



ICLG

The International Comparative Legal Guide to:

Business Crime 2014

4th Edition

A practical cross-border insight into business crime

Published by Global Legal Group, in association with CDR, with contributions from:

Anagnostopoulos Criminal Law & Litigation

Baker & Partners

BCL Burton Copeland

Bloomfield – Advocates & Solicitors

De Pedraza Abogados, S.L.P.

Díaz Reus

ELIG, Attorneys-at-Law

Estudio Durrieu Abogados S.C.

Geni & Kebe

Homburger

Houthoff Buruma

Ivanyan and Partners law firm

Kachwaha & Partners

Knierim | Huber Rechtsanwälte GbR

Lampert & Schächle Attorneys at Law Ltd.

Latham & Watkins

MacPherson Leslie & Tyerman LLP

Maples and Calder

Metzner Associés

Mkono & Co. Burundi Sprl

Nishimura & Asahi

Park & Jensen LLP

Portos, Ortiz Larregui y Asociados, S.C.

Rogério Alves & Associados, Sociedade de Advogados, RL

Skadden, Arps, Slate, Meagher & Flom LLP

Studio Legale Pisano

Torres|Falavigna Advogados

wkklaw attorneys at law



GLG

Global Legal Group

Contributing Editors

Gary DiBianco & Gary Rubin, Skadden, Arps, Slate, Meagher & Flom LLP

Account Managers

Beth Bassett, Maksim Dolgusev, Robert Hopgood, Dror Levy, Maria Lopez, Mahmoud Nedjai, Florjan Osmani, Oliver Smith, Rory Smith

Sales Support Manager

Toni Wyatt

Sub Editors

Nicholas Catlin
Barbara Fitzsimons

Editors

Beatriz Arroyo
Gemma Bridge

Senior Editor

Suzie Kidd

Group Consulting Editor

Alan Falach

Group Publisher

Richard Firth

Published by

Global Legal Group Ltd.
59 Tanner Street
London SE1 3PL, UK
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design

F&F Studio Design

GLG Cover Image Source

Global Legal Group

Printed by

Ashford Colour Press Ltd.
October 2013

Copyright © 2013

Global Legal Group Ltd.
All rights reserved
No photocopying

ISBN 978-1-908070-77-7

ISSN 2043-9199

Strategic Partners



General Chapters:

1	The Shrinking Scope of Privilege in Multi-Jurisdictional Investigations – Gary DiBianco, Skadden, Arps, Slate, Meagher & Flom (UK) LLP	1
2	Deferred Prosecution Agreements in the UK – The Dawning of a New Era in Criminal Enforcement Against Corporates? – Richard Sallybanks & Shaul Brazil, BCL Burton Copeland	5
3	The Use of Wiretaps to Investigate Financial Crimes Post-Rajaratnam – Douglas Jensen & Amy Dieterich, Park & Jensen LLP	9
4	An Overview of Business Crime in Latin America – Michael Diaz, Jr. & Carlos F. Gonzalez, Diaz Reus	14

Country Question and Answer Chapters:

