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King & Spalding's Special Matters and Government Investigations team shares its views on developments in transatlantic business crime and investigations.

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THE MESSAGE COMING FROM THE SERIOUS FRAUD OFFICE: A TRANSATLANTIC APPROACH?

Since Lisa Osofsky took over as Director of the Serious Fraud Office (SFO), there has been a flurry of speeches and public comments from the SFO. We assess the direction of travel in three key areas:

International co-operation

"[W]e in law enforcement all around the world need to work more closely with each other." These were Lisa Osofsky's words at the New York University School of Law (see *Director of the Serious Fraud Office Lisa Osofsky Keynote on Future SFO Enforcement, Program on Corporate Compliance and Enforcement at New York University School of Law, 16 October 2018*). The need for international co-operation and collaboration is not a new message from the top of the SFO. However, given Lisa Osofsky's background in US law enforcement, in our opinion, it seems likely that she is better placed to make it happen. In the same speech, she went on to say that one of her first priorities as Director had been to reach out to the US Department of Justice (DOJ) to discuss how they can work better together. Those under investigation will watch developments with cautious optimism.

Compliance programmes and remediation

The SFO is going to take "an increasing interest in the detail of your compliance programmes" (see *Legal update, SFO's joint head of fraud speech to business crime and compliance conference in London*). This was the clear message delivered recently by Hannah von Dadelszen, joint head of fraud at the SFO. It echoed Lisa Osofsky's keynote speech at the Trace European Forum where she is reported to have said that SFO prosecutors need to understand compliance, both to assess whether companies have adequate procedures and whether they have remediated.

It has long been perceived that the DOJ is more focused on this area than the SFO; for example, it previously had an internal compliance counsel and regularly requires the appointment of corporate monitors. This is not surprising given that assessing whether a company has reformed and remediated is central to the decision not to prosecute, and the US has a much longer history of granting Deferred Prosecution Agreements (DPAs) than the

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UK. More recently, the revised Foreign Corrupt Practices Act 1977 (FCPA) Corporate Enforcement Policy (Revised FCPA Policy) has even offered the presumption of a declination if a company self-reports, fully co-operates and has timely and appropriately remediated. Although there is no suggestion that declinations will be offered as a matter of policy in the UK, it appears that with four DPAs under its belt the SFO may be taking a leaf out of the DOJ's book.

Co-operation

According to reports, and a speech by the Joint Head of Corruption, Matthew Wagstaff (see *Legal update, Speech from joint head of bribery and corruption at SFO*), Lisa Osofsky has also indicated that the SFO is considering giving further guidance on what constitutes "co-operation" for the purposes of obtaining a DPA. Corporates in the UK can refer to the DPA Code of Practice and Sir Brian Leveson's judgments to understand what might be expected of them, but they do not contain guidance per se. The Revised FCPA Policy on the other hand is more prescriptive, setting out in detail what "full co-operation" means for the purposes of obtaining a declination. Recent comments from Hannah von Dadelszen perhaps shed light on why the SFO would wish to introduce guidance. She spoke of corporates playing "a game of smoke and mirrors" rather than offering "genuine co-operation". She also underlined that the SFO would "ask a lot" of those that self-report and warned against expecting "a civil negotiation about what a corporate can and cannot produce." The message seems to be that co-operation is likely to be uncomfortable and demanding, and that the SFO wants corporates to grasp that. Providing guidance may be way of shortcutting any further arguments about it.

CROSS-BORDER PROSECUTIONS INVOLVING THE UK AND US AUTHORITIES: LOCATION IS KEY IN THE LIGHT OF THE DECISION IN STUART SCOTT V GOVERNMENT OF THE USA

In October 2018, the UK Supreme Court refused to take up an appeal of an earlier High Court decision barring the extradition of Stuart Scott to the US. For more information, see *Legal update, Forum bar applies where conduct is UK based and requested person has no connection to requesting state (High Court)*.

The US authorities had sought Scott's extradition in January 2017 in connection with alleged fraudulent foreign exchange trading when his employer, HSBC, acted for Scottish oil and gas exploration company, Cairn Energy plc, back in 2011.

Scott and his co-defendant (Mark Johnson) faced trial in the US on charges of conspiracy to commit wire fraud and wire fraud. Johnson (a UK national) was arrested in New York and prosecuted there. He was subsequently convicted and sentenced to two years' imprisonment in the US for his role in the scheme.

Scott, on the other hand, remained in the UK. This led the US authorities to seek his extradition to stand trial. The US authorities were successful at first instance, with the UK district judge rejecting Scott's arguments against extradition based on arguments pertaining to abuse of process, lack of dual criminality, appropriate forum and human rights violations. The Secretary of State subsequently ordered Scott's extradition on 6 December 2017.

