THE YEAR AHEAD

Aziz Rahman considers some points of interest in the world of business and financial crime for 2016

Another year rolls on... and with it the promise of more legal developments.

As with any year, 2016 is set to have its share of talking points. But unlike many previous years, 2016 is already shaping up as one in which the regulatory authorities will face some serious questioning of their abilities.

For a start, this year has commenced just weeks after the Financial Conduct Authority (FCA) dropped its plans for a review of banking culture. Already, this decision is being seen as controversial. The FCA categorically denied anyone had exerted influence on its decision to abandon a review – only for reports to filter out that hint at Bank of England involvement. A review into HSBC’s Swiss private bank has also been scrapped.

Scandal

Such decisions may seem bold and decisive but they can have a habit of coming back to bite you. If 2016 is to go down as a good year for the FCA, it has to hope fervently that the banking industry does not provide further scandal. If it does, then the FCA will face even greater scrutiny about its decision not to look at banking activities in greater detail.

The FCA also has to make sure it conducts its own activities in a way that does not attract unfavourable attention. With its CEO Martin Wheatley effectively forced out last autumn and his acting replacement Tracey McDermott having indicated she is not interested in making the position her own, it remains to be seen who will be running the FCA this year.

With mutterings about increased Bank of England influence at the FCA, along with concerns that government is leaning on regulators to give banks an easy ride and the Treasury Select Committee taking a close interest in the FCA’s shelved reviews, there is little doubt the organisation faces awkward questions this year.

SFO

This year, however, is also set to be a notable one for the Serious Fraud Office (SFO). And whether 2016 will be noted as a favourable or unfavourable 12 months for the SFO remains to be seen. As we write, the very recent collapse of the case against many of those accused of Libor manipulation has to be seen as a hammer blow to the SFO’s credibility.
It has asked for an additional £21M in funding, to add to an extra £10M it has already had on top if its annual £3M budget for 2015–16. This has led to claims that by going cap in hand to the Treasury it is making itself open to political interference. Claims that such a situation will influence which cases it decides to proceed with can only be evaluated over time.

Maybe 2016 will give us the chance to see just how impartial the SFO is. At this time, the SFO is at a crossroads. Will it gain its extra funding? If it does receive it, will it be able to put it to effective use? Will the funding issue make it vulnerable to government pressure?

The SFO faces 2016 having recently secured its first deferred prosecution agreement (DPA), its first Bribery Act conviction and its first successful prosecution over Libor. Whether it builds on such success remains to be seen. The signs regarding Libor this month, however, are not good.

Euribor
One large part of the answer to that question of SFO prospects may lie with Euribor. The SFO has charged six bankers in connection with an alleged six-year scheme to manipulate Euribor benchmark interest rates. The Trial is set for September 2017 but much could happen between then and now that could have a huge effect on whether the prosecution is a high-profile success or a dismal failure.

It will be the world’s first Euribor trial – giving the SFO the chance to grab the glory or become an internationally-recognised loser. In what could prove ominous, an earlier initial hearing at a lower court ended in confusion. The SFO had planned to charge 11 bankers, but prosecutors found out at the last minute that five foreign nationals would not show up. The SFO says it is considering its position about these five. It has to report back to court with its intentions on March 18. Already, it seems, this is to be a challenging year for SFO staff working on Euribor.

Bribery Act
Similarly, the next 12 months could prove informative for investigators looking to bring prosecutions under the Bribery Act. Defenders of the Act, which came into effect in 2011, have always said it would take time to become an effective prosecution tool. The first prosecution has been achieved, along with a deferred prosecution agreement and enforcement action.

The challenge for the SFO – and other organisations – is to show that they can make effective use of the Act to punish corruption. An ability to do this will show both the Act and those using it in a favourable light. A failure to achieve this will call into question both the legislation and the activities of those responsible for wielding it.

Whenever we look ahead, we always emphasise the fact that we are not privy to any special information. We are not granted access to a particular rarefied atmosphere where the legal secrets are held. But we have (again) had another year where our successes have been officially recognised and we do feel that 2016 could be pivotal in the ways we have outlined.

