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McKenzie.**

# **Annual Corporate Compliance Conference 2020**

7 September - 9 October 2020



# Anti-Bribery and Corruption

7 - 11 September 2020



# Agenda

Tuesday 8 September  
2.00 - 3.00 pm BST

## **Latest Anti-Bribery and Corruption Developments in the UK and US**

Chair: Tristan Grimmer, Partner, London | Tom Firestone, Partner, Washington D.C.  
Aleesha Fowler, Associate, New York | Gavin Hayes, Associate, London

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Wednesday 9 September  
2.00 - 3.00 pm BST

## **Key Risks and Emerging Enforcement Trends in Higher-Risk Markets**

Chair: Sunny Mann, Partner, London | Borys Dackiw, Partner, Abu Dhabi  
Yindi Gesinde, Partner, London | Paul Melling, Partner, Moscow | Mini vandePol, Partner, Hong Kong

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Thursday 10 September  
2.00 - 3.00 pm BST

## **Need for Speed: Identifying and Cleansing Compliance Risks in M&A**

Chair: Tristan Grimmer, Partner, London | Jannan Crozier, Partner, London  
Pete Tomzcak, Partner, Chicago | Julian Godfray, Associate, London

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Thursday 10 September  
3.45 - 4.45 pm BST

## **The Impact of the COVID Pandemic on Compliance Risks and Mitigation Tools**

Chair: Ben Smith, Partner, London | Patrick Rowe, Chief Compliance Officer at Accenture | Philip Annett, Partner, London | Mini vandePol, Partner, Hong Kong  
Julia Wilson, Partner, London

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# Latest Anti-Bribery and Corruption Developments in the UK and US

Tuesday 8 September, 2.00 - 3.00 pm BST





# Speakers



**Tristan Grimmer**  
Partner (Chair), London



**Tom Firestone**  
Partner, Washington D.C.



**Aleesha Fowler**  
Associate, New York



**Gavin Hayes**  
Associate, London

# UK Developments



# Airbus DPA - January 2020

## Key Facts

- ▶ Landmark case with significant penalties: EUR 991m in the UK, which formed part of a total global settlement of EUR 3.6bn with agencies in the UK, US and France.
- ▶ UK DPA included five counts of failure to prevent bribery by Airbus employees and other associated persons contrary to Section 7 UKBA between 2011 and 2015 across five jurisdictions – Sri Lanka, Malaysia, Indonesia, Taiwan and Ghana.
  - Conduct focused on appointment as intermediaries of, and payments to, family members and other persons with close links to key decision-makers.
- ▶ Significant amount of the misconduct stemmed from inadequate oversight over third parties and the absence of an effective independent committee to review third party relationships.

# Airbus DPA - January 2020

## Key Takeaways

### International collaboration

- Successful coordination of investigation and resolution with French and US authorities over a number of years.
- Formation of a Joint Investigation Team between the SFO and French PNF, who worked together on global investigation strategy, evidence collection, and information sharing.

### The need for a "self-report"?

- Airbus engaged the SFO after UK Export Finance informed Airbus of its obligation to report suspicions of corruption to the SFO.
- Judge considered that Airbus' subsequent high-quality engagement and cooperation was a "significant factor" in favour of the DPA (notwithstanding UKEF being the "true catalyst" for the matter coming to the SFO's attention).

### "Exemplary" cooperation

- Judge pointed to Airbus' cooperation in determining that the DPA was in the interests of justice despite the nature of the 'self-report' and the serious nature of the conduct in terms of duration, global reach, seniority of relevant employees and involvement of public officials.
- Cooperation included acceptance of expansive interpretation of jurisdiction, providing information that would not otherwise have been known to the SFO, provision of material under a limited waiver of privilege and taking steps to expedite progress of the investigation.



# Airbus DPA - January 2020

## Key Takeaways

### Expansive interpretation of Section 7 UKBA

- Judge held that Airbus was within scope of UKBA even though (i) it is a French / Dutch domiciled company and (ii) the conduct incurred overseas.
- SFO's position was that UK jurisdiction was established by virtue of Airbus' strategic direction of UK business.
- Airbus did not challenge this expansive view of jurisdiction; this was seen as a key factor of the company's cooperation.

### Remedial measures and cultural change


- Judge outlined measures which, in its eyes, remediated Airbus' compliance programme and transformed Airbus into a different company from the one it was during the time of the conduct.
- In light of these changes, and the continuing monitorship by the French anti-corruption agency, the SFO did not recommend the appointment of an external monitor as part of its DPA.

### Public procurement considerations


- In assessing whether a DPA was in the interests of justice, the judge considered the “collateral effects” of prosecuting Airbus, including in respect of debarment from public sector contracts and the impact of this on Airbus' financial position and its employees (see *Serco* by way of contrast).

