'Extraterritoriality: The UK Perspective', by Anupreet Amole

DOJ revised guidance on compliance programme focuses on resources, empowerment and evolving risk-assessment

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On 1 June, the US Department of Justice (DOJ) Criminal Division issued updated guidance on the Evaluation of Corporate Compliance Programs (the Guidance).[1] DOJ policies instruct prosecutors to assess the adequacy and effectiveness of a corporation's compliance programme – including remedial improvements to the programme and internal controls – when making charging decisions and resolving criminal investigations of corporations. The Guidance, first released in April 2019, is intended to assist prosecutors in evaluating corporate compliance programmes by setting out a variety of factors they should consider, framed around three fundamental questions:

1. *Is the corporation's compliance programme well designed?*
2. *Is the programme being applied earnestly and in good faith? In other words, is the programme adequately resourced and empowered to function effectively?*
3. *Does the corporation's compliance programme work in practice?*[2]

The updated Guidance includes a noteworthy revision to the second question. Where, previously, the Guidance asked whether the compliance programme was 'being implemented effectively', the revised Guidance instead focuses the inquiry on the resourcing and empowerment of the compliance programme and function. The DOJ also expects that compliance personnel will have access to, and continually monitor, data across functions.

Moreover, the updated Guidance now makes it clear that prosecutors should answer the three fundamental questions both at the time of the offence and at the time of the charging decision and resolution, emphasising the need for companies to make meaningful changes to their compliance programmes in response to the misconduct identified in the criminal investigation.

The DOJ also further emphasises that compliance programmes should be risk-based and tailored to the specific commercial realities of the company's business. Prosecutors will make a 'reasonable' individualised determination about the company's risk profile, including size, industry, geographic footprint, regulatory landscape, among other factors, that might influence the compliance programme. Moreover, updates throughout the Guidance underscore the DOJ's expectation that companies continually reassess their risk profiles and the efficacy of their compliance programmes to ensure their programmes are fit to address evolving risks and trends.

The updated Guidance expands and adds a number of specific factors that prosecutors should consider when answering the three fundamental questions:

Is the compliance programme well designed?

Periodic review and lessons learned

The updated Guidance places a greater emphasis on periodic assessment and evolution of the compliance programme based on lessons learned. The DOJ will seek to understand why the company has designed its compliance programme the way that it has in light of its own assessment of the company's risk profile. The Guidance also asks

1 US Department of Justice, Criminal Division, Evaluation of Corporate Compliance Programs (updated June 2020), available at https://www.justice.gov/criminal-fraud/page/file/937501/download.

2 Id., p. 2.

whether the compliance programme reflects a 'snapshot' in time, or whether there are processes to ensure that the programme evolves in response to 'continuous access to operational data and information across functions'. The importance of tracking and incorporating lessons learned not just from the company's own prior issues, but also from those of other companies in the same industry or region, is also underlined.

Accessibility of policies and impact of training

The updated Guidance instructs prosecutors to consider how accessible the company's policies and procedures are to employees and third parties. The DOJ will consider whether policies and procedures are published in a searchable format and whether the company tracks access to 'understand what policies are attracting more attention from relevant employees'. Prosecutors will also assess the effectiveness of the company's training and communications, focusing on whether employees can ask questions arising from training sessions and whether the company has evaluated the impact of the training on employee behaviour or operations.

Effectiveness of reporting mechanism

The DOJ will consider whether the company's reporting mechanism is publicised not just to employees, but also to third parties, and whether the company measures employee awareness of the hotline and how comfortable they feel using it. Prosecutors are also instructed to evaluate whether the company periodically tests the hotline's effectiveness.

Third-party relationships

The updated Guidance places greater emphasis on companies' ongoing management of third-party risks. Prosecutors will ask whether the company engages in risk management of third parties throughout the relationship, in addition to due diligence during the on-boarding process.

Mergers and acquisitions

The DOJ has also clarified how it expects companies to manage risk in mergers and acquisitions. Prosecutors will now consider whether the company was able to complete pre-acquisition due diligence and, if not, why not. The updated Guidance also emphasises the need for companies to conduct post-acquisition audits and integrate newly acquired entities into their compliance programme structures and internal controls.

Is the programme being applied earnestly and in good faith?

As noted above, the updated Guidance rephrases the DOJ's second fundamental question. Instead of considering whether a compliance programme is 'being implemented effectively', the DOJ will now assess whether the compliance programme is 'adequately resourced and empowered to function effectively'.

Autonomy and resources

The updated Guidance places greater emphasis on the risks of under-resourcing the compliance programme. In addition to evaluating the structure of a company's compliance function and the reasons for the structural choices the company has made, the updated Guidance now instructs prosecutors to assess the company's investment in training and development of compliance and control personnel.

