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Extraterritoriality: The UK Perspective

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Overview 28.1

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

In the context of economic crime, the past three decades have seen a sustained legislative policy of extending the jurisdiction of the UK authorities. For certain economic crimes, authorities may bring prosecutions in the United Kingdom notwithstanding that all the relevant criminal conduct occurred overseas. The most obvious example is the Bribery Act 2010 (the Act), which we discuss further below. In line with the United Kingdom's extension of its jurisdictional reach, the authorities have increased their coordination and co-operation with other countries' prosecutors. The trend towards greater cross-border information sharing and coordinated investigations is likely to continue in accordance with ongoing domestic and international obligations.[2] The courts have also shown a willingness to endorse that trend. In the recent *KBR* case,[3] the High Court held that information notices issued by the Serious Fraud Office (SFO) under section 2 of

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2 For example, the Common Reporting Standard (formally the Standard for Automatic Exchange of Financial Account Information) is an OECD initiative aimed at hindering tax evasion and money laundering. By June 2018, over 140 countries had committed to join the CRS. Similarly, the trend towards transparency is evident in recent statutory provision for implementing a register of beneficial owners of overseas corporate entities – see s. 9 of the Criminal Finances Act 2017 and s. 51 of the Sanctions and Anti-Money Laundering Act 2018.

3 *R (on the application of KBR, Inc) v. The Director of the Serious Fraud Office* [2018] EWHC 2368 (Admin).

the Criminal Justice Act 1988 can have extraterritorial effect where a 'sufficient connection' exists between an overseas company and England and Wales. In particular, the court observed that SFO investigations should not be 'frustrated or stymied' on the basis that evidence may be held on computer systems located outside the jurisdiction. This chapter provides an overview of the extraterritorial aspects of UK law regarding economic crime.

28.2 The Bribery Act 2010

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

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

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

28.2.1 Offences under sections 1, 2 and 6

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

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

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

Considering a hypothetical example helps to demonstrate this broad jurisdictional scope of the Act. Assume that one Mr John Smith was born and raised in the United Kingdom, and, following university, he moved to live and work in Latin America. While Mr Smith has lived overseas for, say, 10 years, he has retained British citizenship. Mr Smith is a business consultant in the oil and gas sector, and one of his key clients is an energy company based in India. Assume also that Mr Smith bribed a person in, say, Mexico, and did so in the course of

4 s. 12(2)(b).

5 s. 12(2)(c).

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

his services to the Indian company, and in so doing he intended that he would obtain or retain business (in Mexico) for the Indian company. Even where none of Mr Smith's conduct made any contact with the United Kingdom, he would be at risk of criminal prosecution in the United Kingdom because he was a British citizen at the time of the offence, and therefore had a 'close connection' to the United Kingdom as defined by section 12(3) of the Act. In practice, of course, a prosecutor would need to consider carefully whether proceedings against Mr Smith would ultimately be in the public interest both in itself and as part of a wider prosecution strategy against others; in this case, for example, the Indian company if it had been carrying on business in the United Kingdom.[7]

Corporate offence under section 7 28.2.2

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

A 'relevant commercial organisation' includes a company or partnership (wherever incorporated) that carries on any part of its business in the United Kingdom. On the basis of information in the public domain currently, the courts are yet to consider a case where it is disputed that a commercial organisation indicted under section 7 was carrying on business within the United Kingdom.[10] Until the courts hear argument on that specific point, practitioners continue to refer to the Ministry of Justice guidance regarding the corporate offence. That guidance recommends a 'common sense approach' and notes that a 'demonstrable business presence' is required. Neither having the company's shares listed on the London

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

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

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

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

Stock Exchange nor having a UK subsidiary would necessarily mean that a foreign company is carrying on business for the purposes of section 7 of the Act.[11]

For a high-profile application of the concept of an associated person, the case of *Sweett Group PLC*[12] (2015), the SFO's first corporate conviction under section 7, is instructive. The defendant, a UK company, was found liable for the bribery of a non-UK national in the United Arab Emirates by a Sweett Group subsidiary in Cyprus (Cyril Sweet International Limited); the bribe being paid to secure a contract relating to construction of a £63 million hotel in Dubai. On the facts, the court was satisfied that Sweett's subsidiary was an 'associated person' under the Act, and that the bribes were intended to obtain an advantage in the conduct of business for Sweett. The company pleaded guilty, and a financial penalty totalling £2.25 million was levied against it.[13]

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

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

28.3 Money laundering offences under Part 7 of POCA 2002

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

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

Property is 'criminal property' if it represents a person's benefit from criminal conduct; in turn, 'criminal conduct' is conduct that either is an offence in the United Kingdom or would be an offence if it had taken place within the United

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

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

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

14 s. 12(5) Bribery Act 2010.