5	Argentina	Estudio Durrieu Abogados S.C.: Nicolas Durrieu & Amanda Muñoz de Toro	19
6	Austria	wkklaw attorneys at law: Norbert Wess & Bernhard Kispert	27
7	Brazil	Torres Falavigna Advogados: Luís Carlos Dias Torres & Andrea Vainer	37
8	BVI	Maples and Calder: Arabella di Iorio & Victoria Lord	44
9	Burundi	Mkono & Co. Burundi Sprl: Alice Nijimbere & Gustave Niyonzima	51
10	Canada	MacPherson Leslie & Tyerman LLP: Douglas Hodson, Q.C. & John Agioritis	57
11	Cayman Islands	Maples and Calder: Martin Livingston & Adam Huckle	65
12	Colombia	Diaz Reus: Michael Diaz, Jr. & Marcela Cristina Blanco	74
13	England & Wales	BCL Burton Copeland: Guy Bastable & Shaul Brazil	82
14	France	Metzner Associés: Aurélien Hamelle	90
15	Germany	Knierim Huber Rechtsanwälte GbR: Hans-Peter Huber & Dr. Anna Oehmichen	98
16	Greece	Anagnostopoulos Criminal Law & Litigation: Ilias G. Anagnostopoulos & Jerina (Gerasimoula) Zapanti	106
17	India	Kachwaha & Partners: Ashok Sagar & Sumeet Kachwaha	114
18	Italy	Studio Legale Pisano: Roberto Pisano	123
19	Japan	Nishimura & Asahi: Yoshinori Ono & Norimitsu Yamamoto	132
20	Jersey	Baker & Partners: Stephen Baker & Cyril Whelan	143
21	Liechtenstein	Lampert & Schächle Attorneys at Law Ltd.: Siegbert Lampert & Rudolf Schächle	150
22	Mexico	Portos, Ortiz Larregui y Asociados, S.C.: José Manuel Portos Ubierna	157
23	Netherlands	Houthoff Buruma: Aldo Verbruggen & Hansje van den Noort	164
24	Nigeria	Bloomfield – Advocates & Solicitors: Adekunle Obebe & Dayo Adu	171
25	Portugal	Rogério Alves & Associados, Sociedade de Advogados, RL: Rogério Alves	177
26	Russia	Ivanyan and Partners law firm: Vasily Torkanovskiy	186
27	Senegal	Geni & Kebe: Mouhamed Kebe & Papa Massal Sow	197
28	Singapore	Latham & Watkins: Ing Loong Yang & Tina Wang	204
29	Spain	De Pedraza Abogados, S.L.P.: Mar de Pedraza & Cristina de Andrés	213
30	Switzerland	Homburger: Flavio Romero & Roman Richers	226
31	Turkey	ELIG, Attorneys-at-Law: Gönenç Gürkaynak & Ceyda Karaoğlan	236
32	USA	Skadden, Arps, Slate, Meagher & Flom LLP: Gary DiBianco & Gary A. Rubin	243

Further copies of this book and others in the series can be ordered from the publisher. Please call +44 20 7367 0720

Disclaimer

This publication is for general information purposes only. It does not purport to provide comprehensive full legal or other advice. Global Legal Group Ltd. and the contributors accept no responsibility for losses that may arise from reliance upon information contained in this publication. This publication is intended to give an indication of legal issues upon which you may need advice. Full legal advice should be taken from a qualified professional when dealing with specific situations.

England & Wales

Guy Bastable



BCL Burton Copeland

Shaul Brazil



1 General Criminal Law Enforcement

1.1 What authorities can prosecute business crimes, and are there different enforcement authorities at the national and regional levels?

The Crown Prosecution Service (CPS), incorporating the former Revenue and Customs Prosecution Office, prosecutes most forms of business crime, including tax frauds and corporate manslaughter. However, the majority of high value corporate fraud and corruption cases are prosecuted by the Serious Fraud Office (SFO). Numerous other specialist agencies also prosecute business crime. For example: the Financial Conduct Authority (FCA) prosecutes market manipulation and insider dealing; the Office of Fair Trading (OFT) (to be replaced by the Competition and Markets Authority on 1 October 2013) prosecutes cartel arrangements; and the Department for Business, Innovation and Skills, the Health and Safety Executive, and the Environment Agency prosecute insolvency, health and safety, and environmental offences respectively.

1.2 If there are more than one set of enforcement agencies, please describe how decisions on which body will investigate and prosecute a matter are made.

Whilst the CPS, supported by police investigators or HM Revenue & Customs, prosecutes many business crime cases, allegations of certain types of business crime are commonly received by specialist agencies for investigation and prosecution, e.g., boiler room fraud (FCA) or price-fixing (OFT) (see question 1.1 above). Further, where an offence involves serious or complex fraud, it may be referred to the SFO. The SFO is also the lead investigator and prosecutor for allegations of overseas corruption. The decision to refer a case to the SFO is based on statutory provisions and/or memoranda of understanding between the agencies. The SFO then applies certain criteria in deciding whether to accept the case for investigation (see question 6.1 below).

1.3 Is there any civil or administrative enforcement against business crimes? If so, what agencies enforce the laws civilly and which crimes do they combat?