With issues such as FIFA prosecutions, long-running corruption investigations into some of the world’s most famous companies and Forex, Libor and Tesco just some of the other issues that need resolving, there is little doubt that a lot of people have a lot riding on 2016.

Which should make the next 12 months very interesting for those who follow events in the worlds of financial and business crime.
RED ALERT

Why new rules intended to cut red tape could mean extra responsibilities and risks for business.

From this year, businesses that have a turnover below £10.2M will no longer have to have their accounts independently signed off by an auditor. Until now, an auditor had to sign off accounts of all businesses with a turnover of £6.5M and above.

This change is expected to result in thousands of businesses no longer having to be independently audited. Figures vary as to just how many businesses will be affected but the most conservative estimate states that 11,000 businesses will no longer be required to be audited.

The change in the rules is part of Business Secretary Sajid Javid’s attempt to reduce the amount of regulation faced by all UK companies. While the move is being welcomed by many in the business community – and is in line with a European Union directive – it is worth considering what it will mean for those it will affect most. Businesses, after all, are responsible for their books. It is business personnel who can find themselves in the firing line when it comes to identifying any fraud or other wrongdoing. It is them who are expected to explain anything that seems unusual in the company’s books.

Warning

Although the exact figure for the number of companies affected by this change is subject to some discussion, there is another statistic that is worth noting. This relaxation of auditing requirements will mean that 98% of Britain’s businesses will not have to carry out a full audit.

Understandably, the CBI has welcomed the change. But the Institute of Chartered Accountants in England and Wales (ICAEW) has already warned that the relaxation of auditing requirements will make businesses in that 98% more vulnerable to fraud, money-laundering and other financial offences. It has raised its fears with the Department for Business, Innovation and Skills.

Michael Izza, ICAEW Chief Executive, said: “We understand their concern is to reduce the regulatory burden on business, and this is an aim we fully support. We just believe the savings would be better made in less potentially damaging areas.”

Whether the ICAEW obtains any government climb down on the new rules remains to be seen. It is unlikely.

Change

So while the change has alarmed accountants, what concerns should the more general business community have? For those working for companies whose turnover is between £6.5M and £10.2M, it means that their books will no longer have to face the scrutiny they previously had to undergo.

At first glance, this may appear to be an “easy ride” in comparison to businesses with a £10.2M-plus turnover who still have to be audited. But, as we touched on earlier, there is an argument to be made that those who are not audited are under greater pressure – and need to take precautions.

A finger of suspicion will always be pointed when wrongdoing is suspected. The argument that someone should have spotted it is a fair one but does not tell the whole story. Firms have to devise and implement their own procedures to give those in the company the chance to identify wrongdoing. Such procedures will always help tackle the problem. An absence of them is a dangerous and unrealistic way to proceed.

Identification

It may be that many of the companies newly freed from the responsibility of being audited feel they can leave the identification of wrongdoing to the accountant now the auditor will no longer be visiting. Then there are the many firms – either audited or unaudited – who feel that they need do nothing to prevent or identify fraud as the accountant will be on to any illegality in a flash.

This would be a huge mistake. It is imperative that companies do what they can for themselves to reduce the chance...
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of any wrongdoing and the danger of them being implicated in it. Lumping responsibility onto the accountant is a risky, short-sighted approach.

Simple things such as maintaining comprehensive and detailed records of every contact a company has with customers and other third parties may seem like stating the obvious. But such records are essential if and when the investigating authorities come looking for answers.

On a similar theme, companies should not enter a business relationship blindly. They need to learn some basic information about those they are considering working for or with: What line of business are they in? What are the business patterns in their finances? Do certain anomalies indicate anything suspicious? If the answers to such questions are not convincing, you need to tread warily. Such answers (or a lack of them) can give an indication of whether a business (or people working within it) are involved in illegality.

Precautions
To put it simply, ignorance of the law is no excuse. If a firm is to remain on the right side of the law, it has to be aware of the law as it applies to it and its clients. For example, it may be the case that a company may have genuinely never suspected that a customer or partner was involved in, for example, money laundering or other financial crime. But if we consider the money laundering example, the company’s explanations to the authorities will hold greater credibility if its senior staff are familiar with the law regarding money laundering; particularly the relevant aspects of the Proceeds of Crime Act and the Money Laundering Regulations.

