Global Investigations Review

The Practitioner's Guide to Global Investigations

Volume I: Global Investigations in the United Kingdom and the United States

Fourth Edition

Editors
Judith Seddon, Eleanor Davison, Christopher J Morvillo,
Michael Bowes QC, Luke Tolaini, Ama A Adams, Tara McGrath

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Dedicated to the memory of Rod Fletcher, one of the United Kingdom's most highly respected white-collar crime lawyers and a cherished friend.

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Publisher's Note

The Practitioner's Guide to Global Investigations is published by Global Investigations Review (www.globalinvestigationsreview.com) – a news and analysis service for lawyers and related professionals who specialise in cross-border white-collar crime.

The Guide was suggested by the editors to fill a gap in the literature – namely, how does one conduct such an investigation, and what should one have in mind at various times?

It is published annually as a two-volume work and is also available online, as an e-book and in PDF format.

The volumes

This Guide is in two volumes.

Volume I takes the reader through the issues and risks faced at every stage in the life cycle of a serious corporate investigation, from the discovery of a potential problem through its exploration (either by the company itself, a law firm or government officials) all the way to final resolution – be that in a regulatory proceeding, a criminal hearing, civil litigation, an employment tribunal, a trial in the court of public opinion, or, just occasionally, inside the company's own four walls. As such it uses the position in the two most active jurisdictions for investigations of corporate misfeasance – the United States and the United Kingdom – to illustrate the approach and thought processes of those who are at the cutting edge of this work, on the basis that others can learn much from their approach, and there is a read-across to the position elsewhere.

Volume I is then complemented by Volume II's granular look at the detail of various jurisdictions, highlighting, among other things, where they vary from the norm.

Online

The Guide is available at www.globalinvestigationsreview.com. Containing the most up-to-date versions of the chapters in Volume I of the Guide, the website also allows visitors to quickly compare answers to questions in Volume II across all the jurisdictions covered.

The publisher would like to thank the editors for their exceptional energy, vision and intellectual rigour in devising and maintaining this work. Together we welcome any comments or suggestions from readers on how to improve it. Please write to us at:
insight@globalinvestigationsreview.com.

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Preface

The history of the global investigation

Over the past decade, the number and profile of multi-agency, multi-jurisdictional regulatory and criminal investigations have risen exponentially. Naturally, this global phenomenon exposes companies and their employees to greater risk of potentially hostile encounters with foreign law enforcement authorities and regulators than ever before. This is partly owing to the continued globalisation of commerce, the increasing enthusiasm of some prosecutors to use expansive theories of corporate criminal liability to exact exorbitant penalties against corporations as a deterrent and public pressure to hold individuals accountable for the misconduct. The globalisation of corporate law enforcement, of course, has also spawned greater coordination between law enforcement agencies domestically and across borders. As a result, the pace and complexity of cross-border corporate investigations has markedly increased and created an environment in which the potential consequences, both direct and collateral, for individuals and businesses are of unprecedented magnitude.

The Guide

To aid practitioners faced with the myriad and often unexpected challenges of navigating a cross-border investigation, this book brings together for the first time the perspectives of leading experts from across the globe.

The chapters that follow in Volume I of the Guide cover in depth the broad spectrum of the law, practice and procedure applicable to cross-border investigations in both the United Kingdom and United States. Volume I tracks the development of a serious allegation (whether originating from an internal or external source) through its stages of development, considering the key risks and challenges as matters progress; it provides expert insight into the fact-gathering stage, document preservation and collection, witness interviews, and the complexities of cross-border privilege issues; and it discusses strategies to successfully resolve cross-border probes and manage corporate reputation throughout an investigation.

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In Volume II, local experts from national jurisdictions respond to a common set of questions designed to identify the local nuances of law and practice that practitioners may encounter in responding to a cross-border investigation.

In the first edition, we signalled our intention to update and expand both parts of the book as the rules evolve and prosecutors' appetites change. The Guide continues to grow and extend its reach, in both substance and geographical scope. By its third edition, it had outgrown its original single-book format; the two parts of the Guide now have separate covers, although the hard copy of the Guide should still be viewed – and used – as a single reference work. All chapters are, of course, made available online and in other digital formats. Volume I also features tables of cases and legislation along with an index.

In this fourth edition, we have revised extant chapters to keep up with recent developments. To reflect an increased prosecutorial focus on individual accountability and on tone at the top, we have added US and UK chapters on the duties of directors to Volume I, outlining quite divergent corporate governance models. The questionnaire for Volume II authors has been extensively revised and reviewed by the editors and GIR staff. New questions zero in on the growing importance of technology in carrying out and investigating misconduct. There are also questions on economic sanctions, an area of heightened enforcement activity, which GIR has responded to this year with the launch of Just Sanctions (https://globalinvestigationsreview.com/just-sanctions). Volume II also carries regional overviews giving insight into cultural issues and regional coordination by authorities.

Volume II covers 25 jurisdictions, increasing the global coverage, particularly in South America, which continues to rake over recent corruption scandals. As corporate investigations and enforcer co-operation crosses more borders, we anticipate Volume II will become increasingly valuable to our readers: external and in-house counsel; compliance and accounting professionals; and prosecutors and regulators operating in this complex environment.

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Judith Seddon, Eleanor Davison, Christopher J Morvillo, Michael Bowes QC, Luke Tolaini, Ama A Adams, Tara McGrath
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25

Fines, Disgorgement, Injunctions, Debarment: The UK Perspective

Kelly Hagedorn, Robert Dalling and Matthew Worby[1]

25.1 Criminal financial penalties

Criminal offences of fraud, bribery and money laundering are covered by sentencing guidelines (the Guidelines) whether the offender is a company or an individual, and whether the conviction follows an investigation by the Serious Fraud Office (SFO), the National Crime Agency (NCA), Her Majesty's Revenue and Customs (HMRC), or other law enforcement authority.[2] The Guidelines apply in England and Wales and must be followed unless the court is satisfied that to do so would be contrary to the interests of justice.[3]

The Guidelines apply to all sentences passed on or after 1 October 2014, regardless of the date of the offence, and regardless of the date of the legislation under which the prosecution is brought (such as the Fraud Act 2006, the Proceeds of Crime Act 2002, and the Bribery Act 2010 (and their predecessors)).[4] In applying the Guidelines to offences prosecuted under legislation that pre-dates them, the court may reflect 'modern attitudes' to historic offences and make due

1 Kelly Hagedorn is a partner, Robert Dalling is special counsel and Matthew Worby is an associate at Jenner & Block London LLP. The authors wish to acknowledge the contributions of Peter Burrell, Simon Osborn-King and Paul Feldberg, the original authors of the chapter in previous editions, on which this chapter is partly based.

2 The Sentencing Council's Definitive Guideline for Fraud, Bribery and Money Laundering, published on 31 January 2014, available at https://www.sentencingcouncil.org.uk/wp-content/uploads/Fraud-Bribery-and-Money-Laundering-offences-definitive-guideline-Web.pdf. We further note that the Sentencing Council is introducing a general sentencing guideline, effective from 1 October 2019, to cover offences that are not already the subject of a pre-existing guideline (available at https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/general-guideline-overarching-principles/).

3 s.125, Coroners and Justice Act 2009.

4 See p. 4, the Guidelines.

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allowance for any change in maximum sentence for that particular offence, to ensure that the sentence passed is in the interests of justice.[5] While in some cases that can result in an increase in penalty, in others it may mean a decrease. For example, under the Bribery Act the maximum sentence is 10 years' imprisonment, whereas before it had been seven.[6] On that basis, it could be argued that a fine for a pre-Bribery Act offence calculated using the new Guidelines should be discounted by up to 42 per cent to reflect that while the Guidelines apply to pre- and post-Bribery Act conduct, the fine should recognise that Parliament intended conduct after the Bribery Act came into force to be punished more severely.

The Guidelines set out a step-by-step guide to be used by the court in assessing the sentence to be imposed on individuals and corporates. Set out below are the steps the sentencing court must follow when assessing the penalties to impose on a corporate defendant for offences of fraud, money laundering and bribery.

Compensation **25.2**

The court must first consider whether any compensation should be paid by the company to the victim for any personal injury, loss or damage resulting from the offence.[7] The amount of the order will be the amount the court considers appropriate, having regard to any evidence and to any representations made by or on behalf of the offender (or prosecutor).[8] In respect of such claims, the SFO will need to provide evidence to the court of a request for compensation by the victim. In the case of *R v. Smith & Ouzman Ltd*,[9] Recorder Mitchell QC indicated that he would have refused the SFO's request for a compensation order, as the SFO had not produced evidence of a request for compensation from the victim.