Some agencies whose remit includes both a regulatory and enforcement function have powers to impose administrative penalties. The FCA, for example, can impose fines against companies and individuals and may withdraw or limit such persons' authorisation. Agencies such as the FCA and HM Revenue & Customs can also take civil enforcement action in relation to business

crime, e.g., obtain injunctions, payment of restitution, or insolvency orders. In addition, certain prosecutors (including the SFO) can institute civil recovery proceedings for the purpose of recovering money and other property obtained through unlawful conduct.

2 Organisation of the Courts

2.1 How are the criminal courts in England and Wales structured? Are there specialised criminal courts for particular crimes?

Criminal courts are divided into Magistrates' Courts and Crown Courts. There are no juries in Magistrates' Courts, which hear minor criminal cases. Crown Courts generally hear only indictable offences, which are offences of a requisite seriousness. Appeals from decisions of the Crown Court may be made to the Court of Appeal. Exceptionally, a further appeal may be made to the Supreme Court. There are no specialised courts for particular crimes.

2.2 Is there a right to a jury in business-crime trials?

There is a general right to a jury in all cases tried on indictment. However, since 2006, prosecutors have been able to apply for cases to be tried without a jury where there is evidence that jury tampering would take place. Further, since 2003, there have been provisions on the statute book (not yet brought into force) to enable applications to be made for certain fraud cases to be tried without a jury.

3 Particular Statutes and Crimes

3.1 Please describe any statutes that are commonly used in England and Wales to prosecute business crimes, including the elements of the crimes and the requisite mental state of the accused:

o Fraud generally

Many fraud-related business crimes are prosecuted either under the common law offence of conspiracy to defraud or under the Fraud Act 2006. Under the common law, it is an offence for two or more people to agree dishonestly to prejudice the rights of another. Under the Fraud Act, a person may commit fraud either by false representation, by failing to disclose information or by abuse of position. The main elements of the offence are dishonesty with an intent to gain or cause loss or to expose another to a risk of loss.

o **Fraud and misrepresentation in connection with the sale of securities**

Under the Financial Services Act 2012, it is an offence for a person to knowingly or recklessly make misleading statements in relation to investments or to dishonestly conceal information in connection with a statement. The offender must act for the purpose of inducing, or be reckless as to whether he may induce, another person to deal or refrain from dealing in securities. The offence also applies where a person intentionally carries out misleading practices, such as artificial trades, for the purpose of creating a false or misleading impression and thereby to induce another person to deal or refrain from dealing in securities.

o **Fraud and misrepresentation in connection with the sale of derivatives**

There is no specific offence regarding fraud and misrepresentation in connection with the sale of derivatives (albeit that the FCA may take administrative action under the market abuse regime). It is worth noting, however, that the Financial Services Act 2012 has introduced an offence of making misleading statements or creating misleading impressions in relation to the setting of a 'relevant' benchmark. Currently, the only relevant benchmark specified by the UK Treasury is the London Interbank Offered Rate (LIBOR).

o **Accounting fraud**

Under the Theft Act 1968, a person is guilty of false accounting if he destroys, defaces, conceals or falsifies any account, record or document required for an accounting purpose, or where he produces or makes use of any such account etc., knowing it is or may be misleading, false, or deceptive in a material particular. The offender must have acted dishonestly with a view to gain for himself or another, or with intent to cause loss to another.

o **Insider dealing**

Under the Criminal Justice Act 1993, it is an offence for a person who has inside information to deal in securities, encourage another to deal, or disclose inside information to another (other than in the proper course of his employment). However, there are a number of defences which are set out in the Act, for example, where the person would have done what he did even if he did not have the information, or where the person did not realise that the information was price-sensitive.

o **Embezzlement**

There is no specific offence of embezzlement. Rather, such conduct is likely to be prosecuted as a fraud offence (see above) or as an offence of theft under the Theft Act 1968. A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it.

o **Bribery of government officials**

The Bribery Act 2010, which came into force on 1 July 2011, creates offences of bribing another person and receiving a bribe (whether in the public or private sector), and bribery of foreign public officials, as well as a new offence for commercial organisations of failing to prevent bribery by persons associated with them (such as an employee, agent or joint venture partner). The Act describes various ways in which bribery can be committed, but, in general, it is committed where a person offers, promises or gives (or requests, agrees to receive or accepts) a financial or other advantage intending that, as a consequence, a relevant function or activity should be performed improperly. The offence of failing to prevent bribery is an offence of 'strict liability' but is subject to a statutory defence if the company can show it had 'adequate procedures' in place to prevent persons associated with it from bribing. The government has issued guidance on the Act which is intended to help companies understand the types of procedures they can put in place to prevent bribery by associated persons.

