ALLEN & OVERY

European White Collar Crime Report

Q3 2018

Contents

Overview

The reports in this edition of the White Collar Crime Review cover financial crime developemnts across Europe.

Politically exposed persons continue to be an area of focus. In France and Romania there have been investigations into public officials, Germany has been criticised for lacking measures to tackle parliamentary corruption and in the UK the first ever 'Unexplained Wealth Order' has been used against the wife of a politically exposed person (the chairman of a state-owned bank in Azerbaijan).

Financial crime spans borders, and we are seeing more measures being used by authorities to make it easier to fight financial crime across borders too. It is now more difficult for foreign shell companies to be used for improper purposes as the roll-out of the 4MLD beneficial ownership registers continues. A recent English court ruling will make it more difficult for companies to refuse to disdose to investigators documents held abroad by associated entities. And we see more international collaboration – for example, a new joint initiative between Europol and Eurojust to finance joint investigation teams, and a new collaboration between the UK, US, Netherlands, Australia and Canada to fight tax evasion, known as 'J5'.

We also summarise the current state of implementation of 4MLD and 5MLD.

UNITED KINGDOM

Law Commission launches consultation on SARs Regime; Azerbaijani couple at the centre of UK's first Unexplained Wealth Order; New international alliance to combat tax fraud; HMRC has updated its criminal justice and investigations guidance; Two former traders convicted of fraud in SFO's EURIBOR manipulation case; HSBC's former head of FX trading sentenced to two years following conviction for fraud in the U.S.; Royal Mail fined GBP 50m for breaching competition law; Pfizer and Flynn have GBP 90m fine overturned; SFO closes Lloyds LIBOR investigation; SFO charges former employees of Güralp Systems Ltd; Bribery Act review committee commences examination of evidence; New Director, New Direction? Initial insight into the next era at the Serious Fraud Office; SFO can request overseas documents from non-UK companies; SFO continues to bolster AI and technology power; EUR 433,000 fine imposed in the first breach of Irish regulation relating to cyberfraud; Digital currency regulation: an urgent need for regulation in the UK; Office of Financial Sanctions (**OFSI**) publishes first Annual Review; Deadline for frozen assets reports fast approaching; OFSI updates lists of sanction targets; Update on the UK Government's Strategic Export Controls.

GERMANY

Ponzi scheme scandal continues as insolvency proceedings are commenced against container ship company; State Minister of Justice speaks on Cum-Ex investigation and tax reimbursements; Offices of German bank raided in Cum-Ex trading investigation; Antitrust authority imposes EUR 16m fine on media company after tip-off; Antitrust authority imposes EUR 200m fine on steel companies; German government publishes draft bill implementing EU Directive on trade secrets; Greco advises German government to enhance anti-corruption measures against MPs; Car manufacturer to be fined in connection with the diesel emission scandal; Federal criminal police office reports significant rise in white collar crime; Reporting obligations for cyberattacks.

FRANCE

The never-ending carbon tax scam – trial finally takes place in the EUR 70 million B-Concept case; Dubai Papers: French media reveals alleged UAE - based International Money Laundering network; French MP placed in custody on suspicion of tax evasion after immunity lifted by the French Parliament; Enactment of the new law on the reinforcement of the fight against fraud; Further complaint filed against Secretary General of the Elysée Palace; Dozen raids conducted against key electrical equipment manufacturers; Another French-style DPA has been executed with a French company accused of corruption; Extension of French-style DPAs to tax evasion offences; Progress made in the "CEO Fraud" investigation.

Europe at a glance

BELGIUM

The Belgian UBO Register is live; Guidance has been issued on complying with the new Belgian AML Act and the new requirement to submit periodic AML questionnaires; Financial Task Force (FATF) publishes follow-up report on Belgium's AML progress; Guidelines on criminal settlement issued to Belgian Prosecutors.

ITALY

Update on the dual-track system for market abuse offences.

SPAIN

Spain approves law implementing 4MLD; Spanish Supreme Court highlights the importance of introducing corporate compliance programmes.

ROMANIA

The draft law for the transposition of 4MLD is currently under debate before the Romanian parliament; Former Chief Prosecutor sentenced to four years' imprisonment for aiding and abetting; Declassification of protocols between authorities in the judicial system and the Romanian intelligence service prompts debate over the legality of evidence gathering during criminal trials.

EU-WIDE

European implementation of 5MLD and Ultimate Beneficial Ownership (**UBO**) Registers; European proposal to amend European Anti-Fraud Office Regulation; Europol and Eurojust agree to fund joint investigation teams; EU sanctions Russian companies that built Kerch Bridge linking Crimean peninsula with Russian mainland.

Anti-money laundering and proceeds of crime

BELGIUM

The Belgian UBO Register is live

Belgium has implemented its register of beneficial owners through the adoption of the Royal Decree of 30 July 2018 on the operating procedures of the UBO Register (see page 4 of the Q2 2018 edition of Allen & Overy's European White Collar Crime Report). The Royal Decree will enter into force on 31 October 2018, but the online UBO register has been operational since 1 October 2018. Belgian companies and other relevant legal entities (including associations, foundations, trusts and other similar legal structures) must complete the UBO Register by 31 March 2019 via the online platform MyMinfin. Failure to do so may attract an administrative fine of up to EUR 50,000 and a criminal fine of up to EUR 50,000.

Guidance issued on complying with new Belgian AML Act, plus imposition of new requirement to submit periodic AML questionnaires

Pursuant to the adoption of the Belgian AML Act of 18 September 2017, the Belgian Financial Services and Markets Authority (**FSMA**) has imposed new obligations on, and issued guidance relevant to, the obliged entities falling under its supervision. This includes:

- A Regulation (dated 3 July 2018) on the prevention of money laundering and terrorist financing;
- Circular FSMA_2018_12 (dated 7 August 2018) on implementing a risk-based approach to preventing money laundering and terrorist financing; and
- Circular FSMA_2018_13 (dated 9 August 2018) on the requirement to complete a periodic questionnaire on the prevention of money laundering and terrorist financing.

Most notably, entities supervised by FSMA are now required as a result of Circular FSMA 2018 13 to complete and submit a periodic questionnaire on the prevention of money laundering and terrorist financing. The completed questionnaire will mainly cover statistical data and qualitative information regarding the entity's internal AML control system framework and is due to be submitted to FSMA by 15 October 2018. Going forward, the questionnaire will need to be completed on a yearly basis.

Copies of the Regulation and Circulars mentioned above can accessed in French and Dutch here or at the following link, https://www.fsma.be/en/combatting-money-laundering-and-financing-terrorism.

Financial Task Force (FATF) publishes follow-up report on Belgium's AML progress

In September 2018, the FATF published its third enhanced follow-up report on Belgium to assess the jurisdiction's progress in resolving the technical compliance (hence legal) shortcomings identified in the mutual evaluation of 2015. The follow-up report highlights Belgium's overall progress in strengthening measures to tackle money laundering and terrorist financing as a consequence of the implementation of the AML Act of 18 September 2017. It also puts the emphasis on several weaknesses of the legal framework, mainly in relation to the (too slow) application of targeted financial sanctions. Overall, based on the 40 recommendations of the FATF, Belgium is rated "compliant" in respect of 21 recommendations, "largely compliant" in relation to 16 recommendations, and "partially compliant" for the remaining 3 (as compared to 11, 18 and 11 respectively in 2015). The FATF, however, indicated that Belgium will remain subject to enhanced follow-up.

FRANCE

The never-ending carbon tax scam – trial finally takes place in the EUR 70m B-Concept case

Further to our artide on page 5 of the Q2 2018 edition of Allen & Overy's European White Collar Crime Report, there have been further developments in the French carbon tax scam saga.

From 3 September to 4 October 2018, sixteen defendants stood trial before the Paris Criminal Court for their participation in carbon tax fraud amounting to EUR 70m, involving organised cross-border fraud and money laundering. Some of the perpetrators have yet to be located.

The founder of "France Offshore", a French company which promised a "tax haven for everyone", who was convicted last year for tax evasion plus laundering the proceeds of tax evasion and sentenced to five years' imprisonment (three years of which are suspended), features among the defendants. So do three of the main defendants convicted in September in the "Crépuscule" carbon tax fraud case, whereby a Turkish bank had been fined heavily for money laundering (see page 5 of the Q4 2017 edition of Allen & Overy's European White Collar Crime Report). Once handed down, the decision of the Paris Criminal Court will be covered in a future edition of Allen & Overy's European White Collar Crime Report.

Dubai Papers: French media reveals alleged UAE - based International Money Laundering network

Following the Panama and Paradise Papers scandals, on 5 September 2018, the French newspaper L'Obs revealed an alleged international tax evasion and money laundering network based in the United Arab Emirates.

The newspaper focuses on a group based in the United Arab Emirates, daiming that the money deposited by its dients (mainly Russian oligarchs, professional sportsmen and French company directors) was then laundered using various mechanisms such as shell companies, trusts, false loans and pseudonyms.

The newspaper also disdosed information regarding a former manager of a French energy company, who has allegedly already been placed under formal investigation by the French authorities for breach of trust and corruption.

In light of the National Financial Prosecutor's reaction to the Panama Papers, whereby a preliminary investigation was opened on the grounds of aggravated tax evasion the day after the press' revelations, another criminal investigation on similar grounds may be opened in France regarding the Dubai Papers, particularly in light of the potential connections with French persons.

GERMANY

Ponzi scheme scandal continues as insolvency proceedings are commenced against container ship company

One of Germany's largest container ship companies stands accused of operating a Ponzi scheme after it was uncovered in May 2018 that the firm had sold nearly one million more shipping containers than it owned.

The company sold new and used containers to investors and rented them back from investors before then seeking to repurchase them after five years at 65% of their original value.

According to company statements, the firm had sold a total of around 1.6m containers and drew around EUR 3.5 billion from its c.a 54,000 investors. After the firm filed for insolvency in March 2018, it emerged that in fact it only owned around 618,000 containers.

ROMANIA

The draft law for the transposition of the Fourth AML directive is currently under debate before the Romanian parliament

On 20 June 2018, the draft law for the transposition of the EU's Fourth Money Laundering Directive (**4MLD**) was tabled in Parliament, following approval by the Romanian Government. Currently, the draft law is under debate before the Senate, following which it will be sent to the second chamber, the Chamber of Deputies. Thus, we expect the law to be adopted within a few months' time.

As declared by a representative from the Ministry of Foreign Affairs, Romania risks facing backlash given that more than a year has lapsed since the transposition term expired on 26 June 2017.

