ALLEN & OVERY

European White Collar Crime Report

Q2 2018

Europe at a glance

Contents

Overview

In this quarter's European White Collar Crime Report, we identify an increasing drive for corporate transparency, as new beneficial ownership registers are established and updated across Europe – in the UK, Belgium, and the Czech Republic.

As highlighted in last quarter's Report, the EU continues to strengthen its stance against money laundering, introducing the Fifth Anti-Money Laundering Directive in early July. We look at the detail of the new Directive and the tighter controls it imposes. Meanwhile, France takes steps to transpose the 4MLD into national law.

In the UK and Germany, we examine developments in the law on legal privilege in internal investigations. In the UK, two cases against the Serious Fraud Office are considering the application of legal privilege to documents produced during investigations; in Germany, the Federal Constitutional Court has handed down a landmark decision on the subject.

In last quarter's Report we also discussed the growing trend of national courts applying extraterritorial jurisdiction to a number of criminal offences. This quarter, we see that further significant reforms to corporate criminal liability have been introduced in Belgium and Poland too.

Finally, the fallout from the diesel emissions scandal continues apace in Germany. CEOs have been arrested, questioned and indicted, while the German prosecutor has imposed its largest ever fine on a major automotive company.

UNITED KINGDOM

Paradise Papers prompts new ownership registers as the UK pushes corporate transparency; FCA fines Canara Bank for anti-money laundering failings; UK Sanctions and AML regimes after Brexit; FCA secures confiscation orders in Operation Tabernula; Fresh charges in SFO's Unaoil investigation; SFO opens criminal investigation into Ultra Electronic Holdings PLC; ENRC considers civil action against the SFO; House of Lords to review Bribery Act; Treasury Select Committee announces Economic Crime inquiry; The UK's SFO appoints new director; Flexibility in SFO funding arrangements and personnel as 'Robo-Lawyers' are introduced; Legal privilege issues following the XYZ judgment; UK's FCA remains focused on tackling financial crime; NCA-led global investigation shuts down cybercrime site; Crypto-crime: the new risks of financial crime in the time of cryptoassets.

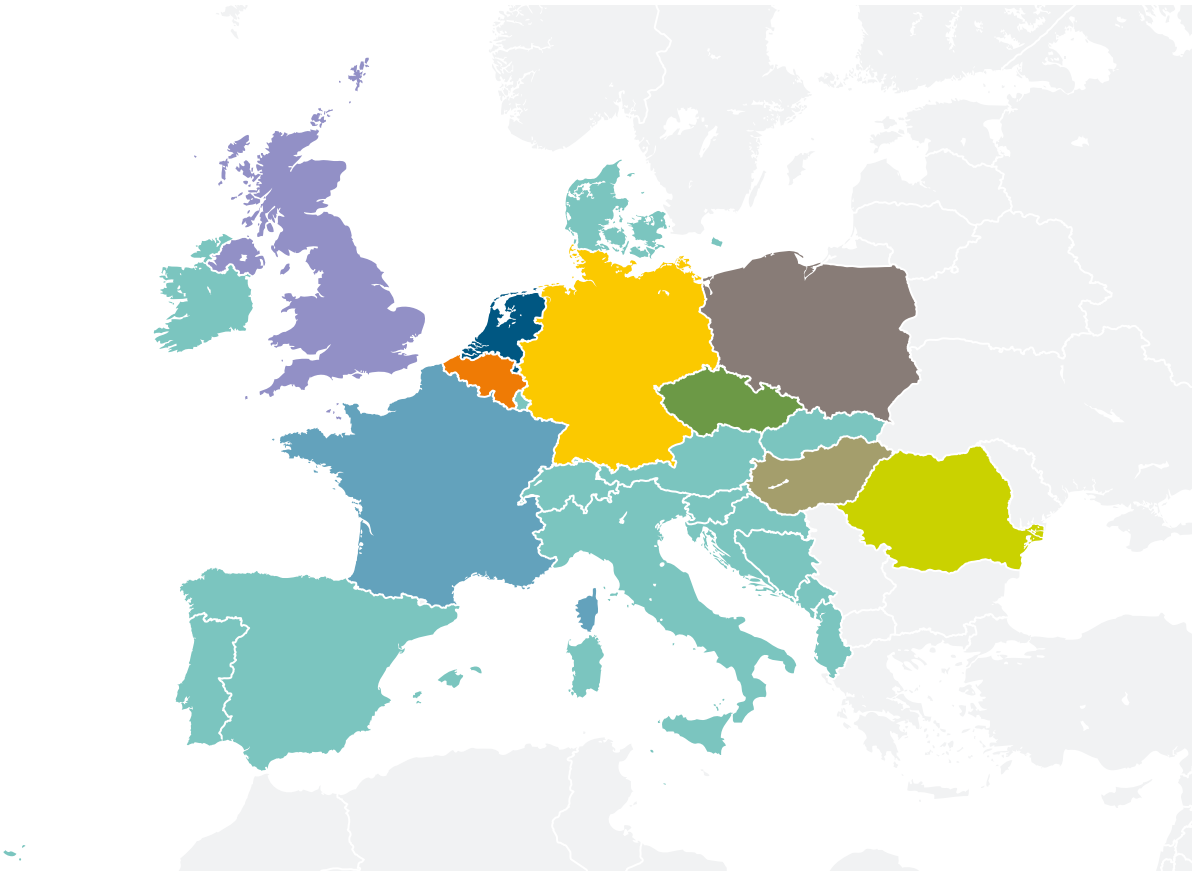
FRANCE

Fourth Anti-Money Laundering Directive transposed in France; The saga of the French carbon tax scam continues; International Court of Justice declares jurisdiction over the Equatorial Guinea v. France case; French aversion to jail for tax evasion?; Harsh penalties requested against art dynasty heirs in tax-related case; French Anti-Corruption Agency gets straight to work inspecting international companies; Increase in corruption investigations against eminent French politicians and businessmen; Crackdown on AML-CTF breaches and market offences through increased sanctions; U.S. and French coordinated settlements with Sociéte Generalé.

GERMANY

Frankfurt prosecutor's office requests instigation of proceedings for tax evasion offences against former football officials linked to the 2006 World Cup; Frankfurt prosecutor brings charges against a lawyer and bankers linked to "cum/ex" trading; German Federal Supreme Court confirms custodial sentence for tax evasion due to trading of emissions certificates; Fallout from the diesel emissions scandal continues; Evidence of major arms manufacturing company bribing German politicians unveiled; Frankfurt public prosecutor alters investigation into board members of pharmaceutical company; Major automotive company appeals against seizure of materials; BaFin signs memorandum of understanding with Hong Kong SFC on enhanced supervision of cross border entities; Landmark decision of the German Federal Constitutional Court on legal privilege in internal investigations.

Europe at a glance



BELGIUM

Belgian central beneficial ownership register to "go live" this summer; Reform of corporate criminal liability laws.

THE NETHERLANDS

Increased focus on money laundering of cryptocurrencies; Stricter rules on prohibition of statements referring to guilt made by public authorities; Higher sentences imposed in bribery appeal case; DPPO barred from bringing case to trial.

POLAND

Significant increase in VAT revenue due to improved collection procedures and curbing tax fraud; Poland plans to significantly reform corporate criminal liability.

HUNGARY

Criminalisation of activities relating to "illegal migration".

CZECH REPUBLIC

Decree of the Czech National Bank sets detailed AML/CFT requirements for credit and financial institutions; Ministry of Finance indicates intention to broaden the possibilities of distant identification for AML/CFT purposes; Companies to update information on benefial ownership; Bribery charges brought against 25 physicians and representatives of pharmaceutical companies.

ROMANIA

Supreme Court rules attachment of property in criminal proceedings does not prevent civil creditors from enforcing their rights over the same property; President forced to dismiss the country's chief anti-corruption prosecutor; Former Tourism Minister guilty of passive bribery and abuse of office.

EU-WIDE

Tighter AML controls imposed by Europe's Fifth Anti-Money Laundering Directive.

Anti-money laundering and proceeds of crime

BELGIUM

Belgian central beneficial ownership register to "go live" this summer

Under the EU's Fourth Anti-Money Laundering Directive (4MLD), all Member States must set up a central ultimate beneficial ownership register which collects and maintains information on the beneficial owners of all companies and other entities incorporated within their territory. This has been implemented in Belgium under the Belgian Anti-Money Laundering (**AML**) Act of 18 September 2017, which requires all companies, associations, foundations, trusts and similar legal structures to collect and hold adequate, accurate and current information on their beneficial owners and transmit this information to the central register of beneficial owners (the **UBO Register**).

Belgium is currently finalising both a Royal Decree on the operating procedures of the UBO Register and its online UBO Register. The UBO Register is expected to go live in summer 2018. Once operational, the directors of all companies, associations and foundations, plus identified trustees, will have to communicate their beneficial ownership information within a month of the UBO Register launching.

Access to the UBO Register will be granted to all competent authorities, the Belgian Financial Intelligence Unit (the **FIU**), and all obliged entities (on a pay-per-view basis). In addition, any member of the general public will be granted limited access to the UBO Register of companies, associations and foundations (on a pay-per-view basis) – as required by the Fifth Anti-Money Laundering Directive (5MLD) (for further information on 5MLD see "A closer look" on page 8). Belgium will be one of the first Member States to implement this new regime. Access to the UBO register of trusts and similar legal arrangements will be limited to persons who have a 'legitimate interest'.

The website of the UBO Register is already operational: **finance.belgium.be/en/register-beneficial-owners**.

FRANCE

Fourth Anti-Money Laundering Directive transposed in France

The transposition of 4MLD has finally been completed in France, with the enactment of Decree No. 2018-284 dated 18 April 2018, alongside Order No. 2016-1635 dated 1 December 2016.