# G4S C&J DPA - July 2020

## Key Facts

 DPA imposed a financial penalty of GBP 38.5m, with a 300% uplift for 'Category A' harm and a **40% discount** to reflect cooperation as well as ordering:

- Disgorgement of profits: GBP 43.5m
- Payment of SFO's costs: GBP 5.9m

 The case related to fraudulent activity and failure to provide accurate financial reports to the Ministry of Justice in respect of electronic monitoring services.

# G4S C&J DPA - July 2020

## Key Takeaways

### "Less than full..." cooperation

- G4S C&J only received a 40% discount to the financial penalty, reflecting the "less than full cooperation" provided during the majority of the investigation.
- Judge stated that G4S C&J's "initial reluctance" to cooperate fully could be dealt with when considering the financial penalty rather than by rendering a DPA unobtainable.

### Remediation and oversight

- G4S (parent company) provided an undertaking to maintain controls, policies and procedures to effectively prevent and detect fraud and bribery throughout its entire operations.
- Both G4S and G4S C&J committed to work with an appointed external reviewer in relation to ongoing programme of corporate renewal. SFO stated that this external scrutiny was greater than in any previous DPA and was necessary given exposure to government contracts.

# Guralp Systems DPA – December 2019

➔ DPA related to improper conduct in respect of the engagement of a public official as a third party intermediary in Korea, including numerous improper payments as well as attempts to obfuscate these payments and the nature of the parties' relationship.

➔ No financial penalty or provision as to costs: the DPA only imposed a requirement for Guralp to disgorge profits (GBP 2.1m) over an extended repayment period, with the SFO noting that Guralp is a small company with limited financial resources and which supplies products that provide important public services.

## Flexibility of DPA regime

- Case demonstrates that SFO will not avoid pursuing "smaller" cases.
- Emphasises the ability of the SFO to use DPAs flexibly depending on the context, such as requiring Guralp to disgorge profits of GBP 2.1m to be paid across five years compared to the SFO requiring payment of almost GBP 1bn from Airbus within thirty days.

## Third party risk

- Case demonstrates that third parties remain a key risk area for corporates, and that the diligence, management and oversight of third parties is crucial.
- Under the terms of the DPA, Guralp is required to report to the SFO on an annual basis on the company's progress in implementing ABC policies and procedures, as well as on the extent and results of any due diligence performed on third party intermediaries.



# UK | Key Developments

## Continued rationalisation of SFO case pipeline

- SFO continuing to work through the backlog of cases inherited by Lisa Osofsky in 2018, including closure and transfer of investigations (De La Rue, ABB Ltd, Euribor and Wood Group).

## Successes and challenges in the prosecution of individuals

- SFO secured convictions against two individuals in Unaoil probe, though success was tempered by the announcement of an independent review into Osofsky's conduct.
- Continued challenges in securing convictions, with acquittals in Barclays and Guralp causing some to question the incentive for corporates to self-report conduct to the SFO.
- SFO nonetheless continuing to pursue prosecution of individuals (e.g. Aximon Legal Financing, GPT and Serco).

# UK | Key Developments

## Heightened scrutiny of auditors

- Increased penalties imposed by FRC against major audit firms.
- FRC further found that a third of audits by the UK's main accounting firms required improvement.
- Implications of enhanced scrutiny being seen in approach of auditors, including around bribery and fraud risks.

## Emerging Corporate Criminal Offence enforcement

- February 2020, HMRC announced nine live investigations under the corporate criminal offence of failing to prevent tax evasion, with a further 21 opportunities 'under review' across a range of business sectors including financial services, oil, construction, labour provision and software development.

# US Developments



# Major FCPA Settlements in 2019-2020

## Ericsson (December 2019)

- Swedish telecom company Ericsson agreed to pay **\$1 billion** in penalties to resolve allegations of FCPA violations committed over a period of 16 years and in 5 countries (Djibouti, China, Vietnam, Indonesia and Kuwait)
- According to the settlement documents, the company used third party agents, paid through false invoices, to bribe high-ranking government officials and also made false accounting entries and failed to implement adequate internal accounting controls
- DOJ took the position that the company should not get full cooperation credit in part because it was slow in producing materials and did not adequately discipline employees responsible for the wrongdoing



# Major FCPA Settlements in 2019-2020

## MTS (March 2019)

- Russian telecom company MTS settled with the SEC and DOJ for **\$850 million** to resolve allegations of having paid bribes to the daughter of the President of Uzbekistan in order to gain market access
- MTS entered into a DPA with a three year monitorship
- This is the third and final Uzbekistan telecom case

# Other DOJ Developments

## Updated Guidance for Corporate Compliance Programs



01 Focus on data preservation and foreign law issues

02 Compliance program may be influenced by applicable foreign laws, but must still meet DOJ expectations

03 Compliance programs need to be suitably resourced to be effective

04 Companies must learn from their and others' mistakes

05 Compliance program monitoring must be continuous and data-driven

# Other DOJ Developments

## Data Preservation and Ephemeral Messaging

▶ DOJ has shifted its focus on ephemeral messaging:

December 2017

DOJ stated in its FCPA Corporate Enforcement Policy that companies should **prohibit** employees from "using software that generates but does not appropriately retain business records or communications."