UNITED KINGDOM

Law Commission launches consultation on SARs Regime

The Law Commission (the independent body responsible for reviewing and recommending reforms to UK legislation) has published a consultation paper on the UK's Suspicious Activity Reports (**SARs**) Regime.

Under the current law, contained in the Proceeds of Crime Act 2002 (**POCA**), a SAR must be submitted to the NCA as soon as it is known or suspected that a person is engaged in money laundering. Submission can provide a defence against committing a money laundering offence. However, the current regime is widely considered to be flawed, with one of the most serious issues being the burden it places on both companies and enforcement authorities: the NCA receives an average of 2,000 SARs every day, many of which are of "*low intelligence value and poor quality*". There is also uncertainty around the meaning of "suspicion" for the purposes of the rules.

The Law Commission's consultation is broad, seeking answers to 38 questions with the aim of identifying difficulties with the current regime and generating ideas for reform. The consultation period closed on 5 October, after which the Law Commission will review the responses and present its recommendations to the UK Government.

A closer look: Spain

Spain approves law implementing 4MLD

On 30 August 2018, the Spanish Council of Ministers approved Royal Decree 11/2018 on the transposition of directives on the protection of pension commitments with workers, prevention of money laundering and requirements for entry and residence of third-country nationals (**RDL 11/2018**) (http://www.boe.es/boe/dias/2018/09/04/pdfs/BOE-A-2018-12131.pdf).

RDL 11/2018, which entered into force on 4 September 2018, incorporates 4MLD within Spanish law. In light of Spain's failure to meet the EU's deadline for transposition (26 June 2017), the Government opted to incorporate 4MLD into national law via Royal Decree as opposed to statute. This is despite the draft statute having been held in Public Hearing until 16 January 2018 (the text of the draft statute can be found here: http://www.mineco.gob.es/stfls/mineco/ministerio/participacion_publica/audiencia/ficheros/ECO_Tes_171222_AP_Ley_BCFT_fin.pdf).

RDL 11/2018 amends Law 10/2010 on the prevention of money laundering and the financing of terrorism (**Law 10/2010**). The main additions in the Spanish legislation are as follows:

- **Beneficial ownership**. The concept of "control" is specified for the purposes of the obligation to identify the ultimate beneficial owner of assets. Likewise, the Royal Decree outlines what is meant by the "real ownership" of trusts or analogous structures, namely:
  - (i) the settlor;
  - (ii) the trustee(s);
  - (iii) the protector (if any);
  - (iv) the beneficiaries, or where the individuals benefiting from the legal arrangement or entity have yet to be determined, the class of persons in whose main interest the legal arrangement or entity is set up or operates; and
  - (v) any other natural person exercising ultimate control over the trust by means of direct or indirect ownership or by other means.
- **Due Diligence Measures**. The obligation to apply enhanced due diligence measures is incorporated with respect to countries specified by the European Commission in accordance with Article 9 of the Directive.
- **Gambling sector**. Control over transactions in the gambling sector has now been expanded. Gambling providers (not only casinos) are required to apply AML measures in transactions of EUR 2,000 or more (whether the threshold is reached in a single transaction or series of transactions).
- **Politically Exposed Persons**. Prior to the introduction of 4MLD, PEPs were divided into two broad categories: (i) individuals with international public responsibility who were subject to enhanced due diligence; and (ii) those with national public responsibility who were subject to enhanced due diligence measures on a case by case basis. A tougher regime is now applicable to those exercising public responsibility or public functions in the domestic arena, with all individuals now being subject to enhanced due diligence measures as a matter of course. In addition, the concept of a politically exposed person (*persona de responsabilidad pública*) is extended (to include directors, deputy directors and members of the board of directors, and positions of senior management within political parties represented in Parliament).
- **Cash use**. There has been a reduction in the threshold at which persons trading in goods that use cash as a means of payment are obliged to comply with the obligation to prevent money laundering, with the threshold falling from EUR 15,000 to EUR 10,000.
- **Sanctions increase**. The sanctions applicable to money laundering breaches now match the maximum thresholds established by the EU regulations.
- **Mechanisms to encourage reporting**. Those subject to RDL11/2018 are now required to establish internal systems enabling them to report breaches to the Commission for the Prevention of Money Laundering and Monetary Offenses (*Comisión de Prevención del Blanqueo de Capitales e Infracciones Monetarias*).
- **Register**. Corporate service providers (those offering services to companies and trusts) are now obliged to register with the Spanish Commercial Registry.
- **Correspondent banking relationships**. Finally, the scope of the legislation's application to due diligence measures in relation to correspondent banking relationships is extended to include all financial institutions, which are now required to comply with certain specified due diligence measures when engaging in correspondent banking.

Lara Ruiz, Associate, Madrid

A closer look: United Kingdom

Azerbaijani couple at the centre of UK's first Unexplained Wealth Order

The UK saw its first use of an Unexplained Wealth Order (**UWO**) in February 2018 when the NCA successfully imposed orders on two UK properties, one in the exclusive Knightsbridge area of London and the second, a golf course in Berkshire, collectively worth circa. GBP 22m.

The individual at the centre of the UWOs commenced a legal battle to dismiss the order relating to her Knightsbridge home and also to protect her identity. At the beginning of October 2018 however, Zamira Hajiyeva failed to have the Knightsbridge UWO lifted and on 10 October 2018, also lost her legal battle to remain anonymous.

Who is Zamira Hajiyeva?

The target of the UWOs is Zamira Hajiyeva, the wife of Jahangir Hajiyev, a former chairman of the state-owned International Bank of Azerbaijan. In 2016, Mr Hajiyev was convicted in Azerbaijan of embezzlement, abuse of office and fraud, to name but a few charges. He was fined nearly USD 40m and imprisoned for 15 years.

What are UWOs?

UWOs came into force in the UK on 31 January 2018. UWOs are an investigative tool which can be used by certain law enforcement authorities, including the UK's National Crime Agency (**NCA**), Her Majesty's Revenue and Customs (**HMRC**), the Financial Conduct Authority (**FCA**) and the Serious Fraud Office (**SFO**).

Where law enforcement reasonably suspects that property is being held by an individual whose known lawful means of income cannot explain their possession of the property, a UWO can be issued requiring the individual to explain: (i) the nature and extent of their interest in the property; and (ii) how they obtained the property. In order to impose a UWO, the individual must be either a PEP or there must be reasonable grounds to suspect that the individual is involved in serious crime.

The key point of conflict is the definition of PEP, which is set out in section 362(B)(7) of the Proceeds of Crime Act 2002 and covers individuals who have been "*entrusted with prominent public functions by an international organisation or by a state other than the UK or another EEA state*". The NCA alleges that Mr Hajiyev is a PEP who obtained his wealth from the embezzlement of public funds. Mrs Hajiyeva, whose lavish spending habits have drawn much fascination from the press, has argued that her husband is not a PEP but gained his wealth legitimately as a commercial banker.

What next?

Having lost her challenge against the Knightsbridge UWO, Mrs Hajiyeva will now have to explain how she was able to afford the two UK properties, despite arguing that only her husband can answer such questions.

Donald Toon, the NCA's Director for Economic Crime, has commented positively on the result, reiterating that the NCA is keen to use UWOs in its battle against 'dirty money': He said, "…This demonstrates that the NCA is absolutely right to ask probing questions about the funds used to purchase prime property. We will continue with this case and seek to quickly move others to the High Court. We are determined to use the powers available to us to their fullest extent where we have concerns that we cannot determine legitimate sources of wealth."

Hayley Humphries and David Odejayi, Associates, London

ACTIONS

Belgium: Make a note of the 3 March 2019 deadline for Belgian companies to complete the UBO register via the online platform by 31 March 2019.

Belgium: Submit AML questionnaires to the Belgian Financial Services Market Authority by 15 October 2018.

A closer look: EU-wide

European implementation of 5MLD and Ultimate Beneficial Ownership (UBO) Registers

As previously reported in the Q2 2018 edition of Allen & Overy's European White Collar Crime Report, the European Fifth Anti-Money Laundering Directive (**5MLD**) entered into force on 9 July 2018, with an implementation deadline of 10 January 2020 (which may include the UK, depending on the terms of the Brexit transition period).

5MLD imposes additional obligations, particularly on those in the finance sector and aims to, among other things, improve enforcement of Europe's Fourth Anti-Money Laundering Directive (**4MLD**) and to ensure tighter controls relating to high-risk third countries. Among the changes introduced by 5MLD is the requirement to provide wider access to each Member State's central register of beneficial ownership of corporate entities. Under 5MLD, these registers can now be accessed by the general public without the need for them to show a 'legitimate interest'.

The table below provides an overview of how some Member States are implementing the requirement to maintain UBO Registers in their national law. Please see the following page for a summary of the implementation status of 4MLD.

Country	5MLD and UBO register implementation status
Belgium	The Belgian UBO Register went live on 1 October 2018 although the deadline for Belgian companies to upload and complete information on the Register is 31 March 2019. Members of the public have restricted access to the UBO Register and will have to identify themselves through eID, and may only search the Register using a company's Crossroads Bank for Enterprises number or company name. Given that companies have until 2019 to update the Register, it seems likely that the Register will be lacking information until this deadline.
Czech Republic	The implementation of 5MLD is at an early stage in the Czech Republic but it has been flagged that significant changes to the Czech rules which govern UBOs are to be expected. The rules are likely to become more detailed as they seek to implement 5MLD.
France	5MLD is yet to be fully transposed into French law, although a draft bill is currently being considered by the French National Assembly in order to allow the Government to transpose the directive through orders. In response to the implementation of 4MLD, a new decree entered into force on 21 April 2018 which includes provisions on UBOs. This decree specifies what is meant by a 'beneficial owner' – this includes whether the owner owns, directly or indirectly, more than 25% of the capital or votes, or if they have control over the company in a way which allows them to determine decisions in general assemblies of the company.
Germany	5MLD is yet to be implemented in Germany. 4MLD has been effective since 26 June 2017 in Germany and this established the German UBO Register. The requirement under 5MLD that UBO Registers are to be public is still to be satisfied as the current register only grants immediate access to certain authorities and individuals who can show they have a 'legitimate interest'.
Hungary	The deadline for the database setup in relation to the implementation of the UBO Register in Hungary is 1 January 2019. Currently, third persons may request data from the central register but this is granted to those with a 'legitimate interest' only.
Italy	The UBO Register has not yet been implemented in Italy despite 4MLD having been implemented by Decree no. 90/2017. Second-level legislation is required to provide details on how companies' obligations to disclose their UBOs should be carried out in practice, however, the deadline for issuing second-level legislation expired in July 2018. The implementation of the UBO Register could be postponed until after the implementation of 5MLD.

