

Q1 2024

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Fieldfisher's Commercial Crime Round-Up

Q1 2024: The last three months have proven to be busy in the world of corporate enforcement, providing plenty of food for thought.

Our Q1 update considers the key developments at the SFO – of which there are many – spanning further dawn raids, new pre-investigation powers and their plans to address shortcomings (perceived and existing) regarding disclosure and whistleblowing. We then consider developments around ESG-related corporate crime, including the use of money laundering legislation to correct corporate behaviours around funding illegal activities. In policy updates, we highlight the FCA's (unpopular) announcement regarding the naming and shaming of those under investigation.

The Serious Fraud Office (the "SFO")

As discussed in our [2023 Commercial Crime Round-Up](#), Nick Ephgrave, the Director of the SFO, wasted no time following his appointment in September 2023 in asserting his presence. We are, of course, referring to the return to fashion for dawn raids at the SFO. Deploying his favoured investigation tool four times to date, in Ephgrave's own words, the SFO has 'already gone through more front doors in the last three months than in the last three years.'¹

With more unannounced investigations promised, businesses should prioritise training on what to do in the event they are subject to one. Fieldfisher's recent guidance on dawn raids can be accessed [here](#).

Ephgrave's aspirations do not stop at the reintroduction of dawn raids, however. He gave his inaugural address to an audience at the Royal United Services Institute in London in February of this year. In it, he signposted what his main priorities are for his tenure at the SFO.

Dawn raids naturally featured, as did his desire to increase collaboration with other enforcement agencies both domestically and internationally. Perhaps two easy wins, given dawn raids are already a part of his established modus operandi and they have, at various points, involved the Metropolitan Police and the National Crime Agency, showing domestic cooperation and collaboration is alive and well. When he gave his speech, he had also booked

his tickets to visit various US enforcement bodies - a reminder that cross-border investigations are going nowhere.

Ephgrave's speech acknowledged the deficiencies with the current approach to disclosure. As predicted in our 2023 Round-Up, the SFO is piloting technology assisted review using AI – a much needed step into the 21st century. Beyond that, we await the outcome of the government ordered independent review considering reforms of disclosure rules and fraud laws led by Jonathan Fisher KC. His recommendations are expected to be made to the government in September 2024.

¹ Director Ephgrave's speech at RUSI 13 February 2024 - Serious Fraud Office (sfo.gov.uk)

Ephgrave's Wish List

Provocatively, Ephgrave also alerted us to items on his wish list, including the ability to offer sentence reductions or immunity to offenders that assist in SFO investigations and paying whistleblowers for information.² Both are traditionally viewed with suspicion in the UK as increasing the potential for a miscarriage of justice by financially motivated individuals or as unfairly rewarding wrongdoers.

While a new Whistleblowing Bill is currently before UK parliament, it does not include provision for financial incentives for whistleblowers. Starting the conversation is the first step towards change though, and Ephgrave has tabled it with the other UK enforcement agencies so time will tell if these come to pass during Ephgrave's tenure.

The Economic Crime and Corporate Transparency Act 2023 ("ECCTA")

Something he is more likely to see is another item on his wish list – being the first person to prosecute a company for a failure to prevent fraud under ECCTA. Although not in effect yet, the publication of the guidance on what constitutes a defence, being 'reasonable prevention procedures', is imminent.

Large companies to which it applies have 6 months to implement those procedures before the offence goes live. It will be a race against the clock for corporates to ensure compliance versus a motivated and ambitious Ephgrave in search of his first scalp.

A further development introduced by ECCTA and which went live in Q1 is the introduction of revised pre-investigation powers for the SFO. Under section 2A of the Criminal Justice Act 1987, the SFO can issue a 'section 2 notice' which enables the SFO to require an individual or corporation to provide documents or information, prior to the formal opening of an investigation. Previously limited to suspected international bribery and corruption, the expanded powers of a 'section 2 notice' now apply to all SFO cases.

This is a significant development and radically increases the ambit of those who will be called on to cooperate in criminal investigations. From financial institutions through to companies with connections to those suspected of wrongdoing, many more people will be faced with responding to a section 2 notice which can be mired in complications.

For third parties in receipt of such notices, there will be an increased compliance burden in reviewing and responding to them, as well as a corresponding increased burden of refreshing risk analysis across the client relationship or updated due diligence. In addition, failing to respond or providing false or misleading information are both criminal offences which means all section 2 notices require careful attention.

Importantly, the risk extends beyond the SFO's powers in a number of respects:

- The SFO can share information it obtains using its compulsory powers with other agencies (including overseas) via one of the information sharing gateways in s3(5) Criminal Justice Act 1987, even if those agencies do not have equivalent pre-investigation compulsory powers;
- The SFO may also be obliged to disclose the information to a third party that the SFO is investigating for an offence, as part of its prosecutor's duty of disclosure or as part of negotiations for a Deferred Prosecution Agreement; and
- Follow-on litigation and disclosure as part of related proceedings is also heightened due to the SFO's new powers.

² Serious Organised Crime and Police Act 2005

Money Laundering from Environmental Crime

In February 2024, two non-governmental organisations ("NGOs") commenced proceedings to judicially review a decision by the London Metal Exchange regarding what metal it is allowed to trade on its exchange. The NGOs allege that the LME is breaching the Proceeds of Crime Act 2002 by providing a platform for trading metals that have been produced in breach of environmental criminal law.

The link between money laundering ("ML") and environmental crime is long established with the Financial Action Task Force ("FATF") estimating that environmental crime alone generates as much as \$281 billion in criminal gains annually.³ However, despite the eye watering figures in question, there has been little by way of enforcement action investigating this.

The LME proceedings follow a year on from similar action taken in France against BNP Paribas for providing financial services to companies they allege contribute to deforestation in the Amazon. With NGOs now seeking to step into the breach and hold corporates responsible, this signifies a new

challenge for companies when assessing and addressing environment, sustainability and governance ("ESG") risks.

We expect this risk will be compounded with the introduction of [the amended Identification Doctrine under ECCTA](#) which introduced new laws on corporate criminal liability for economic crime offences, including money laundering, with the result that corporates can be held liable for the actions of their senior managers.

Financial Conduct Authority (the "FCA") to publish names under investigation

The FCA announced in its [Consultation Paper CP24/2](#) that it is proposing to name firms under investigation purportedly in a bid to deter wrongdoing and increase transparency around its enforcement work.

However, the move has received significant pushback from regulated firms and the wider legal community due to concerns around reputational damage that naturally follows such events. There is also a further risk of perceived unfairness as a decision to announce

who the FCA is investigating will be taken on a case-by-case basis.

The consultation will remain open until April. It remains to be seen whether the proposal is maintained or whether it will be amended to strike a balance with the FCA's existing powers of deterrence.

The contents of this update are for information purposes only and do not constitute legal advice. If you have any questions regarding the topics discussed in this update, please contact the authors and [Fieldfisher's Commercial Crime Team](#) to discuss further.

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With thanks to Trainee, Jessica Solsberg, co-author of this article.

³ [Money-Laundering-from-Environmental-Crime.pdf.coredownload.pdf \(fatf-gafi.org\)](#)