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ESG in the Disputes and Contentious Regulatory Sphere—a Mini-series: Regulatory and Criminal Offence Risks in the ESG Context

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Corporates will be no stranger to the swathe of legislation and regulation that encompasses corporate governance. Recognising that many existing obligations for compliance teams have simply been re-packaged under the new ESG terminology, there has been an increase in the number of new ESG-related legislative developments in recent years, which combine regulatory requirements and criminal enforcement in order to incentivise ethical business practices. As a consequence, corporates must ensure they have measures in place to ensure they do not fall foul of their obligations, particularly as there may be criminal as well as regulatory repercussions for breaches. We highlight below some key recent developments and requirements commercial organisations should have in mind.

FCA Climate-related Reporting Requirements

There is an increasing focus at an international level on the role of financial services in helping to foster a sustainable economy. As highlighted in the U.K. Government's 2019 Green Finance Strategy,¹ the U.K. is committed to playing its part through the implementation of recommendations from the Task Force on Climate-related Financial Disclosures ("TCFD").

The TCFD was established by the Financial Stability Board ("FSB"), upon the request of G20 Finance Ministers and Central Bank Governors in 2015, to make recommendations for more effective climate-related financial disclosures. These recommendations were published in 2017 and as of December 2020, the Financial Conduct Authority ("FCA") introduced a new listing rule requiring U.K. premium listed² commercial companies to make climate-related disclosures, on a comply or explain basis, in their annual reports for accounting periods beginning on or after 1 January 2021.³

However, the FCA recently concluded a consultation on 10 September 2021 on proposals to extend these mandatory requirements to issuers of standard listed equity shares (excluding standard listed investment entities and shell companies)⁴ with the aim of finalising the proposals by the end of 2021. The FCA is also proposing to introduce similar disclosure requirements aligned with the TCFD's recommendations for asset managers, life insurers, and FCA-regulated pension providers.⁵

Companies required to comply with the reporting requirements must include a statement in their annual financial report regarding whether they have made disclosures consistent with the TCFD's recommendations. A company must provide an explanation if it has not made disclosures and describe steps it will take to make consistent disclosures in the future.

From a regulatory perspective, directors and companies in breach of their obligations could be fined for breach of the Listing Rules, for example for contravening the obligation to ensure that misleading

information is not published. Corporates should also be cognisant of the fact that there are other regimes under which they may need to disclose climate change-related risks and as such, they should be aware of the different types of potential liability in the case of non-compliance whether civil, criminal, or regulatory.

There is a risk that directors, as well as corporates, could be held liable if there are false or misleading statements in public disclosures like annual reports. This is all the more pressing if mandatory compliance with TCFD disclosures is introduced for a wider set of issuing companies. This is a concern in particular in relation to forward-looking statements, which inherently contain a degree of uncertainty.

If disclosure requirements are extended to other U.K.-issuing entities as mentioned above, TCFD-aligned disclosures are likely to become mandatory within several years in line with HM Treasury's roadmap.⁶ Indeed, in a statement made on 9 November 2020, the U.K. Chancellor Rishi Sunak stated it was his aim for the U.K. to become the first country in the world to make TCFD-aligned disclosures fully mandatory across the economy by 2025.⁷ Corporates and their directors should therefore keep a close watch and make preparations for likely future mandatory disclosure obligations.

Corporate Compliance Risks in respect of Financial Crime

There are already significant and well-established anti-bribery and corruption ("**ABC**") compliance obligations for companies under U.K. legislation. The Bribery Act 2010 (the "**UKBA**") introduced a "failure to prevent" corporate criminal offence under section 7 where a commercial organisation is criminally liable if it fails to prevent a person associated with it from bribing another with the intention to obtain or retain business or an advantage. This applies to all commercial organisations, and companies must ensure they have "adequate procedures" in place to minimise the risk of prosecution under the UKBA. Such procedures should be designed around the six principles set out in the U.K. Ministry of Justice's Bribery Act 2010 Guidance.⁸

For more in-depth analysis of the development of the UKBA, please see our article series on the tenth anniversary of the Act coming into force [here](#).

Following the introduction of the corporate offence under section 7 of the UKBA, the Criminal Finances Act 2017 ("**CFA**") introduced two new corporate criminal offences also using the "failure to prevent" model. Under the CFA, a corporate body or partnership (a "**relevant body**") may be found criminally liable where it fails to prevent an associated person from committing a facilitating tax evasion offence, in relation to both U.K. and foreign tax evasion.⁹ In order to avoid criminal liability, companies must be able to demonstrate they had "reasonable preventative procedures" in place. Although the difference between "adequate" and "reasonable" procedures has not been clearly set out, the six principles included in the U.K. Government guidance for the facilitation of tax evasion¹⁰ are the same as the principles listed in the Bribery Act guidance.

