

SPRING EDITION

Maduro, Immunity, and the Boundaries of International Law

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law ever get in sync?

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WELCOME



Nick Barnard
Partner and Editor

Welcome to the Spring 2026 issue of The Knowledge

I am particularly proud of this issue as it shows off the true breadth of Corker Binning's crime and regulation expertise. If you can find another professional update that covers all of Supervisory Notices, the politics of both sovereign immunity and seized cryptoassets, the future of whistleblowing, and magic mushrooms, please do let me know.

In this issue:

- Edward Grange analyses the capture of Nicolás Maduro, and the resulting clash of domestic and international law.
- Priya Dave scrutinises the FCA's increasing enthusiasm for 'assertive supervision' and whether corresponding checks and balances have kept up.
- Joe Green considers the future of whistleblowing as the SFO prepares for a new Director.
- Henrietta Ronson writes on the criminalisation of magic mushrooms and the unusual public perception of this Class A drug.
- Finally, I review R v O'Connor and its significance for both cryptoassets and cross-border proceeds of crime investigations.

Maduro, Immunity, and the Boundaries of International Law

Edward Grange Partner

In the early hours of January 3, 2026, US forces entered the sleeping city of Caracas and captured the Venezuelan president, Nicolás Maduro, and his wife, Cilia Flores. They were subsequently taken to New York to face federal charges. US officials portrayed the operation as a law-enforcement action; however, many international lawyers have criticised it as a serious violation of Venezuelan sovereignty and a breach of the UN Charter's prohibition on the use of force.

Maduro's case involves an extradition issue that did not follow any extradition procedure. His physical custody in the United States was secured by force, outside the established extradition treaty channels that govern the lawful cross-border transfer of suspects.

As such, his case offers an opportunity to critically examine the relationship between sovereignty, immunity and recognition, and to assess how those concepts bear upon the legitimacy of criminal proceedings against a head of state.

Sovereignty, immunity and recognition

Maduro's primary defence in the New York court relies on the principle of head-of-state immunity, which holds that an incumbent head of state is shielded from prosecution in foreign criminal courts under international law. Specifically, the principle is a form of *immunity ratione personae*. It does not address criminal liability but rather determines if a foreign court has the authority to exercise its criminal jurisdiction over the person concerned.

Indeed, last year, the Court of Cassation in France, in considering an appeal based on a violation of international customary law concerning the personal immunity of sitting heads of state, ruled that:

"The purpose of personal immunity, as thus defined, requires that it not be linked to the recognition of the status of Head of State by the forum State or to the existence of diplomatic relations between the two States.

"Indeed, the recognition of a government is a unilateral, political act by which a State grants that government rights in their bilateral relations. Customary international law does not prescribe an obligation of recognition and does not regulate either the conditions or the effects on immunities of such a discretionary act.

"If personal immunity were to be conditional upon recognition, this would amount to granting each State, democratic or not, the discretionary power to authorise criminal proceedings before its courts against a foreign Head of State. This would undermine the very substance of personal immunity.

"It follows from all these elements that a unilateral act by which a State decides to cease recognising a government cannot affect the personal immunity of a sitting Head of State by derogating from international custom."

However, this international customary law principle

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¹ Cour de cassation (Assemblée plénière), 25 July 2025, Pourvoi n° 24-84.393 (Arrêt n° 685 B+R), ECLI:FR:CCASS:2025:CR90685 - <https://www.legifrance.gouv.fr/juri/id/JURITEXT000051993273>

is not guaranteed to aid Maduro. In US legal practice, a key question is whether he qualifies as a head of state, and is thus entitled to immunity. Reports suggest that the US Department of Justice ("DOJ") is likely to argue that it has not recognised Maduro as the legitimate president of Venezuela since 2019, when his inauguration for a second term prompted the opposition-led National Assembly in Venezuela – and over fifty countries worldwide including the United States – to declare the election invalid.

Historically, US courts have given considerable weight to the executive's stance as to whether it recognises *de facto* leaders of foreign countries as democratically elected heads of state for the purposes of conferring personal immunity.

This approach has precedent. In *United States v. Noriega*², the Eleventh Circuit upheld the denial of a claim of head-of-state immunity, concluding that the US "never recognised Noriega as Panama's legitimate, constitutional ruler." But Noriega's case is not on all fours with Maduro's. Noriega was regarded, both within Panama and throughout democratic countries worldwide, as nothing more than a military dictator whose junta had seized power without the pretence of an election and without ever officially serving as Panama's president. Maduro, in contrast, was recognised as Venezuela's president by many countries (including the United States) up to 2019 and still enjoys considerable home support today: Delcy Rodriguez, who was sworn in after his capture, has called for his release and has supported his claim to remain president.

Despite these differences, and even if support for Maduro remains strong in Venezuela, it seems likely that the US courts will defer to the executive's non-recognition decision, and on that basis hold that he does not benefit from personal immunity in the criminal proceedings initiated in New York.

If the Court decides not to regard Maduro as an incumbent head of state, with the result that he cannot claim personal immunity, functional immunity (*ratione materiae*) is unlikely to serve as an alternative defence. Functional immunity concerns jurisdiction over 'official acts' performed in the defendant's capacity as head of state, which a forum may treat as non-justiciable out of respect for international comity. However, the allegations against Maduro of drug trafficking and narco-terrorism are challenging to classify as 'official acts'.

Unlawful extraction

Maduro was unlawfully extracted, not lawfully extradited, from Venezuela. Had the US authorities sought Maduro's extradition under the US/Venezuela extradition treaty, no doubt he would have argued in Venezuela's courts – and quite possibly succeeded in arguing – that he should not be extradited because he benefited from personal immunity. By circumventing any Venezuelan determination of this due process safeguard, the US effectively abrogated the same determination to itself, and in the process rode roughshod over all other protections afforded by extradition law. But does this grave breach of international law affect the legality of proceeding against Maduro in the US?

Absent Venezuelan consent (unlikely given Maduro's party remains in power), UN Security Council authorisation (even more unlikely given that Russia exercises a veto), or a persuasive claim of the US acting in self-defence (equally unlikely), a cross-border raid and capture of a head of state violates the prohibition on the use of force under the UN Charter and the customary rule of territorial sovereignty. However, even if the capture is condemned in international law, the jurisdictional consequences in the US are likely to be limited.

