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RECENT PUBLICATIONS //

Global Investigations Review's *Guide to International Enforcement of the Securities Laws - United Kingdom* (19 November), by Ewan Brown, Gayathri Kamalanathan, and Anna Lambourn.

Divergence, Convergence and Challenges: Trends on GDPR Enforcement Across Europe and the UK (22 November), by Richard Jeens, Ross O'Mahoney, and William Doyle.

Greenwashed? The Intensifying Scrutiny of Sustainability Credentials (24 November), by Jonathan Clark, Gayathri Kamalanathan, Jonathan Cotton, Ying-Peng Chin, and George Murray.

DEBARMENT IN THE UK //

What is debarment?

Debarment is one of the many penalties that may be imposed on a company that has been convicted of certain criminal offences. It is the prohibition (on either a mandatory or discretionary basis) from entering into a contract with any public body. For regular government contractors or companies operating in certain industries where public contracts are a primary source of income — including extractive industries, defence and aerospace, medical and pharmaceutical, and construction, to name a few — debarment is something to be avoided at all costs. The current laws on debarment are based on EU law, and are set to change in the coming years.

Legal framework

The UK's current legal framework on debarment has been adopted from EU law: The Public Contracts Regulations 2015 implemented the EU Procurement Directive (Directive 2014/24/EU). Under the legislation, debarment can be mandatory or discretionary, depending on the misconduct. Mandatory debarment will last for a period of five years.

Debarment will be mandatory if the company has been convicted of certain economic crimes (listed in Regulation 57), including bribery (under the common law, and under sections 1, 2, or 6 of the Bribery Act 2010); corruption (under section 1(2) of the Public Bodies Corrupt Practices Act 1889 or section 1 of the Prevention of Corruption Act 1906); money laundering (under sections 340(11) and 415 of the Proceeds of Crime Act 2002); and theft and fraud where those offences relate to fraud affecting the European Communities' financial interests. Mandatory debarment may also apply if an individual within

the company is convicted of such crimes, and that person represents the administrative, management or supervisory body of that company, or has powers of representation, decision, or control at the company (Regulation 57(2)).

DPAs and debarment

Regulation 57(13) provides for companies that "self-clean" to be exempt from mandatory exclusion. The "self-cleaning" process includes the convicted company cooperating with the investigating and prosecuting authorities; paying compensation for the damage caused; and undergoing technical, organisational, and personnel measures sufficient to prevent further wrongdoing. This process includes the same requirements typical of entry into a deferred prosecution agreement ("DPA"); thus entry into a DPA enables a company to be exempt from debarment. Indeed, entry into a DPA avoids a conviction entirely, and a conviction is a necessary precursor to debarment. This can only apply to offences subject to mandatory exclusion, which are also eligible for entry into a DPA (Schedule 17, Part 2 of Crime and Courts Act 2013).

The future of procurement law and debarment

The UK public procurement and debarment framework is now being reviewed in light of Brexit. In December 2020, the Cabinet Office set out proposals for the future of public procurement law and undertook a consultation through the early part of 2021. The results of the consultation were published on 6 December 2021.

Question 20 in the consultation asked respondents to indicate whether further consideration should be given to including DPAs as a ground for discretionary exclusion. While 72% of respondents supported this proposition as a way to increase transparency, the Government has said it "does not intend to introduce the proposal into legislation". Instead, it would "set out in guidance that the circumstances leading to a DPA should be considered in the context of the discretionary exclusion grounds (which we intend to simplify and clarify, as explained above) and that commitments made under a DPA should be considered as part of the assessment of evidence of self-cleaning".

The consultation also sets out the new mandatory and discretionary grounds for exclusion that the Government intends to specify in the new regime. It appears that the offences requiring mandatory debarment will be widened from the current list to include fraud and fraudulent trading, theft, modern slavery offences, corporate manslaughter or corporate homicide, tax evasion, and serious competition law breaches.

The Government estimates that the new legislation will come into force in 2023.

RECENT NEWS //

SFO roundup: Proceeds of corruption returned to Chad; NGO criticises SFO for lack of action against Unaoil owners

The Foreign, Commonwealth & Development Office reported that the UK government had sent £4.4 million in aid to Chad, recovered in a corruption case run by the Serious Fraud Office ("SFO"). The money was recovered from a series of corrupt transactions involving personnel and companies connected to staff at the Chadian Embassy in Washington DC. This is the first time the UK has agreed to channel money from a civil corruption case into a critical global aid project. The funding has gone to support vulnerable people in Chad with food rations, cash assistance, and medical support. The £4.4 million was awarded to the SFO in 2018 following a successful application to the High Court for a Civil Recovery Order. More information about the SFO's case against Chad Oil is available here.