Tone at the middle

The updated Guidance emphasises that prosecutors should focus on whether a company's compliance culture is fostered 'at all levels of the company'. The Guidance now instructs prosecutors to consider whether middle management, in addition to senior management, exhibits a commitment to implementing a culture of compliance.

Data resources and access

The updated Guidance introduces a new factor focusing on companies' use of data analytics. The DOJ will seek to assess whether compliance and control personnel have sufficient access to data to allow them to monitor and test policies, controls and transactions. The Guidance also asks if the company is doing anything to remove impediments to data access.

Consistent application of discipline

The updated Guidance instructs prosecutors to assess whether the compliance function monitors its investigations and resulting discipline to ensure consistency across the organisation.

Does the corporation's compliance programme work in practice?

The DOJ continues to emphasise that an effective compliance programme must improve and evolve over time, and the Guidance instructs prosecutors to consider whether the company periodically reviews and tests whether its compliance programme is working effectively. Consistent with other revisions throughout the Guidance, the DOJ clarifies that for a compliance programme to work in practice, the company should review and adapt its programme based on lessons learned both from its own experiences and from misconduct of other companies facing similar risks.

FURTHER READING

Read the Ropes & Gray chapter on 'Self-Reporting to the Authorities and Other Disclosure Obligations: The US Perspective', by Amanda Raad, Sean Seelinger, Jaime Orloff Feeney and Zaneta Wykowska in GIR's *The Practitioner's Guide to Global Investigations*.

See also in *The Practitioner's Guide* the chapters on:

- 'The Evolution of Risk Management in Global Investigations', by William H Devaney and Joanna Ludlam
- 'Co-operating with the Authorities: The US Perspective', by John D Buretta, Megan Y Lew and Courtney A Gans
- 'Monitorships', by Richard Lissack QC, Nico Leslie, Christopher J Morvillo, Tara McGrath and Kaitlyn Ferguson

NCA criticised by High Court as its wealth orders are successfully challenged

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In April 2020 the English High Court gave an important judgment in a case[1] concerning unexplained wealth orders (UWOs), a tool UK law enforcement agencies can now use to counter serious criminality and corruption. UWOs require politically exposed persons (PEPs), or persons suspected of involvement in, or association with, serious criminality to explain the origin of assets that appear to be disproportionate to their known income.[2] In its decision, the High Court discharged three UWOs obtained by the National Crime Agency (NCA), and criticised the agency's investigation of the case.

The NCA had obtained orders against the registered owners of three London properties with a combined value of £80 million. In their challenge, the respondents relied on evidence of the lawful income of the properties' beneficial owners, and argued that the test for UWOs was consequently not met. These beneficial owners were the ex-wife and the son of Rakhat Aliyev, a deceased Kazakh public official who had been accused of corruption (among other offences).

Requirements for a UWO

The court began by reviewing the power to make a UWO, which arises where a court is satisfied that: (1) the respondent holds property worth more than £50,000; (2) the known sources of the respondent's lawfully obtained income would have been insufficient for the purposes of enabling the respondent to obtain the property; and (3) either the respondent is a PEP, or there are reasonable grounds to suspect involvement by the respondent (or by a connected person) in serious crime, whether in the United Kingdom or elsewhere.

The court examined these requirements in its judgment. In respect of two of the UWOs, the first requirement was not made out on the facts of the case. The recipient of the UWOs was the 'president' of two Panamanian entities that were the registered owners of two of the London properties in question, and on the court's analysis of the Panamanian entities' constitutions, that individual was not a trustee of the entities, nor did he have have effective control over the properties. The 'holding property' requirement was not therefore made out for those UWOs (although it was for the third order).[3]

The NCA also failed to satisfy the court on the second requirement, namely the insufficiency of lawful income. The properties beneficially owned by Rakhat Aliyev's ex-wife had been acquired after their divorce, and evidence was put before the court of her own successful business career and independent wealth (in 2013 her net worth was estimated by Forbes Kazakhstan to be US$595 million).[4] Similarly, Aliyev's son was able to point to independentsources of income. Both persuaded the court that they, rather than Aliyev, had founded the entities that legally owned the properties, and that their lawful income was sufficient to account for the acquisition of the properties.[5]

On the third requirement, that the respondent be a PEP or that there be connections to serious crime, the NCA sought to rely on both limbs as alternatives. The statutory definition of PEP includes family members of a person entrusted with prominent public functions, as well as those closely associated with or otherwise connected to such a

1 *National Crime Agency v. Baker and others* [2020] EWHC 822 (Admin). The Court of Appeal refused an application for leave to appeal in June.

2 See further, Kelly Hagedorn et al., 'Fines, Disgorgement, Injunctions, Debarment: The UK Perspective' in *The Practitioner's Guide to Global Investigations* (4th edn, 2020) at 25.8.

