

SLAUGHTER AND MAY /

# GLOBAL INVESTIGATIONS BULLETIN

October 2022

OFSI enforcement

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## GROUP NEWS //

**Rankings:** We were pleased to retain our Tier 1 ranking for Banking and Commercial Litigation as well as Regulatory Investigations in the recent [Legal 500 UK report](#) and to see partner Gayathri Kamalanathan obtain new rankings in Banking Litigation and Contentious Regulatory. We have also retained our tier 1 rankings for Corporate Crime, Competition Litigation and Tax Litigation and all our other individual rankings have been retained.

**GIR Awards:** We have additionally been shortlisted for three awards at GIR Awards 2022, including partner and group head Richard Swallow being nominated for [Investigations Professional of the Year](#).

**Guide to Workplace Investigations:** We are pleased to announce the launch of the first edition of our Lawyer's Guide to Workplace Investigations in International Employment Lawyer. It can be read [here](#).

## STOP AND SMELL THE ROSÉ: LESSONS TO BE LEARNED FROM OFSI'S LATEST ENFORCEMENT ACTION //

On 27 September 2022, the UK's Office of Financial Sanctions Implementation (OFSI) [announced](#) that it had imposed a monetary penalty of £30,000 against an English incorporated company, Hong Kong International Wine and Spirits Competition Ltd (HKIWSC), for breaches of EU and UK sanctions in relation to Ukraine (specifically, dealing with the funds and economic resources of, and making economic resources available to, a designated person).

OFSI has imposed only eight monetary penalties to date (as at the date of publication), so each OFSI penalty notice provides valuable insight into how UK sanctions are likely to be construed and enforced.

This latest decision is interesting as it potentially broadens how the definition of “economic resources” should be understood.

## Facts

HKIWSC organises an annual competition for wines and spirits, which was entered into by the State Unitary Enterprise of the ‘Republic of Crimea’ Production-Agrarian Union (**Massandra**) in each year between 2017 and 2020. Massandra was designated for asset freeze purposes by the EU on 25 July 2014 under sanctions introduced following the Russian invasion of Crimea.

OFSI investigated HKIWSC’s dealings with Massandra following receipt of a breach report from a third party. OFSI found that:

- HKIWSC’s receipt of three payments and 78 wine bottles from Massandra (with an estimated value of £3,919.86 in total) amounted to dealing with the funds and tangible economic resources of a designated person in breach of sanctions;
- HKIWSC’s provision of publicity to Massandra amounted to making available intangible economic resources to a designated person in breach of sanctions; and
- HKIWSC either knew or had reasonable cause to suspect that it was in breach of prohibitions imposed by financial sanctions legislation (at the time of the breaches the UK’s regime was not one of strict liability, as is the case now).

OFSI imposed a civil penalty of £30,000 against HKIWSC for breaches of EU and UK sanctions (EU sanctions applied to HKIWSC because some of the breaches occurred before Brexit). No voluntary disclosure discount was given, since the matters were reported to OFSI by a third party. The decision and penalty amount were upheld following ministerial review.

## Key takeaways

*Publicity: An intangible asset which can be used to obtain funds, goods or services?*

Perhaps the most significant development from this latest OFSI decision is that publicity was regarded to be an intangible “economic resource”. Although OFSI accepted that it was not possible to ascribe a value to the publicity provided by HKIWSC, it nevertheless determined that publicity can constitute an economic resource on the basis that “*the publicity would be exchanged or used by Massandra in exchange for funds based on the reasonable inference it was for the purpose of increasing Massandra’s wine sales*”.

While OFSI’s determination appears logical from a policy perspective, it’s arguably less so when considering the commentary on this point within official OFSI guidance and the legislative definition of “economic resources”, which is “*assets of every kind, whether tangible or intangible, movable or immovable, which are not funds but can be used to obtain funds, goods or services*”. Publicity is not typically classified as an asset on a company’s balance sheet (whereas goodwill, for example, is). Moreover, while publicity could result in a company obtaining funds - i.e. generating additional sales - this is not guaranteed, nor can publicity directly be “*used... to obtain funds*”. As such, this decision demonstrates that OFSI is ready to take an expansive view of the financial sanctions it enforces.

