

UK White Collar and Financial Crime Insights December 2023

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Dentons' financial crime team operates as part of a global compliance and investigations network, so we are well placed to assist with financial crime matters arising in any jurisdiction. Our multi-jurisdiction clients may be interested in looking at similar updates from our **Ireland colleagues**, our **Middle East colleagues** or our **French colleagues**. If you have any queries about any of the matters arising in the UK or would like to receive this insight direct to your mailbox, then please reach out to one of our team.

This update covers:

- Anti-Money Laundering (AML)
- Bribery and Corruption
- Sanctions
- Corporate Fraud
- Investigations

Anti-Money Laundering (AML)

- The Economic Crime and Corporate Transparency Bill received Royal Assent on 26 October 2023 ([UK Gov press release](#)), becoming the [Economic Crime and Corporate Transparency Act 2023 \(ECCTA\)](#).
 - Among other significant amendments, some of which we discuss in the sections below, the ECCTA will change the role of Companies House in the UK. The changes grant Companies House new powers to check, remove or decline information submitted to it, and more effective investigation and enforcement powers. These changes will increase the reliability of the information held at Companies House and improve transparency of the register, reducing the risk of abuse of the register, which will be a clear benefit to our clients in providing increased comfort in placing reliance on the content as part of due diligence. You can view a helpful summary of the key changes to corporate transparency [here](#).
 - Law enforcement agencies will also see enhanced powers to seize, freeze and recover cryptoassets deemed to be the proceeds of crime under the ECCTA. This is a significant step given the rise of misuse of digital currencies in illegal activities and something to which firms holding cryptoassets for customers should be prepared to respond.
 - Many of our clients will be aware of the struggle to recruit and retain MLROs/nominated officers, which can cause issues in providing consistent long-term oversight of an effective AML framework. The FCA has recently cited concerns about the filling of permanent MLRO roles with temporary contractors and we understand in the last year that it has written to 643 firms asking for explanations for churn in their MLRO function, highlighting that fast turnover of MLROs can compromise effective oversight and can be an indicator of poor culture or a lack of resources dedicated to the position within the firm. With the increased focus on the area, firms should be cautious that they are recruiting the right people into the role, to avoid closer scrutiny from the regulators.
 - The Financial Action Task Force (**FATF**) updated its [grey list](#) and [black list](#) in October 2023. The FATF identifies jurisdictions on its grey list which are under increased monitoring due to weak measures to combat money laundering and terrorist financing. When the FATF places a jurisdiction under increased monitoring, it means the country has committed to resolve swiftly the identified strategic deficiencies within agreed timeframes and is subject to increased monitoring. The FATF also maintains a black list, which identifies high-risk jurisdictions that have significant strategic deficiencies in their AML regimes, counter-terrorist financing (**CFT**) regimes and counter-proliferation financing regimes. For black-list countries, FATF calls on all members and jurisdictions to apply enhanced due diligence and, in the most serious cases, countries are called upon to apply countermeasures. We have summarised the key changes in the FATF grey and black lists below:
 - The black list remained unchanged from June 2023, with the Democratic People's Republic of Korea and Iran subject to countermeasures, and Myanmar subject to enhanced due diligence measures.
 - The grey list was significantly reduced in October 2023, with Albania, the Cayman Islands, Jordan and Panama being removed from the grey list. Each of these jurisdictions had made significant progress in improving their AML/CFT regimes.
 - The FATF also made an initial determination that Barbados, Gibraltar, the UAE and Uganda had substantially completed their action plans. These jurisdictions are set to be removed from the grey list in the next update in February 2024 if an onsite assessment verifies that implementation of AML/CFT reforms has begun and is being sustained.
 - Bulgaria was the only new country added to the grey list.
- Firms should review the changes to the FATF grey list and consider updating their country risk profiles accordingly.

