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# The Practitioner's Guide to Global Investigations

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## Editors

Judith Seddon, Eleanor Davison, Christopher J Morvillo, Michael Bowes QC,  
Luke Tolaini, Ama A Adams, Celeste Koeleveld

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Welcome to *The Practitioner's Guide to Global Investigations 2021* newsletter. Our editors have identified the most significant developments since the fifth edition of the guide was published in January and have commissioned a select group of specialists to report them. They address judgments in the *Serco* and *KBR* cases from the United Kingdom (the *KBR* proceedings were closely watched in the United States) and the *Bolloré* cassation court ruling in France, and the recently announced reboot of a stalled UK consultation on corporate criminal liability.

Christopher David and Matthew Lee of Clifford Chance report on the Law Commission consultation on corporate economic crime in the United Kingdom, which has reinvigorated a debate on legislative reform that somewhat fell off the radar after the government's Call For Evidence in 2017.

Next, Practitioner's Guide co-author Pamela Reddy and her colleagues Claudia Culley and Thomas Hubbard of Norton Rose Fulbright cover the Supreme Court's ruling in *KBR* on the SFO's powers to compel the production of foreign evidence. They conclude that the English enforcer's powers have been hemmed in, but UK law enforcement retains a more traditional process to extract information from American companies.

Then, Practitioner's Guide Volume II contributors Stéphane de Navacelle and Julie Zorrilla and their colleague Thomas Lapierre at Navacelle take a fascinating look at a tension that has emerged in France between provisional plea bargain agreements for individuals and corporate DPAs. As things stand, it appears that individuals who offer pleas may be placing themselves at greater risk.

Finally, Volume I co-authors Jessica Parker and Andrew Smith at Corker Binning report another setback for the SFO, after two employees were acquitted following a deferred prosecution agreement. The judge sternly rebuked the SFO and gave its legal argument short shrift, prompting the question of whether DPAs embolden prosecutors to prosecute weak criminal cases.

We hope readers find this newsletter, which should be read alongside the fifth edition, informative and insightful. The developments described below have a bearing on many other chapters in *The Practitioner's Guide to Global Investigations*, links to which are found below.

The sixth edition is being fully revised and expanded. Among other things, it will cover the ESG issues that practitioners and their clients must now consider. It will also expand the number of jurisdictions for which it provides a comprehensive primer on the law of internal and government investigations in Volume II.

The publisher invites readers to send in their comments on this newsletter and the fifth edition of *The Practitioner's Guide to Global Investigations* to [david.samuels@lbresearch.com](mailto:david.samuels@lbresearch.com).

## Law Commission starts up consultation on corporate criminal liability

**Christopher David and Matthew Lee**

Clifford Chance

In November 2020, the UK government asked the Law Commission to examine the issue of corporate criminal liability. The consultation period was launched in June 2021 and follows a previous Call for Evidence from the Ministry of Justice in 2017 concerning proposals to reform corporate liability for economic crime. The results of this were ultimately inconclusive, leading the Ministry of Justice to ask the Law Commission to pick up the baton and seek views on whether – and how – the law can be improved so that it appropriately captures and punishes criminal offences committed by corporations and their directors and senior management.

The terms of reference for the consultation are broad, and the Law Commission has been invited to consider issues including:

- whether the ‘identification doctrine’ is fit for purpose, when applied to organisations of differing sizes and scales of operation;
- the relationship between criminal and civil law on corporate liability;
- other ways in which criminal liability can be imposed on ‘non-natural persons’ (incorporated and unincorporated bodies) in the current criminal law of England and Wales;
- the relationship between corporate criminal liability and other approaches to unlawful conduct by non-natural persons, including deferred prosecution agreements and civil recovery of proceeds of unlawful conduct;
- approaches to criminal liability taken in relevant overseas jurisdictions;
- whether an alternative approach to corporate criminal liability could be provided in legislation; and
- the implications of any change to the liability of non-natural persons for the liability of directors and senior managers (including under ‘consent or connivance’ provisions, such as those in section 92 of the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017.

The Law Commission has published a discussion paper attempting to summarise and distil the issues it is examining, as well as identify a number of key questions they believe it would be helpful to answer.