Country	5MLD and UBO register implementation status
Luxembourg	Two UBO registers are in the process of being created in Luxembourg by two different laws. On the one hand, there will be a register of beneficial owners of companies and similar entities registered with the Luxembourg trade and companies register (the RBE). On the other hand, there will be a register of *fiducies* (corresponding to the register of trusts in 4MLD). We expect that the law creating the RBE will be adopted before the end of the year. There is no clear timeline as regards the adoption of the law on the register of *fiducies*. The transposition of 5MLD has not started yet, except that the bill that will create the RBE already anticipates a couple of changes required by 5MLD: access to the RBE will be granted to any person and beneficial owners of an entity registered in the RBE have an explicit obligation to provide all relevant information to that entity.
The Netherlands	Implementation of 5MLD has been put on hold while a new draft bill (set to be published in early 2019) is prepared. The implementation deadline of the UBO Register in the Netherlands has been extended to 18 months post-implementation of 5MLD.
Poland	The act which implemented 4MLD postponed the implementation of a UBO Register until 13 October 2019 in Poland. The relevant ministry of the Polish Government has confirmed that it has not yet started working on the implementation of the additional requirements of 5MLD.
Romania	4MLD has not yet been adopted in Romania and the EC has begun infringement procedures in respect of this. The current draft law which would transpose 4MLD into Romanian law does not include provisions which would meet the 5MLD requirements on UBO registers.
Spain	5MLD has not yet been implemented in Spain although the Spanish Council of Ministers approved Royal Decree 11/2018 in August 2018 on the transposition of a number of directives, which includes the prevention of money laundering. This entered into force on 4 September 2018 and incorporates 4MLD within Spanish law. It requires entities subject to 4MLD to indicate their real owners and to keep a record of this in a marginal note within the relevant Commercial Registry filing.
United Kingdom	As noted above, Member States are required to transpose MLD 5 by 10 January 2020. This will be after the UK has formally left the EU, but within the transitional period currently envisaged in the draft EU Withdrawal Agreement. It is therefore assumed that the UK will implement 5MLD in full.

Sabiah Khatun, Trainee, London

The table below summarises the status of 4MLD's implementation as at the end of Q3 2018 in various Members States:

Country	4MLD implementation status
Belgium	Effective from 16 October 2017. The Belgian legislator has adopted the Act of 18 September 2017 on the prevention of money laundering and the financing of terrorism and on restricting the use of cash (*Wet van 18 September 2017 tot voorkoming van het witwassen van geld en de financiering van terrorisme en tot beperking van het gebruik van contanten; Loi du 18 Septembre 2017 relative à la prévention du blanchiment de capitaux et du financement du terrorisme et à la limitation de l'utilisation des espèces*). Provisions regarding the functioning of the ultimate beneficial ownership register will be implemented in a separate royal decree which should be published in the course of Summer 2018.
Czech Republic	Effective from 1 January 2017. Amendment no. 368/2016 Coll. to the Act no. 253/2008 Coll., on Selected Measures against Legalisation of Proceeds from Crime and Financing of Terrorism.
France	Not yet fully implemented. Order No. 2016-1635 of 1 December 2016 yet to be ratified by French Parliament. Many provisions of Decree No. 2018-284 dated 18 April 2018 came into force on 1st October 2018.
Germany	Effective from 26 June 2017. Money Laundering Act (*Geldwaschegesetz*).
Hungary	Effective from 26 June 2017. Prevention and Combating of Money Laundering and Terrorist Financing Act.
Italy	Effective from 4 July 2017. Legislative Decree 90/2017, aimed at amending AML Legislative Decree No. 231/2007, entered into force on 4 July 2017. Second-level regulations still to be implemented by competent supervisory authorities.
Luxembourg	The legislative package implementing 4MLD in Luxembourg is composed of: – the tax reform law of 23 December 2016, which has led to the insertion of criminal tax offences (*fraude fiscale aggravée et escroquerie fiscale*) into the list of predicate offences to money laundering; – the Luxembourg Law of 13 February 2018: it implements the main provisions of the 4MLD and amends the amended law of 12 November 2004 on the fight against money laundering and financing of terrorism; – the Luxembourg Law of 1 August 2018: it implements Directive No. 2016/2258 pursuant to which national tax authorities shall be granted access to the mechanisms, procedures, documents and information referred to in articles 13 and 40 of the 4MLD; – the Luxembourg Law of 10 August 2018 which amended the amended Law of 12 November 2004 on the fight against money laundering and the financing of terrorism, in order to ensure compliance with 4MLD (amendments relate to the Financial Intelligence Unit (*Cellule de Renseignement Financier (CRF)*)); – Bill no.7216, which was introduced before the Luxembourg Parliament on 6 December 2017 and implemented article 31 of the 4MLD pertaining to the register of trusts, has been divided into two separate bills following the adoption of the 5MLD: the first containing the information to be obtained and retained by trustees (no.7216A) and the second concerning the register (no.7216B); Bill no.7216A has been adopted through the Law of 10 August 2018 regarding the information to be obtained and retained by trustees. Bill no.7216B has not yet been adopted; and – Bill no.7217 which was introduced before the Luxembourg Parliament on 6 December 2017 and implemented article 30 of the 4MLD pertaining to the register of ultimate beneficial owners: a series of amendments were introduced on 13 July 2018 following the adoption of the 5MLD, amending the original bill and extending the consultation process and the legislative process. Those last two bills are undergoing the standard legislative process and there is not yet any visibility on the date on which the final laws will be adopted.

Country	4MLD implementation status
Poland	4MLD was implemented by the new Act on Counteracting Money Laundering and on the Financing of Terrorism dated 1 March 2018 which was published on 12 April 2018. It came into force on 13 July 2018, with the exception of Chapter 6 and Articles 194 and 195 concerning the establishment of a Central Register of Beneficial Owners, which will come into force on 13 October 2019.
Romania	Not yet implemented. On 31 May 2018, the Government of Romania adopted the draft Law on the prevention and combating of money laundering and financing of terrorism and for the amendment and completion of certain normative acts, which transposes the Fourth Money Laundering Directive. The draft law will now now submitted to Parliament, a process which may take several months. Given that the deadline for implementing the Fourth AML Directive elapsed a year ago, it is possible that the Government may issue an emergency ordinance to expedite the process.
Slovakia	4MLD was implemented in Slovakia via Act No. 52/2018 Coll., which was an amendment to the Slovak Anti-Money Laundering Act. The amendment took effect on 15 March 2018, although certain selected provisions will only come into effect on 1 November 2018.
Spain	Effective from 4 September 2018. On 30 August, the Spanish Council of Ministers approved Royal Decree 11/2018, 31 August, on the transposition of directives on the protection of pension commitments with workers, prevention of money laundering and requirements for entry and residence of third-country nationals, which incorporates the IV AMLD within Spanish law, and amends Law 10/2010, of April 28, on the prevention of money laundering and the financing of terrorism.
The Netherlands	Effective from 25 July 2018. Please note that provisions regarding the ultimate beneficial ownership register will be implemented in a separate Act.
United Kingdom	Effective from 26 June 2017. Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017.

Taxation

FRANCE

French MP placed in custody on suspicion of tax evasion, after immunity lifted by the French Parliament

Another French politician has been targeted by a tax evasion investigation. This time around, the politician in question is still in office, so the public prosecutor in charge of the criminal investigation had to request that his parliamentary immunity be lifted by the National Assembly prior to taking him into custody.

According to information available in the press, the criminal investigation was first opened by the Nanterre Public Prosecutor on the grounds of suspicions of tax evasion following a complaint from the tax authority, before being extended to corruption offences, misuse of corporate assets, illicit electoral financing and reporting failures with respect to the French Transparency Authority (*Haute Autorité pour la transparence de la vie publique*, known as **HATVP**), to which public officials must declare their property and interests.

The MP is notably suspected of failing to declare his EUR 12,000 monthly income as a strategic adviser in a company specialising in the collection and processing of waste, while acting as the general counsellor of the Ile-de-France region for the UMP political party from 2010 to 2013.

GERMANY

State Minister of Justice speaks on Cum-Ex investigation and tax reimbursements

According to newspaper articles, the Hessian Minister of Justice and the Frankfurt Attorney General's Office consider the German "Cum-Ex" investigations to have been successful, although it is still unclear when and how the criminal investigations will end. Regardless of the outcome, the politician is quoted as stating that banks today consider tax issues more cautiously, especially in connection with new financial products, and in cases of doubt, often approach the tax authorities proactively.

Offices of German bank raided in Cum-Ex trading investigation

One of Germany's largest banks by asset size has been raided by Frankfurt's prosecution office in connection with the "Cum-Ex" trading scandal. In 2013, it emerged that the Bank had been involved in cum/ex share trades taking advantage of an alleged tax loophole and thereby avoiding approximately EUR 131m in tax. In comparison to other European institutions, the bank concerned cooperated swiftly and initiated an internal investigation, as well as paying back EUR 149m, including interest, to the treasury by the end of 2017.

However, it appears that the bank's internal investigation did not satisfy Frankfurt's prosecutors. According to press reports, the raid on 11 July 2018 was aimed at gathering further information on four stock exchange traders who appear to be responsible for the deals.

UNITED KINGDOM

New international alliance to combat tax fraud

An international alliance to tackle tax crime and money laundering has been formed. Known as the J5 for short, it consists of the Australian Criminal Intelligence Commission, Australian Taxation Office, the Canada Revenue Agency, the Dutch Fiscale Inlichtingen-en Opsporingsdienst, the UK's HM Revenue & Customs, and the U.S. Internal Revenue Service Criminal Investigation Division.

The J5 was created following calls from the OECD for countries to improve their efforts to combat tax evasion. It will focus on enhancing member organisations' investigative capabilities, cooperating to address the use of new and emerging technologies (e.g. cryptocurrencies) to facilitate cybercrime and developing shared strategies and best practice in intelligence gathering.

HMRC's updated criminal justice and investigations guidance

The UK's HMRC has provided updated online guidance (available at https://www.gov.uk/government/publications/criminal-investigation/hmrc-criminal-investigation-policy) setting out when and how it will investigate tax fraud using its criminal powers. The guidance reiterates that HMRC's policy is to deal with tax fraud by the use of its civil powers and Code of Practice 9 (which allows for those accused of tax fraud to enter into a settlement agreement known as a Contractual Disclosure Facility) wherever appropriate. Criminal investigations will be reserved for cases where HMRC needs to provide a strong deterrent – this includes the example of cases involving money laundering – with a notable focus on advisers, accountants, lawyers and others "acting in a 'professional' capacity who provide the means to put tainted money out of the reach of law enforcement".

