SLAUGHTER AND MAY/

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RECENT PUBLICATIONS //

Our Horizon Scanning 2024 Programme is now live. In a range of short articles and a five-episode podcast series our experts cover the business challenges and opportunities in relation to Capital Flows, Governance & Sustainability, Energy Transition, Digital and Crisis Management.

The latest edition of Disputes Briefcase is also now available. This is our quarterly client publication covering key developments in litigation and arbitration.

ALL BETS ARE OFF - CPS ENTERS ITS FIRST DPA WITH ENTAIN PLC //

In December 2023, Entain plc, the online sports betting and gaming business, entered into a deferred prosecution agreement (DPA) with the Crown Prosecution Service (CPS), worth £615 million. This is the 13th DPA to be agreed in the UK since the DPA regime was introduced in 2014 and the first one entered into by the CPS. All preceding DPAs in the UK have been the result of investigations and prosecutions by the SFO. This DPA is the second largest recorded in the UK, eclipsed only by the €991 million DPA with Airbus in 2020.

Background

The investigation into Entain was opened by HMRC in 2019 and focused on the company's legacy Turkish-facing business. HMRC's involvement suggests that the investigation was originally driven by tax concerns, and later expanded into a bribery investigation.

Ultimately Entain accepted responsibility for four counts of failing to prevent bribery under section 7 of the UK Bribery Act (UKBA). There is relatively little information available on the underlying conduct, as publication of the full judgment and Statement of Facts have been postponed until criminal proceedings against implicated individuals have concluded. What we do know is that the alleged misconduct involved former third-party suppliers and employees in Turkey during the period July 2011 to December 2017 - a time when gambling was not legal in Turkey. Entain sold its Turkish business in 2017, two years before HMRC's investigation commenced.

Terms of the DPA

Under the terms of the DPA, Entain has agreed to pay a total of £615 million, comprising:

i. a financial penalty of £465 million - reflecting the revenue from the Turkish business during the relevant period;
ii. disgorgement of profits in the amount of £120 million;
iii. £10 million in legal costs owed to the CPS and HMRC; and
iv. a charitable donation of £20 million, to be paid to various charities. This is the first time a DPA has required a donation to charity.

In addition to the usual terms requiring Entain to co-operate fully and in good faith with the authorities in all matters relating to the underlying conduct, the terms of the DPA also require Entain to:

i. commission an external review by PwC, the results of which are to be shared with the CPS;
ii. continue to revise and enhance its ethics and compliance programme; and
iii. conduct its gambling operations only in regulated markets.

Interests of Justice

When considering whether it would be in the interests of justice to approve the DPA, the judge, Dame Victoria Sharp, referred to the following factors:

(1) The significant co-operation and admissions made by Entain. Whilst the company did not make an initial self-report, the CPS described its level of cooperation as exemplary, and "akin to self-reporting".
(2) In the last few years, there has been a wholesale change of senior management at the company and an overhaul of its business model, culture, strategy and ethics. The CPS informed the judge that "the process of ensuring Entain now holds the highest standards of ethical business practice is substantially complete".
(3) The prosecution of Entain would have significantly damaging consequences, including the risk of losing its licences to operate in the US, putting thousands of jobs at risk and losses for shareholders, pension fund holders and those in Entain's supply chain.

Having weighed these factors, the judge was satisfied that the DPA was in the interests of justice.

Comments

Entain's DPA is evidence of the continued interest of UK authorities in corporate criminal enforcement. It also demonstrates that the CPS is becoming a more formidable prosecutor of the corporate offence of failure to prevent bribery. However, whether this leads to a rivalry between the SFO and CPS, with both agencies pursuing substantial corporate criminal resolutions, remains to be seen. At the very least it is a reminder that the SFO is not the only prosecuting agency in this space.

The DPA and summary of the judgment approving the DPA can be found here and here.

RECENT NEWS //

SFO roundup: Court finds that SFO wrongdoing led to ENRC investigation; New investigation opened into global aviation supplier; Conviction for breaching a

Serious Crime Prevention Order; Suspended sentence for solicitor for tipping off; Directors charged with fraud over car leasing scheme

On 21 December 2023, the High Court handed down judgment in the second stage of ongoing litigation brought by Kazakh mining company ENRC, against the SFO, Dechert and Neil Gerrard (former Dechert partner). The judge found that the SFO's wrongdoing was an effective cause of the losses claimed by ENRC, and that wrongdoing by the SFO led to the agency opening its corruption investigation – a finding that means the SFO will be liable for significant damages. This decision was based on an earlier judgment, from May 2022, where the court found that Mr Gerrard, who was hired by ENRC to carry out an initial internal investigation into the company, leaked information to journalists and the SFO. The SFO's decade long investigation into ENRC was closed in August 2023 without any charges being brought.

