

Investigations: A UK Perspective



21 November 2024

GIBSON DUNN

MCLE CERTIFICATE INFORMATION

MCLE Certificate Information

- Approved for 1.0 hour General PP credit.
- CLE credit form must be submitted by **Thursday, November 28th**.
- Form Link: https://gibsondunn.qualtrics.com/jfe/form/SV_07XWHazUvT5G8Hc
 - Most participants should anticipate receiving their certificate of attendance in four to eight weeks following the webcast.
- **Please direct all questions regarding MCLE to CLE@gibsondunn.com.**

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TOPICS

01 Introduction: Key Issues and Context

02 Jurisdictional Nexus

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INTRODUCTION

1

KEY ISSUES

Jurisdictional
Nexus

Privilege

Individuals

Reporting
and
Cooperation

Outcomes

Looking
Ahead

CONTEXT

“I want to be the first to prosecute someone under the new provisions of the Economic Crime and Corporate Transparency Act. There are great new tools, let’s be bold about using those”

Nick Ephgrave, Director of the Serious Fraud Office
Serious Fraud Office, Royal United Services Institute
13 February 2024

“Fighting financial crime is a priority for the FCA and a key commitment in our 3-year strategy”

Sarah Pritchard, Executive Director, Markets and Executive Director, International
Financial Conduct Authority
5 September 2024

“I can grant immunity from prosecution’: UK’s chief fraudbuster on modernising the SFO”

Nick Ephgrave, Director of the Serious Fraud Office
The Guardian
22 October 2024

“Companies seeking to avoid potential liability under the new 'failure to prevent fraud' offence must act now, economic crime specialists have warned”

The Law Society Gazette
29 October 2024

“The publication of this guidance means that time is running short for corporations to get their house in order or face criminal investigation”

Nick Ephgrave, Director of the Serious Fraud Office
Home Office
06 November 2024

“Fraud is a pernicious crime, and we are determined to root it out wherever it takes place. This guidance marks the first steps towards a corporate culture shift around fraud prevention”

Lord David Hanson, Minister with Responsibility for Fraud
Home Office
6 November 2024

JURISDICTIONAL NEXUS

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JURISDICTIONAL NEXUS (1)

General principle

- The offence must have a "substantial connection" with the UK for courts in England and Wales to have jurisdiction

Bribery Act 2010 (UKBA): bribing, being bribed, bribery of foreign public official

- No part of the relevant conduct needs to take place in the UK
- A person's acts or omissions would form part of such an offence if they occurred in the UK
- Person has a "close connection" with the UK

UKBA: failure to prevent bribery

- Applies to corporate bodies or partnerships incorporated or formed in the UK or which carry on a business or part of a business in any part of the UK
- Predicate bribery offence can occur entirely outside the UK

JURISDICTIONAL NEXUS (2)

Criminal Finances Act 2017 (CFA): failure to prevent the facilitation of UK tax evasion

- Applies to any company or partnership regardless of where incorporated or formed

CFA: failure to prevent the facilitation of foreign tax evasion

- Applies to corporate bodies or partnerships incorporated or formed in the UK or which carry on a business or part of a business in any part of the UK, or
- Any conduct constituting the foreign tax evasion facilitation offence which takes place in the UK

Economic Crime and Corporate Transparency Act 2023 (ECCTA): failure to prevent fraud

- Large organisation can be incorporated or formed anywhere and can carry on business anywhere
- Predicate schedule 13 fraud offence must be subject to UK jurisdiction. For offences under the Fraud Act 2006 a “relevant event” in relation to the offence must occur in the UK

JURISDICTIONAL NEXUS (3)

Proceeds of Crime Act 2002 (POCA): principal money laundering offences

- *R v Rogers* [2014] EWCA Crim 1680: money laundering can take place outside the UK if predicate offence takes place in the UK:

“Money laundering is par excellence an offence that is no respecter of national boundaries. It would be surprising indeed if Parliament had not intended the Act to have extra-territorial effect (as we have found it did)”

- *World Uyghur Congress, R (on the application of) v National Crime Agency* [2024] EWCA Civ 715
- Limited overseas conduct defence

PRIVILEGE

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LEGAL TESTS (1)

