



OUR PICK OF THE TOP TRENDS AND BUSINESS TIPS AROUND THE WORLD, APRIL 2024

We reflect on some of the key themes in the compliance and investigations space in the first quarter of the year and set out our predictions for 2024.



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CHANGES TO UK CORPORATE LIABILITY FOR FINANCIAL CRIMES

In the UK, the Economic Crime and Corporate Transparency Act 2023 (ECCTA) was passed late last year which introduced two major changes: a new failure to prevent fraud offence (due to come into force later in 2024) and a new law for attributing corporate liability. We covered the main changes from the ECCTA in our ECCTA briefing which can be found here¹ as well as, in our October 2023 bulletin here.²

The failure to prevent fraud offence is a strict liability offence which only applies to 'large organisations' where a person associated commits a relevant fraud offence intending to benefit (directly or indirectly) the organisation or any person or entity the associate provides services to on behalf of the organisation. It will be a defence for the relevant body if it can show that they had reasonable prevention procedures. What constitutes reasonable prevention procedures is due to be covered in a Ministry of Justice guidance which we can expect later this year, however no specific timeline has been given.

The new law for attributing corporate liability came into force on 26 December and states that where a senior manager is acting within the actual or apparent scope of their authority commits a relevant offence, the organisation will also be found guilty of the offence.

Tip

It is expected that there will be an increased focus on the role of a 'senior manager' and what policies and procedures the company has in place to prevent fraud. We expect that insurers will seek information in relation to their reasonable prevention procedures and recommend clients to check the extent of cover under D&O and management liability insurance policy wording to ensure that their cover remains applicable.

Guidance around what constitutes reasonable procedures will soon be published. Companies should prepare to implement changes to any existing anti-fraud measures in line with guidance issued.



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Footnotes:

- <https://www.hfw.com/The-Economic-Crime-and-Corporate-Transparency-Act-receives-Royal-Assent-what-can-we-expect-Nov-2023>
- <https://www.hfw.com/Global-Investigations-and-Enforcement-bulletin-Oct-2023>
- Section 196, ECCTA

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PRIVATE PROSECUTIONS

Private prosecutions have long been used as an alternative method to obtain justice, having grown in popularity due to cuts to funding for police and prosecutors.

The UK's Post Office Horizon scandal which has dominated the headlines since 2020 with additional focus this year with a dramatized TV series and ongoing public enquiry is a stark example however of what can go wrong when the role of a victim of crime is the same as that of a prosecutor of crime. As a result, there are calls for new legislation to exonerate those convicted¹, and further calls by the Bar Council to implement proposed safeguards in relation to private prosecutions. Currently, the Private Prosecutors' Association has a Code for Private Prosecutors which aims to 'provide a benchmark for best practice in the conduct of private prosecutions', however adherence to the code is voluntary.

Tip

Private prosecutions remain an important avenue to obtaining justice, especially in the context of small-scale criminal behaviour (where the police/ CPS are not resourced-enough to prosecute) or where it involves complex or niche areas of law (such as fraud). They also provide a means to obtain civil recovery. Despite the injustice faced by those convicted postmasters and postmistresses, it is unlikely that the right to bring a private prosecution will ever be abolished however we can expect there to be huge public interest and possible legislative reform as a result in the near future.

Footnotes:

1. <https://www.theguardian.com/uk-news/2024/jan/10/no-precedent-why-commons-approach-to-post-office-scandal-has-lawyers-nervous>

AUDITS

We addressed audit failures in our July 2023 bulletin (which can be found here¹), and predicted that we would see more enforcement action in the second half of 2023 following the newly-issued guidance from UK's Financial Reporting Council (FRC) in May.

As predicted, the FRC has ramped up its enforcement of auditors' firms in respect of audit failures. 2023 has proven to be a bumper year in terms of penalties issued by the FRC to date, amounting to £40.4 million.² £21 million of which related to KPMG's audit failures in respect of its audit of (and subsequent collapse of) Carillion in 2018.