The making of a compensation order is not mandatory, but the court should provide reasons as to why it has not made one.[10] The court must have regard to the financial means of the defendant. If the defendant's means are limited, priority should be given to the payment of compensation over any other financial penalties.

Confiscation **25.3**

Confiscation must be considered if either the Crown asks for it or the court thinks that it may be appropriate.[11] The aim of confiscation is to deprive defendants of the benefit that they have gained from their criminal conduct,[12] and it is irrelevant for the purposes of calculating a benefit figure whether the defendant has retained the benefit of his or her conduct. The benefit figure will represent the total value of the benefit obtained by the defendant, although the final confiscation order

5 *R v. Hall* [2011] EWCA Crim 2753; *R v. Clifford* [2014] EWCA Crim 2245.
6 s.11, Bribery Act 2010.
7 s.130(1)(a), Powers of Criminal Courts (Sentencing) Act 2000.
8 s.130(4), Powers of Criminal Courts (Sentencing) Act 2000.
9 Unreported, Southwark Crown Court, 7 January 2015.
10 s.130(3), Powers of Criminal Courts (Sentencing) Act 2000.
11 The Guidelines, p. 48.
12 s.6, Proceeds of Crime Act 2002.

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cannot be for a greater sum than the value (at the time the order is made) of (1) the assets the defendant has available and (2) any property transferred by the defendant during the six years preceding the date of charge, for less than market value (tainted gifts). The court must address the following factors before making a confiscation order: (1) whether the defendant has benefited from the criminal conduct; (2) the value of the benefit obtained; and (3) the sum that is recoverable from the defendant.[13]

The application of the confiscation regime as regards the calculation of benefit has become less harsh in recent years. In corruption cases, for example, a prosecutor could previously have claimed that the benefit obtained was the entire value of the contract won through the criminal conduct, and request that that amount be confiscated. However, recent case law indicates that a 'judge should, if confronted by an application for an order which would be disproportionate, refuse to make it but accede only to an application for such sum as would be proportionate'[14] when calculating the amount of an offender's benefit. When the offender is a company, this should be restricted to gross profit earned together with any other pecuniary advantage flowing from the corruption.[15] In a separate case, it has been held that where the defendant can establish that VAT output tax on revenue obtained from criminal conduct has been properly accounted for to HMRC, it would be disproportionate to make a confiscation order calculated on the basis that a sum equivalent to that VAT paid has been 'obtained' by the defendant.[16]

When calculating the gross profit, the approach is typically to 'add back' the amount of bribes paid that may have been deducted as an 'expense' before arriving at the gross profit.

An important consideration, particularly where companies participate in joint ventures or collaborate on projects, is that if a benefit is determined by the court to have been obtained jointly by co-defendants, the court may make a confiscation order against each defendant for the whole amount of the benefit obtained.[17]

Companies and individuals should also be aware that the prosecutor may ask the court to apply the criminal lifestyle provisions. If the court determines that a defendant has a criminal lifestyle, the consequences can be serious.[18] The lifestyle provisions apply in a number of prescribed circumstances, including where it can

13 *R v. May* [2008] 1 AC 1028.

14 *R v. Waya* [2012] UKSC 51, [2012] 3 WLR 1188, para. 16: courts must consider Article 1 of Protocol 1 of the European Convention on Human Rights (ECHR) when making a confiscation order, and ensure in particular that confiscation is proportionate to the legitimate aim of recovery of the proceeds of crime.

15 *R v. Sale* [2013] EWCA Crim 1306.

16 *R v. Harvey* [2016] 4 All ER 521.

17 *R v. Ahmad and Fields* [2015] AC 299. However, any sum recovered from one defendant must be taken into account when bringing an action against another.

18 s.75, Proceeds of Crime Act 2002 sets out a three-limbed test, namely where the offence in question (1) is specified in Schedule 2 of the Proceeds of Crime Act 2002, (2) constitutes conduct forming part of a course of criminal activity, or (3) was committed over a period of at least six months, and the defendant has benefited from the conduct.

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be shown that the conduct in the indictment was committed over at least six months. If one considers an allegation of bribery, this is often charged as both a conspiracy to bribe, as well as a substantive offence of bribery. Typically, a conspiracy charge will involve the offer of a bribe, the award of a contract and then the payments. This may well take much longer than six months, bringing the lifestyle provisions into play for even a simple one-off corrupt payment. If the conditions above are met, it will be assumed that property transferred or expenditure incurred by a corporate defendant over the six years preceding the charge was obtained from general criminal conduct, and is therefore liable to be confiscated, unless the company can show this assumption to be incorrect or that applying the criminal lifestyle provision would risk serious injustice.[19]

Fine **25.4**

When considering the extent to which a fine would be appropriate, the court must take into account compensation[20] or confiscation[21] orders made against the offender. Any fine imposed is calculated by reference to the harm caused by the particular criminal conduct. For bribery offences, the appropriate figure is normally the gross profit obtained from the criminal conduct. For fraud offences, it is normally the actual or intended gross gain to the offender, and for money laundering offences, the amount of money laundered.[22]

Once the relevant harm figure is determined, the court will apply a multiplier, to reflect the culpability of the defendant. The Guidelines provide a non-exhaustive list of factors to be taken into account to assess the level of culpability, which will either be high, medium or low. The factors include the role played by the corporate entity in the unlawful activity, the duration of the offence, any obstruction of detection, the scale and vulnerability of the victims, and whether the offence involved the corruption of government officials.[23] The multiplier will either be 300 per cent (high), 200 per cent (medium) or 100 per cent (low). The court will then adjust the percentage within the relevant category range (from 20 per cent up to 400 per cent) depending on any aggravating or mitigating factors, a non-exhaustive list of which is set out in the Guidelines.[24] The fine must represent the seriousness of the offence, as well as the financial circumstances of the defendant.

The court should then 'step back' and consider adjusting the level of the fine based on the effect of compensation, confiscation and fine taken together, which should remove the gain, provide appropriate punishment and act as a deterrent. If a defendant is being sentenced for more than one offence, the court must also consider whether the total sentence imposed on the defendant is just

19 s.10, Proceeds of Crime Act 2002.
20 s.130, Powers of Criminal Courts (Sentencing) Act 2000.
21 ss.6 and 13, Proceeds of Crime Act 2002.
22 The Guidelines, p. 49.
23 Ibid.
24 Ibid., p. 50.

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and proportionate based on the misconduct. It is perhaps this step-back element which increases the uncertainty as to the size of fine.

Before the Guidelines were introduced, Lord Justice Thomas stated in relation to the fine element: 'I approach sentencing on the basis in this case that a fine comparable to that imposed in the US would have been the starting point.'[25] This quote was referred to in the first deferred prosecution agreement (DPA).[26] Following that *dictum*, a judge may decide to step back and increase the fine to the level a US court would impose. Anecdotally, we are aware from recent cases that in one instance the judge did enquire of the SFO what the fine would have been if the US Sentencing Guidelines were being followed. Owing to this level of uncertainty and because the fine cannot be agreed by the prosecution and defence even as part of a plea bargain (or DPA), some corporate offenders may wish to consider asking the court for an indication of the sentence it could expect to receive should it plead guilty, often known as seeking a *Goodyear* indication.[27]

The procedure governing such requests is set out in the case of *R v. Goodyear* and the Criminal Practice Directions.[28] If the request is granted, the indication will be confined to the maximum fine the court would impose if the defendant pleaded guilty at that stage in the proceedings. It will not include ancillary matters such as confiscation. The court cannot give an indication where there is a dispute between the parties as to the factual basis for sentencing. The agreed factual basis should be reduced to writing and placed before the judge. Crucially, the judge has absolute discretion to decline to give any indication. If an indication is given and the defendant does not plead guilty having had a reasonable opportunity to consider it, then the indication will fall away. If the case proceeds to trial, the prosecution will not be able to refer to the request for a *Goodyear* indication. A *Goodyear* indication cannot be sought pre-charge and is therefore unlikely to be of assistance in DPA cases.