US criminal jurisdiction has long been resilient to the

² *United States v. Noriega*, 117 F.3d 1206 (11th Cir. 1997)

"US criminal jurisdiction has long been resilient to the manner of capture ... Considerations of personal or functional immunity are unaffected by the lawfulness of how the defendant arrived in the dock. It matters not that extradition law was ignored. International law may condemn the means, but US domestic law preserves the end."

manner of capture. In *United States v Alvarez-Machain*³, the Supreme Court held that an individual's forcible abduction from Mexico (Alvarez-Machain was accused of killing DEA agent Enrique "Kiki" Camarena Salazar) did not, without more, prohibit his trial in a US court even if an extradition treaty existed between the nations that would have allowed for his lawful transfer.

This illustrates the *Ker-Frisbie*⁴ doctrine: that the method of obtaining jurisdiction is generally irrelevant to a court's power to try a defendant. Considerations of personal or functional immunity are unaffected by the lawfulness of how the defendant arrived in the dock. It matters not that extradition law was ignored. International law may condemn the means, but US domestic law preserves the end.

A UK comparator: status immunity and abuse of process

An analogy substituting the UK for the US sheds light on this complex legal scenario. Consider the following assumptions: (i) the UK intends to prosecute Maduro for serious drug-importation conspiracies, (ii) there is no feasible extradition option, as no treaty exists between the UK and Venezuela, and (iii) Maduro is forcibly brought to the UK with the knowledge and involvement of UK authorities.

In this context, the UK enforces head-of-state immunity under Section 20 of the State Immunity Act 1978, which incorporates the Diplomatic Privileges Act of 1964. This applies to heads of state with the necessary modifications⁵, entrenching immunity as a robust defence.

However, a more distinctive constraint in the UK arises even when immunity is not decisive. UK courts have established an abuse-of-process jurisdiction that can prevent the government from achieving extradition by the back door.

In the case of *R v Horseferry Road Magistrates' Court, ex p Bennett*⁶, the House of Lords affirmed that where

³ 504 U.S. 655 (1992)

⁴ Arising out of *Ker v. Illinois*, 119 U.S. 436 (U.S. 1886) and *Frisbie v. Collins*, 342 U.S. 519 (U.S. 1952)

⁵ Former heads of state do not enjoy immunity *ratione materiae* (functional immunity) from criminal prosecution for international crimes, such as torture, committed while in office - *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* (No 3) [2000] 1 AC 147

⁶ [1994] 1 A.C. 42

lawful extradition procedures exist, the courts may refuse to try an accused person who has been brought into the jurisdiction through executive misconduct, particularly when UK officials are complicit.

In *R v Mullen*⁷, the Court of Appeal overturned a conviction, determining that the defendant's unlawful deportation to the UK from Zimbabwe, facilitated by British officials, had undermined the integrity of the legal process. These legal principles serve to protect the integrity of the court system rather than to uphold the rights of a foreign state.

A further and potentially decisive feature of the UK framework is that the *Bennett/Mullen* abuse-of-process jurisdiction is not a narrow, fact-bound rule, but rather a constitutional control on how the Executive may (and may not) deliver a defendant into the criminal courts. The categories of "executive misconduct" contemplated by *Bennett* are not closed: the principle is the protection of the rule of law and the integrity of the judicial process, not the policing of a finite list of procedural defects. *Mullen* goes further. The Court of Appeal was prepared to characterise the UK's involvement in an unlawful cross-border transfer as a "*blatant and extremely serious failure to adhere to the rule of law*"⁸ and set aside the conviction, precisely because the court would not permit its processes to be used to capitalise on executive illegality. *Belhaj & Anor v Straw & Ors*⁹ demonstrates that the direction of travel is clear: it signals the UK courts' approach to rendition-type allegations (in *Belhaj* it was alleged that the UK "arranged, assisted and encouraged" their rendition, as well as conspired in and assisted torture, inhumane and degrading treatment inflicted on them by the US and Libyan authorities) is that it treats "extraordinary rendition" as executive lawlessness.

On the counterfactual facts as set out above, if Maduro were forcibly brought to the UK with the knowledge and involvement of UK authorities, it would be an

attempt to achieve "extradition by the back door." The absence of a bilateral UK-Venezuela extradition treaty should not dilute the analysis. The point is not that a treaty mechanism was available and ignored; it is that the Executive cannot substitute coercive abduction for legality, and should instead pursue whatever lawful pathway is realistically open, whether an ad hoc extradition arrangement, or some other internationally lawful basis for transfer.

In that sense, the UK position offers a meaningful contrast with the US debates that often turn on deference to executive recognition or the sequencing of immunity determinations. The UK abuse-of-process jurisdiction asks whether the court, by trying the case, would be asked to ratify executive lawlessness and thereby bring the administration of justice into disrepute.

ICC involvement

Another significant development could emerge from the federal courtroom in Manhattan.

The International Criminal Court ("ICC") commenced its Situation in Venezuela I investigation in 2018, and in March 2024, the Appeals Chamber confirmed that the Prosecutor may resume¹⁰, dismissing Venezuela's appeal. As investigations progress, the Court can issue arrest warrants, potentially targeting senior officials.

If the ICC were to issue a warrant of arrest for Maduro and request his surrender from US custody, would Washington comply?

The US is not a State Party to the Rome Statute. Although the ICC can invite a non-party to assist on an ad hoc basis, it cannot compel cooperation.

US domestic law presents a more significant barrier to co-operation with the ICC. Legislation prohibits US governmental entities from transferring "any person" from the US to the ICC and includes broad restrictions on cooperation with ICC requests. Even if there were

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⁷ [2000] QB 520; [1999] 3 WLR 777

⁸ Rose, LJ

⁹ [2017] UKSC 3

¹⁰ <https://www.icc-cpi.int/venezuela-i>

"Nicolás Maduro's capture raises profound questions about sovereignty, immunity, and international law. While the US portrays the operation as a lawful enforcement action, critics highlight significant violations of Venezuela's sovereignty and international norms."

political will, a transfer to The Hague would have to navigate these statutory prohibitions and find a legitimate source of authority.

The political climate also leans toward non-cooperation. Executive Order 14203, issued in February 2025, established a sanctions regime against the ICC, with additional designations announced by US officials in December 2025. In this context, the voluntary surrender of a high-profile detainee to the Court would be unexpected.

Nevertheless, two important caveats should be noted. First, US–ICC relations have historically fluctuated, and there have been occasions of practical cooperation despite non-membership. A notable example is Bosco Ntaganda's surrender at the US Embassy in Kigali in 2013¹¹, followed by his transfer to the ICC. Second, Venezuela's position regarding the ICC is unstable; in December 2025, Reuters reported that the Venezuelan National Assembly voted to repeal the law ratifying the Rome Statute, initiating the withdrawal process. Article 127 clarifies that withdrawal does not stop ongoing proceedings or matters currently under consideration by the Court.