A closer look: France

Enactment of the new law on the reinforcement of the fight against fraud ("loi n°2018-898 relative à la lutte contre la fraude")

After much parliamentary debate, the law on the reinforcement of the fight against fraud has finally been enacted.

Amongst its provisions, the new legislation will introduce a number of significant changes as regards the prosecution of tax evasion offences, including:

The possibility to settle the tax proceedings with the French Tax Authorities' ("FTA") even when criminal proceedings on grounds of tax evasion have been initiated or are considered.

Article L. 247 of the French Tax Procedure Code prevents the FTA from settling once criminal proceedings have been initiated or considered. The proposed legislation amends this provision so as to allow an administrative settlement, notwithstanding pending criminal proceedings. A debate nonetheless remains as to whether the law will now allow a settlement with the FTA regarding only the amount of the penalty to be imposed, or also in respect of the amount of tax avoided.

The extension of the scope of the French style DPA (CJIP) and guilty plea agreement (Comparution sur Reconnaissance préalable de Culpabilité ("CRPC")) to settle tax evasion investigations.

At present, neither French criminal settlement mechanisms, namely the CJIP (no admission of guilt required) or the CRPC (admission of guilt required) are open to individuals and legal entities prosecuted on the ground of tax evasion. Post implementation of the new legislation, the Public Prosecutor will have the ability to enter into a CJIP (with corporates only) and a CRPC (with both individuals and corporates) to settle prosecutions for tax evasion.

The possibility to prosecute tax evasion offences absent any prior complaint from the FTA.

French law requires that a criminal complaint be filed by the FTA before the Public Prosecutor can investigate any tax evasion offence. This mechanism provided by Article L. 228 of the French Tax Procedure Code, also known as the so-called "verrou de Bercy", has been highly criticised insofar as it prevents the Public Prosecutor from investigating tax-related matters where the FTA has chosen not to file a prior complaint.

The new legislation will significantly limit the application of "verrou de Bercy". It now imposes an obligation on the FTA to disclose any serious breach (e.g. those that led to administrative penalties of 40% and more) it becomes aware of to the Public Prosecutor who may, in turn, decide whether or not to prosecute. The legislation will also allow the Public Prosecutor to prosecute tax evasion cases of its own volition that are connected to cases he or she is already in charge of.

The majority of the new legislation enters into force immediately. Its potential to significantly smooth the prosecution and settlement of tax evasion cases is to be welcomed.

Dan Benguigui, Counsel, and Marine Gourlet, Associate, both Paris

Market Offences

UNITED KINGDOM

Two former traders convicted of fraud in SFO's EURIBOR manipulation case

Two former traders, Phillipe Moryoussef and Christian Bittar, have been convicted of conspiracy to defraud by manipulating EURIBOR following a six-year investigation into rate-rigging brought by the Serious Fraud Office (**SFO**). Mr Bittar, formerly a trader at Deutsche Bank, pleaded guilty in March prior to the commencement of the trial while Mr Moryoussef, formerly a trader at Bardays Bank, was found guilty by a jury on 29 June 2018 after being tried in *absentia*.

On the same day, the jury found that another Deutsche Bank trader, Achim Kraemer, was not guilty but was unable to reach verdicts on three of Mr Moryoussef's former colleagues, Carlo Palombo, Colin Bermingham and Sisse Bohart. The retrial of these individuals has been fixed for 14 January 2019.

Mr Bittar and Mr Moryoussef have subsequently been sentenced for eight years and five years and four months respectively, with Mr Bittar receiving a reduced sentence on account of his guilty plea. Mr Bittar was also subject to a confiscation order of GBP 2.5m and ordered to pay the SFO's costs. A further hearing to determine confiscation in respect of Mr Moryoussef is scheduled for 20 December 2018.

HSBC's former head of FX trading sentenced for two years following conviction for fraud in the U.S.

In April 2018, Mark Johnson, the former head of HSBC's global foreign exchange trading, was sentenced to two years' imprisonment and fined USD 300,000. This followed his conviction in October 2017 by a federal jury for conspiracy to front-run and eight counts of wire fraud. Although Johnson was immediately escorted to jail after his sentencing, he subsequently won a bail hearing in June 2018 pending the outcome of his appeal in the Second Circuit Court in New York.

Meanwhile, in July 2018, Johnson's former colleague and co-accused, Stuart Scott, has won an appeal in the UK's Court of Appeal against his extradition to the U.S., where he faces eleven charges of foreign exchange rigging.

SFO closes Lloyds LIBOR investigation

The SFO has ended to its long-running investigation into alleged LIBOR manipulation in the Lloyds Banking Group, citing 'insufficient evidence' to take the matter further.

Allegations that its staff had colluded to set the London Interbank Offered Rate (**LIBOR**) and other benchmark rates saw Lloyds pay GBP 218m to U.S. and UK regulators in 2014. This included a GBP 7.8m sum paid to the Bank of England for manipulating a rate used to set fees on its bank funding scheme in the 2008 financial crisis. At the time of the settlement, the bank stated that 22 employees of Lloyds and HBOS had been involved in such market manipulation.

The SFO has been reviewing evidence of rates manipulation in the City since 2012, in which time there have been four convictions, one guilty plea, and eight acquittals.

A closer look: Italy

Dual-track system for market abuse offences

Recent amendments to Italian law add a new chapter to the longstanding debate over the Italian dual-track system and its compatibility with the double jeopardy (*ne bis in idem*) principle.

On 29 September 2018, Decree no. 107 of August 10, 2018 (the **Decree**), which amended the Italian legislative provisions to transpose the Market Abuse Regulation no. 596/2014 (the **MAR**) in Italy, entered into force. *Inter alia*, the Decree amends art.187-*terdecies* of Legislative Decree no. 58 dated 24 February 1998 (the **Italian Financial Services Act** or **TUF**) on the application and enforcement of criminal and administrative sanctions.

Under the amended law the Italian Companies and Stock Exchange Commission (**CONSOB**) (which is capable of imposing administrative sanctions for market abuse) and the judicial authorities will be required, when imposing sanctions for market abuse or insider trading offences, to take into account any criminal or administrative sanctions already imposed by the other authority on the same individual or entity in cases involving the same facts. This change implicitly confirms the existence of a dual track sanctioning system consisting of administrative sanctions and criminal sanctions for market abuse offences; indeed, the same individual or entity could potentially be sanctioned twice on the same facts, provided that the sanctions already applied are "taken into account" by the competent authorities imposing the second sanction.

Notably the amendment comes into force a few months after the Court of Justice of the European Union (**CJEU**) issued three decisions on the compatibility of the Italian sanctioning regime with EU legislation on double jeopardy (*ne bis in idem*) (for further information see page 12 of the Q1 2018 edition of Allen & Overy's *European White Collar Crime Report*). With these decisions, the CJEU had expressly limited the possibility of someone being sanctioned twice for the same conduct where the first sanction is considered adequate, proportionate and capable of addressing the violation concerned. In other words, the Court concluded that the *ne bis in idem* principle may indeed be limited, though on an exceptional basis and solely for the purpose of protecting the financial interests of the EU and its financial markets.

At first glance, the reform of Article 187-*terdecies* appears to comply with the principles set out by the CJEU in its decisions by requiring CONSOB and Criminal Judges to apply the standards set down by the Court and to take into account the adequacy and proportionality of the sanctions already imposed.

However, the reform does not contain any detail on how the authorities should take into account the sanctions already imposed in practice. This lack of guidance could represent an obstacle, for instance where criminal judges are required to assess the suitability of imprisonment for individuals already sanctioned with administrative monetary penalties, given the substantial differences between these two types of sanction.

Amilcare Sada, Counsel and Tommaso D'Andrea di Pescopagano, Trainee, both Milan

Bribery and Corruption

FRANCE

Further complaint filed against the Secretary General of the Elysée Palace

Further to our previous artide on page 18 of the Q2 2018 edition of Allen & Overy's European White Collar Crime Report, an additional complaint was filed by the anti-corruption association Anticor against the Secretary General of the Elysée Palace on 8 August 2018.

Although this complaint once again targets the offence of directly or indirectly taking, receiving or keeping an interest in a company or an operation over which the suspect was supposed to ensure the supervision, administration, liquidation or payment (*prise illégale d'intérêts*), it focuses on a vote which is alleged to have been taken by the Secretary General in favour of the French subsidiary of an Italian-Swiss group founded and directed by his mother's cousins, regarding the extension of a port in the north of France, between 2010 and 2012.

GERMANY

Greco advises German government to enhance anti-corruption measures against MPs

Germany has been criticised for the measures taken to fight Parliamentary corruption. According to the annual report of the Council of Europe's anti-corruption monitoring body (**Greco**), published on 3 May 2018, Germany has implemented only half of its anti-corruption guidelines in relation to Members of Parliament. In 2015, Germany had previously been advised by Greco to enhance its anti-corruption measures in relation to the legislature, in particular to provide for more transparency with regard to the influence of lobby groups on the legislative process and to require Members of Parliament to disdose conflicts of interests more frequently.

UNITED KINGDOM

SFO charges former employees of Güralp Systems Ltd

The SFO is conducting a criminal investigation into Güralp Systems Ltd (**Güralp**), a global provider of broadband seismometers, accelerometers and seismic digitisers which record movements and vibrations in the Earth's crust. The SFO's investigation, which is focused on alleged corrupt contracts in South Korea, has recently led to charges being brought against three individuals, hence the announcement of its investigation which has been running since December 2015. In August and September 2018, the firm's founder, Managing Director and a fellow co-conspirator were charged by requisition with conspiracy to make corrupt payments contrary to the Prevention of Corruption Act 1906 and the Criminal Law Act 1977. The SFO alleges that the three individuals conspired together to make corrupt payments to a public official and employee of the Korea Institute of Geoscience and Mineral Resources.

Bribery Act review committee commences examination of evidence

The House of Lords Select Committee convened to review the Bribery Act 2010 (the **Act**) has started the process of considering submissions made to it by (among others) the Ministry of Justice, the Law Society, anti-corruption NGOs and trade experts. The Select Committee is tasked with considering the Act's effectiveness in deterring bribery, the adequacy of its enforcement, its impact on SMEs, and the role played by deferred prosecution agreements (**DPAs**).

The post-legislative scrutiny memorandum submitted by the Ministry of Justice to the Select Committee in June 2018 noted that there have been successful prosecutions of the offences under sections 1, 2 and 7 of the Act and three successfully negotiated DPAs, and that the Act "*is recognised internationally as a leading model, alongside the U.S. Foreign Corrupt Practices Act, for effective criminal anti-bribery legislation*". The written submissions made by the Law Society in July 2018 were more cautiously optimistic about the Act's reach, however, noting that "*[t]here remains the archetype of the ex-pat of thirty years who is far from bashful about bribery as being "how things are done" and "part of the culture"*". The Select Committee will now review these and other submissions, and must complete its report by March 2019.