International NGO Spotlight on Corruption wrote an open letter to the SFO saying that a lack of enforcement action against Unaoil's owners, including to pursue at least £7.5 million in suspected criminal property, is a "concern". The campaign group asked whether the SFO is planning on pursuing these assets, or if it was aware of any other agencies doing so. Former Unaoil executives Cyrus and Saman Ahsani are awaiting sentencing on US corruption charges, after the SFO dropped its investigation into them in June 2019.

FCA roundup: Changes planned for decision-making process; broker fined over "cum-ex" tax scandal; Chief Executive admits there is "some work to do" on expediting fintech authorisation process

The Financial Conduct Authority ("FCA") recently published a policy statement outlining changes made to its governance process. The changes transfer decision-making powers — including over financial firms' authorisation, and whether to pursue civil or criminal proceedings — from the Regulatory Decisions Committee ("RDC") to senior managers in the FCA's Authorisations, Supervision and Enforcement divisions. The ability for senior managers at the FCA to make charging decisions, without consulting the independent RDC, could see the agency become more nimble in its decision-making. The FCA is also making changes to its Handbook to modify the Executive Procedures framework to provide additional flexibility. The policy change follows the FCA's consultation (in July 2021) on these proposals. A summary of the feedback, together with a response, are included in the statement. Mainly, the FCA addressed concerns that the emphasis on speed and efficiency would increase the potential risk of fairness and objectivity in decision-making.

The FCA fined Sunrise Brokers LLP £642,400 for "serious financial crime control failings in relation to cum-ex trading". In the Final Notice against Sunrise, the FCA stated that the brokerage lacked adequate systems and controls to detect fraudulent trading and money laundering in 2015 when it carried out £36 billion worth of trades for companies connected to the now-shuttered investment business Solo Group. The FCA said Sunrise should not have executed the trades because the circular nature of the transactions suggested they were part of a cum-ex trading scheme, where multiple tax credits are claimed on share dividends that are paid and taxed only once. The brokerage earned a £467,000 commission on the trades, according to the agency. Sunrise is the second company the FCA has penalised over cum-ex trades, the first being Sapien Capital, which was fined £178,000 for systems and control failings linked to £6 billion of trades it executed for Solo Group-linked companies.

Speaking to the Parliament Treasury Committee on 8 December, FCA Chief Executive Nikhil Rathi emphasised the constant "balance" the FCA is "trying to strike" between expediting the authorisation process for financial technology companies and ensuring consumer protection. Rathi stated, however, that the regulator is "putting more grit in the system, and some of that is deliberate. That applies right across the board". The Chief Executive admitted that there is "some work to do" about existing "backlogs", including appointing 100 staff and digitalising more of the process. Rathi noted the challenges of attracting innovation in the UK while addressing criticisms in the London Capital and Finance independent report published last year, which concluded, in his words, that the FCA was not "inquisitive, demanding and probing enough". The Treasury Committee itself, he noted, has been sceptical of firms that self-identify as fintech companies and use an appointed representative to evade direct regulation. Rathi said that, following the collapse of Wirecard in August 2020, the FCA is tightening its stance on e-money firms in particular. Watch the broadcast here.

Law Commission delays corporate criminal liability report, while MP warns against watering down corporate liability law

The Law Commission's publication of an Options Paper, following a review on the laws concerning corporate criminal liability for economic crime, has been delayed until early 2022. Kevin Hollinrake, co-Chair of the All Party Parliamentary Group on Fair Business Banking, expressed concerns in Parliament that the legal framework will be "downgraded to regulatory offences rather than those involving criminal sanctions". The MP has written to the Prime Minister, asking him to "prioritise legislation to tackle economic crime throughout the UK in this Parliamentary session".

ESG: FinCEN says banks should report environmental crimes-based money laundering; FCA asks funds to step up scrutiny over "greenwashing"

The US Treasury Financial Crimes Enforcement Network ("FinCEN") issued a Notice to "call attention to an upward trend in environmental crimes and associated illicit financial activity". FinCEN has asked banks to file suspicious activity reports for transactions they believe may be related to environmental crimes as part of their anti-money laundering procedure. FinCEN notes that environmental crimes frequently involve transnational organised crime and corruption and are often associated with various other crimes such as money laundering, bribery and tax evasion. The agency advised banks to use phrases such as "wildlife trafficking", "illegal logging", "illegal fishing", "illegal mining", and "waste trafficking" in their suspicious activity reports.

In a discussion document issued this month, the FCA suggested that investment funds labelled as sustainable should carry "concise and accessible" language for consumers alongside more detailed underlying disclosures aimed primarily at institutional investors. The FCA also wants asset managers to provide more information about how environmental, social and governance factors are incorporated into their investment processes. Similar disclosure requirements were introduced by the EU in March under the Sustainable Finance Disclosure Regulation. The International Organization of Securities Commissions ("Iosco"), a global standard-setter for securities trading, aims to co-ordinate policy development among national regulators. Currently, only a minority of Iosco's members across 130 jurisdictions have specific rules covering sustainable investments.