A corporate convicted of any of the failure to prevent offences, faces an unlimited financial penalty, possible debarment from certain contracts, and serious reputational damage. Companies may also be required to make disclosures to professional regulators in the U.K. and overseas which will have a negative impact on their business.

The Serious Fraud Office ("**SFO**") has had relatively limited success to date in securing convictions under the section 7 UKBA offence. Nevertheless, it has concluded nine Deferred Prosecution Agreements ("**DPAs**") where the section 7 offence was on the indictment.¹¹ In an updated Freedom of Information Act Release,¹² HM Revenue & Customs ("**HMRC**") reported that, as of 27 May 2021, it had 14 live investigations into corporate criminal offences of facilitation of tax evasion and 14

other live opportunities under review. These matters concern a range of industry sectors from oil and construction to software development and financial services.

Potential Extension of Corporate Criminal Liability

Further compliance requirements to mitigate financial crime risks are potentially on the horizon in light of the Law Commission's review of the law on corporate criminal liability. Commissioned by the U.K. Government in November 2020, the Law Commission was tasked with presenting options for reform, including the introduction of a wider "failure to prevent" economic crime offence. It is anticipated that the Law Commission will publish an options paper by the end of 2021, though any legislative reform based on the recommendations is unlikely to occur until at least 2023.

Impact of Increased Media Focus

In recent years there have been a number of high-profile document leaks resulting from global investigations by journalists, with the most recent of these occurring in October 2021, dubbed the "Pandora Papers". The media attention on these leaks has led to a renewed focus on firms acting as "gatekeepers" in the legal, property, and tax advisory sectors. Due to the risk of criminal enforcement as well as reputational risks, companies, especially those in the professional services sectors, should remain vigilant and ensure they have robust policies and procedures in place.

Sanctions-related Reporting Requirements

The U.K. has recently introduced two targeted sanctions regimes using powers in the Sanctions and Anti-Money Laundering Act 2018 ("**SAMLA**"). The Global Human Rights Sanctions Regulations 2020 (the "**2020 Regulations**") enable the U.K. Government to impose travel bans and asset freezes against individuals and entities who it suspects are involved in serious human rights violations relating to three core human rights: (i) the right to life; (ii) the right not to be subjected to torture or cruel, inhuman, or degrading treatment or punishment; and (iii) the right to be free from slavery, not to be held in servitude or required to perform forced or compulsory labour.¹³ The Global Anti-Corruption Sanctions Regulations 2021 (the "**2021 Regulations**") enable Ministers to impose similar restrictions on designated persons allegedly involved in "serious corruption", which is defined widely and includes efforts to facilitate, conceal, or engage in serious bribery or misappropriation of property.¹⁴

For the purpose of the financial sanctions contained in both regimes, relevant firms, including firms or sole practitioners providing legal, accounting, or audit services, among other things, have an obligation to report information to HM Treasury about known or suspected designated persons or about persons who may have committed an offence under specified provisions of the regulations. Non-compliance with reporting obligations attracts criminal liability.¹⁵ It is also a criminal offence if a person fails to comply with information requests from or fails to produce documents to HM Treasury under both regimes.¹⁶

The Office of Financial Sanctions Implementation ("**OFSI**") is part of HM Treasury and it is the authority which implements and enforces financial sanctions in the U.K. It maintains the "**Consolidated List**"¹⁷ and a list of entities subject to capital market restrictions. The Consolidated List is a list of all asset freeze targets listed under U.K. and UN sanctions. It also publishes Financial Sanctions Notices for each sanctions regime when changes are introduced. The Consolidated List directs firms to, among other things, check if they maintain any accounts for the designated persons; freeze such accounts if so; and refrain from dealing with or making available the funds or assets to such designated persons unless licensed by OFSI.

The U.K. Government has said that it will continue to consider targets globally, "*guided by the objectives of the human rights sanctions regime and the evidence*"¹⁸ and that the anti-corruption sanctions regime forms a significant part of the Government's "Anti-Corruption Strategy 2017-

2022".¹⁹ Indeed it is likely the U.K. will keep its sanctions aligned to its trade policy, which may lead to a more U.S.-style regime as the U.K. continues to diverge further away from the EU sanctions regime. Corporates must stay alert to these changes to ensure continued compliance with these different regimes.

Modern Slavery Act 2015

Human trafficking and modern slavery remain high on the international agenda. In the U.K., the Modern Slavery Act ("MSA")²⁰ was passed into law in 2015. It consolidated existing criminal laws on slavery and human trafficking and introduced new requirements for certain businesses to disclose what activity is being undertaken to eliminate slavery and trafficking from their supply chain and business.

Under section 54 of the MSA, commercial organisations that supply goods or services, do business in the U.K. and have a global annual turnover of £36m or above must publish an annual slavery and human trafficking statement, often referred to as a "modern slavery statement". In the statement companies must explain the steps taken to eliminate modern slavery in their supply chain and business in the previous year.