3 Paragraphs 123, 169 and 198 of the judgment.

4 Paragraph 71 of the judgment.

5 Paragraphs 139, 171 and 210 of the judgment.

person. The serious crime connection is also wide, and extends to respondents who are connected to a person who has been involved in serious crime. In both cases, the NCA relied on the respondents' connection to Aliyev. The court found, however, that on the evidence before it the respondents (namely the entities that were the registered owners of the London properties, along with the president of two of those entities) did not have the requisite connection to Aliyev, since the entities had been founded by his ex-wife and son independently of him.[6]

Further considerations

In addition to acting as an important reminder of the requirements for a UWO, the court's decision is noteworthy in two further respects.

First, the court adopted a cautious approach to the question of inferences based on complex structures. The judge said:

> *The use of complex offshore corporate structures or trusts is not, without more, a ground for believing that they have been set up, or are being used, for wrongful purposes, such as money laundering. There are lawful reasons – privacy, security, tax mitigation – why very wealthy people invest their capital in complex offshore corporate structures or trusts. Of course, such structures may also be used to disguise money laundering, but there must be some additional evidential basis for such a belief, going beyond the complex structures used.*[7]

Second, the NCA was criticised by the judge for how it had investigated the case. In particular, although there was no finding of material non-disclosure by the NCA at the *ex parte* hearing when the UWOs had initially been made, the judge did observe that the NCA's case at that stage was flawed by 'inadequate investigation into some obvious lines of enquiry',[8] for example into the alleged connections between the respondents and Aliyev. The NCA failed, according to the court, to carry out a 'fair-minded evaluation' of the information provided to it by the respondents after the UWOs were made.[9]

Both of these features of the judgment may cause law enforcement agencies to be more circumspect in the future when deciding whether to apply for a UWO. Although the PEP test and the serious crime connection test are both widely drawn, one or both will need to be satisfied in relation to the specific respondent of the UWO, who may or may not be the ultimate beneficial owner of the property. Complex structures may afford a proper basis for an adverse inference, but only if there is other evidence to support such an inference. And an agency which successfully obtains a UWO from a court must continue to keep the situation under review, in particular in light of material reviewed from the respondents.

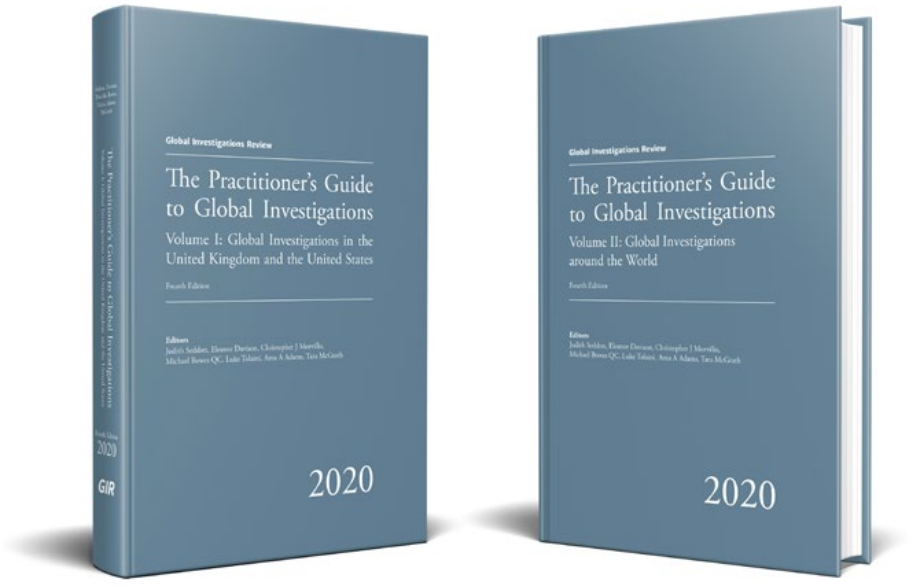
FURTHER READING

Read the Jenner & Block chapter on 'Fines, Disgorgement, Injunctions, Debarment: The UK Perspective', by Kelly Hagedorn, Robert Dalling and Matthew Worby in GIR's *The Practitioner's Guide to Global Investigations*.

See also in *The Practitioner's Guide* the chapters on:

- 'Extraterritoriality: The UK Perspective', by Anupreet Amole
- 'Individual Penalties and Third-Party Rights: The UK Perspective', by Elizabeth Robertson

6 Paragraphs 154, 172 and 216 of the judgment.
7 Paragraph 97 of the judgment.
8 Paragraph 217 of the judgment.
9 Ibid.



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Editors

Judith Seddon, Eleanor Davison, Christopher J Morvillo, Michael Bowes QC, Luke Tolaini, Ama A Adams, Tara McGrath

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