Kingdom.[15] Although the prosecution must adduce evidence of a predicate offence from which the proceeds of crime emanate, a prosecutor need not prove the type of predicate offence in every instance. Instead, the prosecutor will need to provide the court with detailed particulars explaining why the property that is the subject of the money laundering offence should be regarded as criminal in origin, and that evidence should be sufficiently potent to demonstrate that the only reasonable inference is that the property arose from criminality.

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

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

In dismissing the appeal, the court expressly considered the wording of section 340(11)(d) of POCA, that money laundering is an act that would constitute an offence under sections 327, 328 or 329 if done in the United Kingdom, and concluded that the language clearly indicated that Parliament had intended for the Part 7 offences to be extraterritorial in effect. (It is arguable that this amounts to a misreading of the statutory provisions because section 340(11) defines 'money laundering' for the purposes of the reporting obligations set out in sections 330 to 332 and, for that obligation, it does not matter whether the money laundering takes place in the United Kingdom or abroad. In contrast, the term 'money laundering' does not appear as a constituent element of the offences in

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

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

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

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

sections 327 to 329 of POCA.) The court went on to state that, even if they were wrong on that interpretation of the statute, the modern approach to jurisdiction required 'an adjustment to the circumstances of international criminality', noting that '[t]he offence of money laundering is *par excellence* an offence that is no respecter of national boundaries. It would be surprising indeed if Parliament had not intended the Act to have extra-territorial effect (as we have found it did).'[19]

In light of this extraterritorial effect, the court was able to establish a sufficient jurisdictional nexus to try Mr Rogers on the basis that the acts that led to the property becoming criminal property for the purposes of POCA plainly took place, and had an impact on victims, in the United Kingdom, and that the laundering of the proceeds by Mr Rogers in Spain was directly linked to those acts in the United Kingdom. The court added that this was:

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

The court's decision in *Rogers* makes plain that UK persons based overseas, including, for example, professional legal or tax advisers, face the risk of criminal liability in the United Kingdom for money laundering offences committed wholly overseas. *Rogers* and subsequent cases indicate that a person may be guilty of a money laundering offence under sections 327 to 329 of POCA in circumstances where both the predicate offending (ie, the criminality that gives rise to the existence of proceeds of crime) and the laundering of the criminal property take place outside the territory of the United Kingdom.[21]

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

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

20 Ibid. (*per* Treacy LJ) at pp. 1026–1027 at para. 55.

21 *Sulaiman v. Tribunal de Grande Instance* [2016] EWHC 2868 (Admin) in which Dingemans J confirmed that *Rogers* is 'binding' authority 'for the proposition that offences of money laundering extend to extraterritorial actions' (at [18]) and *Jedinak v. District Court in Pardubice* [2016] EWHC 3525. The implication of these decisions is that, while *Rogers* suggests that cases where both the predicate offence and the money laundering offence take place overseas might be decided differently, in fact in cases decided subsequent to *Rogers* this has not been the case. In *Jedinak* despite the arguments by the defence that 'the court was clearly to an extent motivated by the recognition that some part of the offending [in *Rogers*] (and indeed the damage cause by the offending) impacted on this country and nationals of this country', the court held that 'it is clear in my judgment that the decision relating to the possible extra-territorial effect of the money laundering offences was independent of that'.

- he or she knew or reasonably believed that the relevant criminal conduct occurred abroad; and
- that relevant criminal conduct was not, when it took place, unlawful under the criminal law of that other country.[22]

The 'overseas conduct defence', however, does not apply to conduct that (despite being legal under local law) would constitute an offence punishable by a maximum sentence of imprisonment over 12 months in the United Kingdom if it had occurred in the United Kingdom.[23] In practice, therefore, most cases (e.g., bribery, corporate fraud, tax evasion) relevant to readers will remain squarely within the wide extraterritorial scope of POCA.

