Developments in Financial White Collar Crime: A UK-US Perspective

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The past year has seen significant and noteworthy changes in the white-collar crime landscape. With the U.K.'s impending exit from the European Union now more likely and the imprint of the Donald Trump presidency on the U.S. Justice Department, the trans-Atlantic investigation and prosecution of white-collar crime continues to face an uncertain future.

As in the last few years, the Serious Fraud Office ("SFO") in the U.K. and the U.S. Department of Justice ("DoJ") have continued to engage in significant trans-Atlantic cooperation in sharing of information between the two countries on matters under common investigation and prosecution. This despite considerable changes underway not only within the SFO and the DoJ but with the wider business community with which they interact. The nature of this sort of cooperation continues with other U.S. authorities, such as the Federal Bureau of Investigation (FBI) or the Securities and Exchange Commission (SEC). In the U.K., the FCA and the Competition and Markets Authority have also been involved in selected matters. The SFO's arrangement to have a prosecutor from the U.S. Justice Department's criminal division seconded to the SFO and the FCA is now established for a two-year period to assist with cross-border investigations. The cases below will reflect the nature of such future investigations.

Advanced technology both to conduct white-collar crimes and to investigate and prosecute them has now become *de rigueur.* Cybercrime, as it is more commonly referred to, is now a phenomenon which includes commercial fraud, bribery, insider dealing/trading, embezzlement and currency counterfeiting. More recently, cybercrime has come to include credit card and online bank frauds and tele-calling forgeries, the fastest growing white-collar crimes. As markets have become more technology driven, with complex trading platforms such as 'dark pool trading venues', regulators are constantly trying to keep pace. Banking and securities regulators are now heavily reliant on the use of 'sentinel' programs to look for aberrations in market trading using algorithms which spot fraudulent activity. While such strict oversight is imposed mostly in the U.S., the resulting investigations have ensnared British banks and companies.

Prosecution authorities in the U.S. are also stepping up efforts to obtain grand jury indictments (often in secret) against foreigners suspected of white-collar offences which violate U.S. law. Despite reporting in the popular press, trans-Atlantic extraditions are actively underway.

This is a good time to review the enforcement activities in 2017.

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Bribery, Corruption and Criminal Cartels

In the UK, the *Bribery Act 2010* came into effect on 1 July 2011, and it empowers the SFO to prosecute any company or individual irrespective of where the alleged bribery offence occurred if there is a UK connection. While this was not a year for many *Bribery Act* prosecutions, there were some notable cases:

A. Rolls-Royce

It's been a difficult few years for Rolls-Royce. Regulators in the UK, the United States and Brazil charged that Rolls-Royce had paid bribes to intermediaries to secure high-value export contracts in a number of overseas markets, including China, Brazil and Indonesia. These charges resulted in Deferred Prosecution Agreements (discussed in more detail below). On the back of that extensive, multijurisdictional investigation, in November 2017, the U.S. Justice Department unsealed criminal charges against two former executives of Rolls-Royce, a former employee, a former intermediary for Rolls-Royce, and a former executive of an international engineering consulting firm. The charges stem from alleged participation in a scheme to pay bribes, disguised as commissions, to foreign government officials for the benefit of Rolls-Royce's U.S. subsidiary, including to secure a contract to supply equipment and services to power a gas pipeline from Central Asia to China. According to the allegations, the individuals charged were part of a scheme to pay kickbacks and disguise those payments to an intermediary company, in exchange for helping Rolls-Royce win contracts for the Asia Gas Pipeline. That pipeline was ultimately awarded to Rolls-Royce in November 2009 for $145 million, and Rolls-Royce then allegedly made payments to the intermediary company. The investigation was led by the FBI's International Corruption Squad with significant cooperation and assistance by the SFO.

B.Unaoil

The SFO initially opened a criminal investigation into Unaoil in March 2016, focusing on the company's activities, those of its officers, its employees and its agents in connection with suspected offences of bribery, corruption and money laundering. The investigation was initiated due to allegations that Unaoil had been acting as a "middleman" in fixing lucrative service contracts for a fee. In November 2017, the SFO charged two former executives of Dutch oil services firm SBM Offshore NV for allegedly funnelling bribes to officials in Iraq through intermediary Unaoil. The SFO also charged two others, a former Unaoil employee and a former business consultant to the company with conspiracy to make corrupt payments to secure engineering contracts for Unaoil's client, SBM Offshore. As the alleged corrupt conduct occurred between June 2005 and August 2011 (largely pre-dating the *Bribery Act 2010*), the suspects were charged with offences of conspiracy to make corrupt payments, contrary to section (1) of the *Criminal Law Act 1977* and contrary to section 1 of the *Prevention of Corruption Act 1906*. The SFO also initiated extradition proceedings against a former Unaoil executive residing in Monaco, where the company is based.