In light of this decision, OFSI has called on companies to “*consider their potential sanctions risk exposure broadly, to include the potential provision of intangible economic resources, and not just financial transactions and tangible economic resources*”. This undeniably appears to be prudent advice.

*OFSI: Sufficient resources to investigate even relatively low value potential breaches?*

In response to the sanctions introduced following Russia’s invasion of Ukraine earlier this year, much has been said about the apparent lack of resources available to OFSI for monitoring and enforcing financial sanctions in light of the current sanctions landscape. However, although the majority of OFSI’s investigation into HKIWSC would have pre-dated the latest wave of Russia sanctions (at a time when OFSI may have been relatively better resourced), this latest penalty notice shows that companies cannot be complacent, as it demonstrates that OFSI may still take action even in relation to relatively low value breaches.

*Compliance advice*

The UK’s sanctions regime does not impose specific obligations in relation to the systems and controls companies should put in place to ensure compliance. Rather, companies are afforded discretion to determine how best to manage the sanctions risk inherent in their businesses. In this latest penalty notice OFSI acknowledged this, confirming that “*companies should consider the international scope of their activities, assess their own exposure, and put appropriate due diligence measures in place to identify and manage potential risks of breaching financial sanctions*”.

As for what amounts to “*appropriate due diligence measures*”, OFSI has provided the following reminders and recommendations:

- It is not sufficient for any company to rely on the banking sector to conduct due diligence on their behalf.
- Companies must make themselves aware of financial sanctions imposed by the UK as well as the UN.
- It is necessary for companies to assess all aspects of their businesses to identify if any companies or individuals they conduct, or are considering conducting, business with appear on the consolidated sanctions list or are owned or controlled by any listed persons.
- Companies should consider their sanctions exposure, especially when operating in high-risk regions, and take steps to mitigate against dealing with designated persons/entities.

While perhaps not ground breaking advice, the above are all timely reminders that companies should actively seek to assess and manage sanctions risks in their businesses.

*With thanks to associate [Connor Williamson](#) for the above piece.*

## RECENT NEWS //

## **SFO Update: Swiss ENRC evidence granted despite conduct complaints; individual behind £226m hotel investment fraud scheme jailed; reviewers say that agency has “endemic lack of resources”**

Switzerland’s highest court, the Federal Tribunal in Lausanne, [authorised Geneva prosecutors](#) to release evidence requested by the UK’s Serious Fraud Office as part of its investigation into Kazakh mining company ENRC, despite objections filed over the SFO’s conduct in the UK. The SFO can now receive the banking details of six unidentified companies and individuals linked to its ENRC investigation.

The court acknowledged objections to the SFO’s use of information leaked to it by retired Dechert partner and ENRC’s then-lawyer, Neil Gerrard, but found that this would be a matter for a trial judge in the UK if the SFO ever brought criminal charges. ENRC had sued Dechert, Gerrard and the SFO alleging that the now-retired lawyer had leaked information to encourage the SFO to open an investigation. The [High Court had ruled earlier this year](#) that the SFO had been complicit in some of the “almost unimaginable” misconduct of Gerrard.

The SFO [reported](#) that David Ames, who was behind a £226m fraud scheme, has been jailed for 12 years and disqualified as a company director at Southwark Crown Court. Ames was originally convicted in August 2022 for two counts of fraud by abuse of position after an investigation by the SFO, who advocated for a lengthy prison sentence due to the “financial and long-term harm” caused to thousands of victims. The SFO has said Ames abused his position as Chairman of the Harlequin business and exposed over 8,000 investors to huge losses between 2010 and 2015 by fraudulently selling them holiday properties.

Sir David Calvert-Smith KC and Brian Altman KC, the authors of two recent reports into failings at the SFO, [told the parliamentary justice committee](#) on 19 October that the SFO lacks funding, staff knowledge and training. “There’s an endemic lack of resources,” said Calvert-Smith, who recently wrote a [public report](#) into the SFO’s investigation into oil services consultancy Unaoil, a case which saw SFO disclosure failures result in quashing of the bribery convictions of three former executives. Brian Altman, author of a [separate report](#) into the collapse mid-trial of the SFO’s fraud case against two former Serco executives, told the committee the SFO lacked experienced disclosure officers for its complex investigations. SFO director Lisa Osofsky expressed regret at allowing David Tinsley, a “fixer” acting for the founding family of Unaoil, to seek to influence its investigation. The SFO’s chief capability officer Michelle Crotty told the committee the agency faced a £2.15 million bill to cover the legal costs of the one of the three Unaoil executives.