In short, the decree modifies the French Monetary and Financial Code (*Code monétaire et financier*) in order to strengthen the French AML and counter terrorist financing (**CTF**) framework, in particular with respect to: (i) the definition of the "beneficial owner" of a legal entity; (ii) the due diligence, know your customer (**KYC**) and internal control duties imposed on regulated entities; (iii) the organisation, missions and powers of the French financial intelligence unit (*Tracfin*); and (iv) the duties imposed on professionals outside the financial sector (lawyers etc.).

The decree is due to enter into force on 1 October 2018, except for several provisions which entered into force on 21 April 2018 (eg provisions on the identification and declaration of the "beneficial owner" and provisions on sanctions incurred by non-financial professionals).

The saga of the French carbon tax scam continues

Further to our article in the **Q1 2018 edition of Allen & Overy's European White Collar Crime Report (see page 4)**, further convictions have been imposed in the French carbon tax scam, dubbed the "fraud of the century".

On 23 May 2018, Christiane Melgrani, a former maths teacher, considered to be one of the main protagonists in the scam, was sentenced to nine years' imprisonment and a fine of EUR3 million by the Paris Criminal Court on grounds of organised tax fraud, laundering the proceeds of the said fraud, and taking part in a criminal organisation (*association de malfaiteurs*). The other 33 defendants received sentences ranging from suspended sentences to six years' imprisonment (plus a fine of EUR200,000).

A French lawyer who had assisted in the setting up of the fraudulent financial scheme was sentenced to five years' imprisonment and prohibited from practicing law indefinitely.

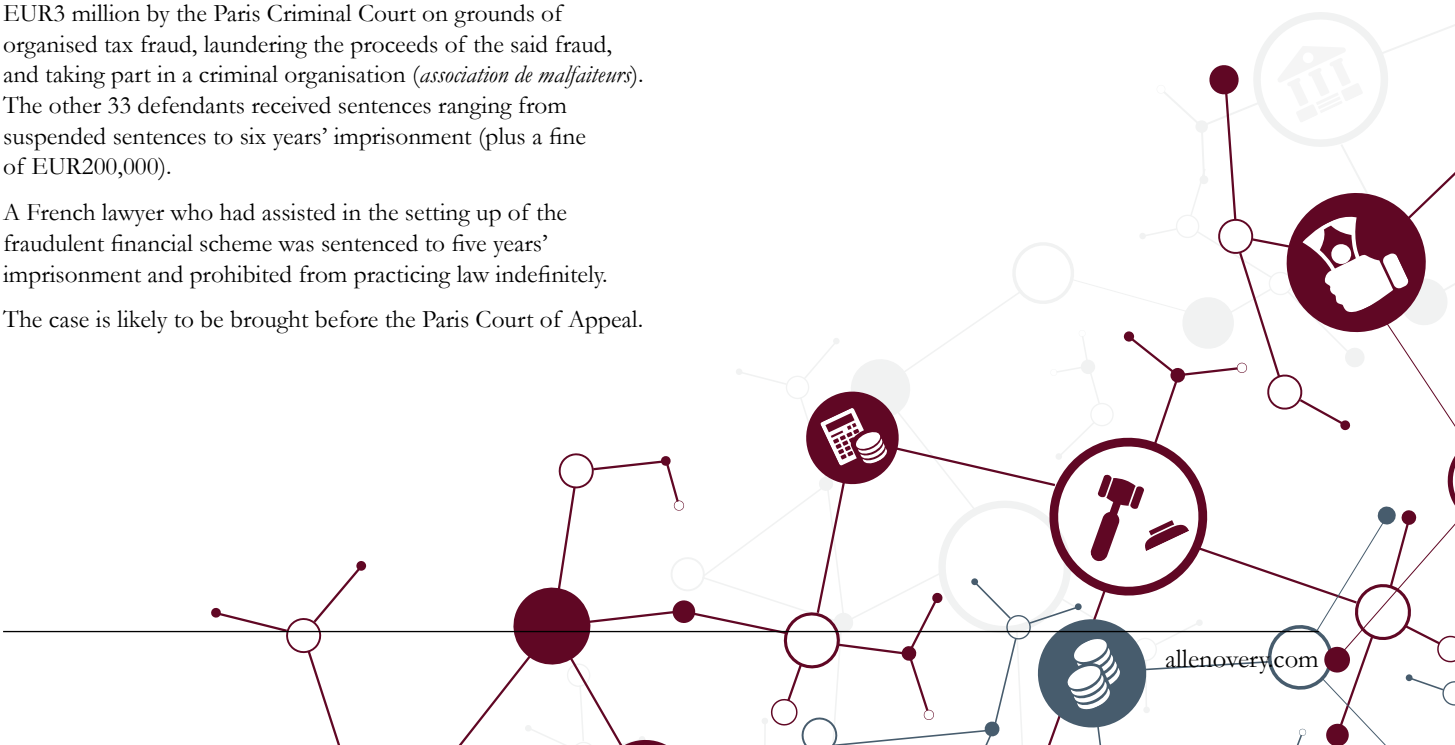
The case is likely to be brought before the Paris Court of Appeal.

International Court of Justice declares jurisdiction over the Equatorial Guinea v. France case

Last October, the Paris Criminal Court imposed a three-year suspended sentence, a fine of EUR30m plus forfeiture orders on Teodorin Obiang, Vice-President of Equatorial Guinea, for laundering approximately EUR150m of misused public funds between 1997 and 2011. He is the first person to be convicted in the French "*biens mal acquis*" (ill-gotten gains) case. The ill-gotten gains case was initiated in 2007 following complaints by NGOs against various African Heads of State in relation to alleged embezzlement of public funds in France, particularly through the French property market.

Further to a challenge filed by Equatorial Guinea before the International Court of Justice (the **ICJ**), the French criminal proceedings have been stayed. Equatorial Guinea argues that Mr Obiang benefits from diplomatic immunity and that as a result, the forfeiture order was issued in breach of a treaty governing diplomatic relations between the two countries.

The ICJ ruled on 6 June 2018 that it has jurisdiction to hear the dispute between France and Equatorial Guinea. The ICJ is not expected to issue its decision on the merits of the case before 2019 but the repercussions of this case are likely to reach beyond the French borders. In March 2018, the French NGO, Sherpa, in cooperation with the Canadian Coalition "*Biens mal acquis*", requested that a criminal investigation be opened by the Canadian Federal Police regarding ill-gotten assets allegedly held by African leaders and their friends and families in Canada.



THE NETHERLANDS

Increased focus on money laundering of cryptocurrencies

The Dutch FIU has announced that the number of suspicious transaction reports involving cryptocurrencies, such as bitcoin, has increased from 300 in 2013 to 5,000 in 2017. In addition, Dutch authorities are prosecuting increasing numbers of money laundering cases involving cryptocurrencies. In two cases in April and May 2018 alone, ten individuals were found guilty of offences of money laundering of bitcoin. (For more information on managing AML risk arising from cryptocurrencies see our Risk Note article **Cryptocurrency AML risk considerations**, available at **www.allenovery.com/publications/en-gb/lrrfs/cross-border/Pages/Cryptocurrency-AML-risk-considerations.aspx)**

UNITED KINGDOM

Paradise Papers prompts new ownership registers as the UK pushes corporate transparency

The recent headline-grabbing Panama and Paradise Papers scandals appear to have galvanised the UK government into taking action as Parliament voted to introduce registers of company ownership in British Overseas Territories via an amendment to the Sanctions and Anti-Money Laundering Act 2018 (see "Closer Look" section for more details). British Overseas Territories include traditional offshore jurisdictions such as the Turks and Caicos Islands; Gibraltar; the Cayman Islands; the British Virgin Islands and Bermuda.

In the UK itself, UK companies have been required to publicly disclose details of "people with significant control" (**PSCs**) ie individuals with significant shareholdings or control since 2016. This information is made publicly available via Companies House.

FCA fines Canara Bank for anti-money laundering failings

Canara Bank is an Indian state-owned bank with two branches in the UK (London and Leicester).

In June 2018, the UK's FCA imposed a financial penalty of GBP896,100 and a restriction lasting 147 days on Canara Bank for breaches of the FCA's Principle 3 (the requirement that authorised firms must take reasonable care to organise and control their affairs responsibly and effectively, with adequate risk management systems).

Eleven failings over a period of just over three years resulted in Canara Bank failing to maintain adequate systems and controls to manage the risk of money laundering and financial crime. The main failings occurred in relation to senior management, governance and oversight, the three lines of defence model, the firm's money laundering reporting function and its lack of effective anti-money systems and controls. In particular, the FCA found that at every level of seniority, Canara's staff lacked an understanding and appreciation of the anti-money laundering risks and regulatory requirements to which Canara Bank was exposed. The FCA commented that Canara's practice of seconding personnel from Bangalore into senior management positions in the UK without appropriate training contributed to this issue.

Although Canara agreed to settle at an early stage and therefore benefitted from a 30% penalty discount, it is notable that the FCA deemed the bank's conduct to be at one of the highest levels of seriousness on its fining scale. In particular, Canara Bank was aware of failings as highlighted during previous FCA visits and in a Skilled Person's report.

Sanction and Anti-Money Laundering Act 2018 receives Royal Assent (see "Closer Look" section for more information on the framework for the UK's sanctions and anti-money laundering regimes post-Brexit).

EU-WIDE

Tighter AML controls imposed by Europe's Fifth Anti-Money Laundering Directive (See "Closer look" section for more information).

ROMANIA

Supreme Court rules attachment of property in criminal proceedings does not prevent civil creditors from enforcing their rights over the same property

In a welcome clarification of the interplay between parallel criminal and civil proceedings, Decision No. 2 dated 19 February 2018 rendered by the High Court of Cassation and Justice has held that the attachment of property by prosecutors or courts for the purpose of a criminal trial does not prevent creditors from enforcing their previous mortgages over the same goods.

In October 2017, several courts of appeal requested the High Court to rule on whether a civil creditor having a mortgage over property of its debtor may still enforce that right in cases where that same property has been subject to attachment under the Code of Criminal Procedure.