25.5 Guilty plea

If a guilty plea is entered by the defendant, the court must give the defendant credit.[29] The Reduction in Sentence for a Guilty Plea: Definitive Guideline recommends a sliding scale of discount, which will be applied to the harm figure, dependent on the stage at which the plea is entered: one-third for a plea at the first stage of the proceedings and a maximum of one-quarter thereafter.[30] The

25 *R v. Innospec Ltd*, [2010] Crim LR 665, Southwark Crown Court, 26 May 2010, unreported.

26 *SFO v. Standard Bank Plc* (Case No. U20150854) [2016] Lloyd's Rep FC 102 30 November 2015.

27 See *R v. Goodyear* [2005] 1 WLR 2532.

28 Criminal Practice Directions VII Sentencing C: Indications of Sentence.

29 s.144, Criminal Justice Act 2003.

30 The Reduction in Sentence for a Guilty Plea: Definitive Guideline (https://www.sentencingcouncil.org.uk/publications/item/reduction-in-sentence-for-a-guilty-plea-definitive-guideline-2/) applies, regardless of the date of the offence, to all offenders aged 18 or older and to organisations, where the first hearing in respect of the case is held on or after 1 July 2017. This chapter proceeds on the basis that these guidelines apply.

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reduction should be further decreased to a maximum of one-tenth on the first day of trial, having regard to the time when the guilty plea is first indicated relative to the progress of the case and the trial date.[31] The first stage will normally be the first hearing at which a plea or indication of plea is sought and recorded by the court. The Reduction in Sentence for a Guilty Plea: Definitive Guideline explains that where the court is satisfied there were particular circumstances that significantly reduced the defendant's ability to understand what was alleged or otherwise made it unreasonable to enter a guilty plea sooner, a reduction of one-third should still be made. The court should distinguish between cases in which it is necessary to receive advice or see the evidence to understand whether the defendant is guilty of the offence and cases in which a defendant merely delays a guilty plea to assess the strength of the prosecution evidence and the prospects of conviction or acquittal.[32] The court should also consider applying a further discount to reflect any assistance provided by the defendant to the prosecution.[33]

Costs **25.6**

The court may make an order in favour of either the prosecution or the defendant.[34] Ordinarily, in the event of a plea or a conviction, the court will make an order that the defendant pay the investigation and court costs of the prosecuting body. If a defendant is acquitted or the prosecution does not proceed to trial, the court may make an order in favour of the defendant. A defendant's costs will be met out of 'central funds' (i.e., public money)[35] in an amount the court considers reasonably sufficient to compensate the defendant for any expenses properly incurred in the proceedings. An award may also be made against a party for unnecessary or improper acts or omissions that result in another party incurring costs.[36] A court may also make an award against a representative (not a party) who conducts litigation in a way that results in wasted costs.[37] A defendant's costs order should usually be made unless there is a positive reason for not doing so.

Private prosecutions are subject to the same costs regime. As a result, while persons who bring a private prosecution without any realistic chance of success will likely be faced with a costs order, they will not generally be liable for costs simply because the prosecution failed or was withdrawn. The justification is that 'the law should guard against inadvertently discouraging the bringing of private prosecutions because of a fear of adverse costs consequences.'[38] A court may also

31 The Reduction in Sentence for a Guilty Plea: Definitive Guideline, Revised June 2017, s.D2.

32 Ibid., s.F1.

33 *R v. Wood* [1992] 2 Cr App R (S) 347.

34 Prosecution of Offences Act 1985; Access to Justice Act 1999; Lord Chief Justice's Practice Direction (Costs in Criminal Proceedings) 201; and Costs in Criminal Case (General) Regulations.

35 s.16, Prosecution of Offences Act 1985.

36 Ibid., at ss.19 and 19A.

37 *Evans v. SFO* [2015] 1 WLR 3595.

38 *The Queen on the Application of David Haigh v. City of Westminster Magistrates' Court* [2017] EWHC 232 (Admin), para. 35.

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make an award in favour of a private prosecutor in respect of that party's own costs, to be paid out of central funds, whether or not the defendant is convicted.[39]

25.7 Director disqualifications

Under the Company Directors Disqualification Act 1986 (CDDA), any director convicted of misconduct in connection with a company (either in the United Kingdom or overseas) or considered unfit to be concerned with the management of a company, may be disqualified from the right to manage a company by a disqualification order.[40] A disqualification order may bar a person from acting as a director of any UK company for up to 15 years, and the person will be entered on the register of disqualified directors.

Proceedings for a disqualification order are not brought by the company itself. If a director is convicted of an indictable offence in connection with the promotion, formation or management of a company,[41] usually the court before which the director is convicted will consider whether a disqualification order ought to be made and impose it. The Insolvency Service,[42] however, may look to bring disqualification proceedings before, separately from, or even alongside, a criminal prosecution brought by the SFO or other agency, irrespective of whether the company in question is solvent.

In such instances parties should be wary of competing court timetables and the need to ensure their pleadings are consistent. This is of particular importance because the Insolvency Service may share documents produced to it,[43] and given the wide ambit of any such investigation into the general 'fitness' of an individual to be a director, the production orders issued by the Insolvency Service may be wider than those of another agency. Moreover, the Insolvency Service has a memorandum of understanding with the Financial Reporting Council (FRC),[44] and so it is possible that any such information received is shared on a voluntary basis to the extent 'one regulator considers that information it has gathered will be materially relevant to the other'.[45]

The standard of proof in such proceedings is to the civil standard, but given disqualification involves 'a substantial interference with the freedom of the individual . . . [t]he more serious the allegation, the more the court will need the assistance of cogent evidence'.[46]

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39 s.17, Prosecution of Offences Act 1985.

40 ss.2(1), 5A(2) and 8(2), CDDA.

41 In addition, any conviction in connection with the liquidation or striking off of a company, with the receivership of a company's propertyor with being an administrative receiver of a company's property may also result in a disqualification order: s.2(1), CDDA.

42 See https://www.gov.uk/government/organisations/insolvency-service.

43 s.447, Companies Act 1985.

44 The Financial Reporting Council (FRC), in turn, has separate memoranda of understanding with the SFO, Financial Conduct Authority and Prudential Regulation Authority.

45 5.2.b, Memoranda of Understanding between the FRC and the Insolvency Service, 18 January 2018.

46 *Re Living Images* [1996] BCC 112, page 116.

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In the case of an offence committed outside the United Kingdom, the Secretary of State has standing to apply to the court for a disqualification order, if it appears expedient in the public interest. The Secretary of State also may apply to court for a disqualification order against a person who is (or has been) a director or a shadow director of a company, if it appears expedient in the public interest. On an application, the court may make a disqualification order where it is satisfied that a person's conduct in relation to the company (alone or taken together with their conduct as a director or shadow director of one or more other companies or overseas companies) makes that person unfit to be concerned in the management of a company.

A disqualification order for unfitness may be made on any information properly put before the court that demonstrates that the director or shadow director is unfit to be concerned in the management of a company.[47] As an alternative, the Secretary of State may accept a disqualification undertaking, if it is expedient to do so instead of applying for a disqualification order.

The matters to be taken into account by the court or the Secretary of State, in considering whether a person's conduct makes him or her unfit to be concerned in the management of a company, whether to make a disqualification order and what the period of disqualification should be, are set out in Schedule 1 to the CDDA. Specific matters are to be taken into account where the person is or has been a director, including (1) any misfeasance or breach of fiduciary duty in relation to a company or overseas company, (2) any material breach of any statutory or other obligation that applies as a result of being a director of a company or overseas company, and (3) the frequency of any such conduct.

If a company enters formal insolvency proceedings, the appointed liquidators or administrators must submit reports about directors (including shadow directors) to the Secretary of State if it appears to them the conditions for disqualification are satisfied.[48] For companies entering insolvency proceedings starting on or after 6 April 2016, this obligation to report will apply in respect of all directors and shadow directors (current and past within the previous three years), irrespective of their conduct.[49]

See Chapter 41 on directors' duties

Civil recovery orders 25.8

Companies should also be aware of the SFO's ability to obtain a civil recovery order (CRO) to recover property it has proved, on the balance of probabilities, is or represents property obtained through unlawful conduct, pursuant to Part 5 of the Proceeds of Crime Act 2002 (POCA 2002).

The SFO is not required to obtain a conviction to apply for a CRO. The civil standard of proof and the absence of the need for a conviction have historically made the use of CROs attractive to both the SFO and corporate entities alike.

