

Slaughter and May podcast: 2021 Investigations and Enforcement Outlook: Corporate Crime

Delivered by David Green, Holly Ware, with Jonny Cotton

Jonny Cotton	Welcome to the third and final instalment in the Slaughter and May podcast series, where we're discussing the investigations and enforcement outlook for 2021. I'm Jonny Cotton, co-head of our Global Investigations group
David Green	I'm David Green, a consultant here at Slaughter and May and previously Director of the Serious Fraud Office
Holly Ware	I'm Holly Ware, a partner in the disputes and investigation group and part of my practice includes white collar defence work.
Jonny Cotton	Thank you both. Sir David, Holly, there's been quite a lot of speculation in the legal press regarding the Serious Fraud Office's activity, or lack thereof, and its impact on the UK corporate crime bar. Can you talk about your insights and what you think this means for corporates? From my perspective at least, last month the SFO announced the closure of a long running investigation where I'd been defending British American Tobacco, and I've noticed there haven't seemed to be at least many new cases announced. So maybe they are closing more investigations than they're opening. Holly, what do you think?
Holly Ware	Well we do know that their work is continuing. In 2020 there were three deferred prosecution agreements, including the Airbus one which is the SFO's biggest DPA yet. And at the moment, we're advising on four open investigations—two of which are quite long-running, another for a senior executive, and one for a corporate. So there's still work going on. But you're right, in 2020 the SFO closed three known investigations, into what is now Watchstone PLC, ABB Ltd, and De La Rue and it's only opened one in the last year that's been announced. Of course, there may well be investigations the SFO is undertaking which aren't publically announced.
David Green	I think we should bear in mind that there is no obligation on the SFO to keep the white collar sector fed and inevitably, not all investigations will result in charges or prosecutions, so the closing of several investigations does not in my view represent any kind of trend. On top of that, I think we have to bear in mind the problems that COVID has posed, particularly in relation to searches and interviews. The SFO website shows 42 open investigations. Now, of those 26 began before April 2018. Now, the number of announced investigations is not definitive. As Holly has said there will be projects under development in the Intelligence section, and also investigations which remain covert for the moment in accordance with the SFO's published policy in this area which can easily be seen on the website.
Holly Ware	So it sounds like we shouldn't be searching too hard to find any trends from these numbers or to draw conclusions from what is in the public domain. Lisa Osofsky did say when she took over in 2018 that she would be closely examining long-running cases at the SFO with a view to retaining those that proved viable, so it's hard to say quite what the purpose of the exercise at the moment is, whether they're clearing the decks for a new and different case load, or whether they're focusing resources.

David Green	I think it's probably more accurate to talk about priorities rather than trends in the SFO's workload. The current Director has begun, for instance, 2 investigations relating to large scale investment fraud both of which have multiple victims. There's the London Capital and Finance, started in March of 2019 and the Pinnacle, Angelgate, North Point and Chinatown investigation, started in January 2019. I think the real driver behind the opening of investigations is frankly events or "what turns up" for example, if you look back at Patisserie Holdings, begun in October 2018, and historically further back into Libor and Barclays.
Jonny Cotton	<p>So, I think what we can say, is that either there's no new activity happening or low levels of it but it's just not in the public domain, or it is happening and SFO isn't telling the world at large. Certainly I would be surprised if there were new but unannounced investigations of PLCs because of market announcement requirements and market announcement practice, meaning that the likelihood is that they would have been announced. I do also think that there's a real point in David's 'what turns up' analysis. The SFO is in control of its workload and can only take cases that come across its desk.</p> <p>So if we turn David and Holly to look at the corporate criminal liability regime more broadly, do you think there are going to be any changes in 2021?</p>
David Green	I think it's pretty much certain there'll be no change in the regime this year. Looking back, successive SFO Directors have been arguing the case for an expansion of the ambit of the offence in Section 7 of the Bribery Act and they've been doing that since before 2012. The current position is that there is support for such an amendment among really pockets of MPs of all the major parties. There's also said to be strong opposition from within the Treasury and BEIS. In the context of course of the post-COVID economic position, it is surely unlikely that many MPs would want to add to the burdens borne by recovering businesses. Recently the Financial Services Bill was debated in parliament on the 13th January and Dame Margaret Hodge, who is Chair of the influential All Party Parliamentary Group on Anti-Corruption and Responsible Tax, moved an amendment to create new offences. Those were to be of an FCA-regulated body failing to prevent Fraud, Tax Evasion and Proceeds of Crime offences. And another offence of a Financial Services Company failing to take all reasonable steps to prevent such offences. Interestingly John Glen, the Economic Secretary to the Treasury, replied on behalf of the government in that debate and he said that the results of the 2017 call for evidence had been inconclusive. I don't think everybody would recognise that description, but that's what he said, and that stronger evidence was needed on the issue before any change could be contemplated, and that therefore the proposed amendment would operate unfairly for small businesses. Also in that debate Sir Bob Neill, who's Chair of the Justice Committee, added that it would be wrong to pre-empt the recommendations of the Law Commission, due before the end of this year. So over all,