In terms of the issue itself, historically, critics of the current state of the law take aim at the identification principle. Broadly speaking, this is the most common means of establishing corporate criminal liability, in the absence of legislation expressly creating this liability for particular offences. The principle provides that, where the commission of an offence can be attributed to a company’s ‘directing mind and will’, the company will also be liable, as acts of a directing mind and will should be considered acts of the company.

In practice, only a limited number of directors and senior managers of a company will be considered to have sufficient discretion and autonomy to represent the company’s directing mind and will. Under the identification principle, at least one of these individuals must have committed an offence for criminal liability to extend to the company.

This has led to criticism that it is prohibitively difficult to prosecute companies for criminal wrongdoing, even if it has been committed for the company’s benefit or on the company’s behalf. When criminal acts do occur in the corporate context, they are often committed by individuals outside this narrow group of senior managers. It has also been suggested that the current law treats smaller companies unfairly. They are at greater risk of successful prosecution as their senior managers are more likely to be personally involved in everyday corporate decisions and acts.



The Law Commission's consultation examines the approach taken to corporate criminal liability in several other jurisdictions, such as vicarious liability in the United States. However, the Law Commission also seeks inspiration from UK legislation and examines whether the recently created offences of failure to prevent bribery and failure to prevent the facilitation of tax evasion could serve as models for a broader range of economic crimes. With both the Serious Fraud Office and the Crown Prosecution Service supportive of expanding failure-to-prevent offences, the prominence of this model in the consultation materials is unsurprising, and this could represent the most likely direction of travel for the Law Commission when formulating its recommendations.

Over the summer the Law Commission has hosted a number of events to encourage debate among practitioners and stakeholders. One view that has been expressed challenges the assumption that the difficulty of prosecuting corporates is actually a problem. There are good reasons why corporates are ill-suited to many forms of criminal liability. And, as the Law Commission states in its consultation, companies act through people, be they directors, managers, employees or agents, and companies cannot intend to do something or be dishonest in the same way that people can. There is therefore an argument that these efforts may be better directed at ensuring that criminal acts of individuals are effectively investigated and prosecuted. If the prospect of individual culpability in a corporate setting is remote, then the fact that it is easier to impose a criminal financial penalty on the company is likely to act as little disincentive to the wrongdoer.

Another area of debate has been around the proposal to expand the failure-to-prevent model, with much being made of the virtues that come with enhanced compliance programmes and policies and procedures to prevent corporate wrongdoing. While these arguments try to support the expansion of the failure-to-prevent model, they also overlook that it is simply not good business sense for companies to become embroiled in criminal conduct by their employees, regardless of whether the company will also be held criminally liable for this conduct, and that companies therefore already have sufficient incentives to have procedures in place to prevent corporate wrongdoing.

The consultation is scheduled to close on 31 August 2021, with the Law Commission publishing an option paper towards the end of the year.

## FURTHER READING

Read the '[Introduction](#)', by Judith Seddon, Eleanor Davison, Christopher J Morvillo, Michael Bowes QC, Luke Tolaini, Ama A Adams and Tara McGrath in GIR's *The Practitioner's Guide to Global Investigations*.



## UKSC overturns decision on extraterritorial effect of section 2 notices

**Pamela Reddy, Claudia Culley and Thomas Hubbard**

Norton Rose Fulbright LLP

In its recent *KBR* judgment,<sup>1</sup> the UK Supreme Court clarified the extraterritoriality of the powers of the Serious Fraud Office (SFO) to obtain documents. The Court confirmed that notices under section 2 of the Criminal Justice Act 1987 (section 2 notices) have no extraterritorial effect against foreign companies that do not conduct business in the United Kingdom.

However, the Supreme Court also confirmed that a UK company can be compelled under a section 2 notice to produce documents held outside the UK and a company considered to be ‘carrying on a business in the UK’ can be compelled to comply with a section 2 notice, even if it is not a UK company.