47 s.109 of the Small Business, Enterprise and Employment Act 2015 removed the previous reference to 'investigative material' in s.8 of the CDDA, with effect from 1 October 2015.

48 s.7, CDDA 1986.

49 s.7A, CDDA 1986.

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CROs have also been used by the SFO in addition to a prosecution, to target tainted assets. However, CROs, which are *in rem* actions, have rarely been used by the SFO in this way, as the SFO must show that the property it seeks to recover is the property that has been created by the criminal conduct. Such difficulties associated with proving the exact nature of the property can of course be dealt with by the respondent entity admitting that the property is tainted in the way alleged by the applicant.[50]

One notable case in which the SFO used a CRO to recover tainted assets followed a guilty plea to corruption offences and breaches of UN sanctions in 2009 by the engineering firm Mabey & Johnson Ltd. In 2012, the SFO then successfully obtained a CRO of approximately £130,000 against its parent company, Mabey Engineering (Holdings) Ltd, even though the parent company had no knowledge of the unlawful conduct. The CRO was obtained to recover a sum representing the value of the dividends received by the parent that were derived from contracts won through Mabey & Johnson Ltd's unlawful conduct.

However, the SFO's use of CROs as an alternative to prosecution in corporate matters received considerable criticism, concerning the lack of detail surrounding the underlying criminal conduct, and the basis on which the SFO decided to pursue a CRO rather than a criminal conviction.

Perhaps in light of this criticism, in 2012 the Attorney General's Office published guidance for prosecutors and investigators on how they should use these asset recovery powers.[51] The Attorney General's guidance sets out a non-exhaustive list of circumstances in which these powers might be appropriately used when it is not feasible to secure a conviction. It also sets out a non-exhaustive list of circumstances in which these powers could still be properly used when a conviction is feasible, but the use of asset recovery powers that do not require a conviction might better serve the overall public interest.

The SFO now states that it may use these powers as an alternative (or in addition) to prosecution, but states that if it does so, it will publish its reasons, the details of the illegal conduct and the details of the disposal. In 2018, the SFO obtained a significant CRO (against an individual) following the guilty plea by Griffiths Energy to charges brought by the Canadian authorities for bribing Chadian diplomats to secure contracts. The £4.4 million CRO was brought against the wife of a former Chadian diplomat who received an improper inducement from Griffiths Energy to obtain contracts. The traceable proceeds of this inducement were located in a bank account in London.[52] At the time of writing, the SFO's CRO proceedings against Gulnara Karimova (a daughter of the former

50 As the DPA regime has not been adopted in Scotland, civil recovery remains the route to a negotiated outcome in this jurisdiction.

51 Guidance for prosecutors and investigators on their asset recovery powers under section 2A of the Proceeds of Crime Act 2002, 29 November 2012.

52 *SFO v. Saleh* [2018] EWHC 1012 (QB). For another example of a significant CRO against a corporate, see the 2012 CRO against Oxford Publishing Limited: https://www.sfo.gov.uk/2012/07/03/oxford-publishing-ltd-pay-almost-1-9-million-settlement-admitting-unlawful-conduct-east-african-operations/.

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Uzbekistan president Islam Karimov) and Rustam Madumarov continue in connection with alleged corruption in that country.[53] It is as yet unclear what assets the SFO is attempting to seize, or to which deals the assets relate. The SFO has been granted until 3 January 2020 to submit its claim.

Under section 20 of the Criminal Finances Act 2017, the Financial Conduct Authority (FCA) may recover property in cases where there has not been a conviction, but where it can be shown, on the balance of probabilities, that property has been obtained through unlawful conduct. Applications are made in the High Court.

See Chapter 17 on individuals in cross-border proceedings and Chapter 30 on individual penalties

The Criminal Finances Act 2017, Part 1, sections 1 to 9 amends section 362 of POCA 2002 and empowers the High Court to make unexplained wealth orders (UWOs). These require persons suspected of involvement in, or association with, serious criminality to explain the origin of assets that appear to be disproportionate to their known income. A failure to provide a response will give rise to a presumption that the property is recoverable, to assist any subsequent civil recovery action. Persons may also be convicted of an offence if they make false or misleading statements in response to a UWO. Applications can be made by the SFO, NCA and FCA, among others. The NCA secured its first two UWOs in February 2018, against the wife of an individual serving a prison sentence in Azerbaijan for embezzlement, in respect of properties that reportedly cost £22 million. Three further UWOs, in addition to interim freezing orders, were obtained by the NCA in May 2019 in respect of three residential properties in 'prime locations'[54] linked to a politically exposed person believed to be involved in serious crime.

Criminal restraint orders 25.9

The SFO and other enforcement authorities may also apply for a restraint order in the Crown Court. This prevents a defendant from dissipating, disposing of or detrimentally dealing with its assets. The Crown Court may impose a restraint order, which applies to all 'realisable property' currently in the defendant's possession or subsequently acquired by the defendant.[55] As such, restraint orders are the criminal law equivalent of freezing injunctions.

The legislation stipulates five different scenarios in which a restraint order may be imposed.[56] The common thread is that there must normally be reasonable cause to believe that the defendant has benefited from his or her criminal conduct and is likely to dissipate the assets prior to any fine or confiscation order being imposed. If that is the case, an application for a restraint order may be made after commencement of a criminal investigation, during proceedings for an offence,

53 https://www.sfo.gov.uk/2018/10/03/sfo-begins-action-to-recover-proceeds-of-alleged-corrupt-telecoms-deals-in-uzbekistan/.

54 29 May 2019, NCA press release, 'NCA secures Unexplained Wealth Orders for prime London property worth tens of millions'.

55 s.41(2), Proceeds of Crime Act 2002; this is subject to a number of exceptions, such as for legal fees and ordinary living expenses.

56 Ibid., at s.40.

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or in the context of specific applications filed by the prosecution. In the event of suspected non-compliance the enforcement authorities may apply to appoint a management receiver[57] or an enforcement receiver,[58] depending on the specific circumstances of the case.

The court has broad discretion in defining the terms of a restraint order,[59] but must require the applicant, usually the SFO or the Crown Prosecution Service (CPS) (which pursues restraint proceedings in cases involving investigations by police or HMRC), to report to the court on the progress of the investigation at specified intervals.[60] A breach of a restraint order constitutes civil contempt.[61]

A considerable challenge presented by restraint orders is that they may prevent individuals or companies from using their funds to obtain legal representation in the proceedings to which the order relates.[62]

25.10 Serious crime prevention orders

Unlike the orders discussed above, Serious Crime Prevention Orders (SCPOs), which were first introduced in the Serious Crime Act 2007 (SCA) and which have been significantly broadened by the Serious Crime Act 2015, can be imposed prior to any finding of criminal liability. SCPOs are civil orders.[63]

SCPOs may be imposed only upon application by the Director of Public Prosecutions (or equivalents in Scotland and Northern Ireland) or the Director of the SFO[64] where the court is satisfied that the person concerned has been involved in 'serious crime' anywhere in the world, and that there are reasonable grounds to believe that an SCPO would protect the public by preventing, restricting or disrupting involvement by the person in serious crime in England and Wales.[65] The CPS will also 'make applications on behalf of other prosecutors for SCPOs' within the Whitehall Prosecutors Group, further to a memorandum of understanding published on 9 October 2017.[66] A recent example of this can be seen when the CPS sought an SCPO on behalf of the FCA in February 2018.[67]

The prosecution needs to prove these matters to the civil standard of proof: namely, it must be more likely than not that the defendant has been involved in serious crime, and that the order would protect the public.[68] However, there is

57 s.48, Proceeds of Crime Act 2002.

58 s.50, Proceeds of Crime Act 2002.

59 Ibid., at s.41(7).

60 Ibid., at s.41(7B)(a).

61 *Director of the Serious Fraud Office v. O'Brien* [2012] EWCA Crim 67.

62 *AP v. CPS* [2008] 1 Cr App R 39.

63 s.35(1), SCA.

64 s.8, SCA. SCPOs are therefore not available in private prosecutions.

65 s.1(1), SCA.

66 Signed by individuals on behalf of the Director of Public Posecutions, the Food Standards Agency, the Insolvency Service, the FCA, Natural Resource Wales, the Environment Agency and the Competition and Markets Authority.

67 Referenced in *R v. Gopee* [2019] EWCA Crim 601.

68 s.35(2), SCA.