The Fourth Money Laundering Directive (4MLD)

The POCA 2002 regime has been further supplemented by the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, which gave effect to the European Union's Fourth Money Laundering Directive.[24] The 2017 regulations apply to both financial institutions and to over 100,000 businesses that may be considered the 'gatekeepers' of the financial system.[25] Those 'gatekeepers' include, for example, legal advisers, insolvency practitioners, casinos and dealers in high-value goods. The 2017 regulations provide for a 'risk-based' approach to money laundering and provide *inter alia* for reforms to risk assessments, customer due diligence and employee screening. The 2017 regulations also provide for a number of criminal offences, which are given extraterritorial effect through Regulation 90, which enables courts to treat offences 'committed wholly or partly outside the United Kingdom' as 'having been committed within the jurisdiction of the court'.

The scope of the 2017 regulations has been extended to cover the operations of subsidiaries and branches operated by a 'relevant person'[26] outside the United Kingdom.[27] Where the relevant person is operating in a European Economic Area state that has implemented the 4MLD, it must follow the law of that state. Significantly, if the subsidiary or branch is operating in a country that has not implemented the 4MLD, it must comply with the regime as implemented in England and Wales.

22 ss. 327(2A), 328(3) and 329(2A) POCA 2002.

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

24 The regulations came into force on 26 June 2017, giving effect to Directive 2015/849. The previous regime, governed by the Money Laundering Regulations 2007 and the Transfer of Funds (Information on the Payer) Regulations 2007 was revoked.

25 Explanatory Memorandum to the regulations, p. 2.

26 Namely a person to whom the regulations apply, as defined by Regulation 8, Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017.

27 Regulation 20, Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017.

Civil recovery orders

Separately, the civil recovery regime set out in POCA[28] enables UK prosecutors to seek orders from the High Court to recover property that either is or represents property obtained through unlawful conduct. As applications for civil recovery orders and property freezing orders are determined through civil, not criminal, proceedings before the High Court, the standard of proof is the balance of probabilities. The High Court may issue such an order against any person or property wherever domiciled or situated, if there is or has been a connection between the facts of the case and any part of the United Kingdom.[29] Combined with the wide jurisdictional scope of the definition of 'unlawful conduct',[30] civil recovery orders are a powerful and attractive tool in the hands of UK prosecutors. While foreign courts did not traditionally recognise the enforceability of these orders against assets in their jurisdictions, a relatively recent case saw the United Kingdom's National Crime Agency (NCA) succeed in persuading the Luxembourg court to enforce an order against a UK person's bank accounts in that jurisdiction.[31] This was the first time that a foreign court had enforced a civil recovery order, permitting the NCA to recover unlawful property held entirely outside the United Kingdom. It remains to be seen whether other jurisdictions will take a similarly collaborative approach to UK civil recovery efforts overseas.

An additional civil recovery power became available to the NCA and other UK prosecutors in late January 2018.[32] On application to the High Court, prosecutors can seek an unexplained wealth order (UWO) against any persons (whether or not UK domiciled) regarding their property, irrespective of that property's location. In summary, a UWO is available where:

- there is reasonable cause to believe the respondent holds specific property valued at or above £50,000;
- there are reasonable grounds to suspect that the respondent's known income is insufficient to acquire that property; and

28 Part 5 of POCA 2002.

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

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

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

32 See Part 1 of the Criminal Finances Act 2017, which amends POCA.

- either the respondent is a 'politically exposed person' or there is reasonable suspicion that the respondent (or a person connected to him or her) is or has been involved in serious crime in the United Kingdom or abroad.

Where granted, the UWO compels the respondent to explain the nature of their interest in the property, and to explain how they obtained it. Failure to do so creates a presumption that the property was obtained unlawfully, and it is therefore a valid target for civil recovery proceedings under Part 5 of POCA.

The respondent, namely the person who holds or obtains the relevant property, 'includes any body corporate, whether incorporated or formed under the law of a part of the United Kingdom or in a country or territory outside the United Kingdom.'[33] By express cross-reference to section 414 of POCA,[34] it is clear that 'property is all property wherever situated'.