### **Facts and appeal**

Section 2 notices empower the SFO to require a person or an entity to provide information during an investigation where they have reasonable grounds to suspect an offence concerning serious fraud or corruption has been committed. They are unique to the SFO.<sup>2</sup>

KBR, Inc is a company incorporated in the US. KBR did not carry on business in the United Kingdom. KBR did have UK subsidiaries, including Kellogg Brown and Root Ltd.

In April 2017, the SFO issued a section 2 notice to the subsidiaries who provided various materials in response to the notice but emphasised that certain information or documentation was not in their control but was held by KBR in the United States. In July 2017, while officers of KBR attended a meeting with the SFO in London, the SFO presented a second section 2 notice requiring the production of material held by KBR outside the UK.

KBR applied for a judicial review of the second section 2 notice. KBR argued that a notice does not permit the SFO to require a company incorporated in the United States to produce documents it holds outside the United Kingdom.

The Administrative Court held that section 2(3) of the Criminal Justice Act 1987 (CJA), under which the SFO could require a relevant person or entity to produce relevant documents for its investigation, has extraterritorial application to foreign companies in respect of documents held abroad, where there was a ‘sufficient connection’ between the foreign company and the United Kingdom. This wording is not included in the CJA itself.

### **Decision and reasoning**

The Supreme Court held that there is nothing in the legislative history of the CJA to suggest that Parliament intended section 2(3) to have extraterritorial effect. Rather, the Supreme Court found that the CJA’s legislative history shows that Parliament intended that evidence should be obtained from abroad by establishing reciprocal arrangements for co-operation with other countries through mutual legal assistance treaties (MLATs), which are fundamental to the principles of comity governing relations between states.

The Supreme Court also noted that the Administrative Court’s decision to imply a ‘sufficient connection’ test in section 2(3) was inconsistent with Parliament’s intention and would involve ‘re-writing’ the statute.

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1 *R (on the application of KBR, Inc) (Appellant) v. Director of the Serious Fraud Office (Respondent)* [2021] UKSC 2.

2 Although since the CJA 1987 other regulators including HM Revenue and Customs and the Crown Prosecution Service have acquired compulsory powers.



The Supreme Court did not provide any clarity as to the definition of ‘carrying on a business in the UK’ in the context of section 2 notices.

## Implications

The Supreme Court’s decision confirms that the traditional presumption against extraterritoriality still applies to the CJA and that the Court will not give effect to public policy considerations where that effectively involves the re-writing of legislation contrary to the intention of Parliament.

In practice, the decision limits the SFO’s ability to serve effective section 2 notices on the representatives of a foreign company while they are in the UK as a short-cut to the traditional MLAT route. It does not prevent them pursuing that traditional route. Documents can therefore still be obtained from a foreign company that does not carry on a business in the United Kingdom; the MLAT process is just more cumbersome. It is important to note that the decision is grounded in the narrow facts of this case. Just because a company is registered outside the United Kingdom, it will not necessarily be outside the jurisdiction of a section 2 notice, if for example it ‘carries on a business’ in the country.

There remains, however, another route for US and UK law enforcement agencies, including the SFO, to obtain extraterritorial data: through the use of the US Clarifying Lawful Overseas Use of Data Act 2018 and the UK Crime (Overseas Production Orders) Act 2019. A data access agreement signed by the US and UK governments facilitates requests for electronic data related to serious crimes that are made directly to technology firms in the respective countries. This option offers a faster means of evidence-gathering, by providing an alternative to the traditional MLAT regime, and is likely to become an increasingly important route to obtain company data and communications.

## FURTHER READING

Read the Norton Rose Fulbright chapter on ‘[Production of Information to the Authorities](#)’, by Pamela Reddy, Kevin Harnisch, Katie Stephen, Andrew Reeves and Ilana Sinkin in GIR’s *The Practitioner’s Guide to Global Investigations*.