## **Economic Crime and Corporate Transparency Bill: Bill passes second reading; SFO welcomes expanded investigative powers; Law Society expresses concern over plans to boost penalties for lawyers, offers proposals**

On 13 October 2022, the [Economic Crime and Corporate Transparency Bill](#) had its second reading in the House of Commons. The Bill, which was introduced to the House of Commons on 22 September 2022, is the second part of a legislative package to prevent the abuse of UK corporate structures and tackle economic crime. It follows on from the [Economic Crime \(Transparency and Enforcement\) Act 2022](#), which received Royal Assent on 15 March 2022. It reforms Companies House, aiming to improve the transparency of company formation and give Companies House more power to verify the identity of

people behind businesses, allow the registrar to more actively manage company data and provide investigative and reporting powers. The Bill has now been sent to a Public Bill Committee for line by line examination, which is scheduled to report back by 29 November 2022. Parliament on 17 October [published](#) an invitation to submit written evidence on the Bill to the House of Commons Public Bill Committee.

The SFO [has positively commented](#) on the Bill's provisions to increase its powers. The bill would expand the SFO's pre-investigative Section 2A Criminal Justice Act 1967 powers to compel witnesses to give evidence in relation to suspected fraud or domestic bribery and corruption, beyond its current abilities to do so only in cases of suspected international bribery and corruption. The agency stated that the new powers would enable the gathering of evidence at an earlier stage, reduce its reliance on the voluntary provision of information by third parties, allow obtaining of information from institutions previously unable to share information, and speed up the process for gathering information and opening investigations.

[The Law Society published a response](#) to the bill on 26 September. While it welcomed measures to stop money laundering, it stated that it was 'extremely concerned' over government plans to raise penalties against solicitors, with the SRA's fining powers increasing from £2,000 to £25,000 and potentially allowing it to rule over cases that would currently go before the Solicitors Disciplinary Tribunal. They offered proposals, prepared jointly with the City of London Law Society, on 20 October, commending the increase in the registrar of companies' powers to query, correct and remove information on public registers, and focussing on improving the bill's clarity, proportionality and business-friendliness.

### **Czech Minister says deal on anti-money laundering rules expected by end of year**

Czechia's deputy finance minister [said on 20 September](#) that officials aim to finalise a deal on new regulation and directive against money laundering by the end of the year, with the first compromise text in October. This would be followed by three-way talks with the European Parliament and European Commission to finalise the agreement. The proposed package on money laundering has four elements: new AML regulation harmonising rules across Europe; a new AML Directive for rules to be implemented by public authorities; an extension of rules to cryptoassets and virtual spaces; and the establishment a new EU authority to supervise certain credit and financial institutions and help harmonise supervision across the EU.

### **FCA Update: Head of Enforcement to step down in 2023; Link Group facing £300mn redress and £50mn fine over fund collapse; criminal proceedings started against five members of the Worthington group; decision notice on Barclays disclosure failures published; Gatehouse fined for AML controls failings; Sigma Broking Ltd fined for market abuse reporting failings; whistleblowing data for Q2 2022 published**

Mark Steward, executive director of enforcement and market oversight at the FCA, will remain at the agency until Spring 2023, the FCA stated [on 19 October](#). Successors have not yet been shortlisted with the search for his replacement to begin soon.

The FCA has informed Link, a fund administrator, that it is "likely" to receive a penalty up to £306 million. Link has been under investigation following its freezing of its Woodford fund in 2019, trapping

investors' money. The FCA has not yet published a report but, following a takeover bid for Link, [made a statement](#) on 12 September that multiple parties were under investigation and they would probably “seek to require [Link] to pay a financial penalty and/or consumer redress” for “failings in managing the liquidity”. It followed this up [with a draft Warning Notice](#) on 21 September, proposing a £50 million fine based on perceived misconduct in managing the fund.

Link is separately facing multiple lawsuit on behalf of investors. RGL [issued a claim](#) on 17 October on behalf of over 3,000 claimants against both Link and Hargreaves Lansdown, a financial services firm who is alleged to have recommended the Woodford Fund despite being aware of liquidity issues. Law firms Leigh Day and Marcus Parker [are preparing separate actions](#) arguing that investors are due compensation for Link's failure to oversee the fund properly.