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authority from the House of Lords regarding antisocial behaviour orders, which are similar to SCPOs in nature and operation, to the effect that the standard of proof in proceedings where 'allegations were made of criminal or quasi-criminal conduct which, if proved, would have serious consequences for the person' is the criminal standard of proof, namely beyond reasonable doubt.[69] It is unclear whether this would apply to SCPOs notwithstanding the statutory provisions, but the CPS has taken the view that the criminal standard does apply to the issue as to whether a defendant was 'involved' in serious crime.[70]

There are two types of SCPO: Crown Court orders and High Court orders. The Crown Court may impose an SCPO only upon conviction of a person for a serious crime. The High Court may make an order without the need for a conviction.[71] The distinction turns on proof of 'involvement in' as opposed to 'conviction of' a serious offence. It follows that 'involvement' is broader than 'conviction', and includes conduct that may have facilitated the commission by another of a serious offence in England and Wales,[72] or that was likely to facilitate such offence, whether or not it was actually committed.[73]

'Serious crime' is defined broadly, and includes any offence listed in Part 1 of Schedule 1 to the SCA, as well as any other offence 'which, in the particular circumstances of the case, the court considers to be sufficiently serious to be treated' as serious crime for the purposes of an SCPO application.[74] Schedule 1 lists an array of specific offences under 16 headings, ranging from trafficking in arms, to substantive money laundering offences, fraud, tax evasion, bribery and offences in relation to breaches of sanctions.[75]

SCPOs may be imposed on individuals as well as bodies corporate, partnerships and unincorporated associations.[76] Where a corporation is in breach of an order, the court may order its dissolution where to do so would be 'just and equitable'.[77] The court has wide discretion in formulating the terms of the SCPO.[78] The overriding test for imposition of an SCPO is that the court may include such terms as

69 *R v. Manchester Crown Court ex p McCann* [2002] UKHL 39, [2003] 1 AC 787.

70 CPS guidance on serious crime prevention orders, available at https://www.cps.gov.uk/legal-guidance/serious-crime-prevention-orders.

71 s.1(1), SCA.

72 s.2(1)(b), SCA.

73 s.2(1)(c), SCA.

74 s.2(2), SCA.

75 Sched. 1, SCA. In particular offences under: Proceeds of Crime Act 2002, ss.327 (concealing, etc. criminal property), 328 (facilitating the acquisition, etc. of criminal property) and 329 (acquisition, use and possession of criminal property); Fraud Act 2006 ss.1 (fraud by false representation, failing to disclose information or abuse of position) and 11 (obtaining services dishonestly); Bribery Act 2010 ss.1 (offences of bribing another person), 2 (offences relating to being bribed) and 6 (bribery of foreign public officials).

76 s.30, SCA.

77 s.27(4)(b), SCA.

78 The court may include a provision allowing a law enforcement agency to enter into a monitoring arrangement with a third-party contractor, and to have the subject of the SCPO pay some of the costs: s.39(4) and (5), SCA.

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it considers 'appropriate for the purpose of protecting the public by preventing, restricting or disrupting involvement by the person concerned in serious crime in England and Wales'.[79] Section 5 of the SCA contains a non-exhaustive list of restrictions that might be imposed, such as limitations on financial, property or business dealings;[80] a person's associations or communications;[81] use of any item;[82] and travel both within and outside the jurisdiction.[83] Notably, an SCPO may also include a requirement to provide specified information or disclose documents to law enforcement.[84] While this is subject to legal professional privilege,[85] there is no provision in the SCA to protect the right against self-incrimination. However, a statement made by the defendant in compliance with a request for information may not be given in evidence against the defendant.[86]

The NCA has published a list of all SCPOs in force. In May 2019, 203 were in effect.[87] They have been imposed for a range of offences, ranging from drug trafficking (by far the largest category) to money laundering, illegal immigration and fraud. The conditions imposed in the orders vary in severity, but include restrictions on possessing cash and financial reporting requirements. However, this list does not include SCPOs obtained by local police authorities or HMRC that the NCA was not notified of.

Although at the time of writing there are no publicised examples of SCPOs having yet been used for this purpose, they could allow enforcement authorities to instal monitors in cases involving corporate organisations. To date, monitors have only been appointed in cases involving CROs and DPAs where the corporate organisations have co-operated with enforcement authorities. The SCA provides for the possibility of the appointment of an 'authorised monitor' following conviction regardless of whether the defendant has co-operated during the preceding investigation and proceedings (although there clearly would be significant difficulties associated with appointing a monitor in respect of an unco-operative corporate defendant).

79 s.1(3), SCA (High Court); s.19(5) (Crown Court). Other legislation dealing with civil orders in furtherance of the criminal law, such as ABSOs, sexual offences prevention orders and terrorism prevention and investigation measures impose a requirement of 'necessity' rather than 'appropriateness'. As most applications for an SCPO will engage one or more rights under the ECHR, however, the court will need to consider the Human Rights Act 1998, in particular the precept of proportionality, which includes necessity. See also CPS guidance on serious crime prevention orders (Terms of orders), available at https://www.cps.gov.uk/legal-guidance/serious-crime-prevention-orders.

80 s.5(3)(a), SCA.

81 s.5(3)(c), SCA.

82 s.5(3)e), SCA.

83 s.5(3)(f), SCA.

84 s.5(5)(a), SCA. But a requirement to provide information orally is not permissible: s.11, SCA.

85 s.12, SCA.

86 s.15, SCA. This is similar to the provisions under s.2 of the Criminal Justice Act 1987.

87 See https://nationalcrimeagency.gov.uk/who-we-are/publications/299-nca-ancillary-order-register.

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DPAs 25.11

The legislation and DPA Code[88] state that the level of financial penalty imposed as part of a DPA should be broadly comparable to a fine that a court would have imposed following an early guilty plea,[89] which would ordinarily be a reduction of one-third. However, in all but the first DPA[90] approved by the court, a discount of 50 per cent to the financial penalty imposed has been applied. In the *XYZ* DPA (now known to be agreed with Sarclad Limited, following the lifting of reporting restrictions), Sir Brian Leveson, then President of the Queen's Bench Division, considered that a 50 per cent reduction was appropriate as the company had self-reported in a timely way and had fully co-operated with the SFO. The court in its judgment stated that the reduction was made to encourage others to act similarly when confronting corporate criminality.[91] A similar justification also prompted a 50 per cent discount for the *Tesco* DPA[92] and the *Serco* DPA.[93]

In the *Rolls-Royce* DPA, no such initial self-report was made by the company but the court still reduced the financial penalty by 50 per cent. Leveson P cited the following as factors that he took into consideration when reducing the financial penalty: Rolls-Royce's 'extraordinary cooperation' in the SFO's investigation, including voluntary disclosure of internal investigation materials; not winding up companies of interest to the SFO's investigation; and identifying conduct to the SFO that went beyond that which had triggered the SFO's initial investigations.[94]

See Chapter 23 on negotiating global settlements

In addition to a reduced criminal penalty, the mandatory debarment provisions of the Public Contracts Regulations 2015 (the Regulations) will not apply because the entry into a DPA does not constitute a conviction. However, if a DPA is agreed and approved by the court, the DPA and the underlying facts and conduct will be published. A contracting authority (as defined by the Regulations) may consider that the underlying facts and conduct as set out in the DPA are an 'appropriate means' of demonstrating that a company is guilty of 'grave professional misconduct', in accordance with the Regulations, resulting in discretionary debarment from public procurement procedures, as considered below.

Debarment 25.12

In addition to financial penalties, companies will need to be mindful of the impact that any conviction, or misconduct not resulting in a conviction, may have on their ability to tender for public contracts. The rules governing debarment are

88 Deferred Prosecution Agreements Code of Practice; Crime and Courts Act 2013.

89 Crime and Courts Act 2013, Schedule 17, para. 5(4).

90 *Rolls-Royce* [2017] Lloyd's Rep FC 249; *Sarclad Limited* [2016] Lloyd's Rep FC 509; *Tesco Ltd* [2017] 4 WLUK 558; *Serco Geografix Ltd* [2019] 7 WLUK 45.

91 *SFO v. XYZ*, Redacted Approved Judgment (Case No. U20150856), para. 57.

92 In a judgment issued by Leveson P.

93 In a judgment issued by Davies J.

94 *SFO v. Rolls Royce PLC and Rolls Royce Energy Systems Inc*, [2017] Lloyd's Rep FC 249, paras. 16 to 24.