The Bribery Act is not retrospective. In respect of conduct prior to

1 July 2011, bribery of government officials may be prosecuted under the common law, under the Public Bodies Corrupt Practices Act 1889 (PBCPA) or under the Prevention of Corruption Act 1906 (PCA). The PBCPA is limited to local government bodies. Bribery of central government employees is therefore usually prosecuted under the PCA.

o **Criminal anti-competition**

Under the Enterprise Act 2002, it is an offence for an individual dishonestly to agree with one or more others to make or implement, or cause to be made or implemented, certain types of anti-competitive conduct, namely price-fixing, market-sharing, bid-rigging and limitation of production or supply. Companies have only a civil liability, e.g., under the Competition Act 1998. However, following the coming into force of the competition provisions in the Enterprise and Regulatory Reform Act 2013, expected to take place in April 2014, the requirement to establish dishonesty in anti-competition prosecutions against individuals will be removed. Instead, a number of statutory defences will be available, including, for example, the absence of an intention to conceal the arrangement.

o **Tax crimes**

There are numerous revenue and customs related offences. For example, under the common law, any form of fraudulent conduct which results in diverting money from the Revenue is an offence of cheating the Public Revenue. Under the Taxes Management Act 1970, a person who is knowingly concerned in the fraudulent evasion of income tax will commit an offence. Under the Customs and Excise Management Act 1979, it is an offence to be in any way knowingly concerned in any fraudulent evasion or attempt at evasion of any duty chargeable on any goods. Finally, under the Value Added Tax Act 1994, it is an offence for a person to be knowingly concerned in, or take steps with a view to, the fraudulent evasion of VAT.

o **Government-contracting fraud**

There is no specific offence relating to government-contracting fraud. Such conduct is likely to be prosecuted as a fraud or corruption offence (see above).

o **Campaign-finance/election law**

The Representation of the People Act 1983 contains the principal electoral offences, namely: 'undue influence' whereby it is an offence to make use of, or threaten to make use of, force, violence or restraint in order to induce or compel any voter to vote or refrain from voting; 'personation' whereby it is an offence to vote as someone else; 'bribery' whereby it is an offence to give any money or procure any office to or for any voter in order to induce any voter to vote or refrain from voting; and 'treating' whereby it is an offence if either before, during or after an election a person gives or provides or pays wholly or in part the expense of giving or providing any food, drink, entertainment or provision in order to influence corruptly any voter to vote or refrain from voting.

The Political Parties, Elections and Referendums Act 2000 contains various offences in relation to breaches of limits on campaign expenditure incurred by or on behalf of registered parties or by or on behalf of third parties in relation to the production or publication of promotional material. The Representation of the People Act 1983 further prohibits unauthorised expenditure by or on behalf of individual candidates in an election campaign.

o **Any other crime of particular interest in England and Wales**

Money laundering

Under the Proceeds of Crime Act 2002, it is, in general terms, an offence to deal with 'criminal property', i.e., property which constitutes or represents a person's benefit from criminal conduct and the alleged offender knows or suspects that this is the case.

Corporate Manslaughter

Under the Corporate Manslaughter and Corporate Homicide Act 2007, an organisation will be guilty of an offence if the way in which its activities were managed or organised caused a person's death and amounted to a gross breach of a relevant duty owed by the organisation to the deceased, where the way in which its activities were managed or organised by its senior management was a substantial element of that breach. Fatal accidents also expose companies to criminal liability under the Health and Safety at Work etc. Act 1974.

Offences under the Companies Acts

The various Companies Acts create numerous criminal offences, including failing to keep adequate accounting records, making false statements to an auditor, and fraudulent trading (where a person is knowingly party to the carrying on of a business for any fraudulent purpose).