	it would seem the possibility of legal change appears to have lost priority and momentum in the current context.
Jonny Cotton	Holly, have you got any views on this?
Holly Ware	<p>There are a few other developments to note. Looking at the SFO's ability to investigate criminal activity, the Supreme Court earlier this month issued its decision in the KBR case concerning the ability of the SFO to issue notices under Section 2 to foreign companies, in that case KBR Inc, in respect of documents located abroad. And what the Supreme Court did was look at the language, the purpose and the history of the act, and as a result it held that the SFO's investigative powers under section 2 do not apply extraterritorially. The legal press has characterised this as a bit of a blow to the SFO although in practice I'm not sure it's going to have a significant impact on the day to day running of the SFO's investigations. The SFO can still obtain documents held by a UK company overseas and it still has tools to obtain documents internationally. For documents located in the US, the SFO has the Crime (Overseas Production Orders) Act and that should make it easier for it to obtain documents in relation to certain kinds of investigations going forward. The bigger blow for the SFO I think is in relation to documents located in Europe, where before Brexit the SFO would have been able to use EIOs but after Brexit is having to revert to the more cumbersome MLA methods.</p> <p>Other matters to keep a bit of an eye on this year will be the cases against the individuals involved in the Serco and G4S deferred prosecution agreements, and whether executives involved in the Airbus misconduct will be charged by the SFO. We haven't yet seen an instance where a company entered into a DPA and its executives are subsequently charged and convicted. For example the executives in Sarclad and Tesco were acquitted. How this areas develops may lend further weight to Osofsky's case for reform of the law, but as David says, that may not be enough to overcome the lack of political appetite at the moment.</p>
David Green	<p>I think the current Director seems to have developed a more flexible and pragmatic approach to DPAs. The G4S DPA is a good example that I would say lowered the bar, in that a DPA was sought for a company whose cooperation had been poor at first, but had improved later. Of course, before the current Director, the original line was that 'no co-operation, no DPA'. So for that reason I say the bar has been somewhat lowered. The more flexible approach adopted is seen as I think better for the taxpayer and it emphasises that DPAs hopefully lock in better corporate conduct in future. It will also be interesting to watch the SFO's prosecution in the GPT case. Now there it charged the company and three individuals with corruption offences under the old bribery laws, not the Bribery Act. They were charged last year after a sure-cross exercise across government, but we're not expecting to see a trial until next year at the earliest. The reason for interest in that case is that it's a long running investigation with considerable political context to it because it concerns military supply contracts with the Kingdom of Saudi Arabia.</p>

Jonny Cotton	<p>Thanks both. I think I might add as well that I think one thing that I've seen increasingly, which I think will carry on into 2021, is activity by the National Crime Agency, the NCA, impacting on corporates. We're coming across more frequently account freezing orders where we're being asked to advise companies on what they are and how to handle them and what the impact is on a business who finds itself caught up in a case where an account freezing order has been issued. There's also more activity around Unexplained Wealth Orders, which again sometimes touch on corporates. So I think there is increased likelihood as well that not only the SFO but the NCA will start to be seen by corporates.</p> <p>So to conclude the session, I wonder if both you might give a few thoughts on the impact of Brexit and other likely international developments this coming year?</p>
Holly Ware	<p>I touched on this earlier; but Brexit will have an impact on UK authorities' relationships with their counterparts in Europe, with European Investigation Orders no longer available to domestic law enforcement. I think using the older forms of document compulsion will likely have an impact on the speed of investigations which might prove frustrating. It will also be interesting to see how the SFO works with its European counterparts in the future. We've seen lots of sharing of investigations with the SFO and the US authorities. We've seen it with the French authorities in the Airbus case and the SFO has spoken about wanting to expand that kind of co-operation in the future. So, we'll see what happens on that front.</p>
David Green	<p>Yes, I think one could add to that, that just how quickly documentary evidence can be obtained from a foreign jurisdiction by the SFO can also depend on the closeness of the SFO's relationship with prosecuting investigative agencies in that particular jurisdiction and that to say the least can vary. Looking at the US, the election of a new president would normally bring speculation about whether there will be increased enforcement under the FCPA, and traditionally a democratic president is seen as favouring a more aggressive approach to enforcement. But looking back, enforcement under the Trump administration did not drop as much as had been anticipated. We've also seen the classic revolving door in operation with significant Biden appointments from the private sector to the DOJ.</p>
Jonny Cotton	<p>Thank you both for your insights and for those listening, if you've got any questions or want to chat through the issues we've discussed today, please do not hesitate to contact any of us. Many thanks for joining and if you haven't yet, do listen to the other podcasts in this series where we've looked at 2021's outlook for GDPR enforcement and data breach and also enforcement and investigation trends in the financial services sector. Thank you all.</p>