Where a UWO is granted against property outside the United Kingdom, and the UK prosecutor believes there is a risk of dissipation or frustration by concealing the relevant assets, that prosecutor may make a formal request for assistance from the other country's government.[35] The use of UWOs remains a developing area of practice, and one to watch closely in light of the authorities' recent success in the case of *National Crime Agency v. Mrs A.*[36]

Tax evasion and the Criminal Finances Act 2017 28.4

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

See Chapter 1

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

See Section 28.2.2

- failure to prevent the facilitation of UK tax evasion offences (section 45): a company or partnership is guilty of an offence if a person commits a UK tax evasion facilitation offence when acting in the capacity of a person associated with that company or partnership;[37] and
- failure to prevent the facilitation of foreign tax evasion offences (section 46): a company or partnership is guilty of an offence if at any time a person commits a foreign tax evasion facilitation offence when acting in the capacity of a person associated with that company or partnership, and any of the following conditions is satisfied:

33 s. 362H(5) POCA, inserted by s. 1 CFA 2017.

34 s. 362H(6) POCA, inserted by s. 1 CFA 2017.

35 s. 362S POCA, inserted by s. 3 CFA 2017.

36 [2018] EWHC 2534 (Admin).

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

- the relevant body is incorporated or formed in the United Kingdom;
- the relevant body carries on business or part of a business in the United Kingdom; or
- any conduct constituting part of the foreign tax evasion facilitation offence took place in the United Kingdom.[38]

If the offence took place outside the jurisdiction, however, UK prosecutors must still prove to the criminal standard that both the taxpayer and the associated person committed an offence. The prosecutor will also need to prove dual criminality of the conduct. The offences consist of three component parts. First, the prosecution must prove criminal evasion by a taxpayer; and there must have been dishonest[39] facilitation of tax evasion by an associated person. Where these two components are satisfied, the relevant body is criminally liable (unless it can show that it had 'reasonable preventative procedures' in place, or that it was unreasonable to expect the company to have had such procedures in place).

A 'relevant body' is a company or a partnership, wherever it may be incorporated or formed.[40] A 'person associated' with the relevant body is an employee, an agent or any other person performing services for or on behalf of that relevant body.[41] Again, this is broadly comparable to the concepts in the Bribery Act. Section 46 of the Criminal Finances Act 2017 provides that a company or partnership that carries on business in the United Kingdom will commit an offence if a 'person associated' with it commits a 'foreign tax evasion facilitation offence', unless the company or partnership had reasonable procedures in place to prevent the facilitation offence. A foreign tax evasion facilitation offence means conduct that amounts to:

> *an offence under the law of a foreign country . . . relates to the commission by another person of a foreign tax evasion offence under the law of that country, and . . . would, if the foreign tax evasion offence were a UK tax evasion offence, amount to a UK tax evasion facilitation offence . . . .*[42]

The UK government recently published guidance on the meaning of reasonable preventative procedures.[43] The guidance states that those procedures should be informed by the same six guiding principles as those expected by the Bribery Act

38 s. 46(2).

39 The test for dishonesty must now be viewed in light of the Supreme Court's decision in *Ivey v. Genting Casinos (UK) Ltd t/a Crockfords* [2017] UKSC 67 which disapproved the second limb of the well-known test in *R v. Ghosh* [1982] EWCA Crim 2. Although the observations of the court were technically *obiter*, the Court of Appeal (Criminal Division) has indicated that *Ivey* correctly reflects the law – see *R v. Pabon* [2018] EWCA (Crim) 420.

40 s. 44(2) and (3)

41 s. 44(4).

42 s. 44(6).

43 Tackling tax evasion: Government guidance for the corporate offences of failure to prevent the criminal facilitation of tax evasion, HM Revenue and Customs, 1 September 2017, available at

model. The six principles are proportionality, top level/board level commitment, risk assessment, due diligence, training and communication, and monitoring/review. Companies doing business in the United Kingdom should consider carefully how to prepare their own reasonable preventative procedures to address the risk of associated persons facilitating tax evasion.