Furthermore, we can expect to see the transition from the FRC to the Audit, Reporting and Governance Authority (ARGA), which is part of the larger plan to 'overhaul' the audit sector. Once this transition has occurred, we can also expect to see further audit reform from the UK government.

Tip

The FRC's enforcement track record from 2023 is part of a strengthened approach to regulating the UK's audit sector and this trend is only going to increase. For companies being audited, they can expect to demonstrate proper procedures and be ready to answer tough questions, instructing external counsel where necessary, as auditors are understandably under pressure from their regulators and will face hugely expensive fines if they are found to have committed regulatory breaches.

Footnotes:

1. <https://www.hfw.com/Global-Investigations-and-Enforcement-bulletin-July-2023>
2. [FRC imposes £33.2 million fines on audit firms amid crackdown - Accountancy Age](#)

MARKET ABUSE REMINDER

In its January 2024 market watch¹ newsletter the FCA have reminded firms about the market abuse practices of printing and flying, stating that despite their previous newsletter on the topic it continues to see instances of such conduct in several markets, including commodities, and a failure of management within affected firms taking a robust approach to dealing with that behaviour.

Tip

The fact the FCA have felt it necessary to issue this reminder indicates they will bring enforcement action against offending firms not only for instances of such conduct but also where there are failings in firm's systems and controls for preventing such conduct. Firms should consider their risks and ensure that they have taken suitable steps to prevent such conduct as outlined in the newsletter.

Footnotes:

1. <https://www.fca.org.uk/publications/newsletters/market-watch-76>



REGULATORY SCRUTINY OF NON-FINANCIAL MISCONDUCT

In February of this year the FCA issued a letter to certain London Market firms, using its powers of compulsion to require them to complete a survey on non-financial misconduct for the years 2021-2023. This follows a consultation in September 2023 on conduct rules relating to diversity and inclusion in the financial sector (CP23/20¹).

The survey requested data on instances of NFM, such as bullying, harassment and discrimination, for the years 2021-2023 and covered conduct both in and outside of the workplace, such as where staff are working from home. Offsite or in work related social situations (social events, conferences and client entertainment). The survey also asks questions about firms' systems and controls to identify and mitigate risks relating to NFM and how such allegations are dealt with including whether non-disclosure agreements were used indicating an interest in the wider governance framework.

Indications are that similar letters will be sent to other firms within the regulated sector in the next few months. This together with the publication of the Treasury Committee's "Sexism in the City"² report on International Women's Day, which calls for boards and senior leadership at firms to take greater responsibility for delivering change and emphasises the role regulators have to play, means we can expect to see the FCA pushing this workstream and where failings are identified taking enforcement action.

Tip

With the increasing focus on NFM firms are advised to review how they seek to encourage a culture of respect, diversity and inclusivity and how they deal with NFM issues that may arise.

Footnotes:

1. <https://www.fca.org.uk/publications/consultation-papers/cp23-20-diversity-inclusion-financial-sector-working-together-drive-change>
2. <https://committees.parliament.uk/publications/43731/documents/217019/default/>





FRAUD, BRIBERY AND CORRUPTION

Bribery and corruption remain a staple of enforcement focus in the Commodity sector.

In Switzerland, commodity giant Trafigura was charged in December with bribery of foreign officials in relation to its operations in Angola between 2009 and 2011.

In the US, a former UK Trafigura commodity trader Charlotte Bamber admitted to wire fraud and price manipulation and entered into a non-prosecution agreement in exchange with cooperation with the Department of Justice (DOJ). However, this agreement was undermined when Ms Bamber sent threatening communications with ex-colleagues. She was sentenced in October to one year of probation and a \$5,000 fine.¹

Also in the US, commodity trader Freepoint Commodities LLC entered into a deferred prosecution agreement and has agreed to pay \$98 million to the DOJ for the FCPA violations in relation to a corrupt scheme to pay Brazilian government public officials. Freepoint has also agreed to pay \$7.6 million to the Commodities and Futures Trading Commission (CFTC) in related matters.

