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What to look out for in UK litigation and investigations in 2018

2017 was an important year for the UK’s Serious Fraud Office (“SFO”). The Government’s plan to merge the SFO with the National Crime Agency was scrapped, seemingly securing the SFO’s future as an independent investigator and prosecutor. 2018 looks set to be equally important. Director of the SFO, David Green, is due to step down, and the Government recently announced the creation of the [National Economic Crime Centre](#) (“NECC”), which could encroach on the SFO’s autonomy.

Attorneys
[Amanda N. Raad](#)
[Joanna Torode](#)
[Mair Williams](#)

The largest SFO Deferred Prosecution Agreement (“DPA”) with Rolls-Royce involving payments of £497,252,645 was reached in 2017 – the third DPA by the SFO since their introduction in February 2014.¹ These DPAs will be monitored closely by the SFO, and companies and observers will continue to pay close attention to how this area develops in an effort to better understand what is required to earn a DPA, as well as some of the potential benefits and detriments of engaging in self disclosure and proactive negotiations with the SFO.

Financial information on the SFO’s Deferred Prosecution Agreements

Year	Financial penalties payable to Consolidated Fund	Compensation	Costs	Total Payable
2016-2017	£503,806,000	-	£12,961,000	£516,767,000
2015-2016	£16,782,000	£4,692,000	£330,000	£21,804,000

The [ENRC judgment which narrowed the scope of legal privilege in the criminal investigations and cooperation context](#) will reach the Court of Appeal in 2018. Businesses will be hoping that the Court of Appeal takes a different approach to the High Court and rolls back some of these challenging restrictions that afford greater privilege protections in the civil context. Whatever the outcome of the appeal, the SFO’s aggressive stance with regards to privilege has had a knock-on effect on how businesses approach investigations and cooperation with regulators.

The UK’s focus on prosecuting individuals will continue in 2018, in line with both Europe and the United States. The Supreme Court decision in *Ivey* will be key in this, making it easier for authorities to prosecute individuals for dishonesty offences. The Court took the opportunity to review the criminal law on dishonesty and, seeing a need for change, intervened to remove any requirement for defendants to subjectively view their actions as dishonest. The simplification of the test could have a significant impact on financial crime investigations wherever dishonesty is an element of the alleged offence, such as those under the Fraud Act 2006.

Political changes will, of course, dominate the UK in 2018. Whilst the legal technicalities of Brexit start to take shape, the UK is continuing in its (and the EU’s) commitment to tackle corruption and economic crime. In addition to the NECC, the Government has announced a Ministerial Economic Crime Strategic Board and is also committing to a review of the SARs regime and the Proceeds of Crime Act 2002, two key tools for combatting money laundering and terrorist financing. On the continent, the EU announced its [tax haven blacklist](#) at the end of 2017. Whilst much of the scheme, including the enforcement regime, is yet to be decided upon, the creation of both the black and grey

¹ The other SFO DPAs were made with Standard Bank in 2015 and, in 2016, with a UK SME that cannot currently be named due to ongoing, related legal proceedings. A fourth DPA was agreed with Tesco PLC in April 2017.

lists may lead to a change in the tax regimes in certain states and, in consequence, may cause some companies to reconsider their tax arrangements.

The 2017 Paradise papers did not create the same public outcry as the Panama papers, but they focused the media's attention on legal tax avoidance measures once again. The new offence of "failure to prevent the facilitation of tax evasion" is a solid commitment to prioritising the prevention and enforcement of tax evasion. Companies need to look not only at the legality of their tax arrangements in 2018, but also at the serious reputational consequences associated with potential tax avoidance.

The [Modern Slavery Act](#) kicked into life in 2017, with companies publishing their first compulsory statements. A surprising number of companies also decided to file statements voluntarily, so the Act does seem to be starting to encourage the greater levels of transparency envisaged by parliament. That being said, the legislation remains relatively toothless with the main risk to businesses being reputational. It will be interesting to see whether or not compliance with filed statements comes under scrutiny in 2018, and whether or not companies who fail to file are enjoined to do so.

The UK's commitment to corporate compliance looks set to continue in 2018. The combination of legislative change, international and public pressure, political will, and a strengthened SFO together with an increased emphasis on effecting behavioural change through corporate compliance means that businesses will have to keep up to date with changes to their businesses, UK regimes and regulatory priorities in order to ensure that their compliance programmes are properly fit for purpose.

Ropes & Gray will continue to monitor developments and provide updates in 2018. For more detailed analysis of these issues, please contact your usual Ropes & Gray partner or one of the attorneys listed above.