Acknowledging previous contradictory rulings, the Court held that in cases where the public formalities of the mortgage have been duly performed, there was no reason to give priority to the right of the state or that of aggrieved parties arising out of an attachment of goods which occurred at a later stage. The Court held, inter alia, that the general interest of the state cannot prevail over the specific interests of creditors who have prior rights because that principle is only applicable in substantive proceedings to establish criminal liability, and not in related attachment proceedings.

As a result, the Court found that criminal attachment proceedings do not nullify or suspend enforcement proceedings by creditors who have a mortgage over the affected property.

CZECH REPUBLIC

Decree of the Czech National Bank sets detailed AML/CFT requirements for credit and financial institutions

A Decree of the Czech National Bank (no. 67/2018 Coll.), regarding internal principles, procedures and controls against the laundering of proceeds of crime and financing of terrorism, was published on 11 April 2018.

With effect from 1 October 2018, the decree sets out AML/CFT requirements for credit and financial institutions in greater detail. The Decree, based on principles set out by the 4MLD and FATF Recommendations, provides new binding guidance namely in relation to a risk-weighting approach to the categorisation of clients, individual trades, and business relationships.

Ministry of Finance indicates intention to broaden the possibilities of distant identification for AML/CFT purposes

The Czech Ministry of Finance has carried out a public consultation regarding online identification of clients for the purposes of AML/CFT regulation. Following research into the approach taken in other EU countries, the Ministry asked for opinions on enabling a technology-neutral solution, as well as some technology-specific solutions to enable distant identification.

The outcome of the consultation was predominantly positive, confirming appetite for eligibility of distant video identification. A proposal to amend the currently very limited means of distant identification can be expected.

Companies to update information held on beneficial ownership

Following the implementation of 4MLD, the Register of Beneficial Owners was established in the Czech Republic on 1 January 2018. The register, kept by the Register Courts, is not public.

Legal persons registered in the Commercial Register have until 1 January 2019 to update the information on their beneficial owners. However, the law does not set any specific sanctions for non-compliance with this requirement. As a result, many question whether the information in the register will be reliable and up-to-date.

A closer look: EU-wide
Tighter AML controls imposed by Europe's Fifth Anti-Money Laundering Directive

The EU continues to tighten its grip on money laundering. Hot on the heels of the Fourth Anti-Money Laundering Directive (4MLD), which Member States had to implement by June last year, we now have the next instalment – the Fifth Anti-Money Laundering Directive (5MLD), which came into force on 9 July 2018 and must be implemented by Member States (and the UK probably depending on the terms of any Brexit transition period) by 10 January 2020. The changes will impose additional obligations particularly on those in the financial services sector.

5MLD amends 4MLD, and includes some lessons learnt from the Paris and Brussels terrorist attacks and the Panama Papers, plus technological innovation. Key changes include:

– **Catching up with new technologies**: Custodian wallet providers and virtual currency exchange platforms will fall within the scope of AML laws, as they have been added as new 'obliged entities' (**OE**). 5MLD also allows the use of electronic identification for customer due diligence.

– **Improving enforcement**: There will be new national bank account registers in each Member State to enable easy access by law enforcement authorities to bank account information for all bank accounts held in that Member State. The registries will all be interconnected between Member States. In addition, enforcement authorities will be able to request information from an OE even where no Suspicious Activity Report has been filed.

– **Clarification of 'Politically-Exposed Persons' (PEPs)**: Each Member State will have to issue a list setting out which functions qualify as "prominent public functions".

– **Tighter controls relating to high risk third countries**: 5MLD prescribes enhanced due diligence measures for business relationships or transactions involving high-risk third countries, and also allows Member States to restrict OEs from opening branches/subsidiaries in high-risk third countries, and to restrict the opening of branches in a Member State of an OE based in a high-risk third country.

– **Increasing transparency of beneficial ownership of corporates**: There will be wider access to each Member State's central register of beneficial ownership of corporates. Any member of the general public can access basic information without the need to demonstrate a 'legitimate interest' (this is already available in the UK). There is also a new 'discrepancy reporting requirement' which will require OEs to report any discrepancies they find between the information that they hold and the information on the register.

– **Beneficial ownership of trusts**: 5MLD extends beneficial ownership reporting requirements to any legal arrangement that is similar to a trust, and also tax-neutral trusts. It also widens access to the central register of beneficial ownership to any person who can show a 'legitimate interest'. There is no definition of 'legitimate interest'; this will be up to each Member State to determine although 5MLD states that the definition should not restrict the concept of legitimate interest to cases of pending administrative or legal proceedings, and should take into account the preventive work in the field of anti-money laundering, counter-terrorist financing and associated predicate offences undertaken by non-governmental organisations and investigative journalists.

– **No more anonymous safe-deposit boxes**: Anonymous safe-deposit boxes will no longer be allowed.

– **More prepaid instruments subject to due diligence** (eg gift cards, travel cards): The threshold requirement has been reduced from EUR250 to EUR150.

Full text of 5MLD://data.consilium.europa.eu/doc/document/PE-72-2017-INIT/en/pdf.

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A closer look: United Kingdom

The Sanctions and Anti-Money Laundering Act: The UK Sanctions and AML regimes after Brexit

When the Sanctions and Anti-Money Laundering Act 2018 was first proposed, the expectation was that it would enable the UK to maintain the status quo after it leaves the EU in the areas of sanctions and anti money laundering alone. However, now the Act is law, the position is not quite that simple. In this article, we summarise how the Act enables the UK Government to go beyond the current position under EU law.

The Act (which received Royal Assent on 23 May 2018) creates powers enabling the UK to comply with any future international sanctions or anti-money laundering obligations and to impose its own sanctions and anti-money laundering measures post-Brexit. Its key provisions are intended to come into effect when the UK leaves the EU and is no longer subject to EU law in these areas. In short, while the Act does not require any immediate actions, it creates a risk that the UK will diverge from the existing EU regimes in due course. All UK businesses and persons, but particularly financial institutions, financial services firms and exporters will need to consider this in the future.

How does the Act go beyond existing sanctions legislation?

Wider scope than existing EU sanctions: In summary, the UK Government will be permitted to impose sanctions regulations that are considered "appropriate" for a number of purposes. These include: compliance with a UN obligation or any other international obligation, for the prevention of terrorism, in the interests of national or international peace and security or to further a UK foreign policy objective. In a late addition to the Act, it also specifically allows the UK to impose sanctions on people who commit gross human rights violations under the so-called "Magnitsky amendment". Accordingly, it potentially widens the scope of the UK sanctions regime especially as UK sanctions will not need to be agreed by the 27 other Member States in the future.

Potentially broader financial sanctions reporting obligations: Since 8 August 2017, the current UK financial sanctions regulations require relevant businesses and professionals (eg financial institutions, lawyers and accountants) to report to the UK's Office of Financial Sanctions Implementation when they know or suspect that a person is an asset freeze target or has breached a financial sanction. Failing to do so is a criminal offence. The Act allows for such sanctions reporting obligations to be imposed on any individual or firm. This broader power reflects existing reporting obligations provided for under EU law, breach of which has not to date been a criminal offence under English law.

Designation by description: The UK Government will gain the power to designate persons not only by name but also by description in situations where it is impractical to identify by name all designated persons. The description, however, must be sufficiently precise that a reasonable person would be able to identify individuals falling within the designation. This raises the obvious question, if a reasonable person could identify sanctioned individuals; why does the UK Government not simply designate them by name? If frequently used, this provision is likely to create uncertainty for firms tasked with identifying those individuals who meet a description, particularly if that description is broad or requires individual-by-individual research.

A tightly controlled review mechanism: The Act prevents designated persons from immediately challenging regulations before the courts; they must request either variation or revocation of the designation from the Secretary of State. Only after that stage may a designated person seek judicial review of a sanctions-related decision. Even if judicial review is successful, the UK Government will only be liable for damages if it is found to have acted negligently or in bad faith. Finally, a closed court procedure

may be used in cases where individuals have been designated based on sensitive intelligence material. While similar procedures are available in the EU courts, it is more likely to be utilised by the UK Government, which may increase the number of designations based on sensitive intelligence material.

A broad licencing power: The Act includes a broad licencing power. The UK Government has confirmed that it intends to issue general licences for issues that are urgent; that could not be foreseen at the time of the drafting of the sanctions regulations; or need to be time-limited. For example, a general licence may be issued where the UK Government introduces an unrelated financial services policy that would otherwise be hindered by sanctions law and does not contradict the policy intent of the sanctions regime. We anticipate that the practice is likely to be similar to OFAC's current practice.

What are the new anti-money laundering powers?

Enabling Powers: Part 2 and Schedule 2 of the Act provides the powers for the UK Government to continue to make provision in relation to anti-money laundering, specifically: the detection, investigation or prevention of money laundering or terrorist financing or the implementation of Financial Action Taskforce (FATF) standards.

Registers of beneficial ownership: A high profile amendment to the Act was the inclusion of section 51 which requires the UK Government to make provision for public registers of beneficial ownership of companies in all British Overseas Territories by the end of 2020. This excludes the Isle of Man, Jersey and Guernsey but includes significant offshore jurisdictions such as the British Virgin Islands and Cayman Islands (see page 6 of this Report).

What next?

The Sanctions and Anti-Money Laundering Act undoubtedly creates scope for the UK sanctions and anti money laundering regimes to gradually differ from the equivalent EU regimes. However, whether the UK has the appetite to diverge is a different question. Historically, it has been extremely rare for the UK to impose unilateral financial sanctions (the most recent examples being the Landsbanki Freezing Order 2008 issued against certain Icelandic financial institutions during the financial crisis and the Andrey Lugovoy and Dmitri Kovtun Freezing Order 2018 against the suspected killers of Alexander Litvinenko). In addition, the UK Government has indicated that it will seek to coordinate the UK and EU sanctions even if it is outside of the EU's Common Foreign and Security Policy.

