

Alert | White Collar Defense & Special Investigations



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Top 5 Predictions for UK White Collar Defence in 2019

What does 2019 have in store for white-collar defence in the UK? In this GT Alert, we list our top 5 predictions.

1. HMS SFO: Ms Osofsky Gains Her Sea Legs

In September 2018, the new Serious Fraud Office (SFO) Director Lisa Osofsky indicated various areas of focus for her tenure. Speeches given in Ms. Osofsky's first few months have been underpinned by her eagerness to promote a proactive approach. Most recently, she indicated a desire to combat the slow pace of SFO cases by personally reviewing more than 70 cases.

She also cited the use of cooperating witnesses in the U.S. and stated that the SFO is 'intently exploring' their use in U.K. investigations. The use of cooperating witnesses, and in particular the granting of immunity to them in white collar cases, would be a potential game changer for the agency. White collar cases are notoriously document-heavy, and live testimony from a cooperating witness for the prosecution may effectively remove nagging doubts for a jury.

Our Prediction: There Is Work to Do

We expect Ms Osofsky's words to manifest into action in the early part of 2019. Against a backdrop of some historic cases awaiting decisions and the new director's desire to speed up the investigative and enforcement process, we expect some decisions to be made, charging in some cases and jettisoning others that may have seen lengthy periods of inactivity.

With regard to cooperating witnesses, we expect the SFO to begin to seek the promotion of immunity from prosecution for cooperating witnesses in the right circumstances. This will represent a significant cultural shift.

2. Brexit

With Brexit looming, the loss of the European Arrest Warrant regime and the U.K.'s access to EU shared crime agency databases are both real possibilities.

Our Prediction: New Rules, Same Effect

We anticipate that through new legislation and other interstate agreements, much will ultimately be preserved through slightly different means; though this may take some time. It makes little sense for countries so close geographically to lose mutually beneficial international law enforcement tools.

3. Updates to UK Criminal Law

The new director has flagged, like the director before her, that the present law in the U.K. often makes it hard for the SFO to successfully prosecute cases. The example of corporate criminal liability is often cited.

Our Prediction: The Discussion Will Persist – Any Action Should be Carefully Scrutinised

We expect the new director to continue to lobby for U.K. criminal law to be updated to enable the SFO to investigate and prosecute more easily. Any legislative developments must be closely watched. While on the one hand, it may be true that in certain areas the law could reasonably be changed, it will be important to ensure that fundamental protections are not washed away during the process under the auspices of bringing criminal law up to date. Ironically, Brexit may be the legislative vehicle under which other U.K. criminal laws are updated to plug some of the gaps the new director has highlighted.

4. Unfinished Business – Privilege and Extraterritoriality

Privilege

Last year, the Court of Appeal restored balance when it issued a decision finding that the broad protection afforded by Litigation Privilege under English law applies in the context of an internal criminal investigation. This decision overturned an earlier unexpected and divisive first instance decision which potentially rendered internal investigation reports susceptible to disclosure to a prosecutor.

Following the earlier judgment, the SFO had been touting its entitlement to review documents created by companies during their investigation into alleged wrongdoing, including notes of internal interviews.

The Court of Appeal held that interview notes on the facts of the case in question were privileged, and their production could not be compelled by the SFO.

At the same time, the Court of Appeal stated that it also considered English rules of privilege outside the confines of litigation privilege (namely the 'Legal Advice Privilege') to be out of line with other legal jurisdictions (with English privilege rules affording less protections to companies). The Court of Appeal declined to address this issue, and the SFO did not appeal. As such, the issue of legal privilege in the U.K. remains unresolved.

Extraterritoriality

The Administrative Court ruled that the SFO's powers extended to compel overseas companies to produce material under Section 2 held overseas provided there was a 'sufficient connection'. The decision has been questioned by various commentators.

Our Prediction: To Be Continued...

The issue of privilege and of the SFO's powers will continue to be a hot button issue for companies who will need to carefully assess their position.

5. Transatlantic Collaboration

Currently, the SFO has a secondee from the U.S. Department of Justice (DOJ), a former DOJ/FBI director in the name of Lisa Osofsky, and another former DOJ prosecutor on loan from a U.S. law firm whose remit includes international relations.

Our Prediction: Special Relationship, Special Approach

We expect an increasingly U.S. approach to the way the SFO operates, including more transatlantic investigations as well as a ramping up of the desire for companies to enter into Deferred Prosecution Agreements (DPAs). Whether an increased focus on DPAs will result in a decrease in the prosecution of individuals, a criticism often levelled at U.S. white collar corporate resolutions, remains to be seen.

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