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contained in the Regulations, which came into force on 26 February 2015, and which implemented the EU Procurement Directive in the United Kingdom.[95]

Debarment can be mandatory or discretionary. Debarment is mandatory if the tendering company has been convicted of a specific category of offence, including economic crimes such as bribery,[96] corruption, money laundering, fraud or conspiracy to defraud affecting the European Union's financial interests. Debarment will also be mandatory if an individual who is a member of the relevant company's administrative, management or supervisory body, or has powers of representation, decision or control in the company, is convicted of one or more of these offences.[97]

In comparison with the prior legislation, which imposed an automatic, indefinite debarment for companies convicted of these types of offence, mandatory debarment now only applies for a maximum of five years.

Discretionary debarment applies to a different range of conduct, including insolvency, the distortion of competition or where a contracting authority is able to demonstrate by appropriate means that a company is guilty of grave professional misconduct rendering its integrity questionable. A contracting authority may exclude a company from participation in procurement procedures[98] for three years following such conduct.[99]

While the Regulations do not define 'grave professional misconduct', the European Court of Justice has interpreted this term as covering 'all wrongful conduct which has an impact on the professional credibility of the operator'.[100] Reference to a conviction for an economic crime not within the remit of mandatory debarment could form the basis for demonstrating such misconduct.

The most significant change in respect of debarment in the United Kingdom is the introduction of 'self-cleaning', which is applicable to both mandatory and discretionary debarment. The Regulations set out a number of conditions that, if met, can demonstrate a company's suitability for access to public procurement tenders, despite the existence of grounds for mandatory or discretionary debarment. The conditions include the payment of compensation, co-operation with investigative authorities, and the taking of concrete measures to prevent further criminal offences or misconduct being committed. If a contracting authority considers that the evidence of self-cleaning provided to it by a company is sufficient,

95 Directive 2014/24/EU on public procurement.

96 Specifically, the common law offence of bribery; corruption within the meaning of s.1(2) of the Public Bodies Corrupt Practices Act 1889; corruption within the meaning of s.1 of the Prevention of Corruption Act 1906; bribery within the meaning of ss.1, 2 or 6 of the Bribery Act 2010; or bribery within the meaning of s.113 of the Representation of the People Act 1983. The failure of a commercial organisation to prevent bribery, contrary to s.7 of the Bribery Act 2010, will not trigger mandatory debarment but may result in discretionary debarment.

97 Regulation 57(1).

98 Regulation 57(8)(c).

99 Regulation 57(12).

100 Case C-465/11 *Forposta v. Poczta Polska*, para. 27. This was in light of Article 45(2) of the previous Public Procurement Directive, Directive 2004/18/EC, though it remains persuasive in relation to interpretation of the new Public Procurement Directive.

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it must not debar the company.[101] The gravity and circumstances of the misconduct are relevant factors when evaluating whether a company has self-cleaned; the graver the offence, the more comprehensive these self-cleaning steps need to be.[102]

Until the *Serco* DPA, there had been no substantive discussion as to what impact a DPA would have in the context of debarment. In the *Serco* DPA, Mr Justice William Davis expressly noted that in his opinion (on the facts of the case) he was satisfied that:

> *[A]pproval of this DPA will not be the determining factor in what is a political decision. Public procurement is subject to statutory regulation, namely by the Public Contracts Regulations 2015. The Regulations provide for mandatory or discretionary debarment in different situations. They also provide for what is known as self-cleaning by which a company can provide that it has taken appropriate remedial action sufficient to satisfy the contracting authority that it has demonstrated its reliability.*[103]

He added: 'The same exercise must follow in the event of the DPA.'[104]

In light of a letter received by William Davis J from the government's Chief Commercial Officer, addressed to the SFO, it was clear that in Serco's case a DPA would not be a mandatory or discretionary bar to contracting with the government. The letter stated that 'we see no current reason why Serco should not continue to be a key strategic supplier to [the UK government]',[105] and, on this basis, William Davis J stated that his 'approval of the DPA, although of relevance, is not the determining factor in terms of Serco PLC or its subsidiaries continuing to provide services to HM Government'.[106] This would appear to also be the case for other companies that have agreed a DPA with the UK government, as on 5 August 2019, when Rolls-Royce announced a contract with the Ministry of Defence to continue to provide support to the Royal Air Force's Typhoon aircraft as 'a follow-on to the 10 year Partnered Support Operational Phase arrangement'.[107]

Regulatory financial penalties and other remedies **25.13**

Companies and individuals may also face regulatory sanctions for their misconduct separately and sometimes in addition to any criminal penalties. The primary regulatory authority is the FCA, which regulates firms (such as banks, credit unions and insurance firms) and individuals performing regulated financial services activities. The FCA may bring enforcement action against these firms (as well

101 Regulation 57(13) and 57(14).

102 Regulation 57(16).

103 *Serco Geografix Ltd* [2019] 7 WLUK 45, para. 28.

104 Ibid., at para. 29.

105 Ibid., at para. 30.

106 Ibid.

107 Rolls-Royce press release, 'Rolls-Royce continues to support EJ200 engine for RAF's Typhoon fleet', 5 August 2019.

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as individuals) in connection with economic crimes to the extent that it considers there has been a regulatory breach. In certain areas (such as cases concerning market abuse and unauthorised business), it may also take action against persons who are not authorised by it to carry on regulated activities.

On 6 March 2010, the FCA adopted a new method of calculating financial penalties and published the procedure in the Decision Procedure and Penalties Manual (DEPP). This procedure allows the FCA to take into account the revenue generated by the relevant part of the financial institution when determining the level of the fine, which may well be in excess of any gain made through misconduct. In relation to an individual, the FCA will look at the gross amount of any benefit received by the individual in connection with the breach when assessing the fine figure.

The use of the new procedure has resulted in the FCA imposing fines on financial institutions for conduct after 6 March 2010 that are substantially higher than fines that would have been imposed under the previous penalty regime. If the relevant conduct spans the date of both the old and new penalty procedures, the FCA will apply the old procedures to the conduct preceding 6 March 2010 and the new procedures to the subsequent conduct.[108]

Penalty regime after 6 March 2010

Under the penalty regime, the FCA uses five steps to determine the level of a financial penalty it will impose on a firm for a regulatory breach:[109]

1. disgorgement of the financial benefit derived directly from the breach (which may include the profit made or loss avoided);
2. seriousness of the breach;[110]
3. any mitigating and aggravating factors;
4. adjustment for deterrence;[111] and
5. settlement discount.[112]

108 We do not consider the penalty regime prior to 6 March 2010 in this chapter, as we anticipate that the number of matters involving conduct that pre-dates March 2010 will likely be small at the time of writing.

109 FCA Handbook, Decision Procedure and Penalties manual (DEPP) 6.5 (current version November 2019).

110 In relation to financial institutions this figure will typically be determined by reference to the 'relevant revenue' from the particular product line or business during the period of the breach. The FCA will determine what percentage of the revenue figure it considers to be an appropriate basis for the financial penalty, from a minimum of 0 per cent to a maximum of 20 per cent. The assessment is based on a number of factors including the impact and nature of the breach, and whether the breach was deliberate or reckless. A Level 5 breach is most serious at 20 per cent of relevant revenue, reducing in 5 per cent increments, such that a Level 1 breach is 0 per cent. The figure to be imposed under this section is in addition to the disgorgement amount.

111 If the FCA considers the figure arrived at after Step 3 is insufficient to deter the firm that committed the breach, or others, from committing further or similar breaches, the FCA may increase the financial penalty.

112 If the financial institution settles all issues of fact and liability at the earliest stage, it will receive a 30 per cent reduction on the financial penalty. However, this will not apply to any disgorgement sum due.

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Since the introduction of this regime, the FCA has an increased flexibility in determining the level of financial penalty to imposed on a financial institution. For any misconduct after 6 March 2010, the penalty regime gives the FCA wide discretion in determining the 'relevant revenue' forming the basis for the penalty, and this can now include the underlying revenue of the relevant part of the financial institution. However, the FCA may consider other factors when considering the seriousness of the breach, such as market capitalisation, where 'relevant revenue' is not deemed to be an appropriate measure of the harm caused by the breach.[113]

After the introduction of the revised DEPP, there was a marked increase in the fines imposed by the FCA (or its predecessor) from just over £66 million in 2011 to nearly £1.5 billion in 2014.[114] However, in 2018 the FCA levied fines totalling just under £60.5 million.[115] It is the authors' view that the introduction of the revised DEPP happened to coincide with a period of increased regulatory enforcement activity, for example in connection with the benchmark manipulation and foreign exchange manipulation cases, which resulted in an unusual spike in financial penalties, rather than the spike being attributable solely to the revisions to DEPP.