Another commodity giant Glencore was also in the news in late 2023. The company already pleaded guilty and paid a £276 million fine to the SFO last year, however the SFO has still yet to make any individual charging decisions in respect of the former Glencore staff involved in the corruption.

Tip

Many large commodity traders have in recent years been the subject of regulatory and law enforcement interest and we recommend that all commodity traders ensure that their compliance programs are in good shape and in particular are updated to reflect current law and practice including the recent and prospective changes under the Economic Crime and Corporate Transparency Act referenced earlier.

Footnotes:

1. <https://globalinvestigationsreview.com/just-anti-corruption/article/ex-trafigura-trader-avoids-prison-time-lying-us-investigators>

SANCTIONS

In the UK, the Office of Financial Sanctions Implementation (OFSI) is responsible for financial sanctions-related breaches and the UK equivalent of the US's Office of Foreign Assets Control (OFAC), although arguably the latter has been much more active in enforcement than the former.

This may be the reason why in December it was announced that there would be the creation of the Office of Trade Sanctions Implementation (OTSI) slated to be launched early 2024. OTSI is billed to be responsible for the civil enforcement of trade sanctions and has the power to issue civil monetary penalties and refer matters to HMRC for criminal enforcement if necessary.¹

Also in December, OFSI amended the existing Russian sanctions regime², prohibiting UK banks from processing payments previously processed by designated banks or were intended for a designated bank. Effectively, the *'UK bank should not process the transaction even if the account holders sending or receiving the funds are not designated for the purpose of the asset freeze or otherwise sanctioned'*.³

Despite this, in February this year, the Financial Times reported that UK banks have been used by Iran to evade sanctions. A state-controlled sanctioned Iranian petrochemicals company that was sanctioned was able to open accounts with Lloyds Banking Group and Santander via the use of UK companies set up via 'trustee agreements and nominee directors'. At the time of writing, there has been no formal investigation to the UK banks' position in respect of sanctions evasion allegations.

In the US, the Price Cap Coalition released the 'Oil Price Cap Compliance and Enforcement Alert' which applies to the US, G7, EU and Australia and builds on previous price cap guidance. In January alone, OFSI has already sanctioned and fined a tanker operator for evading the oil price-cap.⁴

In a blow to the EU the European Court ruled recently that the case for sanctions against two well-known Russian Oligarchs was not made out and annulled the sanctions against them. This is a

significant victory and unsurprising given the basis underpinning many of those sanctioned was of a fairly generic nature.

In another case a premature challenge against sanctions designation was thrown out by the High Court in London.

Also, in February OFSI updated its guidance for businesses in the maritime sector, including shipping companies, port operators, insurers, and financial institutions, and in its blog on 2 April⁵ emphasised the importance of ensuring businesses in the sector have the right controls in place.

Tip

As the sanctions regulatory landscape keeps evolving, we would encourage industry stakeholders to consult the latest guidance issued by OFAC and OFSI for possible evasion methods that may be used and red flags to look out for to ensure that one wouldn't be inadvertently at risk of breaching sanctions. Notably OFSI have been expanding their sanctions designation to incorporate some involved in the shipping sector.

Commodity traders and shipping companies should take extra care to ensure demonstrable compliance with Russian sanctions.

If subject to a sanctions designation, there is a clear and established process which must be followed and depending on circumstances there may be a good chance for challenge especially in the wake of the recent EU ruling. Short cuts may look attractive, but they are likely to fail.