3.2 Is there liability for inchoate crimes in England and Wales? Can a person be liable for attempting to commit a crime, whether or not the attempted crime is completed?

A person is guilty of attempting to commit an offence if, with intent to commit an offence, he does an act which is 'more than merely preparatory' to the commission of the offence, i.e., he tried to commit the offence. A person may be guilty of attempt even if it would be impossible to commit the substantive offence.

If a person agrees with any other person or persons to pursue a course of conduct which, if carried out, would amount to the commission of an offence, or would do so but for the existence of facts which render the commission of the offence impossible, he is guilty of conspiracy to commit the offence in question.

Finally, a person is guilty of an offence where he does an act capable of encouraging or assisting the commission of an offence and he intends to encourage or assist its commission or believes that it (or at least one of a number of possible offences) will be committed and that his act will encourage or assist its commission.

4 Corporate Criminal Liability

4.1 Is there entity liability for criminal offences? If so, under what circumstances will an employee's conduct be imputed to the entity?

In the eyes of the law, a company is a 'person' and is therefore capable of being prosecuted unless a statute indicates otherwise. A company may be guilty of strict liability offences where the act of an employee counts as the act of the company. In addition, in relation to offences involving a required mental element, a company is only liable where the act and state of mind of a company officer who is its 'directing mind' can be attributed to the company; commonly, a director or senior manager. All elements of the offence must be proved against the 'directing mind' with the company's liability following as a matter of course.

4.2 Is there personal liability for managers, officers, and directors if the entity becomes liable for a crime?

The accessory liability of company officers is often provided for in a statutory provision creating liability where it is proved that the predicate corporate offence was committed with the consent or connivance of, or was attributable to the neglect of, a company

officer. Individuals may also be liable for crimes committed by companies if they aid, abet, counsel or procure the commission of the offence (see question 10.1 below).

4.3 Where there is entity liability and personal liability, do the authorities have a policy or preference as to when to pursue an entity, when to pursue an individual, or both?

Offence-specific (e.g., overseas corruption) and generic guidance on corporate prosecutions has been issued by various prosecuting agencies. Generally, the guidance provides that as a company is capable of being prosecuted, it should not be treated differently from an individual because of its artificial personality. Further, prosecution of a company should not be seen as a substitute for the prosecution of criminally culpable individuals. There are, however, distinct public interest factors to be considered in relation to charging companies. Factors tending against prosecution include the availability of civil or regulatory remedies that are likely to be effective and more proportionate, and a genuinely proactive approach adopted by the company when the offending is brought to their notice, involving self-reporting and remedial actions, including the compensation of victims (see questions 13.1 and 13.2 below).

Under provisions of the Crime and Courts Act 2013, due to come into force in early 2014, companies may also be able to enter into Deferred Prosecution Agreements (DPAs) in respect of a variety of financial crimes (see question 8.3 below). DPAs will not, however, be available to individuals.

5 Statutes of Limitations

5.1 How are enforcement-limitations periods calculated, and when does a limitations period begin running?

There are no limitation periods for the prosecution of indictable offences. However, proceedings for offences which may only be tried in a Magistrates' Court must, generally, be commenced within six months from the time when the offence was committed or discovered.

5.2 Can crimes occurring outside the limitations period be prosecuted if they are part of a pattern or practice, or ongoing conspiracy?

No (conspiracies are triable only on indictment).

5.3 Can the limitations period be tolled? If so, how?

No they cannot.

6 Initiation of Investigations

6.1 How are investigations initiated? Are there any rules or guidelines governing the government's initiation of any investigation? If so, please describe them.

Generally, investigations are commenced when a complaint is made or there are circumstances suggesting that a crime may have been committed. However, certain specialist enforcement agencies apply specific criteria. The SFO, for example, considers factors such as whether the value of the alleged fraud exceeds £1 million and whether the case is likely to be of widespread public concern.

6.2 Do the criminal authorities have formal and/or informal mechanisms for cooperating with foreign prosecutors? Do they cooperate with foreign prosecutors?