Nonetheless, a number of political events make divergence more likely. Most immediately, we are awaiting the report of the Treasury Committee after its inquiry into economic crime which closed on 8 May. One of the focuses of the inquiry was the anti-money laundering and sanctions regime. Furthermore, the UK's FATF mutual evaluation is due to conclude later this year and this may flag weaknesses or recommend improvements in the UK's financial crime framework. Finally, as the current differences between the U.S.' and the EU's approach to sanctions on Russia and Iran illustrates, even historically close international allies can have highly divergent sanctions regimes. It is very likely that in the coming years differences in foreign policy approach between the EU and UK will emerge which will affect the sanctions landscape considerably.

Matthew Townsend, Partner, London
Jonathan Benson, Senior Associate, London
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ACTIONS

Belgium: Prepare for the UBO Register becoming operational, by collecting relevant information on your beneficial owners and by consulting the recommendations already provided on the website of the UBO Register.

Czech Republic: Credit and financial institutions should review the published Decree of the Czech National Bank and amend their AML policies, procedures and internal controls by 1 October 2018 at the latest. Companies should also update information on their beneficial owners contained in the Register of Beneficial Owners, either directly with the Register Courts or through a notary.

EU-wide: Monitor national implementation of 5MLD – particularly if you are likely to be impacted by the broader beneficial ownership reporting requirements relating to any tax-neutral trust or 'trust-like' legal arrangement.

The table below summarises the status of 4MLD's implementation **as at the end of Q2 2018** in various Members States:

	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 come into force on 1 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 and escroquerie fiscale*) in the list of predicate offences to money laundering; – the Luxembourg Law of 13 February 2018 which entered into force on 18 February 2018: it implements the main provisions of the 4MLD and amends the law of 12 November 2004 on the fight against money laundering and terrorist financing; – the bill n° 7208, introduced before the Luxembourg Parliament on 8 November 2017: 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 bill n° 7216, which was introduced before the Luxembourg Parliament on 6 December 2017: it implements article 31 of the 4MLD pertaining to the register of trusts; and – the bill n° 7217, which was introduced before the Luxembourg Parliament on 6 December 2017: it implements article 30 of the 4MLD pertaining to the register of ultimate beneficial owners. Those last three bills are now undergoing the standard legislative process.
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 has come into force on 13 July 2018, with the exception of Chapter 6 and Articles 194 & 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 prevention and combating money laundering and terrorism financing and for the amendment and completion of certain normative acts, which transposes the 4th Money Laundering Directive. The draft law will be now submitted to Parliament, a process which may take several months. Given that the deadline for implementing the 4th AML Directive elapsed a year ago, it is possible that the Government may issue an emergency ordinance to expedite the process.
Slovakia	Not yet implemented.
Spain	Not yet implemented.
The Netherlands	Effective from 25 July 2018. Please note that provisions regarding the ultimate beneficial ownership register will be implemented in a separate Act.
UK	Effective from 26 June 2017. Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017.

Taxation

GERMANY

Frankfurt prosecutor's office requests instigation of proceedings for tax evasion offences against former football officials linked to the 2006 World Cup

According to press reports, the Frankfurt prosecutor's office has filed a request to instigate criminal proceedings against three former officials of German football's governing body. These officials are accused of making a payment of EUR6.7m to the football global governing body, in connection with the 2006 World Cup. This payment was allegedly declared as payable towards a cultural event, making it tax-deductible. The event, however, never took place. The investigation also focuses on a fourth individual who is a member of Fifa but against whom no formal charges have been brought at this stage. The German football governing body itself may also be fined up at EUR10m due to incidental participation. The competent regional court is yet to determine whether to allow the claims.

Frankfurt prosecutor brings charges against a lawyer and bankers linked to "cum/ex" trading

The Frankfurt prosecutor's office has brought charges against a lawyer and five former stock traders at a major financial institution linked to "cum/ex" trading. It is estimated that approximately EUR5.3bn in taxation may have been avoided through the practice. The allegations relate to trades carried out over 61 different equities between 2006 and 2008, for which it is alleged that EUR113m in tax was avoided. The charges have been referred to a regional court in Wiesbaden, which has until 31 August 2018 to determine whether to proceed with the case (see "Taxation" section of our **Q1 2018 European White Collar Crime Report)**.

German Federal Supreme Court confirms custodial sentence for tax evasion due to trading of emissions certificates

The German Federal Supreme Court (*Bundesgerichtshof*) confirmed the three-year custodial sentence of a former financial institution department chief in a decision on 15 May 2018. According to a prior judgment of the Frankfurt regional court, the defendant was involved in several unjustified VAT returns of approximately EUR145m concerning services provided by four dealers of CO2 certificates between October 2009 and February 2010. The Court also confirmed suspended sentences against three former bankers for aiding and abetting tax evasion.

POLAND

Significant increase in VAT revenue due to improved collection procedures and curbing tax fraud

A Polish Supreme Audit Office report shows a 24% increase in VAT revenue (an increase of PLN30bn or approximately. EUR7bn) compared to the previous year. According to the report, the increase was achieved through a number of legislative and administrative changes in the Polish tax collection system. Of these, a newly introduced system of tax reporting through Uniform Control Files is credited as the main factor in reducing tax fraud. Using this system, tax administration authorities have gained enhanced access to tax data provided by entrepreneurs. This has helped the authorities pursue tax evasion and shortlist businesses for tax inspections.

Another factor is the change to rules on intra-Community trading in fuel tax, which has helped curb fictional fuel exports from Poland to other member states to obtain an undue tax return. One such example of the increased effectiveness of measures to combat tax evasion is the recent fine against a criminal group in the biofuel industry, which was charged PLN97m (approximately EUR22.95m) for tax evasion and money laundering.

FRANCE

French aversion to jail for tax evasion?

Jérôme Cahuzac, a former Budget Minister, has been at the centre of a highly politicised case which saw him accused of tax evasion and laundering the proceeds of tax evasion. At first instance, Mr Cahuzac was convicted and sentenced to three years' imprisonment and a EUR300,000 fine.

Having heard Mr Cahuzac's appeal on 15 May 2018, the Paris Court of Appeal upheld the former minister's conviction for tax evasion and money laundering as well as the amount of the fine imposed by the first instance judges, but adjusted the prison penalty to four years' imprisonment (two of which are suspended) instead of three years' imprisonment (none of which were suspended). Despite what may appear to be a harsher penalty, the consequence of this decision is potentially very positive for the former French Minister; French law provides the possibility to serve two years of a non-suspended custodian sentence outside of prison (subject to the agreement of a separate sentencing judge). As a result, Mr Cahuzac could avoid spending a single day in jail.

Harsh penalties requested against art dynasty heirs in tax-related case

The severe sentencing standards for tax-related offences flagged in the **Q1 2018 edition of Allen & Overy's European White Collar Crime Report (see page 9)** continue to be applied in France.

Another recent, highly politicised case related to tax evasion and laundering the proceeds of tax evasion involves the Wildenstein family, a famous art clan founded in Paris in the late 19th century. The family is accused of using a network of opaque trusts and tax havens for "at least three generations" in an attempt to conceal its wealth and thereby avoid paying approximately EUR550m to the French tax authorities.

Whilst the public prosecutor had sought harsh penalties against, what he called, the longest and most sophisticated tax evasion in recent French history, in 2017, the Paris Criminal Court dismissed all charges against the art dynasty heirs, their financial advisors and affiliated entities. Unsurprisingly, the public prosecutor filed an appeal against the first-instance decision which was heard in March 2018. In particular, the Public Prosecutor requested that Guy Wildenstein, the Franco-American patriarch of the Wildenstein art-dealing dynasty, be sentenced to four years' imprisonment (two years on a suspended sentence), and a fine of EUR 250m, ie nearly half of the value of the assets allegedly involved in the money laundering transactions.

On 29 June 2018, despite the public prosecutor's requests, the Paris Court of Appeal confirmed the first-instance judgment dismissing all charges against the family, their financial advisors and affiliated entities, on the grounds that the statute of limitations for the offence of tax fraud had expired. On 3 July 2018, the Public Prosecutor publicly announced that it is challenging this decision before the French Supreme Court, which rules on issues of law (not factual issues). The Supreme Court is not likely to issue its decision before spring 2019.

Market offences

GERMANY

Fallout from the diesel emissions scandal continues

Beginning in 2014, vehicles built by a wide range of manufacturers were found to emit higher levels of pollution under real world driving conditions than had been reported during test conditions, resulting in breaches of European emission limits. The fallout from the scandal has had far-reaching consequences in jurisdictions beyond Europe. In Germany in particular, investigations and prosecutions continue in relation to the diesel emissions scandal.

Largest ever German fine imposed on major automotive company

– According to press reports, a major automotive company was found to have improperly supervised its engine development department. The Braunschweig prosecutor's office has fined the company for EUR5 m and ordered disgorgement of EUR995m in profits. This marks the largest sanction ever imposed by a German authority. The lack of supervision of the firm's engine development department is said to have contributed to approximately 10.7 million vehicles being sold to consumers with emissions controlling software. The company has indicated that it will not appeal the fine, hoping that other authorities (who are still investigating its involvement in the diesel emissions scandal) will take a lenient approach as regards any future sanction.

CEO of major automotive company questioned during investigation into diesel emissions scandal

– According to press reports, the German Federal Motor Transport authority has questioned the CEO of a major automotive company following the recall of 6,300 of its vans. The former CEO appeared before Germany's chief transport minister to explain the reasons underlying the recall and to answer questions regarding whether any other vehicles manufactured by the company may have utilised software which sought to cheat European emissions tests. Following this meeting, a more extensive recall of 774,000 affected vehicles was ordered by the Federal Motor Transport authority on 11 June 2018. The investigation is continuing.

CEO of major automotive company arrested in connection with the diesel emissions scandal

– According to press reports, Munich prosecutors have opened a criminal investigation into the CEO of a major automotive company. It is understood that the allegations relate to suspected fraud and false advertising linked to the diesel emissions scandal, for which the company has been in the public spotlight since 2015. The CEO has been remanded in custody under Untersuchungshaft, which is an investigative measure in German procedural law, under which an arrested individual is detained before trial to, among other matters, prevent them from tampering with evidence, absconding or corresponding with potential witnesses. The CEO's house was also raided around the time of his arrest.