Therefore, the implications of an ICC warrant of arrest for Maduro are likely not a straightforward handover but rather a complex debate about sequencing: should the US prosecution occur first, with any later surrender subject to political and statutory considerations, or does the ICC warrant argue for prioritising international rather than domestic jurisdiction? In either case, the issues of immunity and sovereignty remain unresolved.

Conclusion

Nicolás Maduro's capture raises profound questions about sovereignty, immunity, and international law. While the US portrays the operation as a lawful enforcement action, critics highlight significant violations of Venezuela's sovereignty and international norms. The complexities of head-of-state immunity,

particularly in light of US non-recognition since 2019, may ultimately influence the outcome of the case in US courts.

Despite the contentious nature of the capture, US legal precedent suggests that the manner of the capture and in turn Maduro's extraction to New York, may not impede the prosecution process. As this case unfolds, it will likely serve as an insight into the tangled interplay between domestic legal frameworks and international law.

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¹¹ <https://www.gov.uk/government/news/foreign-secretary-supports-transfer-of-bosco-ntaganda-to-icc>

The shroom boom – will UK law ever get in sync?

Henrietta Ronson
Partner

Magic mushrooms are experiencing a renaissance.

Psilocybin, the compound that creates the “magic” in the mushrooms, is quickly converted in the body to psilocin which then binds to serotonin receptors – our “happy channels” – triggering euphoria, altered perception, hallucinations and spiritual experiences. Studies have also shown that psilocybin therapy can alleviate treatment-resistant depression and addiction.

The difficulty for proponents of magic mushrooms is – of course – that they are illegal in the UK.

Under the Misuse of Drugs Act 1971 (“MDA”), substances considered “dangerous or otherwise harmful” when misused are classified according to their level of harm: Class A, B and C. Psilocybin and psilocin themselves have both been historically classed as Class A drugs alongside cocaine and heroin, but it was only in 2005 that the mushrooms themselves were classified as such.

A brief history

The use of magic mushrooms long predates modern drug laws. Indigenous cultures in Central America including the Aztecs used them in ceremony, referring to them as teonanacatl, meaning “flesh of the gods.”

Western interest was ignited in 1955 when R. Gordon Wasson, a banker from J.P. Morgan, participated in a traditional Mazatec mushroom ceremony in Huautla de Jiménez, Mexico. His 1957 *LIFE* magazine photo essay “Seeking the Magic Mushroom” made the front cover, bringing psychedelics and Maria Sabina – the great mushroom priestess – to popular culture.

Wasson sent samples of the mushrooms to Swiss

chemist, Albert Hofmann, who isolated and synthesised the psychoactive compounds, psilocybin and psilocin.

However, scientific research and the use of psychedelics came to an abrupt end in the 1970s when the US criminalised them. The UN Convention on Psychotropic Substances and the UK MDA followed suit a year later in 1971.

It is a widely held view that magic mushroom compounds were classified not because of scientific evidence of harm but as part of a broader political response to LSD and the anti-war movement. The subsequent legal framework was rigid and precautionary, with no regard for recognised medicinal and therapeutic use.

The loophole years

For many years, the MDA contained a significant loophole with regards to magic mushrooms. Although the statutory definition of controlled substances included psilocybin and psilocin, it did not include raw mushrooms. As a result, fresh magic mushrooms could be lawfully sold and possessed, provided they were not dried or otherwise “prepared”.

Throughout the 1990s and early 2000s, this ambiguity was widely exploited. By 2005, an estimated 400 stores openly sold magic mushrooms, including well-known markets such as Camden and Portobello Road.

The contradiction was compounded by Customs and Excise (now HM Revenue & Customs) which subjected magic mushrooms to VAT on the basis that they were consumed as a “stimulant” rather than as nutrition. This effectively acknowledged their drug status whilst permitting their commercial sale in order for the government to collect tax.

In 2005, Parliament amended the MDA to close the loophole, classifying “fungus (of any kind) which contains psilocin or an ester of psilocin” as a Class A drug. Fresh mushrooms became illegal overnight,

“The difficulty for proponents of magic mushrooms is – of course – that they are illegal in the UK.”

"Possession of magic mushrooms carries a maximum sentence of seven years' imprisonment and an unlimited fine. Production or supply carries a maximum sentence of life imprisonment."

making possession, cultivation and supply serious criminal offences.

Although spores themselves remain legal to possess, once they germinate and produce psilocybin, criminal liability follows.

Legal position today

Possession of magic mushrooms carries a maximum sentence of seven years' imprisonment and an unlimited fine. Production or supply carries a maximum sentence of life imprisonment.

Importing magic mushrooms into the UK constitutes separate offences under the Psychoactive Substances Act 2016 and the Customs and Excise Management Act 1979 ("CEMA"), with penalties comparable to supply. There is no exemption for personal use, small quantities, or online purchases.

A key word in the CEMA legislation is 'attempt'. In cases where drugs (or other prohibited items) are intercepted by UK border agencies, it is not a defence to say that the accused never received the parcel or received substituted contents. In practice, many police investigations arise from (small) online orders intercepted at the border.

Cultural perception and evolution of research

Magic mushrooms occupy an unusual cultural footing. Unlike LSD, cocaine or heroin, magic mushrooms have never completed the cycle of excess, backlash and taboo.

Rather, for a generation, they were legal, seasonal, and discussed with relative casualness, associated with folk traditions and nature rather than criminality. In 2004, the music magazine *NME* attributed "the third summer of love" to magic mushrooms which were widely regarded as a safe(r), legal alternative to ecstasy and LSD.

Interest in magic mushrooms has revived through a convergence of factors including renewed psychedelic

research on mental health treatment, Silicon Valley enthusiasm for microdosing, and global conversations around decriminalisation.

In 2018, Professor Michael Pollan's *How To Change Your Mind* brought the science and history of psychedelics back into the mainstream. It topped *The New York Times* Best Sellers list and, in 2022, was adapted into a Netflix documentary.

In various parts of the world, legal approaches remain fractured. Psilocybin is legal in Jamaica. Certain ceremonial uses are protected in Mexico. Psilocybin truffles are legal in the Netherlands. Some US cities, including Washington, D.C., have decriminalised personal use of magic mushrooms. There is an obvious irony when we remember that it was in fact the US who spearheaded the war on drugs.

The UK's growing disconnect

Against this background, the Government's rigidity places the UK increasingly at odds with international trends.

Although the UK launched the world's first centre for psychedelic research in 2019, and has been at the forefront of academic research, psilocybin is listed in Schedule 1 of the Misuse of Drugs Regulations 2001. Drugs in Schedule 1 have no recognised medicinal use. Research into therapeutic potential operates under strict Home Office licences that can make clinical trials expensive, time-consuming and logistically difficult.