The UK authorities both assist and seek assistance from overseas jurisdictions pursuant to the terms of international treaties and other agreements. The Crime (International Co-operation) Act 2003 provides the legislative framework for formal mutual legal assistance requests between the UK and foreign States. Such requests will generally involve obtaining evidence and information from the requested State or securing assets situated in the requested State. In addition, informal investigative assistance is often provided between enforcement agencies directly. Where information is provided between agencies in different jurisdictions on an informal basis there are likely to be restrictions on the use of that information in any criminal trial.

7 Procedures for Gathering Information from a Company

7.1 What powers does the government have generally to gather information when investigating business crimes?

In addition to the powers to obtain search warrants, arrest suspects, search following arrest and interview 'under caution' (via the police), agencies such as the FCA, the OFT and the SFO may issue a notice compelling a person to answer questions about matters relevant to an investigation, to otherwise provide information or to produce documents. Similar powers have been granted to the CPS in relation to certain crimes including: money laundering; false accounting; revenue and customs offences; bribery and corruption; and attempts and conspiracies in relation to the same.

Document Gathering:

7.2 Under what circumstances can the government demand that a company under investigation produce documents to the government, and under what circumstances can the government raid a company under investigation and seize documents?

Certain agencies (e.g., those mentioned in question 7.1 above) may issue a notice compelling a company to produce documents. Generally, the criteria for issuing a notice are that there are reasonable grounds for suspecting that an offence has been committed and that the recipient of the notice has relevant information. The agencies may also apply to a court for a search warrant. To issue the warrant, the court must be satisfied that the company has failed to comply with an obligation to produce documents, or it is not practicable to serve a notice to produce documents, or to give a notice might seriously prejudice the investigation.

7.3 Are there any protections against production or seizure that the company can assert for any types of documents? For example, does England and Wales recognise any privileges protecting documents prepared by attorneys or communications with attorneys? Do England and Wales' labour laws protect personal documents of employees, even if located in company files?

Notices or court orders may not compel the production of a document that is legally privileged, nor may legally privileged

material be seized pursuant to a warrant. However, it is often impractical to identify privileged material at the time of seizure such that potentially privileged material may be seized, but is then subject to independent review and must be returned if it is later determined to be privileged.

Certain confidential material such as journalistic material or personal records acquired or created in the course of business may be protected from seizure, but not, generally, from a production requirement. However, certain documents held in confidence may be protected. For example, in FCA investigations, a recipient of a notice who is not a person under investigation may refuse to provide documents held under an obligation of banking confidence.

7.4 Under what circumstances can the government demand that a company employee produce documents to the government, or raid the home or office of an employee and seize documents?

In the same circumstances that apply in relation to companies (see question 7.2 above). In addition, suspects' premises may be subject to search following arrest.

7.5 Under what circumstances can the government demand that a third person produce documents to the government, or raid the home or office of a third person and seize documents?

In the same circumstances that apply in relation to companies (see question 7.2 above).

Questioning of Individuals:

7.6 Under what circumstances can the government demand that an employee, officer, or director of a company under investigation submit to questioning? In what forum can the questioning take place?

Individuals who are themselves suspected of committing a criminal offence may, where necessary, be arrested by the police for the purpose of interview. The interview will normally take place at a police station.

Alternatively, certain agencies (e.g., those mentioned in question 7.1 above) may, in the circumstances outlined in question 7.2 above, issue a notice compelling any person to answer questions or otherwise furnish information. Such questioning may take place at any location.

Where a company is suspected of committing a criminal offence, it cannot be arrested or compelled to attend an interview. The company can only be invited to nominate a duly authorised representative to attend an interview and answer questions on its behalf. The interview will normally take place at a police station.

7.7 Under what circumstances can the government demand that a third person submit to questioning? In what forum can the questioning take place?

Third parties may not be arrested. However, the powers to issue notices outlined in question 7.6 above are generally used to compel witnesses to provide information.

7.8 What protections can a person being questioned by the government assert? Is there a right to refuse to answer the government's questions? Is there a right to be represented by an attorney during questioning?

Suspects are usually interviewed 'under caution' and can therefore refuse to answer questions for whatever reason. However, an adverse inference may be drawn against a defendant at trial if he relies on facts in his defence which he failed to mention when questioned 'under caution'. All persons interviewed 'under caution' have a right to be represented by a solicitor during questioning.