Ex-manager of car manufacturer indicted in the United States

– According to press reports, judicial authorities in the U.S. have filed an arrest warrant for the former CEO of a major German car manufacturer linked to the diesel emissions scandal. He is accused of fraud and contributing to the usage of the software used to cheat exhaust tests. He was allegedly aware of the manipulating software, but nevertheless allowed the fraud to continue. It is understood that the charges are based on the testimony of another former manager, who has already been convicted to seven years' imprisonment in the U.S. As the German government does not intend to extradite the former CEO, no further consequences are expected, provided that he does not enter the U.S.

A closer look: United Kingdom
FCA secures confiscation orders in Operation Tabernula

The UK's Financial Conduct Authority (**FCA**) has secured confiscation orders totalling GBP1.69m as part of Operation Tabernula – the FCA's longest-running and most complex insider trading case.

Operation Tabernula

Operation Tabernula, (meaning 'Little Tavern') began in late 2007 after the Financial Services Authority (FSA, as it then was) received a Suspicious Transaction Report concerning the trades of Ben Anderson and Iraj Parvizi in one listed company. On the day concerned, Mr Anderson and Mr Parvizi's trades seemingly accounted for 26% of the trading volume in the company. This caused sufficient concern to spark a complex probe into a potential insider trading conspiracy.

An eight-year investigation is reported to have cost GBP14m and drew on the expertise of forensic accountants, lawyers, investigators, markets experts, intelligence analysts and digital forensic specialists, plus utilised surveillance tactics (including wiretaps) deployed by the NCA.

The protagonists

The five Operation Tabernula defendants were accused by the FCA of a single count of insider trading occurring between November 2006 and March 2010:

1. Martyn Dodgson ("Fruit") – a former corporate broker.
2. Andrew Grant Harrison ("Little") – a former corporate broker with a specialty in mid-cap firms.
3. Andrew Hind ("Nob") – trained accountant and former finance director for a large company.
4. Iraj Parvizi ("Mad Punter", "Fatty") – Anderson's former business partner who was reportedly the subject of a now-dropped investigation relating to alleged infiltration of the Bank of England (which he denies).
5. Ben Anderson ("Uncle") – a day trader who operated out of Belgravia.

The FCA alleged that Mr Dodgson and Mr Harrison passed inside information obtained via their jobs to Mr Hind, who then placed trades on their behalf through Mr Parvizi and Mr Anderson.

The indictment listed a single count of conspiring to engage in insider dealing regarding securities in multiple companies. The information exchanges occurred over encrypted memory sticks (known as 'iron keys') and pay-as-you-go mobile phones. The defendants utilised nicknames and passwords (borrowing the names of luxury car brands) to protect their exchanges and utilised bank accounts in Panama and Switzerland to hide their profits.

At the time the insider dealing ring was brought to an end (March 2010), the FCA obtained restraint orders with the aim of preserving the value of the defendants' assets, pending the outcome of its investigation (and the prosecution and confiscation proceedings which flowed from it).

The trial

The trial, which commenced in January 2016, lasted 12 weeks and led the jury to deliberate for eight days. In May 2016, the jury found Mr Dodgson and Mr Hind guilty of conspiracy to engage in insider dealing. Mr Anderson and Mr Parvizi (whose actions seemingly sparked the investigation) plus Mr Harrison were acquitted.

Mr Justice Pegden handed Mr Dodgson a custodial sentence of four and a half years and Mr Hind, a custodial sentence of three and a half years.

Confiscation orders

Mr Dodgson and Mr Hind were convicted on the basis of evidence that they conspired to deal in relation to five stocks, however the confiscation orders included profits generated from a further 23 stocks, which the FCA asserted amounted to profits from insider dealing. Mr Dodgson and Mr Hind did not challenge the FCA's assertion that the profits made from other trading also represented the proceeds of insider dealing and the FCA was able to benefit from the presumption that such profits amounted to benefit derived from general criminal conduct. As the confiscation orders were agreed, there was no contested hearing and no oral argument was heard on this point.

A confiscation order totalling GBP1,074,236 was imposed on Mr Dodgson and an order totalling GBP624,521 was handed down to Mr Hind. The offenders have three months in which to satisfy their confiscation orders, or they will face further jail time (a further seven and a half years for Mr Dodgson and a further five and a half years for Mr Hind).

FCA convictions

The convictions of Mr Dodgson and Mr Hind – alongside those of Paul Milsom, Graeme Shelley and Julian Rifat – bring the FCA's tally to five convictions in respect of Operation Tabernula. One additional individual is still due to stand trial.

In 2016, we reported (see our previous Investigations Insight Blog Post on Operation Tabernula at: **www.aoinvestigationsinsight.com/one-little-tavern-one-large-insider-dealing-ring/)** that the FSA/FCA had secured 28 criminal convictions in relation to insider dealing. To date, this number has not increased, although the FCA remains committed to investigating insider trading and other forms of market abuse.

Hayley Humphries,
Associate, **London**

Bribery and corruption

GERMANY

Evidence of major arms manufacturing company bribing German politicians unveiled

According to press reports, a major arms manufacturing company has been accused of providing bribes to members of the German parliament from two political parties in 2010. It is understood that the company sought to bribe the individuals in relation to government export licences for assault weapon sales to Mexico. The payments were purportedly below the EUR10,000 threshold at which donations to political parties have to be disclosed in Germany. Against this backdrop, the Stuttgart public prosecutor's office commenced and then closed investigations of domestic bribery against the company in January 2017. This was on the grounds that any punishment received in ongoing court proceedings (relating to illegal arms deals carried out by the former CEO and other employees) would be more significant than that of the closed investigation. An investigation into extraterritorial bribery remains ongoing.

Frankfurt public prosecutor alters investigation into board members of pharmaceutical company

It is understood that the Frankfurt public prosecutor's office has discontinued the bulk of its investigations into the board of a major pharmaceutical company. Having reviewed the findings of internal investigations concluded by two law firms in December 2017, the Frankfurt public prosecutor's office found no evidence of fraud, corruption or personal gain at the expense of the company. However, the public prosecutor has now turned its attention to two board members of the company, who are accused of embezzlement and corporate mismanagement.

UNITED KINGDOM

Fresh charges in SFO's *Unaoil* investigation

The Serious Fraud Office (**SFO**) has brought two further charges against individuals already facing trial as part of its ongoing investigation into Unaoil. In May 2018, the SFO charged Basil Al Jarah, Unaoil's Iraq Partner, and Ziad Akle, Unaoil's territory manager for Iraq, both of whom reside in the UK, with conspiracy to make corrupt payments. The SFO has charged four individuals over alleged corrupt payments to secure the award of contracts in Iraq.

The SFO's investigation into Unaoil, a Monaco-based provider of industrial solutions to energy sector clients, commenced in July 2016. Several months prior to this, Fairfax Media and the Huffington Post published a series of articles alleging that Unaoil had paid millions of dollars in bribes to government officials in oil-rich states around the world on behalf of its clients, in order to help them win government contracts.

SFO opens criminal investigation into Ultra Electronic Holdings PLC

Ultra Electronic Holdings PLC (**Ultra**) announced on 19 April that the SFO has launched a criminal probe into "suspected corruption in the conduct of business in Algeria by Ultra, its subsidiaries, employees and associated persons". The FTSE 250 company which supplies electronics for the defence sector announced that the investigation followed a voluntary self-report and that it was continuing to cooperate with the investigation.

ENRC considers civil action against the SFO

ENRC is considering whether to challenge the SFO's response to a 2012 whistleblower claim that unnamed SFO officials leaked confidential information to ENRC's lawyers at the time. In a pre-action disclosure application, ENRC is seeking information from the SFO in relation to potential violations of internal procedures. The SFO launched an investigation into ENRC in 2013. The claim alleges that the SFO may have passed information to ENRC's lawyers about its preliminary inquiries into ENRC in breach of its duty of confidentiality and that it then failed to follow appropriate procedures when a whistleblower raised their concerns over the SFO's handling of this information.

House of Lords to review Bribery Act

The UK's House of Lords has appointed an ad hoc Select Committee to review the effectiveness of the Bribery Act 2010. The Committee Chairman, Lord Saville, flagged a concern that the Act may be confusing or cause uncertainty for small businesses. The Committee has issued a Call for Evidence, the deadline for which was 31 July 2018. The Committee is expected to report in 2019.

Treasury Select Committee announces Economic Crime inquiry

The House of Commons Treasury Select Committee announced a new inquiry into economic crime on 29 March 2018. The inquiry will focus on two areas: First, the UK's anti-money laundering and sanctions regime. Secondly, the impact on consumers of economic crime and the security of customer data. The inquiry will also consider how effective financial institutions are at combatting financial crime. The deadline for responses was 8 May 2018.

Of particular note was the decision by the Committee Chair, Nicky Morgan, to highlight in the accompanying press release the perception that the UK is a hub for 'dirty money'. Morgan specifically cited Transparency International's estimate that GBP4.4bn of UK property was purchased with what it considered to be 'suspicious wealth'. This may well indicate where the true focus of the inquiry will be – as a wholesale review of the UK's financial crime framework seems an unrealistically broad remit.

CZECH REPUBLIC

Bribery charges brought against 25 physicians and representatives of pharmaceutical companies

In a bribery case, the police have recommended that 25 physicians and representatives of pharmaceutical companies be charged for participating in the illegal promotion of specific medicines. According to the police, the representatives formed an organised criminal group, offering bribes to physicians for preferentially prescribing the medicines of selected manufacturers.

The investigation is still under way in relation to more than two hundred other physicians potentially involved in the system, according to a state prosecutor.