On 1 March 2017, the FCA introduced a new enforcement procedure for disciplinary cases.

Under this procedure, four options are available to parties looking to resolve cases at an early stage in proceedings. These are:

- obtain a 30 per cent discount on the penalty if the firm or individual settles both the factual issues, the fact of a regulatory breach and the amount of penalty with the FCA;
- obtain a 30 per cent discount if the firm or individual agrees with the FCA all the relevant facts and accepts that they amount to regulatory breaches, whether or not the firm or individual disputes the penalty to be imposed;
- obtain a 15 to 30 per cent discount if the firm or individual agrees with the FCA all the relevant facts but disputes that they amount to regulatory breaches and disputes the penalty. The percentage of the discount made available to the firm or individual is at the discretion of the Regulatory Decisions Committee (RDC), the decision-making board responsible for deciding if enforcement action is appropriate; or
- obtain a 0 to 30 per cent discount in penalty if the firm or individual partly agrees with the FCA some of the facts, liability and penalty, but disputes a narrow set of issues. Again, the percentage of the discount made available to the firm or individual is at the discretion of the RDC.[116]

113 https://www.fca.org.uk/publication/final-notices/tejoori-limited-2017.pdf, paras. 6.5 to 6.11; https://www.fca.org.uk/publication/decision-notices/cathay-international-holdings-limited-2019.pdf, section 6.

114 http://www.fca.org.uk/firms/being-regulated/enforcement/fines.

115 https://www.fca.org.uk/news/news-stories/2018-fines.

116 https://www.fca.org.uk/publication/corporate/enforcement-information-guide.pdf.

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As a result, settlement discounts will now be available in a wider range of circumstances allowing regulated firms to challenge aspects of the FCA's enforcement team's findings before the RDC.[117]

25.14 Withdrawing a firm's authorisation

In addition to imposing financial penalties on authorised firms and individuals, the FCA has a number of other powers at its disposal to meet its strategic and operational objectives, in particular ensuring that financial markets function well, protecting consumers and ensuring integrity and competition in the markets.[118] Perhaps the most draconian measure the FCA can impose on a firm is the withdrawal of its authorisation to engage in regulated activities.

The Financial Services and Markets Act 2000 (FSMA), as substantially revised by the Financial Services Act 2012, imposes a general prohibition on a person or entity engaging in 'regulated activities', which are defined in Schedule 2 to FSMA, but include most financial advisory and transactional work.[119] The general prohibition applies unless a person, legal or natural, is exempt or has been 'authorised' to engage in such activity under FSMA.[120] A common form of such authorisation is permission given by the FCA to a firm under Part 4A of FSMA. In granting permission, the FCA must ensure that the authorised person is satisfying certain 'threshold conditions', and will continue to do so. One key threshold condition is suitability: an authorised person must be 'a fit and proper person having regard to all the circumstances'.[121] The FCA's powers include a right to cancel this permission if it appears to the FCA that the authorised person is failing or is likely to fail to fulfil the threshold conditions.[122]

The withdrawal power is exercisable where the FCA believes that it is 'desirable to exercise the power to advance one or more of its operational objectives'.[123] While the power is broadly worded, the FCA's Enforcement Guidelines state that the cancellation power will be exercised mainly where the FCA has 'very serious concerns' about a firm, or the way its business is or has been conducted.[124] More specifically, this will be the case where the firm has repeatedly failed to comply

117 See, e.g., *Linear Investments Limited v. Financial Conduct Authority* [2019] UKUT 0115 (TCC) https://assets.publishing.service.gov.uk/media/5cac6ef3e5274a42a5619fcf/Linear__Investements_Ltd_v_FCA.pdf. Linear Investments Limited entered into a focused resolution agreement with the FCA, by which is agreed matters of fact and liability with the FCA. However, it disputed the FCA's proposed penalty of £409,300 and appealed to the Upper Tribunal, in the first case of its kind. The Upper Tribunal confirmed the amount of the penalty.

118 s.1B(1) to (3), FSMA.

119 Sched. 2, FSMA.

120 s.19, FSMA.

121 Sched. 6, para. 2E, FSMA. Other threshold conditions relate to matters such as office location, effective supervision, resources and business model.

122 s.55J(1)(a), FSMA. The FCA may also cancel permission if the authorised person has not engaged in regulated activity in the previous 12 months: s.55J(1)(b).

123 s.55J(1)(c), FSMA.

124 EG 8.5.1, FCA.

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with FCA rules and requirements, or has failed to co-operate with the FCA to the extent that it is no longer satisfied that the firm is fit and proper.[125] Withdrawal of permission means that the person ceases to be authorised and cannot engage in any regulated activities.[126] As an alternative to withdrawing permission, the FCA has broad powers to vary a Part 4A permission, or to impose specific conditions on its exercise instead.[127]

Senior Managers and Certification Regime 25.15

Both the Senior Managers and Certification Regime (SMCR) and the Approved Persons Regime regulate individuals exercising functions on behalf of regulated entities. At the time of writing, the SMCR applies to UK banks, building societies, credit unions, Prudential Regulatory Authority-designated investment firms, branches of foreign banks operating in the United Kingdom, and insurance and reinsurance firms. In December 2019, the SMCR will be extended to apply to all firms authorised under FSMA. We only consider the SMCR in this chapter.

The SMCR contains the following three elements:

- *Senior Managers Regime*: This applies to all individuals performing Senior Management Functions (SMF). These individuals need to be approved by the FCA or PRA as appropriate.
- *Certification Regime*: This applies to all employees of regulated firms who could pose a risk of significant harm to the firm or its customers. These individuals are not approved by the FCA or PRA; rather, the employing firm must certify (both at the outset of employment and on a continuing basis) that the individual is fit and proper to carry out his or her functions.
- *Conduct Rules*: Both the FCA and the PRA have issued high-level requirements that apply to individuals falling within the ambit of the SMCR. These replace the Statements of Principle and Code of Practice for Approved Persons. In practice, the FCA Conduct Rules apply to all employees of the FCA, except those performing ancillary functions (for example, receptionists and post room staff). They apply to almost all staff of FCA authorised firms in the United Kingdom, and to those staff based outside the United Kingdom who deal with UK customers.

Section 59ZA of FSMA defines SMF as follows:

> *A function is a 'senior management function', in relation to the carrying on of a regulated activity by an authorised person, if – (a) the function will require the person performing it to be responsible for managing one or more aspects of the authorised person's affairs, so far as relating to the activity, and (b) those aspects involve, or might involve, a risk of serious consequences (i) for the authorised person, or (ii) for business or other interests in the United Kingdom.*

125 EG 8.5.2(7) and (8), FCA.
126 ss.19 and 31(1)(a), FSMA.
127 ss.55J and 55L, FSMA.

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The FCA has designated a number of particular positions within firms as being SMFs (including some 'catch-all' functions designed to cover firms' particular arrangements). Not all of these positions will be applicable in every authorised firm. The FCA and PRA have also specified over 30 prescribed responsibilities within authorised firms (again, not all will apply in every case). These responsibilities, if applicable, must be formally assigned to an SMF within the firm. The individuals holding those positions are then accountable for the proper performance of those responsibilities, and applications for approval to the FCA and PRA must be accompanied by corresponding statements of responsibility.

The FCA and the PRA can take enforcement action against senior managers if:

- the manager is responsible for any activities in the firm in relation to which the firm contravenes a regulatory requirement; and
- the manager has not taken such steps as a person in his or her position could reasonably be expected to take to avoid the contravention occurring (or continuing).

The regulators therefore must prove a contravention of a regulatory requirement by the firm, in an area for which the senior manager was responsible. The burden of proof is on the regulators.

The designation of SMF does not necessarily entail an increase in personal liability from that which existed prior to the introduction of the SMCR; it enables the FCA and the PRA to more effectively identify those individuals responsible for areas of firms in which there has been a breach. Senior managers remain liable for being knowingly concerned with breaches by firms of relevant rules, and the FCA and PRA can take enforcement action against senior managers and certified individuals for breaches of the Conduct Rules.[128]

25.16 Restitution orders

The FCA may also seek restitution where it seeks to compensate those adversely affected by a breach of regulatory provisions.