The FCA [has announced](#) that it has begun criminal proceedings against five individuals in an investigation into market abuse and market manipulation launched in April 2016, following the suspension of Worthington Group plc's shares from the Main Market of the London Stock Exchange on 10 October 2014.

The accused include two former directors of Worthington, a media advisor and a person allegedly involved in running the business while disqualified from acting as a company director. They face counts of knowingly concealing Worthington group' insolvent financial position and coordinating a “pump and dump” scheme.

On 21 October, the FCA [published a decision notice](#) stating that it has decided to fine Barclays a total of £50 million in relation to its failure to disclose certain arrangements agreed with Qatari entities as part of its capital raisings announced on 25 June 2008 and 31 October 2008. It has concluded that Barclays' conduct in the capital raising was “reckless and lacked integrity”. Barclays have referred the Decision Notices to the Upper Tribunal and so any findings in the Notices are therefore provisional and reflect the FCA's belief as to what occurred and how it considers the firms' behaviour should be characterised.

The FCA [also issued a decision notice](#) to Gatehouse Bank plc on 14 November indicating that the FCA has fined the bank £1,584,100 for significant weakness in its financial crime systems and controls. The FCA alleged that between June 2014 and July 2017 Gatehouse failed to conduct sufficient checks on its customers based in countries with a higher risk of money laundering and terrorist financing. Gatehouse also failed to undertake the correct checks when some of the customers were classed as politically exposed persons. The fine had been reduced however as Gatehouse has subsequently taken significant steps to improve its financial crime systems and controls and agreed to settle at an early stage of the investigation.

The FCA [announced on 6 October](#) that Sigma Broking Limited has been fined £530,000 for missing and inadequate reports on 56,000 contract for difference transactions as well as failing to identify 97 suspicious transactions or orders. It was found that many of its failing were due to inadequate governance and oversight by its board of directors, leading to three of them receiving fines and two of two of them having prohibition orders issued against them.

Whistleblowing data for the period April to June 2022 [has been published](#) by the FCA. The watchdog received 243 new whistleblowing reports containing 474 allegations. They said that the most common



type of allegation concerns fitness and propriety followed by compliance, treating customers fairly, organisational culture and consumer detriment.

### **ICO Update: Interserve fined for GDPR breach; Virgin Media and six UK public bodies reprimanded for GDPR information access failings; TikTok may face multi-million pound fine for failing to protect children's privacy**

The ICO [announced on 24 October](#) that it has fined Interserve Group Limited, a Berkshire-based construction company, £4,400,000 for breaches of the UK GDPR following a May 2020 cyberattack that had affected a number of companies in the Interserve Group. The ICO acknowledged steps taken by Interserve to mitigate the risk of harm to data subjects and provided a reduction in the penalty. Commissioner John Edwards has stated (somewhat forcefully) that he considers the biggest cyber risk to be complacency within an organisation and has warned that organisations will face fines if they fail to monitor for suspicious activity on an ongoing basis, act on warnings, update software and train their staff. Slaughter and May advised Interserve on its response to the cyberattack and the subsequent ICO investigation. See our client briefing [here](#) on managing cyber risks.

The ICO [has taken enforcement action](#) against British telecom company Virgin Media and six public bodies for failing to respond to subject access requests from the public. The public bodies, including the Ministry of Defence, the Home Office, Kent Police and the London boroughs of Croydon, Hackney and Lambeth, repeatedly failed to meet their one to three months deadline or to issue information at all, in breach of UKGDPR and the Data Protection Act. It also issued recommendations for several of the bodies to improve their freedom of information compliance.

The ICO [issued TikTok with a notice of intent](#), a document that precedes a potential fine, setting out a provisional view that Tiktok breached UK data protection law between May 2018 and July 2020. It is alleged that TikTok may have processed the data of children under the age of 13 without appropriate parental consent, failed to provide proper information to its users and processed special category data, without legal grounds to do so. TikTok may face a fine of £27 million, however all findings are provisional and TikTok will have the opportunity to make representations before a final decision is made.