Financial sanctions 28.5

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

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

> *Contrary to what is claimed by Rosneft, there is a reasonable relationship between the content of the contested acts and the objective pursued by them. In so far as that objective is, inter alia, to increase the costs to be borne by the Russian Federation for its actions to undermine Ukraine's territorial integrity, sovereignty and independence, the approach of targeting a major player in the oil sector, which is moreover predominantly owned by the Russian State, is consistent with that objective and cannot, in any event, be considered to be manifestly inappropriate with respect to the objective pursued.*[44]

For the purposes of this chapter, we focus on financial sanctions.[45] The UK legal framework regarding financial sanctions is not contained in any one particular

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https://www.gov.uk/government/publications/corporate-offences-for-failing-to-prevent-criminal-facilitation-of-tax-evasion.

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

45 For trade sanctions, see the Export Control Act 2002 (and the related Export Control Order 2008) and the Customs and Excise Management Act 1979. The Customs and Excise Management Act 1979 imposes criminal liability where a person exports goods from the United Kingdom

statute. Instead, the United Kingdom uses secondary legislation to implement various sanctions programmes made by each of the United Nations Security Council and the European Union. At the same time, the United Kingdom may also issue domestic financial sanctions under certain specific statutes, such as the Terrorist Asset-Freezing Act 2010.[46] The specific restrictions imposed by any one set of financial sanctions (e.g., those relating to Russia's involvement in Ukraine) will vary in each case. Those advising businesses concerned about liability should carefully review the text of the specific statutory instrument, and the underlying EU regulation, in each case. Broadly, however, UK financial sanctions impose criminal liability for a person who:

- makes funds or economic resources available, whether directly or indirectly, to a designated person;
- deals with funds or economic resources belonging to or controlled by a designated person; or
- acts in a way, whether directly or indirectly, to circumvent the relevant financial sanction prohibitions.[47]

Financial sanctions also carry positive reporting obligations for financial services firms. Where a firm detects relevant information, for example that a customer or counterparty is a designated person, the firm must notify the Office of Financial Sanctions Implementation (OFSI), which is part of HM Treasury.[48]

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

- anybody present in the United Kingdom, namely all persons (natural and legal) 'who are within or undertake activities within the UK's territory'; and
- all UK nationals and all UK legal entities (including branches, and the UK subsidiaries of foreign companies), wherever they may be in the world and irrespective of where their activities occur.[49]

In recent guidance, the OFSI emphasised that establishing a UK nexus would be determined by the facts in each case, and that it would not seek to 'artificially

'when the exportation or shipment is or would be contrary to any prohibition or restriction for the time being in force'. The Export Control Order 2008 imposes those restrictions. The ECO 2008 specifies a three-tier categorisation of goods, with Category A products including items designed for torture; Category B includes arms and ammunition; Category C being items that have a dual civil/military use. See Part 4 and Schedule 1 of the ECO 2008. Trade sanctions apply to (1) anybody present in the UK, i.e., all persons (natural and legal); (2) all UK subjects anywhere in the world; and (3) any legal entity incorporated under UK law.

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

47 Office of Financial Sanctions Implementation, Financial Sanctions: Guidance, March 2018, p. 12. The maximum term of imprisonment was recently increased from two to seven years – see ss. 144 and 145 of the Policing and Crime Act 2017 (PCA 2017).

48 Office of Financial Sanctions Implementation, Financial Sanctions: Guidance, March 2018, p. 18.

49 Office of Financial Sanctions Implementation, Financial Sanctions: Guidance, March 2018, p. 7.

bring something within UK authority that does not clearly and naturally come under it'.[50] This may provide some degree of comfort to foreign businesses with no UK footprint. Most recently, the new Sanctions and Anti-Money Laundering Act 2018, which is not yet fully in force, provides for sanctions being imposed regarding (1) conduct within UK jurisdiction by any person and (2) conduct anywhere in the world but only if the conduct is by a 'United Kingdom person'.[51]

Until recently, enforcement options were limited, taking the form of either an official warning letter from HM Treasury or full criminal proceedings by a prosecutor. The Policing and Crime Act 2017, effective from 3 April 2017, introduced a wider range of enforcement options, specifically (1) making sanctions offences eligible for consideration for a deferred prosecution agreement,[52] (2) making sanctions offences eligible for (civil) Serious Crime Prevention Orders under the Serious Crime Act 2007[53] and (3) empowering the OFSI to impose (civil) financial penalties.[54] These developments are all consistent with the general trend in UK law since the Bribery Act 2010 came into effect towards increased enforcement against companies, including for misconduct overseas.