Currently the legislation contains no specific penalties for publishing false or inaccurate statements, nor mechanisms to monitor and ensure compliance. To remedy this gap in the legislation, the Modern Slavery (Amendment) Bill²¹ was introduced as a Private Members' Bill into the House of Lords in June 2021 and it proposes creating two new criminal offences.

The first proposed new offence would be committed by a person responsible for a slavery and human trafficking statement if information in that statement were false or incomplete in a material particular, and the person either knew it was or was reckless as to whether it was false or incomplete. To avoid criminal liability, an individual must be able to prove that they took all reasonable steps to ensure that the statement was corrected and that they informed the Independent Anti-slavery Commissioner as soon as practicable.

The second proposed offence under new section 54ZB is a corporate criminal offence committed by a commercial organisation if it continues to use suppliers or sub-suppliers which fail to demonstrate minimum standards of transparency after having been issued a formal warning by the Independent Anti-slavery Commissioner.

On conviction on indictment (for serious offences), a commercial organisation may be subject to a fine equal to 4% of its turnover (up to a maximum of £20m) for both offences, or for a person convicted under the section 54ZA offence, the penalty could be up to two years' imprisonment or imprisonment and a fine.

It is generally less common for Bills introduced into Parliament as Private Members' Bills to successfully make it onto the statute book. Notwithstanding this fact, in the National Crime Agency's ("NCA") Annual Plan 2020-2021,²² the Home Secretary identifies modern slavery as one of three specific areas of focus for the NCA, the primary U.K. body responsible for tackling serious and organised crime. As such, despite potential procedural difficulties with the Bill, it is likely to garner significant support given that improving transparency and compliance with modern slavery reporting obligations clearly remains high on the U.K. Government's list of priorities.

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¹ [BEIS Green Finance Strategy July 2019 \(publishing.service.gov.uk\)](https://publishing.service.gov.uk)

² A premium listed company is a company that meets standards which exceed those under the applicable legislation whilst a standard listing simply meets the minimum standards under the legislation.

³ [FCA introduces rule to enhance climate-related disclosures | FCA](#)

⁴ FCA Consultation Paper CP21/18: <https://www.fca.org.uk/publications/consultation-papers/cp21-18-enhancing-climate-related-disclosures-standard-listed-companies>

⁵ FCA Consultation Paper CP21/17: <https://www.fca.org.uk/publication/consultation/cp21-17.pdf>

⁶ A Roadmap towards mandatory climate-related disclosures, HM Treasury, November 2020

[FINAL TCFD ROADMAP.pdf \(publishing.service.gov.uk\)](#)

⁷ <https://www.gov.uk/government/news/chancellor-sets-out-ambition-for-future-of-uk-financial-services>

⁸ [The Bribery Act 2010 – Guidance \(publishing.service.gov.uk\)](#)

⁹ Sections 45 and 46 of the [Criminal Finances Act 2017 \(legislation.gov.uk\)](#)

¹⁰ [Tackling tax evasion: Government guidance for the corporate offences of failure to prevent the criminal facilitation of tax evasion \(publishing.service.gov.uk\)](#)

¹¹ See SFO response to FOIA request [2020-040 – Bribery Act 2010 – Serious Fraud Office – Serious Fraud Office \(sfo.gov.uk\)](#). Since this response was published in March 2020, there have been four further DPAs concluded where at least one of the counts on the indictment was a section 7 offence.

¹² **Error! Hyperlink reference not valid.**

¹³ The Global Human Rights Sanctions Regulations 2020, Regulation 4 :

<https://www.legislation.gov.uk/ukSI/2020/680/data.pdf>

¹⁴ The Global Anti-Corruption Sanctions Regulations 2021, Regulation 6 :

<https://www.legislation.gov.uk/ukSI/2021/488/made/data.pdf>

¹⁵ See Regulation 25 of the [2020 Regulations](#) and Regulation 24 of the [2021 Regulations](#)

¹⁶ See Regulation 29 of the [2020 Regulations](#) and Regulation 28 of the [2021 Regulations](#)

¹⁷ Financial sanctions targets: list of all asset freeze targets as of 30 September 2021

<https://www.gov.uk/government/publications/financial-sanctions-consolidated-list-of-targets/consolidated-list-of-targets>

¹⁸ <https://questions-statements.parliament.uk/written-questions/detail/2021-06-09/13116>

¹⁹ United Kingdom Anti-Corruption Strategy 2017-2022

(https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/667221/6_33_23_Anti-Corruption_Strategy_WEB.pdf)

²⁰ [Modern Slavery Act 2015 \(legislation.gov.uk\)](#)

²¹ [Modern Slavery \(Amendment\) Bill \[HL\] – Parliamentary Bills – UK Parliament](#)

²² [NCA Annual Plan 2020-2021 \(nationalcrimeagency.gov.uk\)](#)

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