ICO announces intent to find Clearview AI £17 million

The Information Commissioner's Office ("ICO") has announced its provisional intent to fine Clearview AI £17 million for falling short of a number of data protection obligations. In its statement, the ICO preliminarily found that the company — which uses facial recognition to identify individuals using publically available images — failed to process individuals' data in a fair or reasonable way; had no process in place to stop data being retained indefinitely; and had no lawful reason for collecting the data. The ICO also plans to order the company to stop processing the data of UK nationals and delete any that it currently holds. Although Clearview does not have operations in the UK at present, the ICO considered its use of UK citizens' data a sufficient ground on which to take action. If the ICO proceeds with this fine, it would be the third largest the ICO has issued to date, following the £20 million fine of British Airways and £18.4 million fine of Marriott in 2020.

OECD updates its guidance on combatting foreign bribery

The Organisation for Economic Co-operation and Development ("OECD") has updated its guidance concerning combatting bribery of foreign public officials in international business transactions. The intergovernmental group, comprising 38 member countries, emphasised how early collaboration between cross-border investigation teams can allow international, "coordinated and concerted action" against perpetrators. The OECD advised countries to use technology to monitor the progress of inbound mutual legal assistance treaty requests and employ sufficient staff with the relevant expertise to avoid delays. The organisation also urged countries to share "personnel and experts" by posting law

enforcement officials abroad, as has been done previously between the US Department of Justice and SFO.

SRA proposes to fine firms 5% of annual turnover for misconduct

In a recent statement, the Solicitors Regulation Authority ("SRA") announced the launch of its consultation on financial penalties for law firms and solicitors "where they fall short of the expected professional standards". The proposals, based on the SRA's experience of enforcement over the last ten years, include increasing the maximum fine the SRA can issue to £25,000; taking into account the turnover or income of firms and individuals when setting fines; and introducing a schedule of "fixed penalties" of up to £1,500 to enable lesser issues to be dealt with more easily for all concerned. The SRA proposes that, for more serious cases, it is able to fine firms up to 5% of annual turnover. Anna Bradley, Chair of the SRA, said: "Our proposals are designed to resolve issues much more quickly, saving time and cost for everyone and, importantly, reducing the inevitable stress for those who find themselves in our enforcement processes. Changes to our fining powers would also allow the Solicitors Disciplinary Tribunal to focus on the most serious cases where there is need for greater fines and sanctions such as suspension and strike off".

ESMA publishes report on EU market abuse sanctions

The European Securities and Markets Authority ("ESMA"), the EU's securities markets regulator, published a report which found that France and Sweden accounted for the highest proportion of market abuse fines in the EU in 2020. The report found that National Competent Authorities and other authorities imposed a total of €17.5 million in fines related to 541 administrative and criminal actions under the Market Abuse Regulation in 2020, of which €12 million came from France and Sweden.

Treasury Committee questions Microsoft, Snapchat, TikTok, Twitter on fraudulent advertisements

Mel Stride, Parliament's Chair of the Treasury Committee, wrote to four tech giants requesting details of their plans to combat fraud and protect consumers online. In the letters to Microsoft, Twitter, Snapchat and TikTok, Mr Stride requested information on their policies to combat scams and protect consumers online. The letters posed a serious of questions, including whether firms advertising investment opportunities on these platforms must be authorised by the FCA; the level of revenue received from such advertising; and which policies are in place to compensate users who fall victim to fraudulent content hosted on their platform.

EPPO secures first conviction

The European Public Prosecutor's Office ("EPPO"), the new independent EU body tasked with investigating and prosecuting "crimes against the financial interests of the EU", secured its first conviction in late November. The EPPO announced: "[The] Special Penal Court of the Slovak republic issued the first conviction verdict in an EPPO investigation. The former mayor of a municipality in Eastern Slovakia plead guilty for committing an attempted offence against the financial interest of the EU, based on the fact that he falsified documents in order to illegally obtain a financial support from the European Social Fund for co-financing of local services. The total damage that could have been caused is more than €93,000. The court imposed him a conditional imprisonment of 3 years with probation period and disqualification for a position in public office for 5 years". The EPPO, which began operations on 1 June, has appointed prosecutors from 22 of the EU's 27 member states. Within three months, it had registered over 1,700 crime reports from participating member states and private

parties and opened 300 investigations. Its cases involve bribery, corruption, customs fraud, smuggling, and misuse of EU funds. In July, EPPO signed cooperation agreements with the European Anti-Fraud Office (“OLAF”) and the European Commission. A particular focus is said to be the bloc’s Covid-19 recovery fund — €800 billion to be distributed over the next six years — which is expected to be riddled with fraud. The European Commission allocated the EPPO a budget of €37.7 million for 2021.