In a related investigation, in December 2017, SBM Offshore agreed with the US DOJ to pay a criminal penalty $238 million to settle charges under the Foreign Corrupt Practices Act in the U.S. for its role in bribing foreign officials in Brazil, Angola, Equatorial Guinea, Kazakhstan and Iraq. The SFO, DOJ, and the FBI cooperated extensively in this multi-year, multi-jurisdictional investigation and prosecution. The message to international construction and engineering firms is that enforcement regulators in the U.S. and the U.K. are assertively pursing bribery and corruption allegations.

C. FH Bertling

Last year, the SFO had charged FH Bertling and seven individuals with bribery in connection with the company's business operations in Angola. This past year was not much better for the company. FH Bertling Ltd is the UK-based subsidiary of Bertling Group, the logistics and freight operations company headquartered in Germany.

In May 2017, it was charged by the SFO along with four individuals on one count of conspiracy to give or accept corrupt payments in violation of the *Prevention of Corruption Act 1906* and the *Criminal Law Act 1977*. The allegations involve contracts to supply freight-forwarding services related to a North Sea oil exploration project known as Jasmine. The SFO charge alleges that the suspects conspired together and with others to give or accept corrupt payments for helping FH Bertling win or retain contracts for the oil exploration project. Another individual was also charged with a separate count of conspiracy to give or accept corrupt payments. The alleged conduct in question took place between January 2010 and May 2013.

D. Criminal Cartels

The Competition and Markets Authority (CMA) announced two recent cases concerning anti-competitive activity in connection with supplies to the construction sector. The first involved a company director, Barry Kenneth Cooper, who was arrested and charged under section 188 of the *Enterprise Act 2002* for his role in price-fixing and market sharing arrangements with competitors in the supply of pre-cast drainage products. He was convicted of the criminal offense and given a two-year suspended sentence (due to early cooperation). Mr Cooper was also disqualified from acting as a company director for seven years.

The other case concerned a price-fixing, bidding rigging and market sharing (by way of customer allocation) cartel involved galvanised steel tanks for water storage in which the companies involved were fined over £2.7 million and another director received a suspended prison sentence after pleading guilty to criminal cartel conduct.

The CMA's civil investigation into whether construction businesses have infringed the *Competition Act 1998* remains ongoing. These cases underline the risks associated with anti-competitive conduct both for individual as well as for companies involved.

E. Scotland

In Scotland, there were no new reported cases of bribery but there may well be on-going investigations which are yet confidential. As for other developments in 2017, the Crown Office and Procurator Fiscal Service (COPFS) and the SFO did enter into a memorandum of understanding (MOU) in relation to cases that involve both Scottish jurisdiction and English, Welsh and/or Northern Ireland jurisdiction. As a general rule under the MOU, if the SFO is presented with a report from a business which clearly relates to conduct in, or predominantly in, Scotland then it will refer the matter to the Serious and Organised Crime Unit (SOCU) and the same rule will also apply in reverse. No word yet on whether the MOU has been invoked on either side.

Other Recent Developments

A. Deferred Prosecution Agreements: Rolls-Royce and Tesco

Rolls-Royce: As mentioned earlier, Rolls-Royce reached a DPA with the SFO which was approved by the High Court in London in January 2017. Under the DPA, Rolls Royce agreed to pay £497.25 million in penalties (plus interest) and the SFO's costs of £13 million (over a five-year period). In return the criminal indictment, which covers 12 counts of conspiracy to corrupt, false accounting and failure to prevent bribery has been suspended for the term of the DPA. The conduct spans three decades and involves Rolls-Royce's Civil Aerospace and Defence Aerospace businesses and its former Energy business and relates to the sale of aero engines, energy systems and related services. The conduct covered by the UK DPA took place across seven jurisdictions: Indonesia, Thailand, India, Russia, Nigeria, China and Malaysia.

Rolls-Royce also reached a DPA with the US Department of Justice (which is not subject to judicial approval or oversight) and a Leniency Agreement with Brazil's Ministério Público Federal. In total, all of these agreements result in the payment of approximately £671 million (including US$170 million to the US and $25m to Brazil) by Rolls- Royce. For the SFO, this was the largest ever single investigation, involving some 70 SFO personnel. It was also the third use of a DPA since the power became available to UK prosecutors in 2014.