FRANCE

French Anti-Corruption Agency gets straight to work inspecting international companies

The new French Anti-Corruption Agency (the **AFA**) created by the so-called "Sapin II" Law has published its first annual activity report for 2017.

The first six inspections concern five private companies and one public company, whose turnovers vary from EUR1.2bn to EUR49bn, with employee numbers ranging from 2,000 to 80,000 individuals. These companies have between five and 277 subsidiaries, two-thirds of which are located abroad. The inspections began in November 2017 and involved analysing approximately 500 documents provided by each entity. The week long on-site inspections took place in mid-December, involving around 21 internal and external interviews related to each entity.

Any breaches identified during the inspections will result in either a warning to the entity's representatives or a referral to the Enforcement Committee of the AFA. The latter may issue an injunction and financial sanctions of up to EUR200,000 for individuals and EUR1m for entities. So far, the AFA has not reported any referral to the Enforcement Committee.

Increase in corruption investigations against eminent French politicians and businessmen

– A former French President was placed under formal investigation in March on grounds of corruption, illegal financing of an electoral campaign and receiving misused Libyan public funds in relation to the alleged funding of his presidential campaign by the late Libyan leader, Muammar Gaddafi in 2007.

– Later the same month, the same former French President was referred to trial on grounds of corruption and influence peddling in the so-called "tapping scandal", named after the conversations tapped by investigators between him, his lawyer, and a former judge of the French Supreme Court.

– A French businessman running extensive activities in Africa was placed under formal investigation in April for alleged corruption of a foreign public official, aiding and abetting the misuse of corporate funds, forgery and using forged documents, in relation to port concessions obtained by his group in Africa back in 2010. Other directors have also been placed under formal investigation.

– A preliminary investigation into the Secretary General of the *Elysée Palace* was opened on 4 June, after a criminal complaint had been filed by the anti-corruption association Anticor on 1 June. The investigation targets alleged influence peddling (*trafic d'influence*) and 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 appears to focus on the relationship between the Secretary General and an Italian-Swiss group which conducted a series of negotiations with the French State while he was in office at the Ministry of the Economy, between 2012 and 2016.

ROMANIA

President forced to dismiss the country's chief anti-corruption prosecutor

As noted in previous editions of the White Collar Crime Report, following a request made in February 2018 by the Justice Minister to dismiss Laura Codruța Kovesi (the chief anti-corruption prosecutor), the Romanian President decided to maintain Mrs Kovesi in her position acting on advice from the Romanian Superior Council of Magistracy. However, the Justice Minister appealed to the Romanian Constitutional Court on the grounds that this decision created an institutional conflict and was incompatible with the constitution and requested the Court to overturn the President's decision.

On 30 May 2018, the Romanian Constitutional Court issued a majority verdict overruling the President's decision. It held that Mrs Kovesi should have been dismissed on the Justice Minister's request as, under the constitution, prosecutorial appointments fall under the authority of the Justice Minister. Following this verdict, the President dismissed Ms Kovesi on 9 July 2018.

Former Tourism Minister guilty of passive bribery and abuse of office

Elena Udrea, former Tourism Minister and presidential candidate, has been sentenced to six years in prison for passive bribery and abuse of office. Mrs Udrea requested more than EUR3m in bribes in exchange for corruptly assigned public procurement agreements.

Prior to sentencing, Mrs Udrea left Romania for Costa Rica, where she requested political asylum, arguing that her prosecution was politically motivated. Although she had stated her intention to return to Romania and run for President, Mrs Udrea has obtained interim refugee protection from the Costa Rican government.

ACTIONS

France: Entities should prepare for the next wave of inspections by the AFA by training employees and ensuring evidentiary records are readily available for review.

Prosecutor attitudes and resources

GERMANY

Major automotive company appeals against seizure of materials

According to press reports, the Stuttgart prosecutor's office opened an investigation into a major car manufacturer in late April 2018. This investigation centres on three employees who are accused of fraud in relation to the diesel emissions scandal. Following a dawn raid on the car manufacturer's premises which led to the seizure of files and other materials, the car manufacturer appealed against the prosecutor's actions, which remain subject to judicial review. Linked to this, German police have arrested an employee of the car manufacturer.

BaFin signs memorandum of understanding with Hong Kong SFC on enhanced supervision of cross border entities

BaFin, Germany's principal financial services regulator, has signed a memorandum of understanding with the Hong Kong SFC, which regulates the securities and futures markets in Hong Kong. The memorandum recognises the increased globalisation of the world's financial markets and increase of cross-border operations of regulated entities. It provides the basis for mutual assistance in supervising and overseeing regulated entities. The memorandum focuses: on (i) investor protection; (ii) promoting the integrity of cross border regulated entities; (iii) fostering market and financial integrity; and (iv) reducing systemic risk and maintaining financial stability.

BELGIUM

Reform of corporate criminal liability laws

A new law reform (the Act of 11 July 2018) has been passed and shall apply to offences committed from 30 July 2018 changing two key aspects of Belgian corporate criminal liability.

The previous position, a controversial dual regime, provided that: (i) where an individual did not commit the offence wilfully, the court could only convict the individual or the legal entity involved, not both, depending on who/which was most culpable; and (ii) where the offence was committed wilfully, the court could have convicted both the legal entity and the individual involved (cumulative liability). The proposed reform aims to make legal entities and individuals cumulatively liable as a rule regardless of whether the offence was committed wilfully.

The second key aspect relates to the current immunity granted to identified public legal entities. The reform lifts this immunity, making all public legal entities (including the federal state) subject to criminal law. However, under the reform the identified public legal entities may only face a "mere declaration of criminal liability" (*simple déclaration de culpabilité/eenvoudige schuldigverklaring*). This means that no criminal penalty can be imposed on them, including fines and confiscation orders. However, criminal liability constitutes a wrongdoing under civil liability rules, allowing the victim(s) of any criminal offence to claim civil compensation.

POLAND

Poland plans to significantly reform corporate criminal liability

The Polish Act on the Criminal Liability of Legal Entities (the **Act**), which has been in force for more than 15 years, is likely to undergo significant reform. The Act, which introduced corporate criminal liability into Polish criminal law, has largely proven to be a failure. In order to impute liability to a company, it is necessary to show that: (i) a company officer has previously been convicted of a crime; (ii) the company benefitted from the crime; and (iii) the management was negligent in choosing or supervising the perpetrator or the company lacked an adequate compliance procedure to prevent the crime from happening. Recent statistics published by the Ministry of Justice suggest the Act has not had as much impact as was initially intended. In the last couple of years, there have been only 14 to 31 cases per year. The fines imposed in the few cases tried were marginal. This is largely due to the fact that the secondary character of liability of holding companies cannot be triggered unless a company officer has been convicted of an offence by a final judgment. In addition, the maximum amount of the fine that can be levied under the Act is relatively small. Fines cannot exceed 3% of the company's annual turnover, irrespective of the value of the company's assets.

On the back of these statistics, the Ministry of Justice recently published a comprehensive amendment to the Act (the **Amendment**), which is now in its consultation phase. It: (i) extends a company's liability to all crimes (with certain exceptions); (ii) eliminates the need for a company officer to have been first convicted; and (iii) unbundles and increases maximum fines to approximately. EUR7m. It will take at least several weeks before the Amendment is brought to the Polish parliament.

UNITED KINGDOM

The UK's SFO appoints new director

As had been widely expected, Lisa Osofsky, former Deputy General Counsel and Ethics Officer at the FBI, will take up the post of director of the SFO on 3 September 2018. During her five-year tenure, Ms Osofsky is likely to face a number of challenges at the SFO including the UK's withdrawal from the EU and potential domestic political pressure surrounding the SFO's continued existence as an independent organisation (discussed below). Ms Osofsky replaces former director David Green QC who left the post in April 2018 after having been in the role since 2012. Current interim head, Mark Thomson, will return to his role as Chief Operating Officer.

Ms Osofsky is a dual-qualified UK barrister and U.S. lawyer with a broad range of experience in both the public and private sector. Currently, the EMEA head of investigations at Exiger, Ms Osofksy was previously a regulatory advisor at Control Risks and the Money Laundering Reporting Officer and head of the Business Intelligence Group at Goldman Sachs International. At the FBI, Ms Osofksy handled white collar crime cases and investigations and has also previously served as a Special, Attorney in the Fraud Section of the Criminal Division of the DOJ.

As reported in **the Q2 2017 edition of Allen & Overy's European White Collar Crime Report**, the UK Prime Minister Theresa May attempted while she was still Home Secretary (and it was a pledge in her Conservative Party's July 2017 general election manifesto) to subsume the SFO into the National Crime Agency (the **NCA**). Given the NCA's significant resources, any such merger would likely give rise to significant cost savings and economies albeit while potentially compromising its independence (unlike the NCA, the SFO is not under any political direction). Ms Osofksy had previously commented publically that such a merger would represent the "biggest bang for [Theresa May's] buck". However, she appears to have somewhat backpedalled, saying to the Financial Times that she "didn't take this job to report to the NCA" and reiterating her support for an independent SFO. In light of opposition among white collar practitioners; Ms Osofsky's defiant position and the seeming lack of political will means reports of the SFO's demise may have been greatly exaggerated.

Flexibility in SFO funding arrangements and personnel as 'Robo-Lawyers' are introduced

The SFO has confirmed changes to its funding arrangements for the 2018-19 period including a rise of its core budget to GBP52.4m, an increase of over 50% from the GBP34.3m initially envisaged. This change, announced in April, follows discussions and agreement between HM Treasury and the SFO regarding how to increase the efficiency of the SFO's spending, exacerbated by issues with the pre-existing "blockbuster" funding procedures. The SFO is optimistic about these new arrangements, and has stated that "the changes are cost neutral but will enable the SFO to manage its budget more flexibly and efficiently, with a significantly reduced call on the reserve".