- The [12th edition of the Basel Index Report](#) was published on 13 November 2023. The Basel AML Index is an independent ranking that assesses countries' money laundering and terrorist financing risks and capacity to counter them. The newest edition reveals that the global money laundering and terrorist financing risks have continued to rise, with the average global risk level increasing from 5.25 in 2022 to 5.31 in 2023. Concerningly, the report indicates a drop in the effectiveness of AML/CFT systems, even in countries with robust AML/CFT systems on paper. We expect that regulators globally will be paying greater attention to the key areas lacking efficient AML/CFT systems, such as **non-profit organisations**, **transparency of beneficial ownership** and **new technologies** among other areas. We would urge all businesses to review their current AML/CFT measures with particular focus on the key areas identified in the Basel Index Report.
- Autumn brought with it significant fines for AML failures across various industries. Most recently, ADM Investor Services International Limited was fined £6.47 million for serious financial crime control failings in the wholesale intermediaries and brokers sector, including the lack of formal process to classify customers by risk ([FCA press release](#), 2 October 2023).
- The Economic Crime Levy (**ECL**) was introduced in the 2020 Budget and our AML-regulated clients would already have received their first invoices. We are advising clients (in particular, FCA-regulated firms) to continue to assess the activities that they are undertaking to ensure that any permissions they hold are being used and are needed moving forward, as the ECL will be automatically applied by the FCA to certain permissions. Businesses may find it helpful to refer to an [article](#) prepared by our Regulatory and Investigations team summarising the new ECL.
- In November, the SFO successfully [convicted a solicitor](#) who breached confidentiality by tipping off his client about an SFO money laundering investigation and providing the SFO with a forged document. This is the first time that a solicitor has been prosecuted by the SFO for "tipping off" offences under the Proceeds of Crime Act, perhaps showing an increased willingness for prosecutions outside the financial services sector. Our AML-regulated clients should be aware of this prosecution and may wish to build it into training updates or alerts.

Bribery and Corruption

- The ECCTA received Royal Assent on 26 October 2023. It will transform the SFO's pre-investigation powers to compel individuals and corporates to provide information. These powers were previously limited under the old regime to international bribery and corruption cases where the SFO had "*reasonable grounds to suspect*" that a crime had been committed. Section 211 of the ECCTA will expand the SFO's reach to apply to all of its cases.
 - The Identification Doctrine will also undergo some changes. Under the old regime, criminal liability was based on the "directing mind and will" test, which received criticism for its narrow scope and was a high threshold to meet. The ECCTA will introduce a new "senior manager" test to supplement the old test, which should broaden a prosecutor's reach in attributing criminal liability to a company. The new "senior manager" test will focus on the role a person plays in the making of decisions about the whole or substantial part of the activities of the company. Although this is currently limited to a specified list of offences, the new [Criminal Justice Bill](#) introduced in November seeks to expand the doctrine to all criminal offences.
 - See further commentary [here](#) on the legislation from the Dentons Regulatory and Investigations team and Dentons Global Advisors team.
- As mentioned in our June update, the European Union set forth its proposal for an [Anti-Bribery and Corruption \(ABC\) directive](#) on 3 May 2023 which seeks to set common minimum standards for ABC legislation across member states and ensure more effective cross-border investigations. We understand that there is an optimistic timeline in place to have the proposal adopted by the European Parliament and Council by April 2024, which if approved will mean that member states will then have 18 months to implement.
- The Serious Fraud Office (SFO) has initiated a corruption trial concerning individuals suspected of engaging in bribery. It is alleged that nearly £10 million in bribes were paid to officials of the Saudi National Guard between 2007 and 2012, with the aim of securing lucrative contracts for the corporate entity the individuals were associated with.
 - This case has been under SFO investigation for over a decade. In 2021, a resolution was reached with the corporate entity involved pleading guilty and accepting a financial penalty in excess of £20 million.
- The CPS entered into its first-ever deferred prosecution agreement (**DPA**) this month following an HMRC investigation into global online sports betting and gaming business, [Entain](#), owner of Ladbrokes and Coral bookmakers. Entain has agreed to pay £585 million to HMRC to settle allegations of failure to prevent bribery contrary to section 7 of the Bribery Act at its former Turkish subsidiary between July 2011 and December 2017. The alleged misconduct occurred primarily in Turkey when gambling was not legal in the country. The court recognised sweeping changes to the firm's ABC compliance framework in approving the DPA but warned the wider gaming industry of the need to take stock on compliance frameworks and to take action in respect of any failings identified.