Persons who receive a notice compelling them to answer questions may not, without reasonable excuse, refuse to answer questions. The privilege against self-incrimination is not a reasonable excuse as statements obtained from a person under compulsion may not, save in limited circumstances, be used in evidence against them. Nor is the recipient of a notice entitled to legal representation, although such persons are generally given a reasonable opportunity to arrange this.

8 Initiation of Prosecutions / Deferred Prosecution / Civil Dispositions

8.1 How are criminal cases initiated?

Criminal cases are generally commenced either by orally charging the defendant at a police station and producing or bailing him to a Magistrates' Court; or by laying an 'information' before the court as a result of which the defendant may be summoned to attend court or a warrant may be issued for his arrest. Proceedings against companies are commenced by summons. There are, however, new provisions recently brought into force which enable certain prosecutors to charge suspects in writing and require them to appear in court on a specified date.

8.2 Are there any rules or guidelines governing the government's decision to charge an entity or individual with a crime? If so, please describe them.

The Code for Crown Prosecutors sets out the general principles prosecutors should follow when deciding whether to charge a person (entity or individual) with an offence. Prosecutors must first be satisfied that there is sufficient evidence to provide a realistic prospect of conviction. If so satisfied, prosecutors must then go on to consider whether a prosecution is required in the public interest. In relation to corporate prosecutions specifically, see question 4.3 above.

Prosecutors whose remit includes both a regulatory and enforcement function apply further criteria to the decision as to whether to bring criminal or administrative proceedings. The FCA, for example, takes into account factors including: the seriousness of the misconduct; the financial consequences; and the person's compliance history and level of co-operation with the FCA.

8.3 Can a defendant and the government agree to resolve a criminal investigation through pretrial diversion or an agreement to defer prosecution? If so, please describe any rules or guidelines governing whether pretrial diversion or deferred prosecution are available to dispose of criminal investigations.

Generally, save for minor offences, it is currently not possible for a suspect to agree with the prosecution to divert or defer a

prosecution. However, under the Crime and Courts Act 2013, due to come into force in early 2014, companies will be able to enter into a Deferred Prosecution Agreement (DPA) with prosecutors in relation to specified cases of financial crime (such as fraud and corruption) whereby, in return for compliance with specified requirements (such as the payment of a financial penalty), the prosecutor will suspend and ultimately set aside the criminal prosecution. Guidelines governing the circumstances in which DPAs will be available are in draft form and are expected to be published in February 2014. Current draft guidelines indicate that a key factor for determining the use of a DPA will be the extent to which the corporate has adopted a 'genuinely proactive approach' to the investigation.

8.4 In addition to or instead of any criminal disposition to an investigation, can a defendant be subject to any civil penalties or remedies? If so, please describe the circumstances under which civil penalties or remedies are appropriate.

In many instances, the penalties and remedies imposed against a convicted offender (e.g., a fine, company director disqualification order, confiscation of assets, or a compensation order) will negate the need for civil penalties or remedies. However, where the offender is not prosecuted or is acquitted, or where (after conviction) an appropriate sanction is not imposed by the criminal court, certain enforcement agencies may take civil or administrative action: e.g., civil recovery proceedings to recover the proceeds of the alleged crime, or proceedings to disqualify the person from professional practice. Further, certain prosecutors have powers to impose administrative penalties as an alternative to prosecution (see question 8.2 above).

9 Burden of Proof

9.1 For each element of the business crimes identified above, which party has the burden of proof? Which party has the burden of proof with respect to any affirmative defences?

The prosecution generally has the burden of proving each element of the offences identified above. However, some statutes provide for a reverse burden where the doing of an act is prohibited save in specified circumstances (see, for example, insider dealing at question 3.1 above), in which case the burden of establishing the presence of the specified circumstance may lie with the defence explicitly or by necessary implication.

9.2 What is the standard of proof that the party with the burden must satisfy?

Where the burden lies on the prosecution, the standard of proof is beyond all reasonable doubt. Where the burden lies on the defence, the standard of proof is on a balance of probabilities.