In such circumstances, it is vital that a company has taken all relevant precautions to ensure that the finger of suspicion is not pointed its way – regardless of whether an auditor is also looking at the books.

Businesses’ relationships with their staff, customers and third parties can be laid out in the open, entirely visible to the authorities, when an investigation begins. They need to take steps to make sure there is nothing to see that arouses the suspicions of the investigators. Being audit free must not be seen as a get out of jail card.
YOUR MONEY OR THEIRS?

Restraint Orders and Your Assets

The purpose of a Restraint Order is to freeze property that may subsequently be confiscated through a Confiscation Order. It is the power the Crown Court has to make orders depriving convicted offenders of their assets if the offender has benefited from his criminal conduct. A Restraint Order is made under the Proceeds of Crime Act 2002 (POCA) and will usually require a person to declare all he owns to the prosecutor.

Suspicion
Section 40 of POCA creates a number of circumstances in which the Crown Court may issue a Restraint Order. Usually the Crown will apply for an Order after a suspect has been charged with an offence, but the authorities can seek such an order even before there is an arrest; as long as an investigation has started. The application is made ex parte – without notice – so only the prosecution lawyer is at Court presenting the Crown’s case for the Order.

Up until May last year, it was fairly easy for a prosecutor to secure the Order: all that had to be shown was that there was a reasonable cause to believe that the alleged offender had benefited from his criminal conduct. But since 1st June 2015 the test has become even easier. Section 40 of POCA was amended by the Serious Crime Act 2015 so that now all the prosecution have to show is that there are reasonable grounds to suspect an alleged offender has benefited from criminal conduct.

This means that all the Crown has to do is persuade the Judge to the civil standard – on the balance of probabilities – that there is reasonable cause to suspect that the alleged offender has benefited from criminal conduct.

Joint Property
Third parties holding an interest in property can be affected by a Restraint Order. The most obvious example is the spouse of someone who is facing criminal charges. In such circumstances, an application can be made to the Court under s62(3) for directions. The case of Gibson v RCPO [2008] is a useful one in regard to this. In that case, a Confiscation Order was made against a convicted drug trafficker. The assets identified had been the 50% equity in the matrimonial home (purchased in joint names) and a joint bank account, held by the offender’s wife. The Crown Court took the view that the wife must have realised that the mortgage was being paid by the husband’s ill-gotten gains and was thus an asset which could be sold to satisfy the Confiscation Order. The Court of Appeal took a different view: it found that there was no legal principle under which a spouse could be deprived of the benefit of illegally obtained property on the grounds of public policy. The wife kept her half of the house and bank account.

Challenges
Applying the joint property principle at the start of proceedings can provide a solid argument for limiting the scope of any such Order if there are assets held in joint names with a spouse.

A shrewd legal team can also argue over the amount allowed by the Order for ordinary living expenses. Variation applications made after the initial ex parte Order can challenge the amount allowed. What is required is a careful analysis of expenses together with as much proof as possible. These steps need to be considered at the very earliest opportunity. An exception cannot be made for legal expenses in relation to the actual offence in respect of which the Restraint Order is made (s41(4)(a)). Thus, if there are no free assets, the State therefore must pay for the defence through Legal Aid.

Challenges
Once a suspect has been served with a Restraint Order and he has decided he wants to fight it, it is vitally important to discuss it with legal advisors and figure out what the challenges are to it: how much money is needed for reasonable living expenses, what can be said about the charges or proposed charges, how much of the defence case it is tactically wise to give away at that early stage and whether the prosecution can demonstrate it acted properly at the ex parte stage.

In the right legal hands, opportunities can always be found to prevent the Crown having things all their own way by imposing an Order that makes life extremely difficult for a person. The important thing is to seek the right legal advice immediately.

Future
Having your assets restrained is a serious step. There is not only the worry of impending or actual criminal charges but a protracted period of time when you are having to battle with the authorities over your own assets. Anyone affected by such a Restraint Order needs to get to grips with their own finances as soon as possible, consider the case against them, the terms of the Order and develop a strategy with their lawyers as soon as possible to secure their future.