A closer look: United Kingdom

New Director, New Direction? Initial insight into the next era at the Serious Fraud Office

The question on everyone's mind since the announcement of the Director of the SFO on 4 June 2018 has been: how (if at all) will the new Director change the SFO's strategic direction and enforcement priorities?

We have had the first insight into that topic with the speech delivered in September by Lisa Osofsky in her capacity as the new Director of the SFO at the Cambridge International Symposium on Economic Crime. The take home message was that Ms Osofsky expects the SFO to remain committed to ensuring that the United Kingdom is, and will continue to be, a high risk place for the world's most sophisticated criminals to operate. She anticipates achieving that through global cooperation, the potentially expanded use of DPAs and technological advancements.

The importance of co-operation to the SFO's continuing success

The Director discussed the need for international cooperation due to the increasingly multijurisdictional and complex nature of cases in order to help the SFO achieve global settlements, as achieved with Rolls-Royce. The Director stressed her focus on strengthening and deepening international relationships to achieve more global settlements like Rolls Royce, including the need further cooperation with new comers to DPAs involving countries such as Argentina, Canada and Australia. The Director discussed how DPAs are no longer just a US only phenomenon. She cited her familiarity with the DPA process and indicated a commitment to a continued and potentially increasing use of DPAs under her tenure at the SFO.

The Director also highlighted the continuing work with national law enforcement organisations, including the contribution of the SFO to the development of the National Economic Crime Centre and the SFO's continuing work with the National Crime Agency. A controversial topic surrounding the SFO's administration has been the continued speculation over a potential merger with the National Crime Agency. This was not expressly mentioned within the Director's speech, although she has publicly come out since her appointment was announced to share a view that this would not be in the SFO's interest, and the suggestion has similarly been dropped from the Conservative Party's most recent manifesto. Nevertheless, it is clear from the speech that domestic cooperation with a number of agencies and institutions is going to be intrinsic to the Director's approach.

The Director briefly touched on the SFO's secondment and exchange programme as part of her vision of cooperation including the DOJ secondee currently with the SFO. On the topic of secondments, the Director discussed the exciting development and future cooperation with the National Economic Crime Centre (**NECC**), highlighting the potential opportunities for SFO employees to be seconded to the NECC. The Director also talked of the "natural ally" she saw in HM Revenue and Customs, stating that the SFO and HM Revenue and Customs could build "very strong" cases.

The future of privilege at the SFO?

In one of her first major decisions, the Director has chosen not to appeal the SFO's recent defeat in the ENRC case.[1] Whether or not this signifies a break in term of attitude towards privilege compared to her predecessor, the Director's speech only briefly touched on the topic of privilege; her primary focus in this regard was on enhancing the SFO's use of technology in the process of identifying privileged documents produced in the course of investigations. For example, Osofsky discussed the deployment of an AI robot which helped to check for legal professional privilege material in the Rolls Royce case which led to cost savings of 80%.

This is consistent with the Director's commitment to the advancement and the importance of the strategic use of cutting edge technology within the SFO. The Director discussed the SFO's creation of an "eDiscovery" platform, a feature that will assist with the future review of new investigations to create greater efficiencies, hopefully bringing quicker decisions and shorter trials. Committed to improving the SFO's intelligence function, the Director stated how there is a need to have an ability to collect and analyse data to improve knowledge of priority or emerging threats to enable the SFO to identify proactive investigative lines of enquiry.

Whilst the thrifty element of this new approach in criminal investigations is to be welcomed as a process to utilising financial resources, and may also be helpful for firms negotiating with the SFO in structuring their own investigation, the approach to the SFO's treatment of privilege remains somewhat uncertain post ENRC, and the

[1] http://www.allenovery.com/publications/en-gb/Pages/ENRC-v-SFO-appeal-internal-corporate-investigation-documents-are-protected-by-privilege.aspx

criticism levelled by the Court in AL v SFO.[2] The Director's focus on the Rolls Royce case though does suggest that investigation subjects may still face pressure to voluntarily disclose interview memoranda, should they want credit for a course of "full and extraordinary cooperation" with the SFO in a Deferred Prosecution Agreement.

It leaves open the question of whether the changed position on privilege will result in a practical difference from the SFO when it comes to measuring cooperation credit, or whether there will still be some expectation from the SFO that parties subject to investigations will waive the protection offered by privilege in return for an amicable settlement.

Technological innovation

Discussing the technological challenges that the SFO investigations face, including data-heavy criminal investigations, the Director set out how the SFO is exploring technology to find the right solutions for these challenges, including the use of technology to overcome issues arising through encryption. The SFO will also continue to focus on making the most out of witnesses to bring the most compelling evidence before judges and juries, as well as prioritising the recovery of criminal proceeds.

The expected importance of extensive international and national cooperation, continued pursuit of deferred prosecution agreements and commitment to technology highlights the Director's commitment to becoming a "different kind of Director".

Danielle Hyde, Trainee, London

[2] http://www.allenovery.com/publications/en-gb/Pages/Court-criticises-SFO%27s-approach-to-privilege.aspx

Prosecutor attitudes and resources

GERMANY

Car manufacturer to be fined in connection with the diesel emission scandal

According to press reports, a major German car manufacturer faces a fine of around EUR 10m for unauthorised "defeat devices" detected in 7600 of its diesel models. The Munich prosecutor's office has been investigating the car manufacturer over the past six months in relation to suspicions regarding the deliberate installation of "defeat devices", but has ultimately found that the installations occurred due to an oversight as opposed to a fraudulent scheme. The prosecutor has announced that, although no targeted manipulation of emission control occurred, the manufacturer did neglect its internal supervisory obligations and will therefore face a fine. It is understood that both sides aim to conclude negotiations on the precise amount of the fine before the end of the year.

Federal criminal police office reports significant rise in white collar crime

Germany's Federal Criminal Police Office (the **BKA**) published its latest crime statistics report on 12 June 2018. With 74,070 registered cases in 2017, the report indicates that reports of white collar crime have risen by 28.7% compared to last year and has reached its highest level in five years.

White collar crime only makes up 1.3% of all reported crime in 2017. However, it makes up about half of the financial damages caused by crime in Germany. In 2017, damages totalling EUR 3.74bn were linked to white collar crime. The BKA attributes the development largely to increasing digitisation, which yields new and diverse opportunities for criminals.

The law enforcement authorities plan to respond through awareness-raising and the introduction of preventive measures targeted at companies, trade associations and the public.

ROMANIA

Declassification of protocols between authorities in the judicial system and the Romanian intelligence service raises debates in relation to the legality of evidence gathering during criminal trials

Collaboration protocols concluded between the Romanian Intelligence Service (**SRI**) and institutions which are part of the Romanian judicial authority (High Court of Cassation and Justice, Superior Council of Magistracy, Judicial Inspection as well as the Public Ministry – General Prosecutor's Office) are currently a hot topic in the Romanian press, following their recent declassification.

The request to declassify these protocols came about following concerns that the SRI, Romania's largest secret service, has been interfering with the judicial process and has been helping the National Anticorruption Directorate (**DNA**) to obtain the conviction and imprisonment of top level politicians. The allegations are part of a wider conflict, whereby the current ruling coalition is claiming that an illegal power structure exists in Romania, consisting of the SRI, DNA and other institutions (named the **parallel state**), which aims to control the local political scene.

For instance, the protocol concluded in 2009 between the General Prosecutor's Office and the High Court of Cassation and Justice provides that the SRI and the prosecution bodies, including the DNA, could form common operative teams to investigate crimes related to national security and other serious crimes. The protocol also provided that secret service agents would provide assistance to prosecutors in their investigations.

In this context, there is an on-going debate as to whether the involvement of the SRI in the judicial

process was lawful, given that multiple voices (including the Justice Minister) allege that these protocols undermine the rule of law and the Constitution, the independence of the judiciary and the right to a fair trial. This is the reason behind Justice Minister Tudorel Toader's declaration that he plans to propose an emergency ordinance to the prime minister, Viorica Dancila, to allow all those convicted following investigations that utilised wiretap evidence to have their sentences reviewed.

SPAIN

Spanish Supreme Court highlights the importance of introducing corporate compliance programmes

On 28 June 2018, the Spanish Supreme Court delivered its judgment in case number STS 2498/2018, taking the opportunity to include *obiter dicta* statements outlining the importance of strong compliance programmes in preventing the commission of crimes by staff and the imposition of criminal and civil liability on legal entities.

The Spanish Supreme Court defined a "compliance programme" as a set of rules of internal character, established in the company at the initiative of the firm's administrative body, with the purpose of implementing a model of organisation and effective and suitable management that allows the company to mitigate the risk of committing crimes and exonerate the company from criminal liability for crimes committed by its directors and employees.

In this case, the Supreme Court sentenced the former administrator of a Ukrainian coal importer to four years' imprisonment for the continuous misappropriation of property and unfair administration which caused a loss of EUR 2m to the company. Although neither of the two crimes is included in the *numerus clausus* catalogue of crimes to which corporate criminal liability can attach, the Supreme Court seized the opportunity to highlight the importance of introducing compliance programmes to prevent or immediately detect the commission of crimes, and to reinforce the need for good corporate governance and transparency in management.

Furthermore, the Supreme Court outlined the role insurance companies can play in influencing good corporate governance by charging a lower premium to companies which have introduced robust compliance programmes.

UNITED KINGDOM

SFO continues to bolster AI and technology power

As reported on page 22 of the Q2 2018 edition of Allen & Overy's European White Collar Crime Report, the SFO is increasingly using 'Robo-Lawyers' to review documents, including in order to identify legal professional privilege. The SFO hit the headlines for piloting its AI-powered robot during the Rolls-Royce corruption investigation, which eventually resulted in a GBP 497m settlement in the UK alone. Lisa Osofsky, the new Director of the SFO, stated that the AI technology "*led to savings of 80% in the area that it was used*".

After the excitement with which the pilot was met, the SFO has announced that it is examining a record 65 million documents in relation to one on-going investigation, more than twice the amount reviewed in the Rolls-Royce case. At its fastest, the AI technology is reported to review 600,000 documents per day. Lisa Osofsky, stated that the use of this technology "*should create even greater efficiencies, and potentially help [the SFO] reach charging decisions sooner, and shorten the time it takes to progress to trial*". She indicated that an investigation with over 100 million documents is "*in the pipeline*".