The FCA will take the following considerations into account in determining whether to seek restitution, in the light of 'all the circumstances of the case': whether the profits are quantifiable or the losses identifiable; the number of persons affected; costs to the FCA; alternative redress, such as compensation schemes or another regulator; whether victims can be expected to bring proceedings in their own right; the firm's solvency; alternative powers available to the FCA; and the conduct of persons having suffered loss, for example whether they have contributed to their loss.[129] This list is not exhaustive. The FCA can apply to court for restitution, and if it finds that these requirements are met, the court may order payment of a sum it considers 'just' having regard to the profits made or loss

128 Only FCA Conduct Rules 1 to 5 apply to certified persons or other employees falling within scope; all of the FCA's Conduct Rules apply to senior managers. Only PRA Conduct Rules 1 to 3 apply to certified persons.

129 EG 11.2.1, FCE.

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caused.[130] If the court orders restitution, the money will be paid to the FCA rather than to the person who has suffered loss or at whose expense a profit has been made (FSMA refers to these as 'qualifying persons').[131] However, the FCA must then disburse the money among the qualifying persons according to the terms of the court order.[132] The payment of restitution does not bar an ancillary civil claim for damages being brought by qualifying persons.[133]

See Chapter 33 on parallel civil litigation

Where appropriate, the FCA will consider imposing a restitution order using its administrative powers.[134] A restitution order may be imposed where the FCA is 'satisfied that a person has contravened a relevant requirement, or been knowingly concerned in the contravention of such a requirement'.[135] Further, the person against whom the order is sought must either have profited from the contravention, or must have caused loss or an otherwise adverse effect to another.[136] The FCA will usually choose to apply to the court (rather than using its administrative powers) for a restitution order where there is another factor requiring the involvement of the court. For example, where there is a risk of dissipation, a need to combine the restitution order with a separate order or a concern that the individual subject to the order may not comply.

On 28 March 2017, the FCA used its powers[137] for the first time to require a listed company to pay compensation for market abuse. Tesco agreed that it committed market abuse in relation to a trading update it published on 29 August 2014, which gave a false or misleading impression regarding the value of publicly traded Tesco shares and bonds. Tesco agreed to pay compensation to investors who purchased Tesco securities on or after 29 August 2014 and who still held those securities when the statement was corrected on 22 September 2014. Under the compensation scheme, Tesco must pay each investor an amount equal to the inflated price of each security. The FCA estimated that the total compensation payable under the scheme was likely to be in the region of £85 million, plus interest.[138]

The Office of Financial Sanctions Implementation **25.17**

In the past year the Office of Financial Sanctions Implementation (OFSI) issued its first-ever financial penalties for breaches relating to financial sanctions, following the introduction of powers in the Policing and Crime Act 2017 (PCA17) aiming to strengthen the government's ability to punish financial sanctions breaches. The

130 s.382(2), FSMA.

131 Ibid.

132 s.382(3), FSMA.

133 s.382(7), FSMA.

134 s.384, FSMA.

135 s.382(1) and (6), FSMA. The meaning of 'relevant requirement' is somewhat narrower than under the injunction provisions, but is substantially the same; see s.382(9).

136 Ibid.

137 s.384, FSMA.

138 https://www.fca.org.uk/news/press-releases/tesco-pay-redress-market-abuse.

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penalties, imposed against Raphael & Sons plc for £5,000[139] and Travelex UK Ltd for £10,000,[140] both relate to violations of the EU–Egypt financial sanctions regime.

The maximum penalty that OFSI can impose for a financial sanctions is £1 million or, where the breach relates to particular funds or resources with an estimable value, 50 per cent of the estimated value of the funds or resources – whichever is greater.[141] The PCA17 also raised the maximum term of imprisonment for financial sanctions offences to seven years[142] and amended the DPA regime such that financial sanctions breaches are now included in the list of offences for which a DPA may be entered into.[143]

25.18 The Information Commissioner's Office

The Information Commissioner's Office (ICO) may issue fines and prosecute individuals and corporates it considers have engaged in criminal activity in respect of their data protection obligations. At the time of writing, the ICO has engaged in 12 prosecutions where monetary penalties were sought, and one prosecution where the individual in question was sentenced to six months in prison.[144]

The ICO has, however, been more active in issuing civil monetary penalties, with 54 monetary penalties since 24 November 2017.[145] Following the implementation of the General Data Protection Regulation (GDPR) in the United Kingdom via the Data Protection Act 2018 (DPA 2018), the ICO has issued two intention-to-fine notices under that legislation, which significantly increases the maximum penalties for breaches of data protection law from £500,000[146] to €10 million or 2 per cent of worldwide turnover (whichever is greater)[147] or €20 million or 4 per cent of worldwide turnover (whichever is greater)[148] depending on the nature of the breach.

The notices were issued against British Airways[149] and Marriott International[150] for personal data breaches affecting data subjects within the European Union.

139 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/804117/190502_Raphaels_revised_notice.pdf.
140 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/804021/Travelex_monetary_penalty.pdf.
141 s.146, PCA17.
142 Ibid., at s.144.
143 Ibid., at s.150, inserting para. 26A into Part 2 of Schedule 17 to the Crime and Courts Act 2013.
144 https://ico.org.uk/action-weve-taken/enforcement/?facet_type=Prosecutions&facet_sector=&facet_date=&date_from=&date_to=.
145 https://ico.org.uk/action-weve-taken/enforcement/?facet_type=Monetary+penalties&facet_sector=&facet_date=&date_from=&date_to=.
146 Data Protection Act 1998 s.55A as prescribed by section 2 of The Data Protection (Monetary Penalties) (Maximum Penalty and Notices) Regulations 2010.
147 GDPR, Article 83(4), as implemented by s.157, DPA 2018.
148 GDPR, Article 83(5), as implemented by s.157, DPA 2018.
149 https://ico.org.uk/about-the-ico/news-and-events/news-and-blogs/2019/07/ico-announces-intention-to-fine-british-airways/.
150 https://ico.org.uk/about-the-ico/news-and-events/news-and-blogs/2019/07/statement-intention-to-fine-marriott-international-inc-more-than-99-million-under-gdpr-for-data-breach/.

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These proposed fines, of approximately £183 million and £99 million respectively, if issued without reduction following the written representation and appeal processes, indicate that the risks associated with compliance with data protection law have become significantly higher following the implementation of the GDPR. Given that the United Kingdom has incorporated the GDPR into its national law via the DPA 2018, this position is unlikely to change following its departure from the European Union.

Disclosure to other authorities **25.19**

A look at recent enforcement action shows that UK enforcement authorities co-operate with a number of other enforcement authorities around the world, particularly in the United States. Such co-operation may be governed by legislation, a memorandum of understanding, or less formally through information sharing gateways.

It is therefore possible that, if a company or individual is found criminally liable or in breach of its regulatory obligations in the United Kingdom, the details of the offence or regulatory breach will be made known to interested enforcement authorities in other jurisdictions. If the company or individual faces liability in those jurisdictions, disclosure by the United Kingdom authorities may lead to further enforcement action. This issue naturally should be considered prior to a company or individual accepting any criminal or regulatory liability or entering into an agreement with enforcement authorities. Further, the SFO has made it clear in its Corporate Co-operation Guidance[151] that where a company seeks to co-operate with the SFO, the SFO expects to be notified in the event that any other government agencies contact the company, or if the company reports to any other government agencies.[152]

See Chapter 3 on self-reporting and Chapter 11 on production to authorities

Even if a company is not facing criminal or regulatory liability in other jurisdictions, it will still need to establish whether the local legal requirements would require a disclosure of a finding of criminal liability and subsequent financial penalty. Whether a disclosure is required will depend on the jurisdiction in which the company operates. If there is no local legal requirement to make a disclosure, foreign enforcement authorities may still expect to be notified of any finding of liability and subsequent financial penalty. Whether a voluntary disclosure is made will turn on what is expected by the local regulator and the implications of disclosure or non-disclosure. Such decisions are complicated by issues regarding personal data, which should be considered whenever it is transferring across jurisdictions to disclose misconduct to other enforcement agencies.

See Chapter 40 on data protection

151 SFO Operational Handbook, Corporate Co-operation Guidance, available at https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/sfo-operational-handbook/.

152 Ibid.

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Appendix 1

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