Information sharing powers under the Criminal Finances Act 28.6

As demonstrated by several recent enforcement actions, the UK authorities have increased their sharing of information with counterparts around the world. That coordination is developing further. The Criminal Finances Act 2017 includes certain amendments to POCA, the effect of which will be to enhance the information flow to the UK authorities (specifically, the NCA in the first instance),[55] and most importantly for the purpose of this chapter, to facilitate the NCA's assistance of law enforcement bodies overseas.

Conspiracy 28.7

Readers will be familiar with cases involving suspected or alleged conspiracies to commit substantive offences. When considering conspiracy in the economic

50 Office of Financial Sanctions Implementation, Monetary penalties for breaches of financial sanctions: Guidance, May 2018, p. 12.

51 s. 21 Sanctions and Anti-Money Laundering Act 2018.

52 s. 150 of PCA 2017.

53 s. 151 of PCA 2017.

54 s. 146 of PCA 2017.

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

crime context, practitioners should be aware of the interplay between (1) common law conspiracy to defraud, (2) the conspiracy offence in section 1A Criminal Law Act 1977, and (3) the Fraud Act 2006, whose extraterritorial reach is specified by the Criminal Justice Act 1993 (as amended).

28.7.1 Common law conspiracy to defraud

The leading case defines a conspiracy to defraud as an agreement 'to deprive a person dishonestly of something which is his or to which he is or would be or might be entitled' or 'by dishonesty to injure some proprietary right'.[56]

Common law conspiracy to defraud is one of the very few remaining common law conspiracy offences, section 5 of the Criminal Law Act 1977 having replaced all others with a general statutory offence. The rationale for its retention despite the statutory offences introduced by the Fraud Act 2006 was that the common law offence was broad (as indicated by the definition above), and therefore allowed prosecutors to roll several offences into a smaller number of indictments than would otherwise be required to prosecute multiple examples of fraudulent conduct, and present a single cogent narrative to the court, without needing to charge, and evidence, several separate statutory offences.[57] Statute has made clear that a person charged with conspiracy to defraud may be liable irrespective of whether he or she became a co-conspirator in England or whether any act in relation to the conspiracy occurred in England.[58]

28.7.2 Statutory conspiracy to commit offences abroad

The Criminal Justice Act 1987 provides that a prosecutor may pursue common law conspiracy to defraud even in circumstances where the substantive offence would be covered by a specific statute.[59] However, in many cases, ranging from *Innospec Limited*[60] in 2010 to the recent attempted prosecution of Barclays Bank regarding Qatar, the SFO has relied on section 1(1) of the Criminal Law Act 1977 to bring charges of conspiracy to commit offences.[61]

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

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

58 s. 3(2) Criminal Justice Act 1993.

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

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

61 In *R v. Turner*, *Kerrison, Papachristos and Jennings* in 2014 (and the subsequent appeal *SFO v. Papachristos and Kerrison* [2014] EWCA Crim 1863), four former executives of Innospec were convicted and imprisoned for conspiracy offences in relation to their roles in bribing state officials

In 1998, the Criminal Law Act 1977 was amended to provide expressly for a discrete offence of conspiracy to commit criminal offences outside the jurisdiction.[62] By section 1A of the Act, a conspiracy may involve the doing of an act in a place outside England and Wales that constitutes an offence in that other jurisdiction. The purpose of section 1A was to extend existing UK law, and to give the English courts extraterritorial jurisdiction in relation to a conspiracy (1) partly formed or carried out in England and Wales, and (2) where the object was the commission of a foreign offence (where there is an equivalent offence in England and Wales). This section only applies, however, where four nexus conditions are satisfied:

- pursuit of the agreed conduct would involve an act by one or more of the parties outside the United Kingdom;
- that act is an offence under local law in that other country;
- that the agreement would be a conspiracy (within section 1(1) CLA 1977) but for the fact that the offence would not be an offence triable in England and Wales if committed in accordance with the parties' intentions; and
- a party to the agreement, whether directly or via an agent, did anything in England and Wales regarding formation of the agreement before its formation, became a party to it in England and Wales, or did or omitted anything in England and Wales pursuant to the agreement.[63]

Where those conditions are satisfied, the prosecutor may pursue conspiracy charges under section 1A, referring to the offence as being a conspiracy to commit the underlying substantive offence (e.g., drug trafficking or people smuggling)[64] but for the fact that it was not triable in England and Wales.[65]

Similarly, the Fraud Act 2006 has expressly broad extraterritorial application.[66] Put simply, where any element of a statutory fraud offence[67] occurs within England and Wales, the court will have jurisdiction to try a defendant whether or not he or she was in the jurisdiction at any material time, and whether or not he or she was a British citizen at the time.

Inchoate offences 28.7.3

Separately, practitioners should not overlook the inchoate offences of encouraging or assisting others in the commission of offences. The Serious Crime Act 2007 includes statutory inchoate offences (under sections 44 to 46) of encouraging

in Indonesia and Iraq in order to secure contracts from the governments of those countries for the supply of products produced by Innospec Ltd.

62 Inserted by the Criminal Justice (Terrorism and Conspiracy) Act 1998, s. 5.

63 s. 1A(1) to (5), Criminal Law Act 1977.

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

65 s. 1A(6), Criminal Law Act 1977.

66 Part 1 of the Criminal Justice Act 1993 as amended by the Fraud Act 2006 (Schedule 1)

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

or assisting the commission of offences; these have extraterritorial application in certain circumstances.[68]

Where a person within England and Wales knows or believes that what is anticipated might occur wholly or partly in a place outside the jurisdiction, he or she will be liable under the Serious Crime Act 2007 if the anticipated offence would be triable in England if it were committed abroad or the anticipated conduct would amount to an offence under the local law of that other state.[69] Where that person is also outside the jurisdiction at the time of encouraging or assisting the anticipated offence, he or she will be liable under sections 44 to 46 if he would otherwise be triable within England and Wales, for example on the basis of his or her British citizenship.[70]

28.8 Mutual legal assistance, cross-border production and the extraterritorial authority of UK enforcement agencies

Mutual legal assistance (MLA) allows a state to seek co-operation from another state in the investigation or prosecution of criminal offences via a formal letter of request. MLA is generally used when the enquiries require coercive means.[71] MLA is generally not appropriate if the material can be obtained directly via law enforcement co-operation for intelligence purposes or if the material otherwise is admissible in that form.

The framework governing the United Kingdom's approach to MLA is contained in a number of instruments, primarily the Crime (International Co-operation) Act 2003 (CICA), the European Convention on Mutual Legal Assistance in Criminal Matters 2000, and various bilateral and multilateral treaties (for example, with the United States in 1994, with Brazil in 2005 and with India in 1995). The UK Home Office Central Authority[72] is primarily tasked with receiving, and acceding to, MLA requests.[73]

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

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

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

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

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

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

Outgoing MLA requests (i.e., those from the United Kingdom to a foreign state) seeking evidence must be issued by a court or a designated prosecuting authority.[74] The MLA request can only be issued if it appears to the court or designated prosecuting authority that an offence has been committed or there are reasonable grounds for suspecting that an offence has been committed or proceedings in respect of the offence have been instituted by the designated prosecuting authority, or the offence is being investigated.[75] The request must relate to the obtaining of evidence for use in the proceedings or investigation.[76] The defence can also apply for an MLA request once criminal proceedings have begun.[77] The usual policy for central or executing authorities is to keep the MLA request confidential and not to share its content beyond government departments, agencies, the courts or enforcement agencies.[78]

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

In practice, persons subject to a request from a foreign authority, whether formal or informal, should ensure that they do not disclose material that is legally privileged, and ensure they take all appropriate steps to protect their rights under UK law, including as to the privilege against self-incrimination. For example, one method of MLA to foreign states is to compel witnesses to attend court.[79] Importantly, however, a witness cannot be compelled to give evidence where he or she could not otherwise be compelled to testify under either UK law or that of the requesting state.[80]

Furthermore, in the appropriate case, there is scope for judicial review of the UK authorities' response to a letter of request (LOR) from a foreign authority. In *R (on the application of Soma Oil and Gas Ltd) v. Director of the SFO*[81] the High Court made clear that judicial review challenges to investigation decisions by authorities should be very rare, and only pursued in exceptional circumstances.[82] However, it does remain open to individuals subjected to a LOR to seek protection; the court noted that '[a] balance must be struck between the public interest in international cooperation in investigating and prosecuting serious crime

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

75 s. 7(5), CICA 2003.