The SFO also announced that AI powered 'Robo-Lawyers' capable of processing more than half a million documents a day were made available to all of its new casework from April 2018. The robots are 2,000 times faster than human lawyers and the SFO contends their utility was recently demonstrated by a "pilot" robot used to scan for legal professional privilege content in the Rolls-Royce case. This innovation is heralded as an improvement on the previous system whereby independent barristers needed to sift through tens of thousands of documents to check for such privilege before the SFO investigators could start examining the material themselves. Consequently, the SFO claims that "AI technology allows the SFO to investigate more quickly, reduce costs and achieve a lower error rate than through the work of human lawyers, alone".

UNITED KINGDOM

Legal privilege issues following the *XYZ* judgment

The SFO has been strongly criticised by the UK's High Court for being too soft in its approach to requesting disclosure of privileged documents. Following an investigation opened in 2013, the SFO concluded a deferred prosecution agreement (the **DPA**) in 2016 with *XYZ*, a UK company. During the company's internal investigation, several senior employees were interviewed by external lawyers. The SFO subsequently asked to see the interview notes, but the company asserted privilege over the notes and declined to provide them. The SFO instead agreed to accept short summaries of the interviews.

In February 2016, an ex-employee of the company was charged with corruption offences. As part of its defence, the ex-employee requested the SFO to provide the senior employees' interview notes. The SFO failed to obtain the full interview notes from the company, whose lawyers continued to insist that they were privileged. The SFO instead provided the summaries. The ex-employee accordingly began judicial review proceedings to challenge the SFO's decision not to compel the company to provide the full interview notes.

Although the judicial review application was dismissed because the Crown Court, not the High Court, was found to be the appropriate forum to address disagreements regarding disclosure, Holroyde LJ and Green J made clear they had "real reservations as to the position adopted by the SFO in this case".

The judges were emphatic in their agreement that "the law as it stands today is settled. Privilege does not apply to first interview notes". The SFO's claim that the company's argument regarding privilege was 'not obviously invalid' was therefore incorrect as a matter of law, and the SFO should have challenged the assertion of privilege over the notes. The company's lawyers' suggestion that the interview notes contained 'lawyers' musings' and therefore were privileged was also rejected. Any genuinely privileged material in the interview notes, the court said, could be redacted prior to disclosure. The judges were also critical of the SFO's failure to consider whether the company was obliged to waive privilege over the interview notes as part of its cooperation for the purposes of securing a DPA.

The UK Court of Appeal has also heard the appeal in *ENRC v SFO*. The High Court's initial decision in this case potentially narrowed the scope of privilege in corporate criminal investigations. Judgment is awaited.

UK's FCA remains focused on tackling financial crime

Documents issued by the FCA show that a strong focus on tackling financial crime remains. FCA consultation documents, published in March, on its approach to supervision and enforcement show that one of its four cross-market priorities is to ensure that firms and markets are not used as conduits for financial crime. The FCA approach includes a strong emphasis on early detection alongside efficient investigation – it is noted that, increasingly, the FCA is finding that severe penalties and sanctions alone are not sufficient to reduce and prevent misconduct.

Separately, in April, the FCA's business plan for 2018/19 showed that one of the seven cross-sector priorities is a focus on financial crime and AML. Alongside its regular programme of work in tackling money laundering and financial crime, the FCA is also going to be conducting diagnostic work in two sectors (capital markets and e-money) where the risks are new and/or have not been as prominent or well-known previously. In relation to capital markets, this diagnostic work will build on the findings of the UK's 2017 national risk assessment which concluded that the money laundering risk associated with the capital markets is high due to the complexity of the activities involved, the cross-border nature of the market and the relative lack of compliance controls.

THE NETHERLANDS

Stricter rules on prohibition of statements referring to guilt made by public authorities

The Dutch Ministry of Justice and Security has published guidance outlining existing Dutch legislation through which EU law on the presumption of innocence (Directive 2016/343) has been implemented. The Directive prohibits public authorities from publicly referring to persons (individuals, not entities) accused of an offence as being guilty without (or prior to) their conviction. As existing Dutch legislation only prescribed judges to refrain from any statements or gestures referring to the guilt of a suspect *during* and/or at trial, the Directive broadens the scope of this prohibition. As the implementation period of the Directive has expired, the Directive is now directly applicable to individuals in the Netherlands. While the presumption of innocence still applies to legal entities, there was previously no such equivalent protection regarding public authority statements.

Higher sentences imposed in bribery appeal case

The Appeals Court in Arnhem-Leeuwarden has handed down its ruling in a case involving bribery, forgery of documents, money laundering and participation in a criminal organisation at SNS Property Finance, the property department of insurer SNS Reaal. The Appeals Court imposed a higher sentence than the sentence handed down in the District Court of Utrecht two years prior. The former executive was sentenced to 24 months' imprisonment without probation, double the sentence imposed in 2016.

The increase was due to sentencing guidelines established by the National Consultation on Criminal Law (NCCL or *Landelijk Overleg Vákinhoud Strafrecht*). These guidelines state that a prison sentence of at least 24 months should be imposed if financial harm caused by the offence amounts to over EUR1m.
The Appeals Court ruled that the financial harm caused over EUR1.6m, whereas the District Court had previously ruled that the facts did not directly cause any financial harm to SNS Property Finance or other third parties.

DPPO barred from bringing case to trial

The District Court in Central-Netherlands has declared the Dutch Public Prosecutor's Office (**DPPO**) unable to prosecute three external auditors for alleged facilitation of money laundering and forgery of documents. The District Court took several factors into account in reaching its decision, including: (i) the timeframe of the alleged facts (12 to 17 years ago); (ii) the fact that the DPPO had reached a settlement with the actual perpetrators of the crime; and (iii) the fact that the DPPO had given the auditors the impression that it wanted to settle the case as soon as possible. The District Court ruled that the DPPO acted improperly in bringing this case to trial. The verdict will likely be appealed.

FRANCE

Crackdown on AML-CTF breaches and market offences through increased sanctions

– The French banking regulator (*Autorité de contrôle prudentiel et de régulation*, the ACPR) has recently published its annual report for 2017. Although its Enforcement Committee issued fewer decisions than in 2016, the sanctions imposed are significantly higher than in previous years, amounting to EUR25.86m in total (as opposed to EUR6.47m in 2016 and EUR9.33m in 2015). In particular, a landmark EUR10m sanction was imposed against the largest French bank for AML-CTF failures, particularly with respect to reporting suspicious transactions to the French financial intelligence unit (*Tracfin*). The fight against terrorist financing and money laundering clearly remains one of the regulator's primary objectives for the upcoming year.

– The French markets regulator (*Autorité des marchés financiers*, the **AMF**) also published its annual report for 2017 on 17 May 2018. The report highlights that the AMF's Enforcement Committee issued 15 sanctions decisions last year, concerning 12 entities and 16 individuals, amounting to EUR40.76m in total. On 25 July 2017, the harshest fine ever issued by the Committee (EUR35m) was imposed on a major asset manager for alleged breaches of its professional obligations in the management of formula funds between 2012 and 2015. A total of 13 settlements (*accords de composition* administrative) were also executed, representing a total amount of EUR2,515,000.

HUNGARY

Criminalisation of activities relating to "illegal migration"

The Hungarian Parliament continues its focus on adopting new legislation on the criminalisation of acts in relation to migration. The latest development is the Hungarian Parliament's approval of legislation making it a criminal offence to undertake activities deemed to support asylum seekers whose request might not be accepted (referred to as illegal migration). Organisations (such as NGOs) may also be subject to sanctions for contravention of the new legislation, including fines or dissolution.

Another act, also part of the legislation dubbed the "Stop Soros Package", will also hinder the work of NGOs that support asylum seekers, such as the Helsinki Committee and Amnesty International. Foreign entities or individuals supporting NGOs that receive a yearly sum of at least approximately. EUR22,000 from supporters of foreign nationality or registered abroad, have been registered as such in a central database pursuant to a 2017 legislation. Under the new legislation, supporters of NGOs that provide assistance to asylum seekers (such as donors to these NGOs) will now become subject to a 25% special tax based on the sum of their support.

A closer look: Germany

Landmark decision of the German Federal Constitutional Court on legal privilege in internal investigations

The concept of legal privilege between a lawyer and his client is not recognised in the same way under German law as it is in common law jurisdictions. In particular, the jurisprudence of the German courts has until now been unclear as to whether documents obtained at a law firm advising its client on an internal investigation are protected from the seizure by and scrutiny of public authorities. For the first time, the constitutional court in Germany has now clarified its position on the scope and application of legal privilege in internal investigations in Germany.

The background of the case relates to the diesel emissions scandal. The law firm Jones Day was engaged by one of the car manufacturers to carry out internal investigations, initially in the context of criminal proceedings in the United States which led to a settlement with the U.S. Department of Justice. In March 2017, the local prosecution authority in Munich searched the premises of the law firm and seized a substantial number of documents which related to the internal investigations, including memoranda documenting interviews with employees of the carmaker. The law firm's challenge of the seizure was rejected by the courts in Munich.

On 6 July 2018, the constitutional court decided to not pursue the complaint further. A subcommittee of the constitutional court held that the local prosecution authority's seizure of documents from the Munich office of Jones Day did not require the court's intervention as a matter of German constitutional law. Although the documents seized are generally protected by the fundamental right of self-determination of the car manufacturer, this right is subject to limits as set out in the German Criminal Code. As the car manufacturer was not subject to criminal proceedings when the documents were seized, it did not enjoy the protections against seizure provided under the German Criminal Code.

Further, the constitutional court held that the law firm Jones Day does not have standing to lodge a constitutional complaint, as its principal office is not located in the EU or another Member State. A partner and two employees of Jones Day also lack standing under the German constitution.

The constitutional court's decision clarifies that an expansion of the limited statutory protection of documents relating to internal investigations is not required by German constitutional law. Lawyer-client communications will not be protected in many cases under current German legislation. However, against the backdrop of an increasingly investigation-friendly policy, the ruling coalition had already announced that it is considering changes to legislation to provide for more legal certainty with regard to the seizure of documents related to internal investigations. We will continue to monitor legislative changes in this area.