Legal advice privilege

- Applies to **confidential communications** between lawyer and client, made for the purpose of **giving or obtaining legal advice**
- The identity of the “client” in an internal investigation must be carefully considered. To maintain confidentiality, the client group should be restricted to a sufficiently **narrow group of individuals** (*Three Rivers District Council and others v Bank of England* [2003] EWCA Civ 474)

Litigation privilege

- Applies to **confidential communications** between client and lawyer (or client or lawyer and a third party) created for the **dominant purpose of adversarial proceedings** that are pending, reasonably contemplated or existing at the time (*Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Ltd* [2018] EWCA Civ 2006)
- Dominant purpose requires **more than secondary or co-equal purpose** – if a document is produced for two purposes of equal weight, one of which is the litigation, privilege will not apply (*Waugh v British Railways Board* [1980] AC 521 (House of Lords))

LEGAL TESTS (2)

Common interest privilege

- Preserves **privilege** in a document which a person has shared with a third party. The third party must have a **common interest** in the subject matter of the privileged document, or the litigation in connection with which the document was created. The document remains privileged in the hands of the recipient
- Relationships where common interest privilege has been held to apply include:
 - **Co-defendants** (*Buttes Gas and Oil Co v Hammer* (No 3) [1981] QB 223)
 - **Insured and insurer** (*Guinness Peat Properties Ltd v Fitzroy Robinson Partnership* [1987] 1 WLR 1027)
 - Companies in the same group, including **parent companies and subsidiaries** (*USP Strategies plc v London General Holdings Ltd* [2004] EWHC 373 (Ch))
- There remains uncertainty as to whether common interest privilege will apply in any given situation, so **caution is advisable** when sharing documents with third parties

LEGAL TESTS

(3)

Waiver of privilege

- Privilege ceases to apply to a previously privileged document if the holder of the privilege has acted in a way that is **inconsistent with the communication remaining confidential**
- Privilege in a document may be waived if it **is referred to during the course of litigation**. In particular, this applies to documents referred to in statements of case, witness statements and expert reports

Limited waiver

- A limited waiver allows documents to be shared with a third party on the understanding that they will only be used for **certain limited purposes** (*Berezovsky v Hine and others* [2011] EWCA Civ 1089)
- It is advisable to ensure that there are **express terms** that ensure that the privilege in a document is only waived for specified purposes

INTERVIEWS & INTERNAL REPORTING

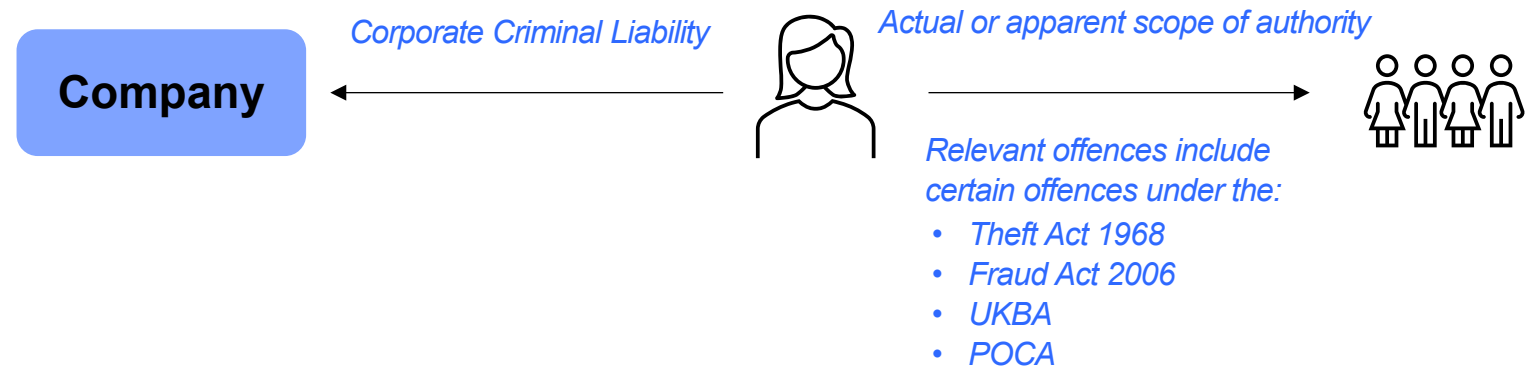
- Careful thought must be given to how [interviews](#) and [internal reporting](#) are conducted and recorded, bearing in mind that they may generate disclosable material
- Determine whether seeking to rely on [legal advice privilege](#) or [litigation privilege](#)
- In both circumstances, care must be taken to ensure the [confidentiality](#) of the documents
- Documents, including interview reports, which contain legal advice may attract legal advice privilege. Verbatim interview notes are unlikely to attract [legal advice privilege](#)
- With regards to [litigation privilege](#), communications with third parties and records of interviews are likely to be privileged if they meet the dominant purpose test