See also in *The Practitioner’s Guide* the chapters on:

- [‘Beginning an Internal Investigation: The UK Perspective’](#), by Jonathan Cotton, Holly Ware and Ella Williams
- [‘Co-operating with the Authorities: The UK Perspective’](#), by Matthew Bruce, Ali Kirby-Harris, Ben Morgan and Ali Sallaway
- [‘Individuals in Cross-Border Investigations or Proceedings: The UK Perspective’](#), by Richard Sallybanks and Jonathan Flynn
- [‘Extraterritoriality: The UK Perspective’](#), by Anupreet Amole, Aisling O’Sullivan and Francesca Cassidy-Taylor
- [‘Sanctions: The UK Perspective’](#), by Rita Mitchell, Simon Osborn-King and Yannis Yuen



## Bolloré: can a failed plea bargain lead to self-incrimination at trial?

**Stéphane de Navacelle, Julie Zorrilla and Thomas Lapierre**

Navacelle

A plea bargaining procedure (*comparution sur reconnaissance préalable de culpabilité* – or CRPC) was introduced in France in 2004.<sup>1</sup> It enables a defendant to agree to an offer from the prosecutor of a reduced sentence in exchange for an admission of guilt.<sup>2</sup> The CRPC applies to natural and legal persons and covers a wide range of criminal offences; it can be used for most offences punishable by a prison sentence of up to ten years, including white-collar offences.<sup>3</sup>

The sentence offered under a plea bargain cannot exceed half of the maximum prison sentence available, nor can it be more than three years.<sup>4</sup> If the defendant refuses the sentencing offered by the prosecutor, the case is sent to trial. If the defendant accepts the sentence, however, the CRPC must be approved during a public hearing before a judge.<sup>5</sup> The judge must verify that the alleged facts are real, that the legal charges are justified and that the defendant admits guilt.

A recent case shows that this hearing could have undesirable consequences for a subsequent trial if a judge refuses to approve the CRPC. On 26 January 2021, Mr Vincent Bolloré, one of the wealthiest businessmen in France, appeared along with several executives of his companies before a judge who had been requested to approve a CRPC regarding corruption and embezzlement accusations. The CRPC stemmed from allegations on public procurement contracts related to a port concession in Togo.<sup>6</sup>

Mr Bolloré's companies had also negotiated a *convention judiciaire d'intérêt public* (CJIP). In the CJIP, the companies did not admit any wrongdoing but agreed to pay a €12 million fine and set up a compliance programme.<sup>7</sup> The CJIP is a deferred prosecution agreement that is only available for legal persons and does not imply a conviction, while the CRPC is a criminal conviction applicable to both natural and legal persons.

During the hearing, as required by law, Mr. Bolloré acknowledged the charges publicly and admitted his guilt in exchange for a €375,000 fine (the maximum for such offences). He had also negotiated with the prosecutor that the conviction would not appear on his criminal record.

However, the judge refused to approve the CRPC and sent the case back to the investigating magistrate, who may order a subsequent trial. The judge held that the alleged offences 'seriously undermined public economic order' and 'undermined Togo's sovereignty'. According to the judge, a public trial was warranted in this case. The companies' CJIPs were nonetheless approved.

This surprised the legal profession, as plea bargains, especially in a white-collar crime context, are supposed to afford defendants some measure of legal certainty.

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1 Law No. 2004-204 of 9 March 2004 adapting the justice system to changes in crime.

2 Article 495-7 of the Code of Criminal Procedure.

3 Article 495-7 of the Code of Criminal Procedure.

4 Article 495-8 of the Code of Criminal Procedure.

5 Article 495-9 of the Code of Criminal Procedure.

6 'Dans une affaire de corruption en Afrique, la justice française refuse le plaider-coupable de Vincent Bolloré', Simon Piel, *Le Monde*, 26 February 2021.

7 CJIP No. 12 111 072 209 between National Financial Prosecutor, Bolloré SE and Société financière de l'Odet SE, 9 February 2021.



## Lack of legal remedies for refusal to approve

While French law does allow for an appeal mechanism against an approved CRPC, it does not allow defendants to appeal against a refusal.<sup>8</sup> The only recourse under the law is an application for a ruling on judicial excess of powers before the Court of Cassation.

The National Financial Prosecutor (PNF) confirmed that it was challenging the decision validating the Bolloré CJIPs, indicating that the judge's decision mentioned the recognition of the facts by Mr Bolloré in the CRPC, even though the plea bargain had not been approved. This could potentially jeopardise the presumption of innocence at a subsequent trial given that the decision validating the CJIP is public.<sup>9</sup> In any event, it was reported that the Court of Cassation had refused to hear the PNF's challenge.