This article is an abridged version of an analysis of Restraint Orders by Aziz Rahman and Jonathan Lennon, which can be found on the Rahman Ravelli website www.rahmanravelli.co.uk

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Another year has passed and brought us some notable legal developments. And perhaps now the dust has settled on 2015, we can look at it in retrospect and see what the truly significant moments were.

Elsewhere in our first newsletter of the year, we take a brief look at what the next 12 months may hold. So here we shall examine what the previous year brought us.

Bribery
Arguably the most notable matter for the record books was the fact that the Serious Fraud Office (SFO) secured its first conviction for bribery under the Bribery Act. Those in favour of the Act always argued that it would take some time to become an effective legislative tool for the authorities – and this has been shown to be true. Since it came into effect in 2011, there had been no convictions until last year; when two defendants were convicted under the Act as part of the Sustainable Growth Group case. Bribery Act detractors could argue with some justification that the case was primarily a £23M biofuel fraud; of which the bribery aspect was far from the major plank of the prosecution. Some have claimed that if it had happened before the Act’s introduction then it is unlikely the bribery aspect of the case would have been prosecuted. But nevertheless, it stands as the first Bribery Act prosecution.

A similarly notable event in 2015 was the first UK disposal of a failure to prevent bribery offence under the Bribery Act. The case was resolved by a civil recovery order for £212,800; with the company under investigation, Brand-Rex Limited, avoiding a criminal prosecution because it had self-reported and carried out what was agreed to be a thorough internal investigation. The company found itself in trouble under S.7 because one of its agents had used its incentive scheme in a manner that was deemed to have given a financial advantage to a customer.

DPA
Making an impressive Bribery Act hat-trick for 2015 was the SFO’s first use of a deferred prosecution agreement. This was in relation to the conduct of Standard Bank and its sister bank Stanbic Bank Tanzania over the payment of commissions to a Tanzanian government official. While the conduct met the criteria for a prosecution, a DPA was chosen as the most appropriate route because the bank had swiftly self-reported what had happened and had cooperated fully with SFO investigators.

A notable year then for those who have waited and watched for signs of the Bribery Act’s effectiveness. While the Act has been slow to set the courts alight, this should come as little surprise. Cases relating to the time before the Act was on the statute books obviously cannot be prosecuted under it and instances of bribery identified since its introduction will be the subject of lengthy, involved legal negotiation before they ever reach court. In time, therefore, 2015 may come to be viewed as the year when the Bribery Act came of age.

Corporate failure
In fairness, in a year in which the government quietly abandoned the much-touted idea of a new offence of a corporate failure to prevent economic
crime, these initial Bribery Act cases may come to have even greater significance. The government argument for not creating such an offence was, we are led to believe, that the idea of establishing corporate criminal liability more widely was unnecessary. We were told last September that this was because corporate wrongdoing was not going unpunished. Yet this seemed to beg the question why was such an offence being considered in the first place.

Certainly, SFO Director David Green was a supporter of the new offence becoming a reality. The idea was not politically contentious as it had cross-party backing and there were few vocal objections to it. Yet for some reason, a plan that the SFO thought would make it easier to prosecute companies was shelved. Such a shelving ensured that the Bribery Act was not extended to cover what seemed to be a popular notion. So, as far as legal developments go, the most important one in 2015 was arguably a non-development.

**Enforcement**

What has to be said, however, is that 2015 was not a quiet year. Even if large-scale legal changes were not ushered in, it was 12 months that saw enforcement at the top of the agenda. Large corporate names, not to mention some of the largest sporting institutions, saw themselves the subject of new or continuing fraud or bribery investigations.

The trend for multi-agency and international investigations continued while some old legal chestnuts such as Euribor, Forex and the conduct of banks in general remained notable issues. 2015 saw Forex convictions, charges brought over Euribor and the Financial Conduct Authority (FCA) rather boldly announcing it was dropping its plans for a wide-ranging review of banking culture. The FCA denied that any political pressure had been exerted on it but the decision looked a little odd, coming out a matter of days after the first Euribor charges were brought against staff from Barclays and Deutsche Bank. Will this do-nothing approach – like the lack of a new corporate failure offence – prove costly?

2015... a year of what could prove to be important firsts and non-events.
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