

## UK Economic Crime Group Enforcement Update

### Update

In this update we report on the introduction of Deferred Prosecution Agreements, the early days of the newly formed Financial Conduct Authority and suspected price fixing in the UK oil industry.

### Oil Investigations

The London offices of BP and Shell were subject to dawn raids last month by the European Commission (EC) who are investigating allegations of oil price fixing. The action comes just four months after the OFT ruled out their own investigation citing “very limited evidence” that falls within the meaning of wholesale prices not being reflected at the point of sale. The UK Government has come under criticism and has been forced to explain why the OFT failed to act. Energy Secretary Ed Davey has responded by highlighting the concurrent review by the Financial Conduct Authority and OfGem into market manipulation in the sector.

BP, Shell and Norway’s Statoil and Platts (the price reporting agency), have all confirmed that they are being investigated for what the EC describes as distortion of the published prices of oil by preventing competitors from participating in the price assessment process. If true, such activity constitutes a breach of European competition/antitrust laws. The investigation comes at time when traded commodities have become increasingly important investments. The allegations have been described by former Liberal Democrat Treasury spokesman Lord Oakshott, “as serious as rigging Libor.” Other commentators have noted the resemblance to the Libor investigation as the transactions are processed by those with a vested interest in their performance through unregulated and opaque exchanges. If cartel or restrictive business practices are found to exist, there could follow substantial regulatory fines and criminal sanctions. Last week, the SFO confirmed that it is considering a criminal inquiry, the Prime Minister stating that, “[t]here is obviously the full force of the law available... so let’s let the investigators do their work. If this has been happening it is very, very serious and major consequences will follow.”

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## DPAs in the Pipeline

Legislation introducing Deferred Prosecution Agreements (DPAs) was given Royal Assent on 25 April 2013. They are set to come in force in early 2014. The DPP and the SFO will have the power to enter into DPAs for a range of offences including conspiracy to defraud, cheating the public revenue and statutory offences covering fraud, bribery, VAT, money laundering and theft. They apply solely to corporates, and not individual defendants. The UK DPA differs from the US model in that they require a greater degree of judicial oversight. Guidance will be published setting out firstly, when a DPA should apply and secondly, how material acquired by prosecutors during the course of negotiations will be used. The impact of DPAs in the US has been subject to some criticism and it will be interesting to see whether they will be effective in the UK system. Corporates will need to consider the implications of a DPA carefully. A self-reporting company may find itself in a vulnerable position in the event of a DPA being rejected by the court, leaving it (and/or senior company officers) liable to prosecution and criminal penalties.

## The SFO Director says 'No More Deals'

The Director of the SFO, David Green CB QC, has also issued a statement on how his agency will use civil recovery powers under Part V of the Proceeds of Crime Act 2002. He asserts the principle of primacy of prosecutions – set out in the Attorney General's guidance – which he pledged the SFO would follow and he also confirmed that the SFO would provide greater transparency in its decision making. (<http://www.sfo.gov.uk/about-us/how-we-work/5-civil-recovery.aspx>.) The Director, in the Inaugural Fraud Lawyers' Association Speech (26th of March 2013), has emphasised that this alternative should never be used as a substitute for a prosecution, stating "we investigate and prosecute: civil settlement is still alive and well, in the right circumstances but we are not there to offer deals and a special easy path for white collar criminals." The timing of this statement is interesting, in view of the imminent arrival of the DPA. It is anticipated the awaited DPA Guidance will contain a similar warning to prosecutors, to ensure that DPAs are not seen as a soft option.

## Early Days at the FCA

The Financial Conduct Agency (FCA) has been busy since its formation on 1 April 2013. The FCA supersedes the FSA and, as the name suggests, will focus more on conduct. The regulation of the banking industry will reside with the newly formed Prudential Regulation Authority. Recent FCA enforcement action includes:

- Eight men being charged in relation to land banking;
- Fining the UK subsidiary, EFG Private Bank Ltd, of the Swiss banking group EFG International £4.2 million for failing to take "reasonable care to establish and maintain effective anti-money laundering controls" for wealthy customers. These failings are said to be "serious and lasted for more than three years." The FCA found that the risks highlighted in a sample of EFG's files related to allegations of criminal activity or that the customer had been charged with criminal offences including corruption and money laundering. EFG was found to have failed to appropriately monitor its higher risk accounts. EFG follows the likes of Coutts (fined £8.75 million) and the Swiss owned Habib Bank AG Zurich (fined more than £500,000 in 2012) to have been fined by the FCA for similar breaches of anti-money laundering controls. Tracey McDermott, head of enforcement and financial crime, reiterated that whilst EFG's policies "looked good on paper, in practice it manifestly failed to ensure that it was addressing its anti-money laundering risks";

- On 30 April 2013 the FCA arrested two individuals for alleged insider dealing and market abuse. Whilst the names have not yet been confirmed it has been widely speculated that one of the suspects is/was a city professional working for a large fund or asset manager. These arrests continue a crack down on insider trading and market abuse offences begun by the FSA and fits into the broader pattern of scrutiny of hedge fund asset managers by the FCA.

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