More recently, the French Constitutional Supreme Court confirmed that the absence of an appeal mechanism to challenge a judicial refusal to approve a CRPC was not unconstitutional and did not violate the right to an effective remedy for the defendant.<sup>10</sup>

Article 495-11-1, which was inserted into the Code of Criminal Procedure in 2019, specifies that the judge can refuse to approve a CRPC if he or she finds that the nature of the facts, the personality of the offender, the situation of the victims or the general interests of society justify a public trial.<sup>11</sup>

However, owing to the lack of an appeal mechanism against a refusal to approve a CRPC, the Court of Cassation has confirmed that the judge has a discretionary power to refuse to approve a CRPC and has no duty to give reasons for the decision.<sup>12</sup>

Initially, the CRPC procedure was set up to tackle petty crimes and not overload the criminal courts with minor cases. As the range of applicable offences has grown to include the most serious white-collar crimes, this uncertainty could deter defendants and prosecutors alike. A failed CRPC creates a risk for the defendant. Not only can such a lack of remedy deter defendants from plea bargaining, but it may also have a decisive impact on the subsequent trial.

## Acknowledgement of guilt in the CRPC and self-incrimination at trial

As noted above, Mr Bolloré admitted his guilt during a public hearing to secure a CRPC. The judge decided not to approve the CRPC and sent the case back to the investigating magistrate, who may order a subsequent trial.

This could be viewed as self-incriminating, raising a doubt as to whether he will be afforded a fair trial and whether denying any involvement in the allegation remains a viable defence.<sup>13</sup> In that respect, Article 495-14 of the Code of Criminal Procedure provides that parties cannot mention the failed CRPC or the content of the negotiation during the subsequent trial.<sup>14</sup> Nonetheless, the failure to approve the CRPC is likely to be well known in the French legal community and to be covered widely in the media. The approval hearing, where the defendant acknowledges guilt, is public and the media may attend.

Additionally, serious white-collar crimes, investigations of which are complex, are often conducted in France by an independent judge with extensive investigative powers. Once the investigation is over, and when the investigating magistrate agrees for the case to be resolved through a CRPC procedure, the target of the investigation must agree to the procedure, admit guilt and recognise the facts before the CRPC process can begin (negotiation

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8 Article 495-11 of the Code of Criminal Procedure.

9 Order of 26 February 2021 validating the CJIP, available at: Justice / Portail / CJIP.

10 French Constitutional Supreme Court, 18 June 2021, No. 2021-918.

11 Article 495-11-1 of the Code of Criminal Procedure.

12 Cass., crim., 1 September 2020, No. 19-83.658.

13 'Justice pénale négociée : quels rapports entre la responsabilité des entreprises et celle des dirigeants ?', Bernard Cazeneuve, Benjamin Van Gaver and Alexandre Menucci, *Dalloz Actualité*, 26 March 2021.

14 Article 495-14 of the Code of Criminal Procedure.





with the prosecutor, sentence offer, etc.).<sup>15</sup> There is some doubt as to whether this acknowledgment of guilt during the investigation phase is covered by Article 495-14 of the Code of Criminal Procedure, as technically the CRPC procedure has not yet started.

This issue was raised during the recent *UBS* trial, where it was alleged that UBS solicited wealthy individuals to open undeclared bank accounts in Switzerland to evade tax.<sup>16</sup> UBS was sentenced to a €4.5 billion fine.<sup>17</sup> An appeal is pending, and a decision will be rendered in September by the Paris Court of Appeal.<sup>18</sup>

In that case, UBS France argued during the trial that a letter sent by an individual to the investigating magistrate to comply with the requirements of Article 180-1 to initiate the CRPC procedure (and thus an admission of guilt) should be struck from the record because it violated Article 495-14. The Paris Tribunal rejected the argument for procedural reasons but still held that given that the CRPC procedure had not been initiated, this was not covered by Article 495-14. Therefore, it held that it could not be struck from the record and was admissible as evidence.<sup>19</sup>

The Court of Appeal might take a different approach to its interpretation of Article 495-14, but the above example, just like the *Bolloré* case, underlines that the decision to opt for a plea deal should not be taken lightly as it implies an acknowledgement of guilt, which to some extent will be either evidenced in the subsequent trial or known by the court. In that regard, a failed plea deal, and by definition an acknowledgement of guilt, can have direct consequences on the outcome of complex white-collar crimes and the possibility for defendants to convincingly argue that they are innocent at trial. Legal practitioners and their clients in France should weigh the pros and cons carefully before opting for a plea procedure and consider the risk that a failed plea deal could bring.