The SFO have opened a new fraud investigation into AOG Technics Ltd, an aircraft parts supplier servicing major airlines in the UK and abroad. The investigation commenced in December 2023, with a dawn raid at one of AOG's sites in greater London. In the preceding months, aviation authorities published warnings stating that airlines have been supplied with unapproved engine parts by AOG, leading to concerns about the safety of planes using the parts. This is the third investigation the SFO has launched since Ephgrave took over as director in September 2023.

The SFO has successfully prosecuted David Black for breaching a Serious Crime Prevention Order (SCPO), after investigators discovered he was using a fake name in business dealings, in breach of conditions placed on him after his release from prison. Mr Black was convicted in 2018 along with five others for his role in a £17 million solar panel fraud which used dishonest sales techniques to defraud victims. Following his release from prison, Mr Black was subject to an SCPO with terms that prohibited him from changing his name. This is the first time the SFO has prosecuted an individual for breaching a SCPO.

In December 2023, solicitor William Osmond (of law firm Osmond & Osmond) was given a nine-month suspended sentence for tipping off his client about an SFO money laundering investigation. This is the first time the SFO has prosecuted a solicitor for 'tipping off'. The judge said that the seriousness of the offence was demonstrated by the fact that Mr Osmond was warned three times not to reveal the facts of the investigation to others and was "well aware" of the relevant legislation given his role as the designated money laundering officer for his firm.

On 19 January the SFO charged two former directors with fraud in relation to the car leasing scheme, Buy2Let Cars. The scheme offered investment in cars, from well-known brands including Toyota and Hyundai. The cars were to be bought and leased out to the public on the promise of high returns. The defendants are accused of providing those who invested with false information and encouraging people to invest when the cars they promised weren't available. The SFO's investigation was first announced in April 2021, shortly after the scheme collapsed.

FCA/PRA roundup: PRA fines HSBC £57.4 million over deposit protection failures; PRA fines ex-CEO of Wyelands Bank for breach of Senior Manager Conduct Rules; FCA fines three money transfer firms for anti-competitive conduct; FCA to undertake work in the motor finance market; PRA publishes new enforcement policies

On 29 January 2024, the PRA fined two UK subsidiaries of HSBC, £57.4 million, for failing to protect deposits for hundreds of customers. The failings included inaccurately identifying deposits as ineligible for Financial Services Compensation Scheme protection (which insures deposits if a bank collapses) and failing to ensure that a senior manager (under the Senior Managers and Certification Regime) was

allocated responsibility for the relevant processes. The fine was reduced by 45% due to the firms' cooperation with the investigation and agreement to resolve the matter. This is the second-highest fine the PRA have imposed to date, after the £87 million fine imposed on Credit Suisse in July 2023.

In a busy month for the PRA, on 10 January 2024, it also fined Iain Mark Hunter, former CEO of Wyelands Bank, £118,808 for breaching PRA Conduct Rules. The fine follows on from the PRA's public censure of Wyelands Bank in April 2023 for multiple regulatory failings. The PRA found that the former Wyeland's CEO failed to take reasonable steps to ensure that, amongst other things, large exposure risks to the bank's business were properly managed. This is only the second PRA enforcement action against a senior individual for breaches of the Senior Managers Conduct Rules.

The FCA has fined three money transfer firms, a combined total of £150,000, for entering into anti-competitive arrangements. The FCA's investigation established that the three companies co-ordinated on certain exchange rates offered to customers in Glasgow for converting UK pounds into Pakistani Rupees. The companies also fixed the transaction fee charged to customers when making certain money transfers from the UK to Pakistan. Each company entered into a settlement agreement with the FCA and admitted they infringed the Chapter 1 prohibition in the Competition Act 1998. This is only the second time that the FCA has used its competition law enforcement powers since they were introduced in 2015.

The FCA has published a statement announcing that it is undertaking work in the motor finance market. In 2021, the FCA banned discretionary commission arrangements (DCAs) which removed the incentive for brokers to increase the interest rate that a customer pays for their motor finance. There have been a high number of complaints from customers to motor finance firms claiming compensation for DCAs entered into prior to the ban. Many firms have rejected complaints asserting that they have neither acted unfairly nor caused their customers loss. The Financial Ombudsman Service (FOS) has considered complaints rejected by firms and found in favour of the complainants in a number of cases. As a result, the FCA is using its powers under section 166 of the Financial Services and Markets Act 2000 to review historical motor finance commission arrangements. In the meantime, it is introducing a pause on the eight-week deadline for motor finance firms to provide a final response to customer complaints. Consumers will also have up to 15 months to refer their complaint to the FOS, rather than the usual six. For more on this see our Weekly Financial Regulation Bulletin.