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ACTIONS

Belgium and Poland: Keep an eye on developments regarding the reform of corporate criminal liability.

Germany and United Kingdom: The application of legal privilege to documents produced during investigations continues to face debate.

Settlement

FRANCE

Coordinated settlements with Société Générale – beginning of a new era?

The "*French-style DPAs: What next?*" Closer Look section on page 26 of the **Q1 2018 edition of Allen & Overy's European White Collar Crime Report** summarised two recent French DPAs and commented that these had set the tone for more settlements to follow. See the "Closer Look" section below for an update on DPA developments in France and a focus on increased cross-border cooperation.

A closer look: France
U.S. and French coordinated settlements with Société Générale

U.S. and French coordinated settlements with Société Générale

Société Générale (the **Bank**) announced that it has entered into settlements with the U.S. Department of Justice (**DOJ**), the U.S. Commodity Futures Trading Commission (**CFTC**) and the French National Financial Prosecutor (Parquet National Financier, **PNF**), on 4 June 2018, in order to put an end to IBOR and Libya related investigations conducted by said authorities.

These coordinated settlements are the first example of transatlantic cooperation between France and the U.S. since the enactment of the so-called "Sapin II" Law on 9 December 2016, introducing the first French style DPA (known as the **CJIP**).

They could mark the beginning of a new era for white collar crime investigations against international companies that are headquartered, present or simply conducting activities in France, if cross-border cooperation (particularly between U.S. and French authorities) is to become common practice.

The settlement between the Bank and the PNF is the fourth CJIP to be concluded in France.

While the first CJIP concerned a foreign company and the laundering of the proceeds of tax evasion, the subsequent CJIPs have been executed with French companies suspected of corruption.

In order to put an end to the preliminary investigation opened by the PNF on 18 November 2016 on the grounds of corruption of foreign public officials in relation to the Bank's business relationships with the Libyan Investment Authority between 2007 and 2010, the Bank has agreed to: (i) be subject to the French Anti-Corruption Agency's monitorship for two years; and (ii) pay a public fine of EUR250,150,755 to the French Treasury.

As the same events were being investigated by the DOJ under the U.S. Foreign Practices Act, the PNF and the DOJ coordinated the settlements and agreed that the same amount (ie EUR250,150,755) would be paid by the Bank to the American Treasury.

The agreement reached between the Bank and the DOJ also resolves investigations regarding alleged manipulation of Libor. The CFTC investigated the same events, as well as alleged manipulation and false reporting in connection with Euribor. The Bank has agreed to pay a fine of USD275 m to the DOJ and a civil monetary penalty of USD475 m to the CFTC.

Such coordinated settlements enable both the authorities and companies to cope with legal uncertainty resulting from lengthy criminal investigations and trial proceedings. Société Générale agreed to pay approximately USD1.3bn in total, in line with the provision booked in its accounts, thereby putting an end to an investigation opened in France only a year and a half beforehand.

On 9 May 2018, the DOJ, via its Deputy Attorney General, recommended coordination with other local or foreign authorities in the context of settlement negotiations, to avoid multiple investigations and sanctions for the same misconduct.

It should be borne in mind that the settlement with a company does not prevent individuals from being prosecuted, as illustrated by the indictment of former Société Générale Treasury Heads in August 2017 in relation to Libor manipulation. It also remains to be seen whether this new approach to co-ordinated settlement will lead to arguments of double recovery – each authority arguing that it should be entitled to receive the full amount of any fine imposed.

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Cybercrime

UNITED KINGDOM

NCA-led global investigation shuts down cybercrime site

An operation led by the UK's National Crime Agency (**NCA**), together with the Dutch National Police, has successfully shut down a website linked to over four million cyber-attacks. The website, "webstresser.org", can be rented for as little as GBP14.99 to launch distributed denial of service (**DDOS**) attacks. DDOS attacks work by launching high volumes of internet traffic at target computers, crippling them and in some cases causing entire systems to shut down. Seven of the UK's biggest banks were targeted by DDOS attacks in November 2017.

Officers from the NCA, in close cooperation with international law enforcement agencies, seized a number of servers and successfully took down the website in April. Cybercrime has the potential to cost billions, and enforcement agencies around the world appear to be closely cooperating to minimise these risks.

A closer look: United Kingdom

Crypto-crime: the new risks of financial crime in the time of cryptoassets

The UK Financial Conduct Authority (FCA) has turned its attention to the prospective criminal dangers of cryptoassets in a letter addressed to the CEOs of the banking industry. This letter follows the FCA's response to a freedom of information request in May that revealed the financial regulator is investigating 24 businesses that deal with cryptoassets.

There's risk, and then there's risk

It is not news that cryptoassets are high-risk investments, but in the FCA's 'Dear CEO' letter dated 11 June 2018, the financial regulator has emphasised that cryptoassets are high-risk in a different sense.

Noting that cryptoassets can be abused because they offer potential anonymity and the ability to move money between countries, the FCA's letter says that firms should take '*reasonable and proportionate measures*' to lessen the risk of facilitating financial crimes which are enabled by cryptoassets.

Enhancing scrutiny of crypto-clients

Firms that offer certain banking services may need to enhance scrutiny of clients that derive significant business activities or revenues from crypto-related activities. The FCA's letter mentions possible services which may require such enhanced scrutiny include:

– where a firm offers services to cryptoasset exchanges which effect conversions between fiat currency and cryptoassets and/or between different cryptoassets;

– trading activities where the clients' or counterparties' source of wealth arises or is derived from cryptoassets; and

– where a firm wishes to arrange, advise on, or take part in an '*initial coin offering*' (**ICO**).

The FCA says that banks are expected to recognise that the risk associated with different business relationships in a single broad category can vary, and to manage those risks appropriately, but that appropriate steps or actions to consider may include:

– developing staff knowledge and expertise on cryptoassets to help them identify the clients or activities which pose a high risk of financial crime;

– ensuring that existing financial crime frameworks adequately reflect the crypto-related activities which the firm is involved in, and that they are capable of keeping pace with fast-moving developments;

– engaging with clients to understand the nature of their businesses and the risks they pose;

– carrying out due diligence on key individuals in the client business including consideration of any adverse intelligence;

– in relation to clients offering forms of crypto-exchange services, assessing the adequacy of those clients' own due diligence arrangements; and

– for clients which are involved in ICOs, considering the issuance's investor-base, organisers, the functionality of tokens (including intended use) and the jurisdiction.

Specific crypto-risks

The FCA's letter says that firms should '*assess the risks posed by a customer whose wealth or funds derive from the sale of cryptoassets, or other cryptoasset-related activities, using the same criteria that would be applied to other sources of wealth or funds*'. However, the letter goes on to say that one way in which cryptoassets differ is that the evidence trail behind transactions may be weaker, but that this '*does not justify applying a different evidential test on the source of wealth*' and the FCA expects firms to exercise particular care in these cases.

The letter also states that the use of a '*state-sponsored cryptoasset*' which is designed to evade international financial sanctions by a client is viewed as a high-risk indicator by the FCA. Although the letter does not provide an example, it is likely that one such cryptoasset is the Venezuelan petro (the first state-sponsored cryptoasset) which the Venezuelan government has described as a means to circumvent U.S. sanctions. Use of the petro by Americans has already been banned in the U.S. by an executive order.

The letter also emphasises that retail consumers contributing large sums to ICOs may be at a heightened risk of investment fraud.

Further reading

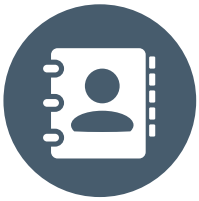
For a high-level overview of how the cryptocurrency sector interacts with anti-money laundering and counter terrorist financing regimes, and the relevant risk considerations for regulated financial institutions, please see the Allen & Overy publication *Cryptocurrency AML risk considerations* available at **www.allenovery.com/publications/en-gb/lrrfs/cross-border/Pages/Cryptocurrency-AML-risk-considerations.aspx**

Vincent Liu, Trainee Solicitor, London

Looking ahead

Date	Event
UNITED KINGDOM	
26 October 2018	Second reading in the House of Commons of the Criminal Fraud (Private Prosecutions) Bill – a Bill to make provision about private prosecutions in cases of suspected criminal fraud in certain circumstances; and for connected purposes.
FRANCE	
September 2018	Reform on the reinforcement of the fight against fraud and tax evasion to be debated in Parliament.
GERMANY	
November 2018	The new "Law on Introduction of a Model Action for Declaratory Judgment" (*Gesetz zur Einführung einer zivilprozessualen Muster-feststellungsklage*) enters into force. It introduces the right of certain consumer associations to file a representative action for the benefit of at least ten affected consumers to obtain a declaratory judgment on factual or legal requirements for the existence of claims.
BELGIUM	
Summer 2018	Belgian central beneficial ownership register expected to go live.
Summer/Autumn 2018	Parliamentary debate on the reform of corporate criminal liability

Date	Event
CZECH REPUBLIC	
2018	Proposal to bring companies that are majority owned by public bodies fully within the scope of the Law on the Register of Contracts. The Law on the Register of Contracts requires that persons in scope, namely the state, regions and municipalities, publish all concluded material contracts. The contracts are then freely accessible online for the public's scrutiny, promising greater public control over the spending of taxpayers' money. Such contracts become effective only from the day they are published. Currently, an amendment to the law is subject to a second Parliamentary hearing. The amendment proposes that companies which are majority owned by the state, regions or municipalities (such as the energy giant ČEZ) will fall within the scope of the law. If adopted, all parties contracting with such majority owned companies should make appropriate arrangements to ensure their contracts are published and thus have legal effect.
HUNGARY	
August/September 2018	Entry into force of the special tax provisions on supporting NGOs that provide assistance to asylum seekers.
EUROPEAN UNION	
10 January 2020	Deadline by which the Fifth Anti-Money Laundering Directive must be implemented across Member States.



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Our European white collar crime practice

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