UK advocacy groups are pushing for revolution. They have called for certain Schedule 1 psychedelic drugs to be moved into Schedule 2 to remove barriers to clinical trials, whilst retaining their Class A status under the MDA.

Historically, the UK Government has been opposed to such change. However, in July 2025, in response to a 2023 Home Affairs Committee report which advocated "urgent" rescheduling, the Advisory Council on the Misuse of Drugs agreed with the recommendation in

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principle but subject to operational feasibility; it is yet to be implemented.

Meanwhile podcasts, social media, culture and wellness platforms frequently promote magic mushrooms using language that implies legality, discretion and therapeutic benefit.

In 2023, Justin Bieber was photographed wearing a hoodie emblazoned with "Magical mushrooms – we shall eat them more often" whilst Harry Styles revealed to *Rolling Stone* magazine that he "did a lot of mushrooms" at Malibu's Shangri-La studio when recording his album *Fine Line*. In a 2021 podcast, Chris Martin of Coldplay revealed that he tried magic mushrooms and "loved it... it sort of confirmed my suspicions about the universe".

Practical problems

This visibility and discourse creates a false sense of legitimacy, reinforced by the historical memory of mushrooms once being lawful, with real-life consequences.

The presentation of magic mushrooms as lifestyle products bears little resemblance to their treatment by the UK criminal justice system.

Interception at the border frequently leads to criminal investigation, arrest and prosecution. Many defendants are genuinely shocked that ordering a small quantity of magic mushrooms online, even for personal use, constitutes a serious Class A drug offence.

Conclusion

The gap between cultural perception and legal consequence is unusually wide, and it is widening as the psychedelic renaissance gathers momentum.

Until Parliament revisits the classification of magic mushrooms with scientific specificity or until public enthusiasm wanes, magic mushrooms will occupy a uniquely dangerous position: marketed as ancient and therapeutic, yet prosecuted as one of the most serious drugs on the statute book.

"Until Parliament revisits the classification of magic mushrooms with scientific specificity or until public enthusiasm wanes, magic mushrooms will occupy a uniquely dangerous position: marketed as ancient and therapeutic, yet prosecuted as one of the most serious drugs on the statute book."

R v O'Connor – the limits of POCA in cross-border investigations

Nick Barnard
Partner

Few areas of the criminal law evolve as quickly as money laundering and the proceeds of crime. As well as relatively frequent statutory amendments¹, since coming into force there have been at least ten House of Lords or Supreme Court judgments concerning the Proceeds of Crime Act 2002 ("POCA"). By contrast, the recent Supreme Court rulings on, say, joint enterprise or the meaning of 'dishonesty' in fraud offences are once-in-a-generation shifts.

Why is POCA so turbulent? Partly, because of its size and scope. The statute itself now runs to some 800 pages – up from a mere 325 on its first enactment. Its eight parts deal with a myriad of criminal and civil offences and procedures, from confiscation and pre-charge restraint to civil recovery to substantive money-laundering offences, and the related investigatory powers available for each.

That size and scope is linked to the second reason – the world of POCA moves quickly. Money-laundering typologies are constantly evolving to try and outpace detection and prevention. Restraint and freezing powers must bite without delay in order to prevent dissipation. As such, new and amended POCA powers are constantly required, and need to be drafted sufficiently broadly in the hope of avoiding obsolescence before they are even implemented.

The increasingly international nature of economic crime – which has grown more prevalent over the lifetime of POCA – is also a contributing factor. Complex fraud and related proceeds of crime investigations are seldom confined to one jurisdiction. As such, POCA is required to address criminality and contested assets based all over the world, and the competing laws and demands of other regimes.

The recent High Court judgment in *DPP v O'Connor* [2025] EWHC 3000 (KB) is a demonstration of how POCA has evolved to address new challenges that could not have been envisaged at the time of its drafting. It also highlights the limitations of POCA with respect to international investigations, and where future conflicts might arise.

The facts

The first respondent to the claim², Joseph O'Connor, is a UK national who was extradited to the US from Spain in April 2023 following his involvement in a series of high-profile cybercrime offences, including the hacking of a cryptocurrency exchange and hijacking the social media accounts of celebrities including Barack Obama and Elon Musk. O'Connor pleaded guilty and was sentenced to five years' imprisonment whilst agreeing to forfeit approximately \$800,000 as his benefit of the offending. In August 2023, the US court made a further restitution order requiring him to pay approximately \$2.2m to the victims of the offences.

Across the Atlantic, in April 2024, the Director of Public Prosecutions of England & Wales applied for a Civil Recovery Order ("CRO") against cryptoassets held in a Coinbase account and two Binance accounts, which had been made the subject of a Property Freezing Order in April 2023. The accounts were held in the names of the second and third respondents, but it was not disputed that the

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¹ For example, the abolition of the Asset Recovery Agency by the Serious Crime Act 2007, the increase in the maximum sentence for non-payment of a Confiscation Order to 14 years by the Serious Crime Act 2015, and the creation of Unexplained Wealth Orders and Account Freezing Orders by the Criminal Finances Act 2017.

² There were two other respondents but neither participated in proceedings, having already admitted that they had opened the relevant cryptoasset accounts in their own names at the request of O'Connor for a small fee. Thereafter, they handed over control of the accounts to him and had no further involvement, and thereby both disclaimed any interest in the assets.

cryptoassets could be traced back to O'Connor's offending, despite efforts to obscure their provenance through crypto-mixers and anonymous exchanges. At the time of the CRO application, the cryptoassets were valued at approximately £3m but by the time of the judgment had appreciated to approximately £4.1m.

Despite the unusual nature of the offending and the assets concerned, the High Court had little difficulty in granting the order:

- i) On application by an enforcement authority under s243 POCA, the court must make a CRO if satisfied to the civil balance-of-probabilities standard that property is recoverable.
- ii) As per *DPP v Briedis* [2021] EWHC 3155 (Admin), cryptoassets are 'property' for the purposes of POCA³.
- iii) Section 282A POCA provides that where the property is situated outside the UK, there must be a 'connection between the case and the relevant part of the United Kingdom'. In this instance, the court concluded that it was sufficient that the second and third respondents were UK citizens currently situated in England & Wales, and that O'Connor was a British citizen who had at the very least passed through Heathrow airport following his release from US prison.

In applying this gateway, the court sidestepped the issue of the 'location' of the cryptoassets, noting only that: *'The Property in this case is held by financial institutions that have a presence in the UK, but it is not entirely clear where the Property is held'*. This acknowledges – but does not attempt to address – the conundrum created by cryptoassets and decentralised blockchains.