EU-WIDE

Europol and Eurojust agree to fund joint investigation teams

On 1 June 2018, the European Union Agency for Law Enforcement Cooperation (**Europol**) and the European Union Judicial Cooperation Unit (**Eurojust**) signed a memorandum of understanding (the **Memorandum**) to establish rules and conditions offering financial support to joint investigation team (**JIT**) activities. A JIT consists of judicial and police authorities from at least two states, conducting a specific cross-border criminal investigation, such as organised VAT fraud, for a limited period. In the Memorandum, it was made clear that:

- Europol and Eurojust are responsible individually for their budget allocation;
- there is a need to avoid double funding in line with the financial regulations;
- Europol and Eurojust will exchange information, including that relating to applications for funding; and
- Europol and Eurojust want to improve the support provided to JITs.

European proposal to amend European Anti-Fraud Office Regulation

On 23 May 2018, the European Commission proposed amendments to Regulation No.883/2013 (the **OLAF Regulation**) on investigations conducted by the European Anti-Fraud Office (**OLAF**), which was set up in 1999. OLAF is tasked with conducting administrative investigations against fraud and any other illegal activity affecting the EU's financial interests, as well as assisting Member States' anti-fraud efforts. OLAF's investigative mandate is currently governed by the OLAF Regulation. The establishment of the European Public Prosecutor's Office (**EPPO**) was approved on 12 October 2017 and this body will have the power to conduct criminal investigations and prosecute before participating Members States' courts any criminal offences affecting the EU's financial interests.

Currently, OLAF carries out administrative investigations using administrative powers which are limited compared to those available during the course of criminal investigations. OLAF may currently only recommend action to national judicial authorities, but there is no guarantee that a criminal investigation will be opened as a consequence. This amendment aims to (i) create a new legal framework that will reinforce the fight against fraud affecting the EU budget through an integrated policy of criminal and administrative investigations; and (ii) clarify and simplify select provisions of the OLAF Regulation. In future, in participating Member States, OLAF will report suspected offences to EPPO and collaborate with it in the context of its investigations.

Examples of key changes include: (i) the establishment of a close and complementary relationship between OLAF and EPPO so that all available means are used to protect the EU budget; (ii) an obligation on OLAF to report to EPPO any conduct on which EPPO may exercise competence; (iii) non-duplication of investigations; (iv) Member States' duty to assist OLAF by transmitting potentially relevant bank account information; and (v) the admissibility of OLAF reports in non-criminal judicial proceedings before national courts and in administrative proceedings in Member States.

To ensure a smooth transition into the new institutional framework, the proposed amended OLAF Regulation should enter into force before EPPO becomes operational (envisaged as being at the end of 2020). As at the date of publication, this proposed amendment is with the European Parliament and is awaiting committee decision.

A closer look: United Kingdom

SFO can request overseas documents from non-UK companies

The Serious Fraud Office can validly issue a section 2 notice with extraterritorial application. It can compel production of documents held extraterritorially by a UK company, or issue a notice to foreign companies in respect of documents held outside the UK if there is a "sufficient connection" between that company and the UK. The ruling comes at a time when the SFO is testing the limits of its powers to seek disclosure of documents. Although unsuccessful in SFO v ENRC when contesting the ambit of legal professional privilege, the SFO will be pleased with the outcome of this ruling on its extraterritorial reach: The Queen on the application of KBR Inc v The Director of the Serious Fraud Office [2018] EWHC 2368 (Admin), 6 September 2018.

Under section 2 of the Criminal Justice Act 1987, the SFO can issue a notice requiring a person or entity under investigation or any other person to produce documents which appear to the SFO to relate to any matter relevant to the investigation. These are commonly called "section 2 notices". Failure to comply with a section 2 notice without reasonable excuse is a criminal offence.

The territorial scope of this power has been unclear: does it extend to documents held by UK companies overseas (including on an overseas server)? Does the SFO have the power to issue a section 2 notice to a foreign corporation that has no business presence in the UK?

These questions were answered in this case dealing with the validity of section 2 notices issued to:

- **an English company**: Kellogg Brown & Root Ltd (**KBR Ltd**): KBR Ltd carried out business in the UK. In February 2017, the SFO commenced a criminal investigation into KBR Ltd for suspected offences of bribery and corruption relating to the Unaoil scandal; and
- **the U.S. parent company**: KBR Inc: the ultimate parent of a multinational group, including KBR Ltd, providing professional services and technologies. KBR Inc had no fixed place of business in the UK and did not independently carry on business in the UK; it only did so through its UK subsidiaries. KBR Inc was under investigation by the U.S. Department of Justice and Securities and Exchange Commission for its dealings with Unaoil.

SFO seeks documents held both in and outside the UK

The SFO issued a section 2 notice to KBR Ltd in April 2017. Initially, the KBR Group expressed an intention to cooperate expansively in its response. It provided: (i) UK-based responsive documents already under KBR Ltd's custody and control; (ii) documents located outside the UK and sent to KBR Ltd at KBR Inc's direction; and (iii) purely on a voluntary basis, documents which KBR Inc had previously disclosed to the DOJ and SEC.

However, the SFO became concerned that the KBR Group was drawing what the SFO considered to be an inappropriate distinction between documents held by or under the control of KBR Ltd, and documents held outside the UK and beyond the control of KBR Ltd. It therefore issued a further, largely duplicative, section 2 notice in July 2017 (the **July Notice**) addressed directly to the U.S. entity, KBR Inc.

The U.S. entity, KBR Inc, challenged the lawfulness of the notice and refused to produce documents in response to it on the grounds that:

- the July Notice was *ultra vires* as it requested material held outside the UK from a foreign-incorporated company;
- it was an error of law for the SFO to exercise section 2 powers despite the power to seek Mutual Legal Assistance (**MLA**) from the U.S. authorities; and
- the July Notice had not been effectively served on KBR Inc when it was handed to an officer of KBR Inc who had temporarily been present in the UK in order to, at the request of the SFO, attend a meeting with the SFO.

The court rejected all of these arguments and upheld the validity of the notice.

Section 2 notice capable of extending to documents held overseas by UK companies

There is a general principle that, absent contrary intention, statutes have only territorial (not extraterritorial) application: i.e. they are restricted in operation to the UK.

However, the court concluded that section 2 notices issued to UK companies had to have at least some extraterritorial reach. This was because it was "scarcely credible" that a UK-based company could refuse to

provide documents solely because the documents were contained on a server abroad, as this would mean that a company could thwart an investigation by moving documents overseas. While section 2 had been drafted pre-internet, and had to be construed accordingly, the underlying policy behind section 2 was to prevent the "determination and ingenuity" of persons trying to obstruct investigations. Even in a pre-internet age, this would have required section 2 notices served on UK companies to have extraterritorial application.

Section 2 notice capable of extending to non-UK companies in respect of documents held outside the UK

There was no express statutory limitation on who could be a potential recipient of a section 2 notice. The court concluded that section 2 was directed at facilitating the investigation and prosecution of top end fraud, which by its nature would have an international dimension. While the international spread of documents has been amplified by technological developments since 1987, the court did not consider that an international dimension to such investigations was "*unknown or not appreciated*" when the Criminal Justice Act 1987 was drafted. Excluding any consideration of MLA, the court saw a "very real risk" that the section 2 power would be frustrated if the SFO was unable to seek documents located abroad from a foreign company. The court recognised the strong public interest in section 2 having an extraterritorial ambit, and concluded that section 2 notices could be validly issued to non-UK companies for documents held both in and outside of the UK.

Section 2 notice issued to non-UK company – must be a "sufficient connection" with the UK

The court applied a new limitation - a section 2 notice can only validly be given to a non-UK company in respect of documents held outside the UK where there is a "sufficient connection" between the company and the UK.

The court found a sufficient connection between KBR Inc and the UK for the July Notice to be valid. This was because the SFO's investigation focused on a large number of suspected corrupt payments made by KBR Inc's UK subsidiaries to Unaoil. The SFO had formed the view that those payments had required express approval by KBR Inc's U.S.-based compliance function and were processed by KBR Inc's U.S.-based treasury function. Further support arose from the fact that a corporate officer of KBR Inc was based in the group's UK office and appeared to carry out his functions from the UK.

The following factors, said the court, would not, without more, amount to a "sufficient connection" between a non-UK company and the UK:

- the non-UK company is the parent company of a company under UK investigation;
- the non-UK parent company cooperates to a degree with the SFO's request for documents and remains willing to do so voluntarily; or
- a senior officer of the non-UK parent company attends an in-person meeting with the SFO.

Mutual Legal Assistance (MLA) regime curtailed?

The court found that the MLA regime provides an additional, alternative route to obtain documents for the SFO but its availability does not affect the lawfulness of the SFO's decision to issue a section 2 notice to a non-UK company with sufficient connection to the UK. Even when there is an available MLA regime, there may be good practical reasons for the SFO to proceed with a section 2 notice (as it had in this case). The SFO has recently used the MLA regime to try to obtain documents in Monaco.

How is a section 2 notice served on a non-UK company?

A section 2 notice should be given to a person within the jurisdiction: there is no additional formality or traditional "service" required beyond the giving of the notice.

In this case, the July Notice was handed to an officer of KBR Inc voluntarily attending a meeting in the UK with the SFO, at the SFO's request. The officer was present in the UK for the purpose of representing KBR Inc, which was sufficient to establish KBR Inc was present in the jurisdiction at the time it (through its officer) was given the July Notice. While the court found it unappealing that the SFO insisted on a KBR Inc representative attending the meeting with the intention to serve the July Notice, this did not affect its validity.

Safeguards/defences

The court pointed to statutory "safeguards" in place in the CJA: the SFO must decide whether to exercise the power to issue a section 2 notice, the issue of such a notice is subject to judicial review and a person may rely on a statutory defence of reasonable excuse if they do not comply. However, it is unclear what the practical value of these safeguards and defences would be to a foreign company facing a potential fishing expedition. The English court has traditionally been reluctant to interfere, by way of judicial review, with the SFO's decision-making powers; for example the 2016 failed attempt, via judicial review, by Soma Oil to stop an SFO investigation.

Comment

While the court was careful to note that it was not engaging in "impermissible judicial legislation", it is difficult to conclude that the decision involves anything else. The CJA imposes criminal penalties for failure to comply with a section 2 notice, which would not usually align with an extraterritorial reach without specific extraterritorial

statutory provision (as in, for example, the Bribery Act 2010).

There is no suggestion in the CJA of the "sufficient connection" test, and in other similar contexts (for example, the Proceeds of Crime Act 2002), the Supreme Court has limited disclosure orders to having jurisdictional reach only. While similar tests have been generated in the insolvency context, the statutory safeguards surrounding exercise of such powers are quite different to those involved in questioning the SFO's power to issue a section 2 notice, which are limited to very narrow grounds.