As complex white-collar crime makes its way through CRPC and CJIP proceedings, the case law is being refined and faces some hurdles. But there is room for hope: the judge in the *Bolloré* case has approved a CRPC in a complex international fraud scheme, saluting the effective remediation measures and victim compensation put in place by the defendants.

## FURTHER READING

Read the Navacelle chapter on 'France', by Stéphane de Navacelle, Julie Zorrilla, Clémentine Duverne and Sarah Reilly in GIR's *The Practitioner's Guide to Global Investigations*.

<sup>15</sup> Article 180-1 of the Code of Criminal Procedure.

<sup>16</sup> 'Procès UBS : avant l'audience, d'ultimes tentatives de négociations', Yann Bouchez et Simon Piel in *Le Monde*, 8 October 2018.

<sup>17</sup> 'UBS condamnée à une amende record de 4,5 milliards d'euros', Danièle Guinot, *Lefigaro.fr*, 20 February 2020.

<sup>18</sup> 'UBS en France: la décision en appel sera bien rendue le 27 septembre pour UBS', *Le Bilan*, 28 June 2021.

<sup>19</sup> Paris Tribunal, 20 February 2019, n°11055092033, p. 28 ('In view of the combined provisions of Articles 179 and 385 of the Code of Criminal Procedure, UBS AG is inadmissible to raise nullities before the criminal court. Moreover, the document in question is a letter from B de BF which is not part of the CRPC procedure. Moreover, the requests made concerning the admissibility of the proceedings or the means of proof are part of the examination of the merits of the case').



## Serco acquittals highlight flaws in corporate settlement process

**Jessica Parker and Andrew Smith**

Corker Binning

Those who follow the prosecution of corporate crime will know the statistics relating to deferred prosecution agreements. At the time of writing, twelve have been agreed with corporates and approved by the court. Four DPAs have been followed by trials of senior employees. Each of those has ended either with the defendants' acquittals or with the case collapsing through judicial intervention.

In the most recent of this latter category, on 26 April 2021, Mrs Justice Tipples handed down a judgment refusing the Serious Fraud Office's application for an adjournment, which effectively forced the SFO to offer no evidence against two former executives of Serco Geografix Limited.

The acquittals have been roundly condemned as further evidence that there are systemic flaws in the DPA process. The first alleged flaw concerns the integrity and coherence of the process. When agreeing a DPA, a company has (at the very least) accepted that there is reasonable suspicion, based on some admissible evidence, that it has committed the offence.<sup>1</sup> For most offences for which a DPA is available, a company can only be guilty where certain individuals' guilty acts can be attributed to it. Where those individuals are subsequently acquitted, many commentators regard this as incoherent, because it means that companies are accepting their guilt – and in doing so not only paying huge penalties, but also typically dismissing individuals who are subsequently acquitted – even though the jury would not have convicted them.

There is some merit in this allegation, but ultimately the court, in approving the DPA, has no power to investigate the strength of the evidence. The court is certainly not making a finding that any individual is guilty. In any event, the SFO's determination of evidential sufficiency is framed against a much lower threshold than that which applies during the trial. Thus an individual who is acquitted after his or her former employer has entered into a DPA might well be aggrieved, but the jury's verdict is not inconsistent with the court's approval of the DPA.

Of course, it is well understood that, from the corporate's perspective, the decision to negotiate a DPA rather than fight a trial is a commercial decision as much as a legal one. But this feeds into the second, and more profound flaw, which is where a company agrees a DPA for primarily pragmatic reasons, it has the effect of fortifying the SFO in their pursuit of evidentially or legally weak cases. Individuals on the receiving end of such cases would be justified in feeling aggrieved.