Rather than being held by one entity in an identifiable jurisdiction, the assets are administered en masse by its users all over the globe. Fortunately for UK enforcement agencies, if an identical case were to arise today there would be a direct solution in the form of Crypto-Wallet Freezing and Forfeiture Orders, which came into force very shortly after O'Connor's CRO proceedings commenced in April 2024. The effect of these powers is to allow English courts to freeze and forfeit cryptoassets administered by 'UK-connected' cryptoasset service providers. The definition of 'UK-connected' under s215ZB POCA permits various gateways. Coinbase operates an FCA-regulated entity and, whilst Binance has had a chequered history with the UK regulator, it nonetheless has UK-registered subsidiaries and evident ambition to operate here. As such, both exchanges would almost certainly fulfil one or more of the necessary criteria.

- iv) Under s304 POCA, property is 'recoverable' if it is obtained through unlawful conduct.
- v) O'Connor's guilty plea in the US, his use of the second and third respondents as well as other proxies, crypto-mixers and anonymous exchanges to obscure the provenance of the assets and the lack of any explanation – from O'Connor or any other source – as to potential lawful sources, were sufficient to conclude that they had indeed been obtained through unlawful conduct.

The effect of a CRO is to vest the property in the nominated trustee for civil recovery, who is responsible for realising it on behalf of the relevant enforcement agency.

The Respondent's position

O'Connor did not oppose the court's conclusion that

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³ As an interesting sidenote on the concept of 'property' in the age of cybercrime, see the very recent judgment in *R v Lakeman* [2026] EWCA Crim 4, in which the Court of Appeal concluded that virtual 'gold pieces' – the in-game currency of online multiplayer adventure Old School Runescape – are property which can be stolen for the purposes of Theft Act 1968.

“Given that there is essentially no dispute as to the facts of O’Connor’s offending, the tracing of the criminal property or the legitimacy of the US restitution, the case illustrates neatly the challenges facing cross-border POCA investigations.”

the cryptoassets were the proceeds of his offending, and therefore recoverable property. Aside from a procedural argument as to service of the claim on him, his main submission concerned the unsatisfied \$2.2m US restitution order.

O’Connor emphasised that the cryptoassets represented his only means of satisfying that order. In the usual course of things, the proceeds of a CRO are divided between the Home Office and the relevant enforcement agency under the Asset Recovery Incentivisation Scheme. In that circumstance, O’Connor would be left with nothing but an unpaid restitution order. As such, O’Connor invited the court to structure its order such that he be permitted to pay his restitution from the assets being recovered.

The Court’s conclusion – and the likely solution

Unfortunately for O’Connor – and the US authorities – the court concluded that it had no power to assist him. The effect of a CRO is to vest the property in the trustee. It is not a compensation order requiring payment to a victim, nor is it a finding of a third-party interest in the property.

Whilst the Crown Prosecution Service (“CPS”) did not oppose O’Connor’s desired outcome, it was also unable to assist directly. It was not open to the CPS to pay the restitution order on behalf of O’Connor from the recovered property, nor could it agree that the relevant amount be excluded from the CRO. However, there was a means by which the recovered assets could be transferred to the US, under a 1994 US-UK Mutual Legal Assistance Treaty (“MLAT”). By the time of the final hearing in November 2025, it had been agreed that, if a CRO was made, the US authorities would make a request under this MLAT for an asset-sharing agreement. The court was therefore persuaded to add a preamble to its order noting the ‘expected’ roles of the US and UK authorities.

So where does this leave Mr O'Connor? Whilst this may well represent the best that the English court could do for him, he is still not out of the woods. There is no guarantee that US-UK negotiations will succeed, particularly in these turbulent political times. Cryptocurrency is famously volatile, and so a price crash in the intervening months could easily leave the value of O'Connor's stash – if not liquidated by the trustee in time – insufficient to satisfy the restitution order. In an interesting shift of positions, his interests have come to align with the same US authorities who extradited and imprisoned him. For the UK authorities, the increase in the value of the assets since O'Connor's offending may well result in a windfall of the remainder after payment of the restitution.

Given that there is essentially no dispute as to the facts of O'Connor's offending, the tracing of the criminal property or the legitimacy of the US restitution, the case illustrates neatly the challenges facing cross-border POCA investigations. Despite having done all of the legwork in investigating, locating, extraditing and convicting O'Connor, the US was apparently unable to compensate the victims.⁴ Conversely, the CPS was offered the opportunity to seize a hefty bounty, despite having had no involvement in the substantive criminal investigation. The only mechanism by which this apparent unfairness might be remedied is diplomatic, rather than legal.

Although a sensible solution for O'Connor looks likely, this is primarily due to the longstanding history of transatlantic mutual legal assistance. Those familiar with the world of POCA may already be considering the equivalent situation concerning Jian Wen, Zhimin Qian (AKA Yadi Zhang) and Song Hok Li. All three have recently been convicted for their part in the UK-based laundering of the proceeds of a significant Chinese investment fraud.

More significantly for the purposes of POCA, at the time of her arrest, Qian was found to be in control of cryptoassets valued at one stage at more than £5bn. These assets are understood to have ultimately derived from the investment fraud and are currently under the control of the CPS. In the opening stages of the related civil recovery proceedings, the DPP has indicated an intention to create a compensation scheme for those Chinese victims, although no details have yet been made public. The devil will inevitably be in that detail – for example, will any compensation be pegged to investors' original losses suffered between 2014 and 2017, or will they benefit from the monumental uplift in the value of Bitcoin? Given the contrast in diplomatic relations between London and Washington, on the one hand, and between London and Beijing, on the other – as well as the vast sums potentially up for grabs by the UK Treasury – it seems unlikely that the negotiations will be as straightforward. However, whatever the approach taken, we can say from the judgment in *O'Connor* that the High Court will be reluctant to go beyond the confines of POCA in determining the eventual destination of the assets.

⁴ The judgment offers no comment as to whether the US had made any attempts to enforce the restitution order, or why if not. It may be that – perhaps in the absence of the jurisdictional ties relied upon by the English court – there were insufficient US powers to move against the cryptoassets. Alternatively, perhaps there was sufficient faith that the UK was best placed to recover the property, and that an appropriate asset-sharing agreement would follow.

Regulatory headlocks and airing dirty laundry – the FCA’s evolving approach to Supervisory Notices

Priya Dave
Of Counsel

“Assertive supervision” has become a favourite refrain at the Financial Conduct Authority (“FCA”), wheeled out as evidence of a tougher, more mature approach to regulation. The FCA now presents assertive supervision as a tool alongside enforcement, designed to tackle harm earlier and more decisively. Since a shake-up in enforcement leadership in 2023 led to a slimmer enforcement portfolio, the message is clear: expect the FCA to reach for assertive supervision far more often than it has in the past.