### **Transparency International: Global foreign bribery enforcement at all time low; UK LLPs abused on “industrial scale”**

The [Exporting Corruption 2022 report](#) by Transparency International released on 11 October has found countries' enforcement against foreign bribery at the lowest level since it began this measurement in 2009. Of the 43 signatories to the OECD Anti-Bribery Convention, only two are considered “active enforcers” that investigate, charge and impose sanctions commensurate with their share of exports while 38 countries have limited or no enforcement at all. While the pandemic is believed to have disrupted efforts, the downward trend in enforcement began in 2018.

Another [report by Transparency International](#) states that 14% of LLPs incorporated between 2001 and 2021 show money laundering red flags. The report estimates that the economic damage caused is in the hundreds of billions of pounds with much of this coming out of Russia. While TI welcomes the

reforms being introduced in the Economic Crime and Corporate Transparency Bill, they have stated that these solve only part of the problem and still leave money laundering vulnerabilities.

### **UK Finance: UK fraud levels are a “national security threat”**

UK Finance has published its fraud report for [the first half of 2022](#). UK fraud figures hit more than 600 million pounds in the first half of this year, a drop of 13 percent compared to the first half of 2021. The banking and finance industry manage to prevent a further £580 million of unauthorised fraud from getting into the hands of criminals. Despite the drop in the amount stolen by fraudsters relative to last year, Katy Worobec, UK Finance director, said that fraud levels represented a “national security threat”, stating “criminal gangs simply bypass the advanced security measures banks have in place and instead directly target the customer, usually outside the confines of the banking system” and that it was key that other sectors work to fight fraud.

### **UK/US data adequacy deal expected to go before parliament in 2023**

The US Secretary of Commerce Gina Raymondo and Michelle Donelan, the UK head of the Department for Digital, Culture, Media and Sport, [issued a joint statement](#) on 7 October that they’ve made “significant progress” on UK-US data adequacy deal discussions. A deal would aim to allow personal data to flow between US and UK with fewer barriers while upholding the rights of data subjects, facilitating innovations and reducing burdens on businesses. President Biden signed [an executive order](#) on the afternoon of 7 October that would establish new redress routes for UK data processed in the US. The UK government [has stated](#) it will review Biden’s executive order in “the coming weeks,” after which it will consult with the Information Commissioner’s Office, before it puts the regulations for an “adequacy” agreement to parliament in early 2023.

### **Public Accounts Committee: UK regulators face challenges in recruiting top staff**

Regulators in the UK are facing challenges in recruiting the individuals they need to regulate effectively, the Public Accounts Committee has said [in a report](#) on regulating after Brexit. This includes a shortage of both lawyers and economists to enforce competition law and protect consumers. Brexit has created both challenges and opportunities for UK regulators but in the short term, they must build their regulatory capacity and capability, address the loss of EU data sharing and cooperation arrangements, and find new sources of international influence the committee says.

### **Shadow Attorney General says rogue companies and bosses in UK to be targeted**

“Unscrupulous bosses” of companies suspected of fraud would face prosecution should the Labour Party return to power said Shadow Attorney General Emily Thornberry in [a speech on 27 September](#) at the annual Labour party conference. She stated that the government has “*simply waved the white flag to white-collar crime [...] We will change the law to make it easier to prosecute companies for fraud, and send the message loud and clear... that if you refuse to play by the rules, then we are coming for you too.*”

### **HMRC adds unlawful estate agents to money laundering business’s list**

HMRC has added 68 unlawful estate agents to [the list](#), previously numbering 175 members, of named businesses not complying with the Money Laundering, Terrorist Financing and Transfer of Funds



(Information on the Payer) Regulations 2017. Fines have been issues of more than £500,000. The fines followed the first prosecution of an estate agent, Felix Uwuigbe, who was sentenced to 120 hours of unpaid community service and banned from acting as an estate agent for 2 years for trading despite not registering with HMRC. Read more on [the government's website](#).

## Horizon Scanning

### Look out for:

**Economic Crime and Corporate Transparency Bill:** The [Economic Crime and Corporate Transparency Bill](#) continues to make its way through Parliament. It is the second part of a legislative package introduced by the UK government to tackle economic crime, following on from the [Economic Crime \(Transparency and Enforcement\) Act 2022](#), which was fast-tracked through Parliament in March 2022 in response to the Russian invasion of Ukraine. The Bill is a significant piece of legislation, running to 162 sections and eight schedules, and is expected to garner cross party support.