

# Gazing into the crystal ball - what to expect from the SFO in 2020

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The SFO faced a challenging 2019, with some high-profile acquittals, dropped investigations and new cases which were widely perceived as relatively underwhelming. We look back at the last 12 months, and set out what might be expected from the agency in 2020.

## Deferred Prosecution Agreements (“DPAs”) – Failing to Hold Individuals to Account?

A DPA with Tesco Stores Ltd was made public in January, shortly after the acquittal of three of its former executives. This outcome added to the ongoing discussion about the mismatch between individual and corporate liability for economic crime. There is an obvious dissonance between admissions of guilt by Tesco and the acquittals of its directors where, under English law, a company’s liability is established by identifying individuals embodying its directing mind and will. Commentators were left wondering how the two positions could be reconciled, and whether the DPA regime is in need of reform in order to resolve the tension.

Another example of the same inconsistency was revealed in February when it was announced that a major investigation into former Rolls Royce executives was to be dropped without any individuals being charged (this despite Rolls Royce entering into a DPA with a fine of £497m).

This worrying trend continued in late December as three individuals associated with Güralp Systems Ltd were acquitted of conspiracy to make corrupt payments in relation to payments made to a South Korean public official between 2002 and 2015. In yet another stark example of the intellectual inconsistency surrounding the DPA regime, the fact that the SFO had agreed to a DPA with Güralp Systems Ltd (which accepted charges of conspiracy to make corrupt payments and failure to prevent bribery) was not announced until after the acquittals of Cansun Güralp, Andrew Bell and Natalie Pearce. This was the first time the existence of a DPA had been postponed until after the trial of individuals, and the statement of facts setting out the company’s purported wrongdoing is replete with references to the role of the three individuals despite the jury’s finding that they had not committed any criminal offence. The case is a striking example of corporates accepting evidence that is clearly vulnerable to challenge for purely commercial reasons, resulting in individuals left with a tarnished reputation despite successfully contesting charges made against them. It also serves to highlight the difficulty the SFO has had in securing convictions in recent years.

The UK DPA regime will be tested once again in the Serco proceedings. A DPA with Serco Geografix Ltd (“SGL”), a subsidiary of the Serco Group, was signed in July. SGL made admissions in relation to three offences of fraud and two of false accounting arising from a scheme to dishonestly mislead the Ministry of Justice as to the true extent of profits made from the provision of electronic tagging services. The SFO has now charged Nicholas Woods and Simon Marshall, two former Serco directors, with fraud by false representation and false accounting. The outcome of these proceedings will undoubtedly contribute to the conversation one way or another about

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whether or not the basis of corporate liability is in need of reform. The failure to secure convictions against Woods and Marshall will reinforce the argument that DPAs provide companies with a convenient way out of criminal proceedings without proper scrutiny and without achieving the objective of holding the relevant individuals to account.

### **What Next for the SFO's High-Profile Ongoing Cases?**

In January 2019, the trial of former Barclays executives commenced. The proceedings saw the acquittal of John Varley following a submission of no case to answer, the jury discharged, a decision of the Court of Appeal to uphold the acquittal, and, in October, the start of the retrial of the three remaining individuals. This all followed the Crown Court's decision, in May 2018, to dismiss charges against Barclays Plc and Barclays Bank Plc, and a failed application by the SFO to the High Court seeking reinstatement of those charges. At the time of writing, the retrial is ongoing. Given the public profile of the case and its recent history, there is no doubt that it is an important one for the SFO and that the reputational consequences, of convictions or acquittals, will be significant.

Another long-running SFO investigation is also continuing, seemingly with no end in sight. The investigation into mining company ENRC was first announced in April 2013, and has grown tentacles and given rise to related litigation ever since. The only charge to date is against Anna Machkevitch, the daughter of an ENRC director, who is due to stand trial in January 2020 for the summary offence of failure to respond to a Section 2 notice.<sup>1</sup> That case will be of particular interest given that such charges are relatively rare, and in light of the related lively debate over the SFO's approach to section 2 interviews which has taken place over the last 12 months.<sup>2</sup> Navigating the ENRC investigation and the related civil litigation will require deft leadership, and as such may come to define Lisa Osofsky's first term as SFO Director. As the case moves towards its seventh year, the question remains – when, and how, will it end?

One case which would have been closely followed was the prosecution by the Crown Prosecution Service of Rapid Engineering Supplies Limited, charged with failure to prevent bribery.<sup>3</sup> As only the second contested case in relation to this offence,<sup>4</sup> both the SFO (who would usually prosecute such offences) and legal advisers would have been observing keenly. On the same day as the Guralp acquittals and DPA, however, it was reported that the case against Rapid had been dropped as there was insufficient evidence to proceed. Charges against two individuals were also dropped, although a third, Kevin Herbert, pleaded guilty to a bribery charge. The spotlight will now turn to any contested cases in 2020.

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<sup>1</sup> Under s.2 of the Criminal Justice Act 1987, the SFO Director has the power to compel any individual or entity to provide the SFO with information or documentation believed to be relevant to a matter under investigation. Failure to comply with any requirement without reasonable excuse is punishable by imprisonment.

<sup>2</sup> <https://www.whitecase.com/publications/alert/plus-ca-change-sfos-approach-section-2-interviews>

<sup>3</sup> Under s.7 of the Bribery Act 2010, a company may be prosecuted for failure to prevent bribery where a person associated with it bribes another person.

The only defence to a charge under s.7 is that the company had in place "adequate procedures" to prevent bribery.