Airing dirty laundry

Key to the supervisory arsenal are VREs (Voluntary Requirement), OIREs (Own-Initiative Requirement), VVOPs (Voluntary Variation of Permission) and OIVOPs (Own-Initiative Variation of Permission). These are used by the FCA to impose specific restrictions or obligations on firms to address risks to consumers or market integrity. VREs and VVOPs are agreed voluntarily with a firm (although many feel that the word ‘voluntary’ is a misnomer as the process can feel like being held in a regulatory headlock) while

OIREs and OIVOPs are imposed unilaterally by the FCA when it needs to act quickly or where cooperation (such as signing up to a VREQ or VVOP) is not forthcoming.

For firms required by the FCA to take specific action, a key consideration in deciding whether to (i) agree to a VREQ/VVOP or (ii) compel the FCA to impose an OIRE/OIVOP is the risk of associated publicity. While

VREs and VVOPs are recorded on the Financial Services Register, they do not necessarily need to be publicised. However, an OIRE or OIVOP is imposed through a Supervisory Notice, which is the formal statutory document used by the FCA to set out the requirement or variation of permission, its scope and when it takes effect. The FCA publishes Supervisory Notices on its website, which are routinely picked up by the press. These Notices normally contain substantial details about the firm’s business practices and why the FCA considers these practices pose a risk to consumers or the financial system. Once this information has been aired in the public domain, it can be hard for a firm to restore its reputation and rebuild consumer confidence. As such, the impact a Supervisory Notice can have on a firm is significant and can be just as damaging as an Enforcement Notice. It is not unusual for a firm’s bottom line to be irreparably damaged by the publication of a Supervisory Notice before it has even had an opportunity to challenge the Notice in the Upper Tribunal.

Given the potentially existential consequences of Supervisory Notices, it is worth scrutinising the slow but steady changes to the underlying process made by the FCA in the last few years, which have incrementally eroded a firm’s ability to meaningfully challenge such a Notice. It is especially pertinent to contrast the Supervisory Notices process with that for Enforcement Notices.

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¹ The information in this table is taken from the Publications section of the FCA website: <https://www.fca.org.uk/publications>. It may not reflect the true number of Supervisory Notices issued as it would not, for example, include Supervisory Notices where successful publication challenges to the Upper Tribunal were made.

Decision-making

Enforcement decisions are made by the FCA’s Regulatory Decisions Committee (“RDC”). The RDC operates separately from the rest of the FCA and its members are drawn from business, consumer and financial services backgrounds.

In relation to Supervisory Notices, from 1 April 2013 (the FCA’s inception) to 25 November 2021, the decision to issue a notice was taken by the RDC where the proposed requirement or variation was considered ‘fundamental’. A ‘fundamental’ requirement or variation is described in the FCA’s Decision Procedure and Penalties Manual (“DEPP”) as one removing a type of activity or investment from the firm’s permission, refusing an application to include a type of activity or investment, imposing or varying an asset requirement, or refusing an application to vary or cancel such a requirement. If the proposed requirement or variation was not ‘fundamental’, the decision could be made by a staff committee or an individual staff member under ‘executive procedures’.

The table below sets out the decision-maker for Supervisory Notices published from the FCA’s inception to 25 November 2021:¹

YEAR	RDC	EXECUTIVE PROCEDURES		TOTAL
		Single staff member	Committee	
2013 (from 1 April)	4	1	1	6
2014	4	0	0	4
2015	4	1	3	8
2016	1	0	0	1
2017	3	0	1	4
2018	4	0	1	5
2019	3	0	1	4
2020	10	0	1	11
2021 (to 25 November)	9	5	6	20

As can be seen, during this period the RDC was the decision-maker most of the time. This demonstrates that the majority of these Supervisory Notices were for ‘fundamental’ requirements or variations, i.e. those that likely had a notable and perhaps even fatal impact on firms. The figures also indicate a rapid increase in the use of Supervisory Notices since 2020, which continued up to 2023 when 21 Supervisory Notices were published. Since 2023, the number of published Supervisory Notices has decreased. However, the industry cannot take much comfort as the number of VREQs and VVOPs has substantially increased year on year since 2021: from just 64 in the financial year 2021/2022 to an eye-watering 125 in the financial year 2024/2025.

These numbers also portray an apparent historic reluctance for a decision under executive procedures to be made by a single staff member rather than a committee. That reluctance dramatically shifted in 2021. In the first eleven months of that year, five of eleven published Supervisory Notices made under executive procedures were decided by a single staff member. Thereafter, on 26 November 2021, the FCA overhauled its decision-making policy. It removed the RDC as a decision-maker for Supervisory Notices, so that all such decisions would be made by FCA staff under executive procedures. The significance of this shift should not be underestimated. The RDC is the most independent decision-making body within the FCA, and is generally regarded as a robust gatekeeper rather than a rubber stamp. As such, it represented an important safeguard for a firm’s right to challenge a Supervisory Notice. Although the FCA received overwhelming opposition when the prospect of removing the RDC from the Supervisory Notices process was announced, it nonetheless doggedly ploughed on with the change.

Moreover, not only did the FCA remove the RDC as a decision-maker for Supervisory Notices, it

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also "disbanded" the Regulatory Transactions Committee ("RTC") which pre-26 November 2021 was the committee for decisions under executive procedures.² This disbandment seems an odd choice for the FCA to have made, given that the executive procedures policy still allows for a decision under executive procedures to be made by a committee or a single staff member. In reality, not one published Supervisory Notice appears to have been decided by a committee since 26 November 2021. The financial services industry is understandably distrustful of the FCA's decision to disband the RTC in the absence of any persuasive reason for the change; explanations of administrative efficiency and faster decision-making simply do not ring true. Firms are suspicious that the true motive is that it is easier for a Supervision team to persuade a single staff member than a committee of three or four that a Supervisory Notice is needed.

Oral representations

It is not just the constitution of the decision-maker for Supervisory Notices that has changed in recent years. Before 26 November 2021, a firm given a first Supervisory Notice had an automatic right to make oral representations to the decision-maker when arguing that a second Supervisory Notice should not be given. This right was removed on 26 November 2021 with the introduction of DEPP 2.3.1A G, which states that oral representations will be considered by the decision-maker "only in exceptional circumstances where [the decision-maker] determine[s] that prohibiting oral representations are likely to impact on the fairness of the decision". This is in stark contrast to the practice for enforcement cases, where a subject has an unfettered right to make both written and oral representations to the RDC. Oral representations are important as they enable a firm to engage directly with the decision-maker, look them in the eye and

² <https://www.fca.org.uk/publication/annual-reports/2021-22.pdf>.