Footnotes:

- <https://www.gov.uk/government/news/new-unit-to-crack-down-on-firms-dodging-russian-sanctions>
- Regulation 17A of the Russia (Sanctions) (EU Exit) (Regulations 2019) was amended with effect from 15 December 2023
- <https://ofsi.blog.gov.uk/2023/12/21/updates-to-correspondent-banking-restrictions/>
- https://www.tradewindsnews.com/tankers/us-aims-for-scalps-and-fines-as-it-steps-up-price-cap-probes/2-1-1588937?zephrosso_ott=07150r
- <https://ofsi.blog.gov.uk/2024/04/02/staying-compliant-with-financial-sanctions-in-the-maritime-sector/>

HONG KONG REGULATORY UPDATE

Late February was the ushering in of the Year of the Dragon. It remains to be seen whether the various Hong Kong regulators in the white-collar crime and investigations space will bring the fire. We can certainly expect to see some activity across the agencies, as briefly outlined below.

The SFC in transition

The Hong Kong Securities and Futures Commission ("SFC") is an agency in transition. In 2023, it appointed Julia Leung as its CEO. This has brought about a focus on reform, with for example a public consultation on proposals to amend the Securities and Futures Ordinance to facilitate more effective enforcement action. In its conclusions published August 2023, the SFC stated that it will proceed with expanding the territorial scope of insider dealing provisions, with further reform in other areas to follow.

The rise of crypto-regulation

One of the SFC's key focuses for 2024 will be on virtual asset providers ("VASPs"), as the cryptocurrency markets in Hong Kong continue to gain popularity. Hong Kong's awareness of the need for robust investor protection has highlighted the need for a robust licensing regime for VASPs. In June 2023, the SFC implemented a licensing regime for VASPs following the publication of its conclusions following a consultation. In short, anyone carrying on a VASP business is required to obtain a licence under the regime, which criminalises a broad range of crypto-related misconduct. It will be interesting to see how this market and the SFC's monitoring of it develops during 2024 (for example, by September 2023 the SFC had already reported an unregulated virtual asset trading platform to the Hong Kong Police Force for investigation following breach of the VASP regime, resulting in over 60 arrests).

Cross-agency cooperation

We can expect to see greater cooperation between agencies. For example, in August 2023 the SFC and the Independent Commission Against Corruption ("ICAC") conducted a joint operation

against two listed companies on suspicion of market manipulation. In October 2023, the ICAC, SFC and Accounting and Financial Reporting Council jointly investigation two listed companies on suspicion of falsification of corporate transactions, resulting in three arrests.

The importance of self-reporting

The Hong Kong Competition Commission ("HKCC") recently took enforcement action against a cartel in the real estate agency sector. One of the defendant's competitors applied under the leniency regime and provided substantial assistance to the HKCC in its investigation resulting in a leniency agreement, under which the HKCC agreed not to take any action against the competitor, its officers or employees. The HKCC is likely to be particularly active in markets involving consumers during 2024 and market participants should strongly consider self-reporting in order to take advantage of the leniency regime.

We may also finally see self-reporting becoming more important in the context of data privacy (it is currently only voluntary). The Office of the Privacy Commissioner for Personal Data ("PCPD") has proposed a mandatory data breach notification mechanism and administrative fines for breach of the privacy legislation as long-awaited proposed amendments to the legislation currently in force.

The ICAC at 50

2024 marks 50 years of the ICAC and we can expect to see the ICAC increasing visibility during the year in the run up to its 8th Annual Symposium in May 2024. In addition, the ICAC will set up the Hong Kong International Academy Against Corruption, which will be inaugurated in February 2024. The role of the academy will be to provide systematic and sustainable anti-corruption training courses and to promote academic research and exchange with overseas agencies.

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CLOSING THOUGHTS

2024 promises big change, as the US presidential election is scheduled for 5 November, and the UK's general election to also take place this year (at the time of writing, the date is undecided). With potential governmental upheaval on both sides of the Atlantic, legislative changes will likely follow the political changes.

We hope that you have found the April edition of our Bulletin helpful. We welcome all feedback and if there is something you would like to see us include in the next update, please let us know. If you would like to discuss any of the matters raised in this update, please contact a member of our team.

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