Sanctions

- Two UK courts have recently opined on the application of the "control" part of the "ownership and control by a designated person" concept prompting government guidance on the point. On 6 October, the Court of Appeal in *Mints v PJSC National Bank Trust*¹ interpreted the definition of "control" literally broadly, concluding that "*in a very real sense (and certainly in the sense of Regulation 7(4)), Mr Putin could be deemed to control everything in Russia*". Amid some consternation about this ruling, a High Court judgment of 15 November (*Litasco*) emphasised the case-by-case nature of control assessments and took the view that a designated person controls a company only if they have an existing influence over its relevant affairs and this does not extend to "companies of whose existence [the Designated Person] was wholly ignorant, and whose affairs were conducted on a routine basis without any thought of him". The FCDO issued guidance on 17 November which contrasts with the *Mints* judgment (without mentioning it) and adopts a position similar to the case-by-case approach taken in *Litasco*. This clarified that:
 - the FCDO does not generally consider that designated public officials exercise "control" over the public bodies they lead;
 - the FCDO does not intend sanctions measures targeting public officials to prohibit routine transactions with public bodies; and
 - there is no presumption that private companies are subject to the control of designated public officials, solely on the basis of their country of incorporation or operations.
- The UK continues to add companies and individuals to sanctions lists, including a November round of Russia-related designations on 29 companies and individuals. The persons designated were all in the gold or oil sectors and the listings were "*intended to block individuals and entities from helping Russia to dodge the impact of international sanctions*". The companies targeted included the Dubai subsidiary of a Swiss energy trading company. This company has been under investigation in Switzerland for shifting operations to its Dubai-based subsidiary, which then traded above the oil price cap.
- Circumvention of existing sanctions continues to be a focus: in November, FCDO, NCA and OFSI issued a joint "[Red Alert" on gold-based circumvention of trade and financial sanctions](#)". This warned that deliberate attempts are being made to launder sanctioned gold to mask its origin for circumvention purposes, so that it can be hidden in supply chains and sold in the UK. It also raises concerns around operations via other globally significant gold hubs with refining capacity that have not applied sanctions against Russia and/or are viewed as low enforcement jurisdictions. The Red Alert lists indicators of circumvention and gives a worked example. All market participants are expected to be aware of the common circumvention techniques set out in this alert, and the risks and obligations in relation to Russia sanctions and gold.
- OFSI has successfully defended the first court review of its licensing decisions. On 26 October, the High Court rejected Mikhail Fridman's challenge to three OFSI licence refusals. Fridman had applied for additional licences to cover the running costs of his house and staff in the UK. The ruling included useful comments on whether a payment to a company owned by a designated person should be considered an indirect payment to that person and on OFSI's discretion to refuse to grant a licence, even if the conditions for the grant of a licence are met. Mr Justice Saini held that OFSI had acted rationally and within the bounds of its residual discretion in these refusals.
- On 11 December 2023, the UK Government announced the creation of new Office of Trade Sanctions Implementation (**OTSI**). OTSI will be responsible for the civil enforcement of trade sanctions (including issuing civil penalties and referring cases to HMRC for criminal enforcement), investigating potential breaches and helping businesses comply with sanctions. Further information on OTSI will be made available in the new year.

¹ *Mints v PJSC National Bank Trust* [2023] EWCA Civ 1132

Corporate Fraud

- Another big change brought in by the ECCTA will be the "failure to prevent fraud" offence, which, similarly to the existing offences of failure to prevent bribery and failure to prevent corporate tax evasion, will seek to hold firms accountable where substantive fraud-related offences benefiting the firm occurred and it did not have appropriate systems and controls in place to prevent and detect the offence.

The offence will not come into force until the UK government publishes guidance on what constitutes reasonable procedures (which we expect will be issued in quarter two of 2024). However, we anticipate this will include properly embedded measures which are principle-driven, as opposed to a checklist of processes and steps. FCA-regulated firms should look to the financial crime guide as an indicator of likely expectations. Firms should consider addressing knowledge gaps through training and cultivate an anti-fraud culture encouraging employees to report wrongdoing.