Fortunately for Scott, however, he was granted leave to appeal (albeit solely on the issue of forum). Under UK law, the issue of forum comes into play when more than one country has jurisdiction over a requested person. If a substantial measure of the requested person's conduct is performed in the UK, and it is not in the interests of justice for extradition to take place, then extradition may be barred.

In Scott's case, the High Court accepted that a substantial measure of his activity was performed in the UK, given he was employed in London. The court went on to assess whether it would be in the interests of justice for Scott to be extradited to the US: the court concluded that it would **not be**.

Against this backdrop, the court rejected the US request for Scott's extradition. In doing so, the court highlighted two key factors:

- Scott's strong connection to the UK: the court pointed out that Scott is a British citizen domiciled in the UK. He was the sole carer for his children (who are also British citizens) until he met his current wife. The court concluded that Scott's entire life is, and has been, in the UK and that he has no links to the US; save for having worked for a bank conducting business internationally.
- The majority of harm alleged by the US authorities was suffered in the UK, given the only quantified harm identified in the extradition request was to Cairn Energy plc (a British company).

The UK Crown Prosecution Service, which acts on behalf of requesting states in extradition proceedings, appealed the High Court's decision. However, the Supreme Court refused to hear the appeal, meaning that the US authorities have now exhausted all avenues for seeking Scott's extradition from the UK.

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It is worth noting that Scott does not face criminal charges in the UK, given the SFO ceased their investigation into fraudulent conduct in the foreign exchange market back in 2016 due to "insufficient evidence for a realistic prospect of conviction" and there has been no recent indication that their investigation will be reopened.

Clearly the Scott decision is good news for lawyers representing British defendants in US criminal proceedings, to the extent those individuals remain in the UK and the harm alleged is UK-centric. However, the decision also presents a stark warning to British nationals facing criminal prosecution who are either based in the US or are considering travelling there; say for the purposes of co-operating with the US authorities or for business.

The imprisonment of Scott's co-defendant Mark Johnson, and the recent conviction of Gavin Campbell Black in New York for LIBOR manipulation, are clear illustrations of the risks posed to UK nationals in cross-border investigations involving the US. It would be prudent for lawyers representing clients in similar or related investigations to carefully consider the implications of these decisions and bear them in mind when advising clients about possible travel plans.

The very recent acquittals of London-based foreign exchange traders Richard Usher, Rohan Ramchandani and Christopher Ashton suggest there is some merit in fighting US criminal proceedings in person. That said, the big question remains: is the risk of travelling to the US worth it, given the outcome for Scott in the UK extradition courts versus Johnson in the US criminal courts?

THE "CORRUPTION NOTEBOOKS" SCANDAL IN ARGENTINA GETS ATTENTION FROM US ENFORCEMENT AUTHORITIES

Argentina's corruption notebooks scandal is just as it sounds: a scandal initiated by eight notebooks documenting at least seven years of elaborate corruption schemes involving senior officials in Argentina's government. The notebooks were kept by the driver for a close adviser to Julio de Vido, who served as Minister of Federal Planning during the presidencies of Nestor Kirchner (2003-2007) and Cristina Fernandez de Kirchner (2007-2015). The notebooks (allegedly) contain meticulous records of money transported between construction companies, the presidential residence, the planning ministry, a series of safe houses, and the Kirchners' private home and document at least US$35.6 million transported over the course of seven years. Federal Argentinian prosecutors estimate that closer to US$200 million may have been transported to secure energy-related projects in Argentina.

The media in Argentina is now reporting that lawyers with the DOJ and the Securities and Exchange Commission (SEC) recently visited Argentina to meet with prosecutors tasked with investigating the scandal to determine if there are any potential FCPA violations. The primary targets of the DOJ and SEC inquiry appear to be companies in Argentina that trade American Depository Receipts (ADRs) on American exchanges. While there are no reports of UK inquiries yet, the UK Bribery Act 2010 has significant extra-territorial effect and the SFO is becoming increasingly aggressive and effective in its pursuit of corruption and money laundering cases that involve companies with connections to the UK and/or its financial sector.

Many modern corruption schemes involve the use of intermediaries and the transfer of things of value less obvious than cash, but the notebooks scandal is evidence that cash schemes still exist. Schemes involving cash payments can leave a greater impression of impropriety because the participants appear to be operating with impunity and making little attempt to cover their tracks. Moreover, anti-corruption investigations by US, UK and other authorities into these schemes typically expand to determine whether less obvious forms of improper payments were also being made to government officials.

While it remains to be seen how significant the notebook scandal will be, as the story progresses it would not be farfetched to expect enforcement authorities to investigate whether the notebooks in Argentina recording bags full of cash being transported to the Argentine president's home are just the tip of the iceberg.

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