March 2019

DOJ clarified that it does not expect companies to prohibit employees from using ephemeral messaging apps but instead requires them to implement "**appropriate guidance and controls** on the use of personal communications and ephemeral messaging platforms that undermine the company's ability to appropriately retain business records or communications or otherwise comply with the company's document retention policies or obligations."

▶ But by permitting employees to use ephemeral messaging apps, companies may lose control over or access to company data

▶ Per DOJ Guidance, prosecutors evaluating a company's compliance program are encouraged to ask if there are any impediments that limit access to relevant sources of data

# Allegations of DOJ Politicization and DOJ Responses

## ➤ House Judiciary Committee Hearing June 24:

- Allegations about AG Barr
- Allegations about Stone case
- Allegations about abuse of antitrust review
- DOJ responses

## ➤ Litigation over motion to dismiss Flynn indictment and judicial review of pleas

## ➤ Implications for negotiations with DOJ?



# Recent Legislative Initiatives

## Foreign Extortion Prevention Act

- Criminalization of foreign passive bribery

## Corporate Transparency Act

- Require identification of UBO upon corporate registration

## CROOK Act

- "Anti-Corruption Action Fund" to aid foreign governments to fight corruption, funded by 5% of each fine or penalty imposed under the FCPA

## Kleptocrat Exposure Act

- Public identification of those denied visas because of corruption allegations

## TRAP Act

- Design to curb Interpol abuse by authoritarian regimes

# Impact of COVID-19



# COVID-19 Fraud

## Combating Fraud in Disaster Loan Programs a Top Priority

➤ Authorities ramp up enforcement activity during and after national crises that involve the distribution of large government funds (e.g., Hurricane Katrina, 2008 Financial Crisis). The COVID-19 pandemic is no exception.

➤ DOJ has made clear its intention to use the many tools in its arsenal to combat fraud in the government loans programs created on the heels of COVID-19, including:

- False Claims Act (31 U.S.C. §§ 3729-3733)
- Bank Fraud (18 U.S.C. § 1344)
- Mail Fraud (18 U.S.C. § 1341)
- Wire Fraud (18 U.S.C. § 1343)
- Money Laundering (18 U.S.C. § 1956)

➤ Recent settlements include:

- July 23, 2020 - A Washington tech executive was taken into custody and charged with fraudulently seeking over \$5.5 million in Paycheck Protection Program (PPP) loans and laundering the proceeds
- May 22, 2020 - A Hollywood film producer was charged with allegedly filing bank loan applications fraudulently seeking more than \$1.7 million dollars in forgivable PPP loans

# COVID-19 Fraud

## Combatting Fraud in Disaster Loan Programs a Top Priority



Findings from a recent report released by the Office of the Inspector General (OIG) of the U.S. Small Business Administration indicate that fraud in these loan programs is **serious, widespread, and in need of immediate action and attention**:

- As of June 19, 2020, more than \$250 million in COVID-19 loans and grants for small businesses were made to ineligible companies
- Approximately \$45.6 million in potential duplicate loans have been made to businesses



Financial institutions have submitted thousands of complaints to the OIG alleging fraud. According to the OIG report, 9 financial institutions reported a combined **\$187.3 million** in suspected fraudulent transactions

- Loans and grants being deposited into personal accounts
- Account holders falsely claiming to use funds to open a new business
- Account holders transferring funds to foreign accounts
- Account holders unable to explain origin of deposits



# Effect on Court Proceedings and Enforcement

## Disruptions in the Legal System, Shifts in Priorities

### Special arrangements for grand juries, trials and court proceedings

- Adjournments
- Remote proceedings
- Glass dividers
- Larger courtrooms

### Impact on rights of criminal defendants?

- Right to speedy trial
- Trial by jury
- Cross-examination

# Effect on Court Proceedings and Enforcement

## Disruptions in the Legal System, Shifts in Priorities

### DOJ (Dan Kahn) Statements on Effects of COVID-19 on Enforcement:

- "We are certainly still pressing ahead on all our FCPA investigations and related investigations as well."
- "Do what you would normally do, and what you can't do because of the situation – explain that to us....We will want to understand why...is it a financial reason, is it a safety issue...[We are] "not looking to be unreasonable in this time" and are "not going to place undue burdens on an already burdened society."
- "One of the considerations that will probably become much more prevalent in this crisis is not so much...a financial inability to pay, but rather a temporary inability to pay. That is a conversation we can also have with companies if they have a sort of short term or temporary financial issue that they expect to deal with over the next 6-12 months"

### SFO Business Plan (May 2020):

- "We have adjusted our ways of working in response to the current Covid-19 crisis but we remain operational and committed to delivering our mission."

The image features a white speech bubble on the left side, containing the word "Questions" in a bold, dark blue font. The background is a dark blue gradient with a glowing teal particle stream or nebula-like structure on the right side, composed of many small, bright teal dots and lines. The overall aesthetic is modern and scientific.

**Questions**

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