Does the *Serco* trial offer any support for this criticism? While ostensibly stayed because of a case-management issue, the judgment reveals that there was more to it. The SFO sought the adjournment having identified a flaw in the management of disclosure. It conceded that problems in case preparation had 'undermined the process of disclosure to the extent that the trial cannot safely and fairly proceed until they have been remedied'.

However, in our firm's experience, applications to adjourn in serious fraud cases, whether for disclosure or other reasons, and even at a late stage, are often acceded to. Tipples J confirmed that it was not simply case management that troubled her, but questions about the framing of the case, which it would be 'unrealistic' to say she had not taken into account when reaching her conclusion to refuse the adjournment. The most troubling issue was how the SFO had framed its case – a terminal problem that went to the heart of the SFO's strategy and decision-making.

The problem was that the SFO did not allege that the transactions forming the indictment were a sham. Rather, the SFO described them as fictitious. A 'sham' is a legal term used to describe a purported agreement where the parties have a common intention not to create the legal relations and obligations they purport to create.

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1 1.2.i(b) of the DPA Code.



The substance of the allegation against the individuals in the *Serco* trial was that they had caused a separate company, Serco Limited, to misrepresent its profit margin to the SFO. If the contract had been a sham, individuals at Serco Limited must have also intended it to be so. But this was not the SFO's case, which focused instead on calling the transactions 'fictitious', a term the judge struggled to distinguish from sham. It is clear that she thought that misrepresenting the case in this way was terminally flawed and may not have survived a half-time submission.

But was this a consequence of the DPA process? Did the company, in accepting a DPA, accept a case theory that not only would not have stood up at trial but also gave the SFO false confidence that its case theory was legally and evidentially sound? The SFO has ordered a review into the failures of the case. It is not known whether the review will be published or whether it will reflect on the way the case was framed. If it does not, the SFO will miss an opportunity to examine whether its evaluation and strategy for prosecuting individuals was adversely affected by what went before with the company.

### FURTHER READING

Read Corker Binning's chapter on '[Representing Individuals in Interviews: The UK Perspective](#)', by Jessica Parker and Andrew Smith in GIR's *The Practitioner's Guide to Global Investigations*.

See also in *The Practitioner's Guide* the chapter on:

- '[Negotiating Global Settlements: The UK Perspective](#)' by Nicholas Purnell QC, Brian Spiro and Jessica Chappatte





# The Practitioner's Guide to Global Investigations

Fifth Edition

## Editors

Judith Seddon, Eleanor Davison, Christopher J Morvillo, Michael Bowes QC, Luke Tolaini, Ama A Adams, Tara McGrath

Access the full text of the fifth edition, volumes I and II, here  
[globalinvestigationsreview.com/insight/guides](https://globalinvestigationsreview.com/insight/guides)

## About the guide

Volume I contains 46 comprehensive, authoritative chapters on investigations in the United Kingdom and the United States, allowing the reader to delve deeply into the full range of issues engaged by internal and government-led investigations. Read papers written by world-beating investigations professionals running the whole gamut of topics including risk management, self-reporting, witness interviews, employee rights, representing individuals in interviews, whistle-blowers, fines and disgorgement, forensic accounting skills, individual penalties and third-party rights, extradition, monitorships, parallel civil litigation, privilege, data protection, directors' duties, publicity, cybersecurity, directors' duties and compliance as well as the chapters identified in this newsletter.

Volume II contains four regional overviews and covers 25 jurisdictions. It provides users with easily comparable and cross-referable answers to questions set by our editors. The result is a set of concise answers to any question a company facing an investigation in an unfamiliar jurisdiction must know about commencing an internal investigation, conducting witness interviews, protecting legal privilege and professional secrecy, communicating and co-operating with the authorities and negotiating a settlement. Jurisdictions featured include Argentina, Australia, Brazil, Canada, Chile, China, Colombia, France, Germany, Greece, Hong Kong, India, Ireland, Italy, Mexico, Nigeria, Peru, Singapore, Spain, Switzerland and Turkey, as well as the United Kingdom and the United States.

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Fifth Edition

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