<sup>4</sup> The first contested case was that of Skansen Interiors Ltd, and led to a conviction in 2018.

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## New SFO Investigations?

There has been little to discuss in terms of major new SFO investigations throughout the course of 2019. In May, SFO confirmed that it had opened a joint investigation with Dutch authorities concerning aspects of biodiesel trading at Greenergy, a supplier and distributor of transport fuels. However, the company recently announced that it had been informed by the SFO that Greenergy and its employees are no longer suspects in the probe (the SFO is yet to confirm this) although a wider investigation is ongoing. In July, it was announced that De La Rue plc and its associated persons were being investigated in relation to suspected corruption in South Sudan. However, it was arguably not until December that the first headline-grabbing investigation of the year was made public, with Glencore announcing, and the SFO confirming, that the company was being investigated for suspected bribery.

On the face of it, the lack of new, high-profile investigations is slightly disappointing for the agency tasked with tackling the most serious and complex fraud, bribery and corruption. However, an interesting line in the SFO's Annual Report for 2018-19 states that only five of the 11 cases opened in 2018-19 had been made public (a marked shift from the approach under the SFO's previous leadership, which provided regular updates on cases). This suggests that the economic crime community may see more activity coming to light in the coming months and that further significant announcements may be in the pipeline. A recent speech by Daniel Kahn,<sup>5</sup> senior deputy chief of the fraud section of the Department of Justice, reinforces that possibility. Mr Kahn stated that he expects to see "good cases" being brought by the SFO "very likely in the coming year", dismissing reports that the agency had "lost its zeal" for the biggest cases<sup>6</sup> by explaining that "it's hard to see what's happening behind the scenes and behind closed doors."

## Continued Americanisation of UK Corporate Crime

Any evidence that the SFO has been working away from the public eye will be seen as a continuation of the trend of the Americanisation of British justice.<sup>7</sup> One reason for not announcing all investigations could be that negotiations towards DPAs are ongoing. As we have previously argued, it is unclear whether the SFO's Corporate Co-operation Guidance will do anything to increase the chances of companies self-reporting to the SFO.<sup>8</sup> Given the drawn-out process of uncovering and agreeing relevant facts, any DPAs which do materialise during the first half of 2020 are likely to be the result of discussions which have taken place behind closed doors throughout 2019.

Another factor which may be at play is the Director's stated ambition to increase witness co-operation in investigations, with Ms. Osofsky offering suspects the chance to "wear a wire and work with us."<sup>9</sup> Any publicity surrounding ongoing investigations would clearly inhibit the effectiveness of such methods. While relatively unfamiliar to UK criminal practitioners (be that defence lawyers, prosecutors or investigators), the introduction of increased individual co-operation could do much to help the SFO avoid further costly and lengthy investigations like those referred to above, but it is also a gamble.<sup>10</sup> Investigations and/or DPAs announced in 2020 may serve as proof that US-influenced techniques are being put into practice by UK law enforcement.

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<sup>5</sup> <https://www.mlex.com/GlobalAdvisory/DetailView.aspx?cid=1147123&siteid=234&rdir=1>

<sup>6</sup> <https://www.bloomberg.com/news/articles/2019-11-14/activists-worry-britain-s-serious-fraud-office-is-losing-its-zeal>

<sup>7</sup> <https://www.whitecase.com/publications/alert/deferred-prosecution-agreements-5-years-americanisation-uk-corporate-crime>

<sup>8</sup> <https://www.whitecase.com/publications/alert/co-operation-or-capitulation-what-sfo-corporate-co-operation-guidance-really>

<sup>9</sup> <https://www.standard.co.uk/news/crime/wear-wire-or-face-jail-whitecollar-criminals-are-warned-by-top-british-law-enforcement-official-a4127346.html>

<sup>10</sup> <https://www.whitecase.com/publications/alert/through-wire-sfos-plan-obtain-evidence-using-informants>

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## The Future of the SFO and its Powers

It is 9 years since Theresa May first suggested that the SFO could be scrapped and incorporated into the NCA or the CPS. Since then, uncertainty about the agency's future has been an almost constant source of discussion. Political support for the idea may be less enthusiastic than it was during Mrs May's tenure at the Home Office and 10 Downing Street, but pressure to produce results has not disappeared – debate about a possible abolition or restructuring will only be quelled if the SFO performs strongly over the next 12 months. With a new government reportedly aiming to shake up Whitehall structures, the effectiveness of the SFO is bound to come under renewed scrutiny. Any prolonged failure of the SFO to announce significant new investigations will only contribute to that discussion, as will the outcome of the trials of the Barclays executives and the Serco directors.

Another discussion which looks set to continue into 2020 is the problem of establishing corporate criminal liability and whether "failure to prevent" offences, currently limited to bribery and facilitation of tax evasion, should be extended to other economic crimes such as fraud. Ms. Osofsky has advocated for this before the House of Lords Committee on the Bribery Act 2010,<sup>11</sup> and increased use of such offences could go some way to resolving the discrepancy where companies admit to a substantive offence while individuals are acquitted. Calls for DPAs for individuals may also increase as part of the SFO's desire to bring cases to a close more quickly, and indeed the Director has expressed a desire to have some of the powers enjoyed by her former colleagues in the US.<sup>12</sup>

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<sup>11</sup> Bribery Act 2010 Committee, Corrected Oral Evidence: Bribery Act 2010, 13 November 2018

<sup>12</sup> <https://www.ft.com/content/b5eb36b6-680f-11e9-9adc-98bf1d35a056>