- In interesting new investigations, in November, the SFO launched a criminal investigation into law firm, [Axiom Ince](#). The investigation follows a large-scale dawn raid by SFO investigators and Metropolitan Police officers.

Due to alleged fraud complexities, the Metropolitan Police referred this case to the SFO, with both bodies collaborating on the ongoing investigation.

- Five years after the collapse of [Patisserie Holdings](#), four individuals have been charged with conspiring to inflate Patisserie Holdings' balance sheets and annual reports from 2015 to 2018 by providing alleged false documentation to the company's auditors. The trial is not scheduled until spring 2026, some eight years after the SFO started the investigation.

The Financial Reporting Council has fined several auditors for their shortcomings in the audits of various corporate entities. There had been some hopes in financial crime investigation circles that the Criminal Justice Bill 2023 would include

significant UK audit reform, but this did not crystallise. Nevertheless, the Government remains committed towards driving a wider corporate governance and audit reform, including establishing a new Audit, Reporting and Governance Authority to replace the FRC.

- The FCA has recently published [guidance](#) aimed at financial services firms following a multi-firm review on anti-fraud controls, focusing on push payment fraud. This is useful guidance as it indicates the likely direction of travel for expectations of what effective anti-fraud controls look like. Many findings are specific to financial services firms and should be read in detail by FCA-regulated firms, but a key takeaway which can be applied across the board is in governance and oversight, where the FCA criticised firms where management information in relation to fraud was poor, there was a lack of effective oversight and there was little challenge by senior management and board members.
- Importantly for financial services firms, the customer duty was placed at the heart of the review and features heavily in the expectations on firms in their development of fraud control frameworks.

In 2022, fraud was the most prevalent crime type in the UK, with Authorised Push Payment (**APP**) fraud comprising 40% of fraud losses.² To reduce consumer harm, the Payment Services Regulator is introducing a reimbursement requirement in 2024, making both receiving and sending firms jointly liable for refunding APP fraud victims.

² [APP Fraud Performance Report October 2023](#)

Investigations

- There was major news in September for financial services firms, when the FCA and PRA published their long-awaited consultation papers into diversity and inclusion in the financial sector ([CP23/20](#) and [CP18/23](#)). Both consultations close soon (18 December 2023) with the FCA stating its intention to publish a final Policy Statement in 2024 (and rules coming into force 12 months subsequently).

The FCA laid out, among other things, what they expect "fit and proper" to mean when it comes to non-financial misconduct and proposals included:

- giving examples of non-financial misconduct (such as sexual or racially motivated offences);
- explicitly including non-financial misconduct within fit and proper assessments (and to provide guidance on how non-financial misconduct should be incorporated into regulatory references);
- explaining that bullying and similar misconduct within the workplace is relevant to fitness and propriety and that similarly serious behaviour in a person's personal or private life is also relevant;
- asserting its view that "there is a risk to public confidence" where individuals that have committed serious non-financial misconduct (inside or outside the workplace) are permitted to continue working within the sector. It notes that the FCA can "impose a partial or a full prohibition, depending on the level and type of risk posed by the individual in question"; and
- clarifying that non-financial misconduct which "could damage public confidence" is likely to mean that a person is not fit and proper.

With the advent of such guidance, firms should pay close attention to how they are receiving, triaging and investigating reports of non-financial misconduct to ensure that they are meeting any reporting expectations from the regulator. We

expect this guidance to result in a further uptick of internal investigations by firms as they consider how to manage and embed the new guidance. You can read more about some of our remaining questions in our article [here](#).

- Our multi-jurisdictional clients will be aware that the end of December brings the final deadline for the implementation of the Whistleblowing Directive for firms operating in Europe with 50 or more employees.
- UK firms, whether or not bound by the Whistleblowing Directive should also consider the adequacy of their reporting mechanisms, not only as a way to detect non-financial misconduct, but to evidence effective financial crime compliance reporting mechanisms. In the UK, there does appear to be an increasing trend towards reporting – for example, the FCA's quarterly whistleblowing data ([here](#)) showed that whistleblowing.
- Reports to the FCA increased considerably between April and June 2023 (300 new reports) as compared to the same period in 2022 (243 reports), suggesting a general trend for "speaking out" against misconduct.