The "sufficient connection" test for when a non-UK company may be issued with a section 2 notice involves considering the factual connection of the company to the UK, not in terms of (as might be expected) the strength of the business connections to the UK or storage of documents here, but rather its connection to the subject matter of the SFO's investigation (in this case, it was the U.S. company's role in the UK company allegedly making improper payments). As such, it is unclear what can be done by a non-UK company to insulate itself from the reach of a section 2 notice, barring avoiding receipt of such a notice by refraining from having its officers enter the UK.

The court did not consider the practicalities of a non-UK company complying with a request for documents. For example, there was no discussion regarding data protection or other overseas laws or arrangements which may restrict a company's ability to comply, and the invidious position a non-UK company may then be put in of facing competing criminal or civil liability (a difficulty which may be overcome through appropriate use of the protections built into the MLA regimes). The practical ability of the SFO to enforce such a notice against a non-UK company without any UK presence may also be called into question, in particular where a foreign company may face domestic blocking statutes or other compelling local law prohibitions against compliance with a UK section 2 notice.

A strong pointer that the legislature itself views the SFO's section 2 power as not being intended for extraterritorial use is the proposed introduction of a new UK law that will allow law enforcement agencies (including the SFO) to apply for a UK court order to obtain stored electronic data directly from a company or person based outside the UK. The Crime (Overseas Production Orders) Bill 2018 contains specific safeguards surrounding the extraterritorial use of production powers. The need for additional UK legislation governing extraterritorial production orders is consistent with the international approach taken in such cases. The Microsoft case in the U.S. (in which the U.S. government sought to compel Microsoft to disclose information stored on servers abroad) was based on unclear drafting in the U.S. Stored Communications Act. To clarify this ambiguity, the U.S. Clarifying Lawful Overseas Use of Data Act (the **CLOUD Act**) was passed. The CLOUD Act amends the SCA expressly to require a provider to provide data within its "*possession, custody, or control, regardless of whether [such data] is located within or outside the United States*".

While the Court did not consider that extending the jurisdiction of the SFO to issue section 2 notices extraterritorially would "raise eyebrows" in this case, it certainly does raise questions about international cooperation and comity, and (if the decision stands) the on-going use of MLA procedures by the SFO in the UK.

Stacey McEvoy, Senior Associate, London

ACTIONS

Germany: Be prepared for further scrutiny to be placed on what firms are doing to combat white collar crime and ensure all internal policies in this area are up to date.

Spain: Esnure robust corporate compliance programmes are put in place and review periodically.

Settlement

BELGIUM

Guidelines on criminal settlement issued to Belgian prosecutors

Following the entry into force on 12 May 2018 of the reform of criminal settlement proceedings (see page 25 of the Q1 2018 edition of Allen & Overy's *European White Collar Crime Report*), the College of Prosecutors General has issued guidelines to be applied by Belgian prosecutors when considering and concluding criminal settlements for individuals or corporates.

The new guidelines no. 08/18 of 24 May 2018 can be found here or at the following link in French https://www.om-mp.be/fr/savoir-plus/circulaires and here or at the following link in Dutch https://www.om-mp.be/nl/meer-weten/omzendbrieven. The new guidelines replace previous, separate guidelines which dealt with criminal settlement depending on whether or not an investigating magistrate or a judge had been seized of the matter.

The guidelines, issued on 24 May 2018, state *inter alia* that a criminal settlement should systematically be considered by prosecutors when they are confronted with certain listed offences, including, in principle, all economic, financial, tax and labour crimes. Where an investigating magistrate or a judge has already been seized of the matter, the guidelines recommend entering into a criminal settlement when the statute of limitations is likely to expire (if this will occur prior to a final decision being taken by the trial judge), or where it is doubtful that the penalty which would eventually be ordered by the court would be recoverable by the State. Where the suspect has a criminal record, the guidelines also indicate that it would normally be preferably to exclude the possibility of criminal settlement.

In terms of the financial penalty to be imposed by a criminal settlement, the guidelines indicate that the figure should be realistic and take into account various factors, such as the seriousness of the alleged crime, the existence of a criminal record, the time that has lapsed since the occurrence of the alleged crime and the magnitude of the proceeds of crime to be transferred as a result of the criminal settlement. The amount to be paid should also be sufficiently significant when assessed against the suspect's assets (while complying with the limits set by the law) so as to avoid impunity.

FRANCE

Another French-style DPA has been concluded with a French company accused of corruption

Further to the coordinated settlements with Société Générale reported on page 29 of the Q2 2018 edition of Allen & Overy's European White Collar Crime Report, another French-style DPA (*convention judiciaire d'intérêt public*, known as the **CJIP**) has been entered into between the Nanterre Public Prosecutor and the French company SAS Poujard, which operates in the thermal insulation and scaffolding sectors as well as in the nuclear and naval construction industries. Since February 2012, its main shareholder has been a French group specialising in the sale and hire of equipment for industry, building and public works.

In the context of a criminal investigation which was opened based on whistleblower information provided by the Head of Security at a French energy company, Poujard was placed under formal investigation for active corruption of a French public official, for having paid unlawful commissions amounting to EUR 29,000 in cash and the financing of works and travel in order to obtain or keep maintenance contracts for various thermal power plants between 2007 and 2011. These acts were alleged to have been committed before Poujard was taken over by the French group (thereby excluding the latter's criminal liability). Pursuant to the CJIP, Poujard agreed to the stated facts and criminal conduct.

The fine to be paid by Poujard is fixed at EUR 420,000 and comprises: (i) the profit drawn from the contracts obtained via the unlawful commissions, based on the gross operating surplus (EUR 240,000) and (ii) an additional penalty (EUR 180,000) in light of the period of the facts in question (five years), the context (contractual relationship of a public company managing thermal power plants and nuclear plants), the fact that Poujard did not report the facts to the judicial authorities or cooperate after the revelation by another provider, mitigated by the departure of the former directors and the implementation of a code of conduct aimed at preventing the risks of corruption in particular.

Pursuant to the CJIP, Poujard was placed under the monitorship of the French Anti-Corruption Agency for two years, and must pay the costs incurred by such monitorship (up to EUR 276,000).

It must also pay EUR 30,000 in damages to compensate the harm suffered by a French energy company, who had registered as a victim in the criminal investigation.

Extension of French-style DPAs to tax evasion offences

The scope of the French-style DPA or CJIP introduced by the so-called "Sapin II" law of 9 December 2016 is currently limited to corruption offences and the laundering of the proceeds of tax evasion.

The new bill approved by Parliament on the reinforcement of the fight against tax evasion now extends the scope of the CJIP to include tax evasion offences. The rationale behind this new provision is to offer public prosecutors an additional tool in their fight against tax evasion (see Closer Look section above).

Cybercrime

UNITED KINGDOM

EUR 433,000 fine imposed in the first breach of Irish regulation relating to cyberfraud

In June 2018, the Central Bank of Ireland (the **Bank**) imposed a EUR 443,000 fine on Appian Asset Management (**Appian**). Appian admitted breaches across client asset, AML and fitness and probity regulatory regimes.

A third party, impersonating a client who had invested in two Appian-managed sub-funds, gave instructions to Appian. Appian acted on these instructions to facilitate a series of transactions (including liquidation of funds and payment of the proceeds into specified accounts). The transactions resulted in the loss of EUR 650,000 of the client's funds, which was later fully reimbursed. This fraud occurred over email correspondence in a two-month period during which no fraud, money laundering or terrorist financing suspicions or fraud reports were submitted by Appian or its employees.

Although this is a fine imposed in Ireland, Appian is an AIFM for the purposes of the AIFM Directive. According to the Bank, Appian was vulnerable to the fraud due to historic regulatory failures and defective controls. The Bank was concerned by this fraud's "red flags", of which all AIFMs should be conscious, including that: (i) the real client's initial strategy was to hold his investment for the long term, while the fraudulent redemption requests arrived within two months of the investment; (ii) the third party provided questionable signatures and inconsistent facts when compared with the real client's profile and financial disclosure; and (iii) the third party requested payments outside the real client's place of residence and split into smaller redemption amounts to avoid UK banking controls. The Bank was also critical of Appian's policies and procedures and its lack of ongoing, tailored AML/CFT training for employees.

In determining the level of the penalty, the Bank considered the seriousness of the breaches, the duration of the breaches, the "need to impose an effective and dissuasive sanction" and Appian's cooperation "*during the investigation and in settling at an early stage*". The financial penalty would have been EUR 825,000 "*had it not been for the financial position of the firm*".

FRANCE

Progress made in the "CEO Fraud" investigation

It is widely recognised that "CEO Fraud" has affected many companies over the past couple of years, causing multi-million euro losses. These cases have essentially seen employees being duped into transferring large sums of money by fraudsters claiming to be CEOs or other members of top management. One case currently under investigation in France concerns the impersonation of the former French Minister of Defence.

According to information available in the press, in 2016, a co-owner of a French wine company received a phone call from an individual impersonating the said Minister, explaining that French citizens had been taken hostage in Syria and that a EUR 40m ransom was requested (and was to be paid by France unofficially, i.e. confidentially). Following the phone call, the co-owner then received a letter using the ministerial letterhead, claiming that the French State would of course refund her. As a result, she made three transfers to a bank account in Switzerland for EUR 5.95m in total.

In July 2018, the main suspect was interviewed by French criminal investigators after being arrested pursuant to an international arrest warrant. He had already been sentenced to seven years' imprisonment and a EUR 1m fine by the Paris Criminal Court in another CEO Fraud case, back in May 2015.

GERMANY

Reporting obligations for cyberattacks

According to the German Federal Ministry of the Interior, corporations often fail to inform the public authorities after falling victim to cyber attacks. Currently, an obligation to report cyber attacks exists only for corporations active in critical infrastructure sectors, such as telecommunications companies, larger healthcare and transport corporations, as well as for energy providers. The Parliamentary State Secretary for the Federal Ministry announced Government plans for a new "IT-Security Law 2", a draft of which is intended to be published in the current legislative period. The new law will presumably stipulate an obligation to report for a wider range of corporations in cases where a gross IT security breach has occurred.

ACTIONS

EU-wide: Ensure internal cyber-policies are kept up to date and consider employing internal IT security staff.

Sanctions

UNITED KINGDOM

Office of Financial Sanctions (OFSI) publishes first Annual Review

OFSI has published its first Annual Review since its creation in 2016, available here: https://www.gov.uk/government/publications/ofsi-annual-review-april-2017-march-2018. The Annual Review revealed that OFSI received 122 reports of potential financial sanctions breaches in 2017 to 18. To date, OFSI has not yet used its new statutory powers to impose a financial penalty in respect of a UK sanctions violation, however, OFSI indicated in the Annual Review that it was likely to do so within the next year.