INDIVIDUALS

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ECCTA: SENIOR MANAGERS

- New *senior manager* test introduced by ECCTA on 26 December 2023:
*“If a **senior manager** of a body corporate ... acting within the actual or apparent scope of their authority commits a **relevant offence** ... the organisation is also guilty of the offence”*



- The senior manager test is broad which means it is likely that a **wider range of individuals** will be able to fix the company with liability
- The legislation makes it easier to prosecute companies, and so the risk facing companies is greater in light of this new test

ECCTA: ASSOCIATED PERSONS

- s.199 ECCTA also creates new corporate offence of **failure to prevent fraud**: a **large organisation** will be criminally liable if:
 - 1) a person **associated** with it
 - 2) commits a **relevant fraud offence**
 - 3) to **benefit** (directly or indirectly) **the organisation, its subsidiary or a client of the organisation**
- **Associated person**: employee or employee of a subsidiary, agent, subsidiary undertaking or person otherwise performing services for or on behalf of the organisation
- A **defence** is available where the organisation can show it had **reasonable procedures** in place to prevent fraud
- Government guidance published on 6 November 2024; offence will come into effect on 1 September 2025
- A similar concept is reflected in the UK Bribery Act and the CFA

INDIVIDUALS: OTHER CONSIDERATIONS

Independent Legal Advisors (ILAs)

- If there is a risk of legal or disciplinary proceedings against an individual, carefully consider the need for [separate representation](#) by an ILA

Non Disclosure Agreements (NDAs)

- Very [broadly defined](#) by Solicitors Regulation Authority: “*any form of agreement or contract, or a clause within a wider agreement or contract, under which it is agreed that certain information will be kept confidential*”
- Cannot be used to prevent reporting to regulators or law enforcement agencies and should not be used routinely

SRA guidance for in-house solicitors (18 November 2024)

- Includes guidance on privilege and managing internal investigations

REPORTING AND COOPERATION

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MAIN UK AGENCIES

- **Serious Fraud Office (SFO):** wide-ranging investigatory powers under the Criminal Justice Act 1987 to investigate and prosecute individuals and companies for serious or complex fraud, bribery and corruption
- **National Crime Agency (NCA):** broad powers to investigate serious or organised crime, including money laundering or drug trafficking. Crime and Courts Act 2013 allows the Director General of the NCA to designate NCA officers with various powers including that of a police constable
- **Financial Conduct Authority (FCA):** regulates financial services firms and financial markets in the UK. Investigative powers under Financial Services and Markets Act 2000 (FSMA) can be used against authorised firms and their staff and against individuals outside the regulated sector (e.g. insider dealing)

REPORTING AND COOPERATION: SERIOUS FRAUD OFFICE

- Corporate self-reporting is **encouraged** by the SFO and is a factor it will take into account when deciding whether to prosecute

*“...‘good cooperation’ includes **coming to the SFO early**, telling the agency something it doesn’t yet know and keeping the agency informed about the progress of investigations”*

- Failure to report **within a reasonable time** of the offending coming to light is a public interest factor in favour of prosecution
- Public interest factors against prosecution include the following:

*“A **genuinely proactive approach** adopted by the corporate management team when the offending is brought to their notice, involving **self-reporting and remedial actions**, including the **compensation of victims**”*