"It is difficult to comprehend how the FCA thinks it can make fair decisions without the benefit of oral representations."

ensure that their position on a prospective notice is properly considered. Nuanced or complex points are often easier for firms to convey orally than in writing. Indeed, it is difficult to comprehend how the FCA thinks it can make fair decisions without the benefit of oral representations.

Disclosure and jurisdiction

Other significant differences between the Supervisory Notices process and the enforcement process are in respect of disclosure and the Upper Tribunal's jurisdiction.

Following the Upper Tribunal's scathing criticism of the FCA's approach to disclosure exercises in several cases, the FCA announced in November 2024 that it had made a number of changes to its disclosure process in regulatory enforcement cases. These changes include disclosing all material that is relevant to the facts of the matter in a regulatory enforcement case, except in certain scenarios. This new approach marks a considerable step change from the statutory requirements on the FCA to disclose only material that it relies on, considers undermining or is of assistance to the subject's case. By contrast, the FCA has been silent on whether it has reviewed or changed its disclosure processes for Supervisory Notices. One therefore assumes that a firm that appeals a Supervisory Notice to the Upper Tribunal will receive only material that meets the statutory disclosure test from the FCA, whereas a firm that appeals an Enforcement Notice will receive all relevant material. A firm that appeals a Supervisory Notice is therefore much more reliant on the FCA having made correct disclosure determinations; in light of the Upper Tribunal's criticisms, it is difficult for firms to have full confidence in the FCA's ability to do this.

Further, the Upper Tribunal's jurisdiction in respect of a Supervisory Notice is generally narrower than

that for an Enforcement Notice.³ This is because a Supervisory Notice is not considered a 'disciplinary reference' for the purposes of s.133 of the Financial Services and Markets Act 2000 and, as such, the only options available to the Upper Tribunal when determining an appeal of a Supervisory Notice are to dismiss the appeal or to remit the matter to the FCA with a direction to reconsider and reach a decision in accordance with the Upper Tribunal's findings. Conversely, when dealing with an appeal of an Enforcement Notice, in respect of the non-prohibition order elements of the notice, the Upper Tribunal must determine what, if any, is the appropriate action for the FCA to take. It then must remit the matter to the FCA with any such directions that the Tribunal considers appropriate for giving effect to its determination. Ultimately, this means that firms subject to Supervisory Notices have less recourse through the courts than firms subject to Enforcement Notices.

Conclusion

The FCA's progressive weakening of checks and balances in the issuance of Supervisory Notices has fostered a climate of deep distrust among firms. Whilst this administratively efficient approach may enable the Regulator to act more swiftly and decisively, it also creates the troubling risk that a firm can, in effect, be sunk by supervisory action alone. When the stakes are this high, it is remarkable that firms are afforded no meaningful opportunity to challenge what may be an arbitrary regulatory decision. The FCA is, in effect, marking its own homework — a position that, if occupied by anyone else, would surely warrant a "must do better".

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³ The exception to this is in respect of prohibition orders, where the Upper Tribunal's jurisdiction is the same as it is for Supervisory Notices.

Incentivising whistleblowing – should integrity come with a finder's fee?

Joseph Green
Associate



Complicated problems often require creative solutions. The Serious Fraud Office (“SFO”) has been on the back foot publicity-wise for some time, as a result of cases collapsing and prominent convictions being overturned. It should therefore be no surprise that its now-outgoing Director Nick Ephgrave marked his tenure with bold proposals to shake up the agency and create a reputation for success rather than scandal. Despite his term in office heading to a premature end, one of those proposals – adopting a US-style incentivisation scheme for whistleblowers – remains in dry ink in the SFO business plan for 2025-2026.¹

In this context, whistleblowing is a report to the authorities by an employee of suspected wrongdoing within their organisation. The SFO is one UK investigatory body currently benefitting from whistleblowing, with its Intelligence Division having processed 167 whistleblowing disclosures from a total of 1,450 referrals between 2024-2025.² Although no UK agency refuses whistleblowing reports as a matter of policy, few offer financial compensation to whistleblowers. This is in contrast to US practice, and Ephgrave has not hidden that the inspiration for pursuing this novel

approach stems in part from the success of incentive schemes offered by law enforcement agencies across the Atlantic.³

The US example

The U.S. Securities and Exchange Commission (“SEC”) utilises provisions under section 922 of the Dodd-Frank Act to compensate whistleblowers. The requirements are straightforward:

- i) the whistleblower’s information must be ‘original’, i.e. derived from the whistleblower’s independent knowledge or analysis;
- ii) it must not already be known to the SEC; and
- iii) it must not exclusively derive from an allegation made in legal proceedings, a government report, or from the media.

If the SEC’s prosecution is successful and the financial sanction exceeds \$1 million, the whistleblower is entitled to compensation of between 10-30% of the sanction. In 2020, the Commission awarded \$175 million to 39 individuals, which rose to \$255 million awarded to 47 individuals in 2024.^{4,5}

The SEC’s philosophy was put bluntly by Nicole Creola Kelly, the chief of the SEC Whistleblower Program, in 2021: *“I don’t think people appreciate this enough...that when a whistleblower comes forward, they might have potential exposure. We pay whistleblowers to have culpability.”*⁶

Inspired the SEC’s success, the Department of Justice (“DOJ”) initiated its own Whistleblower Awards Pilot Program in 2024, providing a financial incentive for the reporting of corporate misconduct akin to that investigated by the SFO. Ephgrave has claimed that many hundreds of whistleblowers have chosen to report wrongdoing abroad due to the lack of financial incentive in the UK. If implemented, the SFO’s proposals would seek to keep at least some of that intelligence bounty at home.

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¹ SFO Business Plan 2025-2026, page 2 https://assets.publishing.service.gov.uk/media/67ee4e86199d1cd55b48c6e8/SFO_2025-26_Business_Plan.pdf

² SFO Annual Report and accounts 2024-2025 GOV, page 21 https://assets.publishing.service.gov.uk/media/686f95fc10d550c668de3d9c/SFO_Annual_Report_and_Accounts_2024-25.pdf

³ GOV website, Director Ephgrave’s speech at RUSI 13 February 2024, para 28. <https://www.gov.uk/government/speeches/director-ephgraves-speech-at-rusi-13-february-2024>

⁴ 2020 Annual Report to Congress – Whistleblower Program https://www.sec.gov/files/2020_owb_annual_report.pdf

⁵ SEC Office of the Whistleblower – Annual Report to Congress for Fiscal Year 2024 <https://www.sec.gov/files/fy24-annual-whistleblower-report.pdf>

⁶ The Wall Street Journal – SEC’s Whistleblower Chief Manages Growing Pains as Program Gains Popularity

"Ephgrave has claimed that many hundreds of whistleblowers have chosen to report wrongdoing abroad due to the lack of financial incentive in the UK. If implemented, the SFO's proposals would seek to keep at least some of that intelligence bounty at home."