Deadline for frozen assets reports fast approaching

It is that time of year again; frozen asset reports must have been submitted by 12 October 2018 to the OFSI. Anyone (including solicitors) who holds or controls funds or economic resources belonging to, owned, held or controlled by a designated person (i.e. **frozen assets**) must provide a report with information on those frozen assets to OFSI. This report is required annually. A designated person is an individual or entity listed under EU or UK legislation as being subject to financial sanctions (the list can be found here: https://www.gov.uk/government/publications/financial-sanctions-consolidated-list-of-targets). There is no obligation to submit a report if frozen assets are not held or controlled, unless they were held or controlled last year, in which case, a nil report must be submitted.

The report must contain information on those assets including their value as of 28 September 2018. All reports must be submitted using the 'Annual frozen asset review and reporting form'

The report can be found here: https://www.gov.uk/government/publications/annual-frozen-asset-review-and-reporting-form) and emailed to ofsi@hmtreasury.gov.uk.

OFSI updates lists of sanction targets

OFSI has updated its consolidated lists of financial sanctions targets, asset freeze targets, persons subject to restrictive measures in view of Russia's actions in Ukraine, and terrorist activity targets. It has also updated its financial sanctions statements on Iraq, Libya, North Korea, South Sudan, Syria, Ukraine, ISIL and Al-Qaida – see OFSI's website for further details, https://www.gov.uk/government/organisations/office-of-financial-sanctions-implementation.

Update on the UK Government's Strategic Export Controls

The UK Government's 2017 Annual Report on Strategic Export Controls was published on 23 July 2018 and provides an update on the UK's approach to the export of restricted items, such as weapons, through export licences and gifts.

The report illustrates how export licences, or the legal framework through which the UK exports controlled products, remain a key element of UK business and foreign policy despite the macro-economic uncertainty that followed the June 2016 Brexit vote. There are still plenty of countries which wish to buy weapons made in Britain and, in 2017, the UK Government approved the majority of applications for licences to export controlled items to its allies across the world.

In addition, the report details how the UK's approach to so-called "strategic gifting" – or the provision of arms and support to preferred military actors in areas where UK forces do not operate – continued to abound in 2017. Often focused on providing hardware and support to military actors engaged in conflicts in which the UK has a geopolitical interest, some of the more interesting examples detailed in the report include the provision of 4x4s to the "Syrian Moderate Opposition" and night-vision goggles to the "Tunisia Brigade" (an anti-terrorist division of the Tunisian police).

The paper confirms that the Brexit transition period means common rules will remain in place with the European Union until at least the end of 2020, but provides no assurances beyond then other than a broad position that the UK Government will maintain the "effectiveness" and "integrity" of its export controls following the end of any transition period. As with so many elements of Brexit this remains to be seen, and it is apparent that the final deal – be it a common rulebook for goods or no-deal – is likely to have an impact on the way the UK operates in this market.

EU-WIDE

EU sanctions Russian companies that built Kerch Bridge linking Crimean peninsula with Russian mainland.

In July 2018, as part of the EU's policy of non-recognition of Russia's annexation of Crimea and Sevastopol, the EU Council confirmed that it regards Russia's construction of the new Kerch Bridge connecting the Crimean peninsula with the Russian mainland as a "*further action undermining the territorial integrity, sovereignty and independence of Ukraine*", being a "*key symbolic step… in consolidating the Russian Federation's control over the illegally annexed Crimea and Sevastopol and further isolating the peninsula from Ukraine*". The EU therefore imposed sanctions on six Russian-based engineers, road and rail contractors involved in the bridge's construction.

ACTIONS

UK: Ensure frozen assets reports have been made if required and, if not, submit these immediately.

Europe-wide: Monitor updates to national and international sanctions lists to ensure compliance.

Competition

GERMANY

Antitrust authority imposes EUR 16m fine on media company

One of Germany's oldest and largest publishing houses has been fined EUR 16m by Germany's antitrust authority for conduding an illegal territorial agreement with a regional daily newspaper. In December 2000, the media company and the newspaper agreed to each largely withdraw their distribution from certain areas by thinning out local reporting. The territorial agreement ran up to 2016 and was safeguarded by the companies in 2005, when the publishing house granted a contractual pre-emption right to the regional newspaper. The pre-emption right was deliberately left undisdosed, although it would have been of key relevance to the authority's examination of the mutual participation under German merger control law.

Antitrust authority imposes EUR 200m fine on steel companies after tip-off

Germany's antitrust authority has fined six steel companies, a steel association and ten individuals around EUR 205m for price-fixing and exchanging sensitive information. The proceedings were initiated in November 2015 following a leniency application submitted by an Austrian steel company, which disdosed in a separate statement that it had only found violations when conducting an internal audit. The company did not receive a fine in line with the authority's antitrust leniency policy.

UNITED KINGDOM

Royal Mail fined GBP 50m for breaching competition law

The Royal Mail has been fined GBP 50m by the UK's competition regulator for abusing its dominant market position by discriminating against its only major competitor. The fine is the result of an investigation by Ofcom into a complaint from Whistl, one of Royal Mail's wholesale customers and a rival business mail delivery service.

The complaints arose in 2014 after Royal Mail increased the prices it was charging wholesale customers (such as Whistl) to allow them to access its delivery network. Following the price increase, Whistl who at the time were expanding and starting to challenge Royal Mail's dominance in certain areas suspended plans to extend into new regions.

Ofcom found that the price hikes were part of a deliberate strategy to limit competition in delivery services and came about as a direct response to the threat of competition from Whistl. The price rise put Royal Mail's competitors at a significant disadvantage and had a material impact on Whistl's profits. Announcing the fine, Ofcom's Competition Group Director called Royal Mail's conduct 'unacceptable' because it 'denied postal users the potential benefits that come from effective competition'.

Pfizer and Flynn have GBP 90m fine overturned

Pharmaceutical giants Pfizer and Flynn have had a GBP 90m fine overturned by the UK's Competition Appeal Tribunal (the **Tribunal**).

The fine was originally imposed by the UK's Competition and Markets Authority (**CMA**) in 2016. After an investigation, the CMA found that the prices at which the companies were supplying and selling an epilepsy drug called phenytoin sodium were excessive and unfair. The CMA consequently imposed a fine of GBP 84.2m on Pfizer and GBP 5.2m on Flynn and directed both to reduce their prices.

On appeal, the Tribunal found that the CMA had erred in their finding that the companies had abused competition law. The decision had not, for example, taken into account the potential impact of any meaningful comparator drugs in assessing whether the prices charged were unfair. Both fines were consequently set aside.

FRANCE

A dozen raids conducted against key electrical equipment manufacturers

On 6 September 2018, twelve searches were conducted by French criminal authorities against several key electrical equipment manufacturers, as well as against their main client distributors.

According to information available in the press, the searches were conducted in the context of a criminal investigation opened by the Paris Public Prosecutor in June 2018 following reports from the Competition Authority and Anti-Corruption Agency (**AFA**) in April 2018. The investigation allegedly targets anti-competitive practices, forgery, use of forged documents, breach of trust, misuse of corporate assets and laundering the proceeds of tax evasion and corruption. The last offence explains the involvement of the AFA, set up by the "Sapin II" law, which has a duty to inform public prosecutors of any potentially criminal acts it discovers in the course of its work.

Other developments

GERMANY

German government publishes draft bill implementing EU Directive on trade secrets

On 18 July 2018, the German Government published a draft bill implementing EU Directive 2016/943 on the protection of undisclosed know-how and business information (**trade secrets**) against their unlawful acquisition, use and disclosure. The aim of the directive is to harmonise the laws regarding trade secrets and in particular to provide minimum levels of uniform protection across the EU Member States. The directive also establishes clear rules concerning the protection of whistleblowers.

At the core of the German Government's draft bill is a new law on the protection of trade secrets, known as the GeschGehG, which establishes that companies can bring civil claims where trade secrets have been obtained, exploited or disclosed in unauthorised circumstances. The new bill stipulates stricter rules than those currently imposed by the law and provides for the greater protection of companies. Under the draft bill, civil claims may also be submitted where the information alleged to constitute trade secrets remains the subject of dispute. In such cases, the information is to be deemed confidential.

Furthermore, the draft bill envisages the possibility of a 'justification' defence for journalists and whistleblowers. This would provide journalists and whistleblowers with the ability to argue that the disclosure of trade secrets was justified in circumstances where the disclosure aimed to protect a legitimate interest, such as the exercise of freedom of expression or the exposure of unlawful acts and misconduct.

ROMANIA

Former Chief Prosecutor sentenced to four years' imprisonment for aiding and abetting

Alina Bica, the former Chief Prosecutor of the Directorate for Investigating Organised Crime and Terrorism, has been sentenced to four years' imprisonment for aiding and abetting.

Mrs Bica was investigated together with the former Economy Minister, Adrian Videanu, although he was eventually acquitted. Mr Videanu complained of a seizure order imposed by the Directorate over his shareholding in a private company. The investigation found that Mrs Bica acted unlawfully in granting Mr Videanu's request to list the seizure despite not having legal competence to do so.

Prior to sentencing, Mrs Bica fled Romania for Costa Rica, where she requested political asylum and in January 2018, she obtained interim refugee protection from the Costa Rican government.

Looking ahead

Date	Details
UNITED KINGDOM	
12 October 2018	Deadline to submit frozen assets report to OFSI
20 December 2018	Hearing to determine confiscation in respect of Phillipe Moryoussef in the SFO's EURIBOR manipulation case.
14 January 2019	Retrial of Carlo Palombo, Colin Bermingham and Sisse Bohart in the SFO's EURIBOR manipulation case
29 March 2019	HM Treasury has published a draft version of the Alternative Investment Fund Managers (Amendment) (EU Exit) Regulations 2018 which seeks to ensure that the European regime continues to apply post Brexit. It is anticipated that the new Regulations will enter into force on exit day.
FRANCE	
24 October 2018	Enactment of the law on the reinforcement of the fight against fraud and tax evasion. Most of its provisions enter into force immediately.
BELGIUM	
15 October 2018	Financial institutions subject to the AML legislation under the supervision of the FSMA to complete the periodic questionnaire on the prevention of money laundering and terrorism financing
31 October 2018	Entry into force of the Royal Decree of 30 July 2018 on the operating procedures of the UBO Register
31 March 2019	Belgian companies and other relevant legal entities to complete the UBO Register
ROMANIA	
TBC	Adoption of the law implementing 4MLD

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