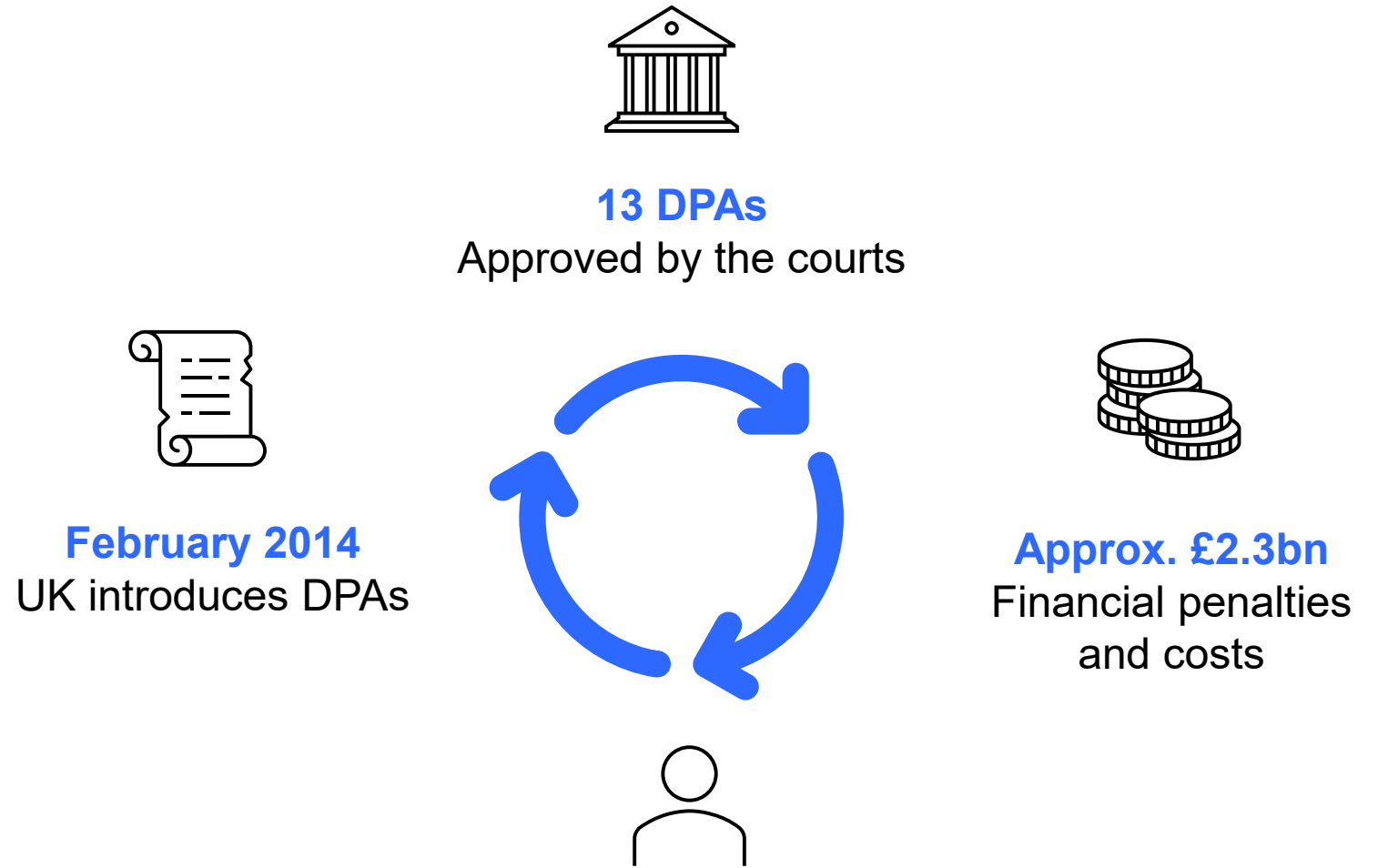
*“ ... the prosecutor needs to establish whether sufficient information about the operation of the company **in its entirety** has been supplied in order to assess whether the company has been **proactively compliant**. This will include **making witnesses available and disclosure of the details of any internal investigation**”*

DEFERRED PROSECUTION AGREEMENTS (1)

- **Deferred Prosecution Agreement (DPA):** an agreement between a prosecutor and a company to suspend criminal proceedings upon various conditions being fulfilled by the company (e.g. a financial penalty, compensation, ongoing cooperation and costs)
- DPAs must be approved by a judge
- Self-reporting and co-operation are an important aspects of the SFO agreeing to a DPA and of securing a judge's approval
- Lord Justice Edis made the following comment when approving the DPA with Amec Foster Wheeler Energy Limited in 2021:

“I accept that there was no legal requirement to report suspected crime to the authorities, but there is a moral duty on all citizens in this respect which extends at least equally to corporations”