The Bank of England and the PRA have published a Policy Statement PS1/24, which sets out the revised approach to enforcement for PRA firms and financial market infrastructure firms. This includes revisions to the procedures for the Bank's Enforcement Decision Making Committee. The revised policies contain a new route for early cooperation and greater incentives for early admissions, with the stated aim of speeding up investigations in appropriate cases.

ClientEarth fails for a second time in judicial review against the FCA

On 13 December 2023, the High Court denied ClientEarth's renewed application for permission for judicial review of the FCA's decision to approve the prospectus of oil and gas exploration company, Ithaca Energy plc. Permission was first denied in April 2023. ClientEarth argued that the FCA's decision to approve Ithaca's prospectus was unlawful because the prospectus failed to disclose or describe adequately Ithaca's assessment of the materiality of its climate-related financial risks, in breach of the Prospectus Regulation. The High Court held that it was not part of the FCA's function to evaluate the extent to which a prospectus promotes climate change mitigation. The court respected the FCA's discretion and expertise as a regulator in making the decision.

ICO update: HelloFresh fined for spam emails and texts; Reprimand for Bank of Ireland; Fines for Ministry of Defence and the Crown Prosecution Service

On 12 January, the ICO fined HelloFresh £140,000 for breaching the marketing rules in the Privacy and Electronic Communications (EC Directive) Regulations 2003 (PECR). The fine was issued in relation to "a campaign of 79 million spam emails and one million spam texts over a seven-month period." This is another fine in a longer list which includes the likes of Cover Appliance Ltd and Maxen Power Supply Limited. The ICO appears to have opened its investigation into HelloFresh as a result of complaints received through Mobile UK's 'Spam Reporting Service', which provides a mechanism for reporting spam messages. A total of 15,221 complaints about HelloFresh were logged this way. For more on this see our client publication on The Lens.

The ICO has reprimanded Bank of Ireland UK for giving inaccurate information on more than 3,000 customers. The bank sent incorrect outstanding balances of 3,284 customers' loan accounts to credit reference agencies which could have led to those individuals being unfairly refused credit or being granted credit they couldn't afford.

The ICO has fined the Ministry of Defence (MoD) £350,000 for disclosing personal information of people seeking relocation to the UK shortly after the Taliban took control of Afghanistan in 2021. The ICO has said the fine was reduced from a starting point of £1,000,000 to £700,000, to reflect the subsequent remedial action taken by the MoD and the challenges facing the team at the time. The fine was further reduced to £350,000 pursuant to the ICO's public sector approach.

The ICO has also fined the Crown Prosecution Service £50,000 after an employee used a USB device to transmit sensitive personal data as part of an investigation. The decision concerns a breach of the sixth principle of the DPA 2018, under which data processed for law enforcement purposes must be appropriately secured.

OFSI update: FCA and OFSI agree new Memorandum of Understanding; OFSI publishes Annual Review

OFSI and the FCA have published a memorandum of understanding (MOU) setting out arrangements for co-operation and the exchange of relevant information between the two agencies. This replaces a previous MoU between the FCA and OFSI dated April 2019. Under the MOU, the parries have agreed that: (i) the FCA will send information concerning suspected breaches of financial or maritime services sanctions to OFSI; (ii) OFSI will share with the FCA information about potential weaknesses in regulated companies systems and controls for preventing sanctions; and (iii) both agencies will share information about suspected sanctions breaches where there is a reason to believe that joint investigations would benefit the enforcement of those sanctions.

At the end of last year OFSI published its Annual Review for the 2022-2023 financial year. As expected, the report focused predominantly on the Russia sanctions regime, noting that by 31 March 2023, "130 oligarchs and family members" who had a combined net worth of approximately £145 billion had been sanctioned. The report also notes that as of October 2023, £22.7 billion worth of Russian assets had been reported as frozen since February 2022. The report also details that during the financial year, OFSI recorded 473 suspected breaches of financial sanctions, in respect of which seven warning letters were issued, two monetary penalties were issued, and 51 cases were closed with no further action. Looking ahead the report states that making an impact on the ongoing conflict in Ukraine remains at the forefront of OFSI's priorities, and it will look to deliver an increasingly proactive enforcement model.

UK government announces new enforcement unit for trade sanctions

In December 2023, the UK government announced the creation of a new agency responsible for the civil enforcement of trade sanctions. The Office of Trade Sanctions Implementation (OTSI) will be responsible for the civil enforcement of trade sanctions, including those that have been imposed on

Russia since February 2022. The new agency will sit within the UK's Department of Business & Trade. Its remit will involve activity by companies who may be avoiding sanctions by sending products through other countries. The agency will be able to issue civil penalties for trade sanctions breaches and refer cases to HMRC for criminal enforcement.