76 s. 7(2)), CICA 2003.

77 s. 7(1)(b) and (3)(c), CICA 2003.

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

79 s. 15 CICA 2003.

80 Schedule 1 CICA 2003.

81 [2016] EWHC 2471.

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

and the rights of the individual . . . . Though such challenges are not at all to be encouraged . . . they would dovetail well with the statutory and treaty regime *provided* their focus was upon compliance with the CICA and treaty conditions for the making of a LOR.'[83]

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

28.8.1 Requests from within the European Union

Customarily much of the cross-border co-operation between authorities is informal, relying on established relationships whether directly between states or through organisations such as Interpol and Europol.[84] More recently, however, the European Union has embarked on a programme of reform, resulting in the European investigation order (EIO)[85] and in the proposed European production and preservation orders (EPOs).

The purpose of the EIO is to make it easier for authorities in one Member State to obtain evidence from others through the mutual recognition principle. In contrast to MLA, following a validly issued EIO, a Member State must conduct the investigative measures specified by the order (subject to certain exceptions). Those measures may include the transfer of prisoners for the purposes of investigations, the hearing of witnesses by video link and covert investigation. An EIO may only be issued where there is 'dual criminality' in the receiving and executing countries. Broad exceptions to this principle (including offence categories such as terrorism, and human trafficking) that mirror the exceptions in the current scheme, exist however.

See Chapter 17 on individuals in cross-border investigations

On receipt of an EIO, a participating Member State will have 30 days to decide whether to recognise and execute it. If the EIO is recognised, the request should be completed within 90 days, although extensions are permissible.

To apply for an EIO, an investigator in England and Wales must do so either to a 'designated public prosecutor', or by applying to a magistrates' court or the Crown Court, depending on the type of investigative measure sought. Defendants in criminal proceedings may also apply for an EIO from a judicial authority (any justice of the peace or judge). Irrespective of who is making the application, the public prosecutor or judicial authority must be satisfied that an offence has been

83 Ibid. at 35 (original emphasis).

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

85 Directive 2014/41/EU was implemented in England and Wales by the Criminal Justice (European Investigation Order) Regulations 2017, which came into force on 31 July 2017.

committed, or there are reasonable grounds for suspecting that an offence has been committed, and proceedings have begun in respect of the offence, or it is being investigated.

Brexit 28.8.2

On 17 April 2018 the European Commission published its proposals for EPOs.[86] Unlike EIOs, EPOs will specifically target electronic evidence and would enable judicial authorities to receive electronic data from service providers within 10 days, and within six hours in an emergency. A preservation order would enable a judicial authority to require a service provider to preserve data, which could subsequently be obtained via MLA, and an EIO, or an EPO.

As Brexit approaches, it is not yet known how, or if, the United Kingdom will implement EPOs as proposed by the European Commission. So far, the government White Paper on Brexit has stated that the United Kingdom will seek to retain an 'efficient and secure evidence exchange . . . on the basis of the EIO';[87] at the same time, the Crime (Overseas Production Orders) Bill, which would enable courts to make orders similar to the EIO, is proceeding through Parliament. However, as the House of Lords briefing that accompanies that Bill makes clear, the necessary underlying international treaties and the agreements that would enable orders under the Bill are yet to be concluded. Nevertheless, there would appear to be an appetite in government to promote and facilitate the faster sharing of information with law enforcement in other states.

86 http://europa.eu/rapid/press-release_IP-18-3343_en.htm, accessed 30 August 2018.

87 The future relationship between the United Kingdom and the European Union, Cm 9593, July 2018, para. 49.

Appendix 1

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

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