DEFERRED PROSECUTION AGREEMENTS (2)



Nick Ephgrave told the Financial Times that DPAs “*could come back with a vengeance once a new offence that puts the onus on businesses to prevent fraud comes into force*”

REPORTING AND COOPERATION: NATIONAL CRIME AGENCY

- Regulated individuals (including MLROs) have an **obligation** to submit a **Suspicious Activity Report** (SAR) if they know or suspect, or have reasonable grounds to know or suspect, that a person has engaged in or attempted money laundering or terrorist financing
- Any person who knows or suspects that they may commit a money laundering offence may apply to the NCA for a **Defence Against Money Laundering** (DAML)
- Firms or individuals must consider seeking a DAML if an internal investigation reveals criminality and they know or suspect that they are dealing with the proceeds of such criminality
- Companies and individuals also **encouraged** to make report to NCA of any information likely to **help NCA fulfil its functions**.

REPORTING AND COOPERATION: FINANCIAL CONDUCT AUTHORITY

- A firm must notify the FCA **immediately** if it becomes aware, or has information which reasonably suggests, that any of the following has occurred, may have occurred or may occur in the foreseeable future:
 - (1) the firm failing to satisfy one or more of the threshold conditions;
 - (2) any matter which could have a significant adverse impact on the firm's reputation;
 - (3) any matter which could affect the firm's ability to continue to provide adequate services to its customers and which could result in serious detriment to a customer of the firm; or
 - (4) any matter in respect of the firm which could result in serious financial consequences to the UK's financial system or to other firms
- Regulated entities must also disclose to the FCA anything relating to the firm of which the FCA would “**reasonably expect notice**”. This applies to the **firm's regulated and unregulated activities**

OUTCOMES

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OUTCOMES



LOOKING AHEAD

7

LOOKING AHEAD

(1)

ECCTA: failure to prevent fraud offence

- Introduces **corporate liability** for large organisations that fail to prevent fraud by associated persons if fraud was intended to benefit the organisation and the organisation did not have **reasonable fraud prevention procedures** in place
- Government guidance published on 6 November 2024
- Offence will come into force on 1 September 2025

ECCTA: role of Companies House

- Companies House to be more effective gatekeeper

Whistleblowing

- 27 March 2023: Government review of effectiveness of current whistleblowing protections and reporting mechanisms
- 18 March 2024: research phase completed; findings and legislative proposals not yet published

LOOKING AHEAD (2)

FCA “name and shame” proposal

- February 2024: FCA proposed policy to publicly disclose identities of firms under investigation
- 30 April 2024: consultation period ended; FCA assessing feedback and final decision expected in early 2025
- 13 Nov 2024: FCA acknowledges mishandling of proposal; update to be published later this month and usual policy-making timetable slowed

SFO approach

- DPAs: increased use from 1 September 2025?
- Raids: increased appetite?
- Increased funding announced by UK Government on 8 November 2024

Q&A

Upcoming Programs – Fall White Collar Webcast Series

Date and Time	Program	Registration Link
<p>Wednesday, December 4, 2024 12:00 PM – 1:00 PM ET 9:00 AM – 10:00 AM PT</p>	<p>FARA and CFIUS Enforcement Presenters: David Burns, Stephenie Gosnell Handler, Amanda Neely</p>	<p>Event Details</p>
<p>Thursday, December 5, 2024 11:00 AM – 12:30 PM ET 8:00 AM – 9:30 AM PT 4:00 PM – 5:30 PM BST</p>	<p>The Economic Crime and Corporate Transparency Act Presenters: Allan Neil, John Chesley, Amy Cooke, Marija Brackovic</p>	<p>Event Details</p>
<p>Tuesday, December 10, 2024 12:00 PM – 1:00 PM ET 9:00 AM – 10:00 AM PT</p>	<p>Anti-Corruption Enforcement and Recent Developments in Latin America Presenters: Michael Farhang, Patrick Stokes, Pedro Soto</p>	<p>Event Details</p>
<p>Thursday, December 12, 2024 12:00 PM – 1:00 PM ET 9:00 AM – 10:00 AM PT</p>	<p>Gatekeeper Liability Presenters: David Ware, Michael Scanlon, Nancy Hart</p>	<p>Event Details</p>



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