Sanctions litigation update: Free speech challenge to sanctions designation dismissed

On 12 January 2024, the Administrative Court gave judgment in the UK's first case to consider the relationship between financial sanctions and freedom of expression. Graham Phillips was sanctioned by the UK in July 2022 for producing propaganda videos in favour of Russia and its invasion of Ukraine. Phillips challenged the decision on the grounds that (i) the UK Government doesn't have the power to impose financial sanctions on a person because of their political views; and (ii) his designation was a disproportionate restriction on his right to freedom of expression. The court rejected Phillips application finding that: (i) he was not sanctioned for his political views, but because his content was propaganda in favour of Russia's invasion of Ukraine; (ii) the government does have the power to impose financial sanctions on someone who supports or promotes policies or actions that destabilise Ukraine or undermine its territorial integrity; and (iii) the financial sanctions imposed were a proportionate restriction on his rights.

Home Office issues guidance on DAML exemption provisions

The Home Office has published guidance on the two new 'pay away' exemptions to the principle money laundering offences under sections 327-329 of the Proceeds of Crime Act 2002 (POCA). These exemptions were introduced by the Economic Crime and Corporate Transparency Act 2023 (ECCTA) and expand the situations in which regulated firms can deal with suspected criminal property without having to submit a Defence Against Money Laundering (DAML) to the National Crime Agency (NCA). The first exemption means a firm can now pay away money and exit a relationship, without seeking a DAML where the value of property is below £1,000. The second exemption addresses the challenge firms face when they identify suspicious funds in an account that have been mixed with legitimate funds. Under s.183 of the ECCTA, firms are now able to pay money or other property from a customer's account, provided the amount left in the account equals or exceeds the amount to which the suspicion relates. Amongst other things, the Guidance states that these exemptions can be used for the same account or customer, but not within the same transaction.

Deal struck on the EU 'single rulebook' against money laundering and terrorist financing

On 18 January, the Council of the European Union and the European Parliament announced that a political agreement had been reached on (i) a new Regulation setting out a single anti-money laundering and countering the financing of terrorism rulebook (AML Regulation) and (ii) a sixth AML directive (MLD6). This follows the announcement in December 2023 of a political agreement on establishing an EU-wide Authority for Anti-Money Laundering and Countering the Financing of Terrorism (AMLA). The AML Regulation, among other things, expands the list of obliged entities to new bodies (including most of the crypto sector and professional football clubs and agents), sets an EU-wide maximum limit of EUR10,000 for cash payments and makes the rules on beneficial ownership more harmonised and transparent. MLD6, among other things, grants more powers to financial intelligence units and further harmonises the content and function of beneficial owners' registers. The texts of the AML Regulation and MLD6 (which have not yet been published) will be finalised before they are formally adopted by the Counsel and the Parliament.

Court of Appeal finds that the CMA has the power to request documents from overseas companies

The Court of Appeal has handed down judgment on the scope of the CMA's information gathering powers under s.26 of the Competition Act 1998. The CMA issued s.26 notices to Volkswagen AG and BMW AG, in connection with its vehicle recycling cartel investigation. Both Volkswagen and BMW are German companies, with subsidiaries in the UK. For the purposes of UK competition law, the UK subsidiaries are considered to form part of the same 'undertaking' as their German parents. In a joint decision by the High Court and the CAT in February 2023, it was held that the German companies were not obliged to comply with the s.26 notices as it was outside the scope of the CMA's powers to seek documents that were held outside the UK and from foreign domiciled companies. However, the Court of Appeal overturned that decision in January 2024, finding that the CMA's ability to conduct competition investigations would be compromised if it were not able to obtain information from overseas, saying it would create "a perverse incentive for conspirators to move offshore to organise cartels directed at harming the UK market". The Court of Appeal also held that nothing in "logic, policy, case law or legislative history" supported the restrictive interpretation adopted by the CAT and High Court.

Horizon Scanning

Look out for:

- The verdict in the SFO's prosecution of former executives of GPT Special Project Management Ltd, which is expected early this year. The men are accused of paying bribes under a major defence contract with the Saudi Arabian National Guard. GPT pleaded guilty to related corruption charges in April 2021.
- The trial of Romy Andrianarisoa, former Chief of Staff to the president of Madagascar, which is scheduled to start on 6 February 2024. Andrianarisoa is accused of seeking bribes from Gemfields, the UK mining company.
- The new Criminal Justice Bill, which is currently making its way through Parliament. In particular, it's proposal to further expand the new identification principle (set out in section 196 of the Economic Crime and Corporate Transparency Act 2023) to include all criminal offences, not just economic crimes.