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Tesco Stores Ltd: In April 2017, the SFO confirmed that it has entered into a DPA with Tesco Stores Limited (Tesco). Earlier, in 2014, Tesco (a UK subsidiary of Tesco PLC) gave a false account of its performance. The company admitted deliberately overstating its profits by £326 million after incorrectly booking payments from its suppliers. This led to the SFO investigation into Tesco's accounting practices.

There still exist certain reporting restrictions which prevent the judgment, the DPA and the statement of facts being published. However, it appears that under the DPA, Tesco will pay a fine of £129 million and it agreed with the Financial Conduct Authority (FCA)'s finding of 'market abuse' in relation to the trading statement which overstated the Group's profits. However, there is no admission by Tesco that it or any of its employees committed a criminal offence.

The FCA has also stated that it is not suggesting that the Tesco board of directors "knew, or could reasonably be expected to have known" that the information in the company's trading statement was false or misleading. Tesco has also agreed a compensation scheme with the FCA to pay £85 million to investors who were affected by the inflated figures. This is the first time that the FCA had used its regulatory power to require a listed company to pay compensation for market abuse. The fine, compensation payments, and costs are set to total £235 million.

This is also the SFO's fourth DPA, however it is the first one that has been used in respect of criminal activity other than bribery. As SFO's David Green stated recently, DPAs are now demonstrably being used as a key enforcement tool, to promote a culture of self-reporting and co-operation, and to redress corporate offending out of court.

If 2017 has had a trend, it has been scrutiny. From close examination of those involved in the Paradise Papers and the penalties that many have paid this year for their illegal financial activities, one thing is clear – business is being watched very closely by investigators and prosecutors.

B. Criminal Finances Act 2017 and the Panama Papers

The Criminal Finances Act 2017 (the "CFA 2017") came into force on 30 September 2017. It is intended to strengthen the UK government's ability to confiscate the proceeds of crime; to improve the international reach of enforcement; and to extend the applicability of enforcement to also cover investigations under the *Terrorism Act 2000*. The CFA 2017 purports to bring about the most significant changes to the anti-money laundering and terrorist finance regime in the UK since enactment of the *Proceeds of Crime Act 2012*.

As a consequence of the sensational news from the leaked "Panama Papers" in 2016, these changes now include two new corporate criminal offences for the failure to prevent the facilitation of tax evasion, whether in the UK (Section 45) or abroad (Section 46). It also includes provisions relating the seizure and forfeiture of the proceeds of crime stored in UK assets, increased powers to require those suspected of corruption to explain the source of their funding ("Unexplained Wealth Orders").

The CFA 2017 is a substantial piece of legislation for which the UK government has issued detailed guidance which should be reviewed with care.

C. Privilege: SFO -v- *Eurasian Natural Resources Corporation (ENRC)*

In this landmark case last year, in May the High Court in London held that ENRC, which was suspected of civil or criminal misconduct (bribery, fraud, and corruption) must turn over documents generated by in internal investigation to a prosecution authority (the SFO). In so holding, the Court reinterpreted legal advice privilege (LAP) and litigation privilege (LP) more narrowly, deciding that LAP did not attach to communications by a party's lawyer with third parties in the course of gathering evidence and making inquiries. The Court further held that LP cannot protect documents produced to enable advice to be taken about litigation, or to avoid litigation, and further that LP did not apply to documents prepared during an internal investigation because they were not prepared with the sole or dominant purpose of conducting reasonably anticipated adversarial litigation.

In October, the Court of Appeal granted ENRC leave to appeal on the basis that "the grounds for appeal have a real prospect of success". The case has ignited considerable debate because it has ramifications for banks facing similar attempts by the SFO and the FCA to make them reveal privileged documents during routine investigations.

Examples of the types of documents that ENRC was required to disclose to the SFO as a result of the judgment are: notes of interviews with potential witnesses, including where lawyers were present (employees and former employees of the company and its subsidiaries, their suppliers and other third parties); communications with the advisors investigating the allegations; books and records of the company and its subsidiaries compiled by the advisors; reports prepared by the advisors; and, emails between senior officers of the company.

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Conclusion

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Major bribery and corruption cases have been brought this year relating to the activities of the gas and energy sector around the world. In 2017, there were a raft of banks across the world accused of money laundering with many being fined millions.

If we look towards 2018, therefore, everyone in business must do all they can – and seek all necessary help – to make sure they remain on the right side of the law.

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