The UK opposition

The Financial Conduct Authority ("FCA") and Prudential Regulatory Authority ("PRA") have previously formed a united front against incentive schemes. Their joint 2014 report appeared to halt incentive schemes dead in their tracks, at least for the two regulators.⁷ Amongst the various risks and challenges cited were:

- a) malicious or speculative reporting;
- b) entrapment – a party seeking to engineer or encourage wrongdoing to create an opportunity to report;
- c) conflicts of interest in court – if a whistleblower's evidence is subsequently relied upon, will the incentive undermine their credibility;
- d) qualification criteria – striking the balance between ensuring valuable reports are remunerated, without raising the expectations of payments for low quality reports or reports made in bad faith;
- e) public perceptions – potentially significant payouts for whistleblowing would be at odds with UK policy and cultural expectations around reporting wrongdoing.

Many of the FCA/PRA objections still carry weight and would equally apply to paid SFO whistleblowers, particularly malicious or speculative reporting. The prospect of reward will inevitably encourage bad actors to furnish unreliable or contrived information in the hope of a payout, whilst perhaps glossing over their own culpability. In doing so, they may well tarnish the overall perception of whistleblowing, at least in this jurisdiction, which until now at least has rested firmly on a sense of duty to call out wrongdoing simply because it is the right thing to do. Less persuasive is the suggestion that incentive payments create an irreconcilable conflict of interest.

⁷ Financial Incentives for Whistleblowers - Note by the Financial Conduct Authority and the Prudential Regulation Authority for the Treasury Select Committee <https://www.fca.org.uk/publication/financial-incentives-for-whistleblowers.pdf>

"Whatever the arguments against, the tone surrounding incentive schemes for whistleblowers is undoubtedly at a turning point."

It is true that whistleblowers who go on to give evidence will have their credibility tested. However, this is a consistent challenge faced by prosecutors of all stripes. Every day juries assess the character of witnesses and evaluate their motives. As long as the application of the incentive scheme in each case is properly disclosed, it is down to the jury to make a determination as to the whistleblower's reliability.

Whatever the arguments against, the tone surrounding incentive schemes for whistleblowers is undoubtedly at a turning point. HM Revenue & Customs ("HMRC") has recently implemented a 'strengthened' reward scheme and, notwithstanding its former misgivings, the FCA tentatively announced in December its recognition of *"benefits in, and implications of, providing incentivisation to whistleblowers."*⁸ The FCA's change in stance is particularly interesting, given the existing obligation for its supervised firms and individuals to proactively report wrongdoing.

Protection for whistleblowers

For those who decide to make a disclosure, the current legal protections are afforded by the Public Interest Disclosure Act 1998 ("PIDA"), which ensures that the whistleblowing employee *"has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done [by their employer]."*⁹ However, these measures are not fit for purpose. Should the whistleblower be treated unfairly, their remedy is a claim for damages against their employer, which is daunting, potentially expensive and has no guarantee of success. Furthermore, irrespective of motive or outcome, involvement in whistleblowing can have an irreparable impact on reputation, particularly within close-knit industries. When considering an incentive scheme to augment these protections, those who blow the whistle must have their expectations properly set from the beginning. The pay-out mechanism and prospects

of success in general terms should be made clear in published guidance and during the earliest stages of reporting, to ensure that each individual is fully informed as to the protection that a (potential) future settlement might offer.

Simultaneously, businesses will need to consider their own whistleblowing policies. Employers generally encourage their workers to report wrongdoing internally in the first instance, but query whether the average such programme is sufficient to discourage a whistleblower from reporting straight to the SFO. Cementing a culture which encourages internal reporting would in turn bolster the spirit of the protections offered by PIDA.

What next for the SFO?

The SFO is pushing an 'everything now' approach to intelligence, whether it be tip-offs from whistleblowers or corporate self-reporting. It is keen to filter the good information from the bad itself, implementing a 'carrot-and-stick' approach in order to have sight of potential criminal wrongdoing at the earliest opportunity. The promotion of whistleblower incentive schemes sits neatly alongside the SFO's stance on corporate self-reporting – most recently set out in its April 2025 guidance on Corporate Cooperation – and in particular self-reporting as the primary route to securing a Deferred Prosecution Agreement.

The SFO would do well to ensure that incentives for whistleblowers and self-reporting are not at odds. Interestingly, the DOJ's Corporate Whistleblower Awards Pilot Program has catered for this balance, which ultimately comes down to timing. If a company self-reports within 120 days of receiving the whistleblower's report they can still be eligible for a presumption of a declination under the Corporate Enforcement and Voluntary Self-Disclosure Policy, the first step towards a non-prosecution agreement. On the flip side, an employee in the US who reports

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⁸ IFCA - Prescribed Persons Annual Report 2024/25 <https://www.fca.org.uk/data/prescribed-persons-annual-report-2024-25>

⁹ Incorporated into section 47B of the Employment Rights Act 1996 <https://www.legislation.gov.uk/ukpga/1996/18/section/47B>

"The SFO seems confident that it can filter good information from the bad, and not agonise about compromised witnesses. From an agency perspective, it is difficult to see how that approach is wrong. If the SFO can justify a programme into existence in the UK, it may also have a significant impact on how businesses respond to internal reporting."

internally triggers a countdown of 120 days, within which they must report to the DOJ following the engagement with their employer.¹⁰ Seemingly in the spirit of encouraging reporting wholesale, internal reporting by the whistleblower in the first instance can increase the size of their award at the end of a case. The SFO should keep this approach in mind, if whistleblower incentives become a reality.

Conclusion

The US has led the way and it appears the UK will follow eventually. The SFO seems confident that it can filter good information from the bad, and not agonise about compromised witnesses. From an agency perspective, it is difficult to see how that approach is wrong. If the SFO can justify a programme into existence in the UK, it may also have a significant impact on how businesses respond to internal reporting. Perhaps the only remaining question is whether Mr Ephgrave's successor will share in his enthusiasm to take whistleblowing incentives from concept to reality.

¹⁰ Corporate Whistleblower Awards Pilot Program Guidance, page 4. <https://www.justice.gov/criminal/media/1400041/dl?inline>

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