9.3 In a criminal trial, who is the arbiter of fact? Who determines whether the party has satisfied its burden of proof?

In a Magistrates' Court, the magistrates are arbiters of both fact and law. In the Crown Court, the arbiter of fact is nearly always the jury (see question 2.2 above). However, at any time after the close of the prosecution case the judge may rule that the defendant has no case to answer and withdraw the case from the jury if the evidence,

taken at its highest, is such that a reasonable jury, properly directed, could not properly convict.

10 Conspiracy / Aiding and Abetting

10.1 Can a person who conspires with or assists another to commit a crime be liable? If so, what is the nature of the liability and what are the elements of the offence?

A person can be guilty of conspiring to commit an offence (see question 3.2 above) and may be punished to the same extent as if guilty of the substantive offence. A person may also be guilty of an offence if he aids, abets, counsels or procures the commission of an offence and may be punished to the same extent as a principal offender.

11 Common Defences

11.1 Is it a defence to a criminal charge that the defendant did not have the requisite intent to commit the crime? If so, who has the burden of proof with respect to intent?

A defendant is entitled to be acquitted if the state of mind required by the offence has not been proved. In nearly all cases, the burden lies with the prosecution to prove the requisite state of mind. However, certain offences provide for a specified qualification, which can mean that the defendant must prove that he had an innocent state of mind in order to be acquitted of the offence charged (see question 9.1 above).

11.2 Is it a defence to a criminal charge that the defendant was ignorant of the law i.e. that he did not know that his conduct was unlawful? If so, what are the elements of this defence, and who has the burden of proof with respect to the defendant's knowledge of the law?

Ignorance of the criminal law is no defence.

11.3 Is it a defence to a criminal charge that the defendant was ignorant of the facts i.e. that he did not know that he had engaged in conduct that he knew was unlawful? If so, what are the elements of this defence, and who has the burden of proof with respect to the defendant's knowledge of the facts?

A genuine mistake of fact may entitle a defendant to be acquitted where, for example, the mistake prevents him from possessing the relevant state of mind required for the offence. For example, it is a defence to an allegation of theft if the defendant believed mistakenly but genuinely that he had a legal right to the property. If the issue is raised by the defendant, the onus of proving that the defendant did not make a mistake generally lies on the prosecution (see question 11.1 above).

12 Voluntary Disclosure Obligations

12.1 If a person becomes aware that a crime has been committed, must the person report the crime to the government? Can the person be liable for failing to report the crime to the government?

Generally, a person is not obliged to report a crime. However, an

offence may be committed where a person who receives information in the course of a 'business in the regulated sector' (e.g., the financial sector) has reasonable grounds for knowing or suspecting that another person is engaged in money laundering or terrorist financing and fails to report the same to the authorities.

13 Cooperation Provisions / Leniency

13.1 If a person voluntarily discloses criminal conduct to the government or cooperates in a government criminal investigation of the person, can the person request leniency from the government? If so, what rules or guidelines govern the government's ability to offer leniency in exchange for voluntary disclosures or cooperation?

In general, prosecutors can secure the co-operation of offenders in an informal manner, for instance by concluding that a prosecution of that person is not in the public interest (see questions 4.3 and 8.2).

In relation to companies, the guidance on corporate prosecutions issued by the SFO and CPS specifies that the public interest factors against prosecution include a genuinely proactive approach adopted by the corporate management team when the offending is brought to their notice, involving self-reporting and remedial actions, including the compensation of victims. In addition, the forthcoming introduction of DPAs (see question 8.3 above) will enable prosecutors to defer a prosecution in return for, amongst other things, such factors as voluntary disclosure and cooperation with the investigation.

In relation to individuals, a formal process exists under the Serious Organised Crime and Police Act 2005 (SOCPA) which provides that the SFO, CPS and FCA may enter into agreements with offenders providing that, in return for the offender's co-operation, the prosecutor will: not prosecute them; not use certain evidence against them; or set out in writing their co-operation with a view to obtaining a reduced sentence from the court (see question 15.1 below). Generally, to benefit from an agreement the offender must: fully admit their own criminality; provide the investigators with all information available to them; and agree to co-operate in any prosecution against others.

Further, under the Enterprise Act 2002, the OFT may grant immunity (so-called 'no action letters') to individuals in cartel cases who come forward and give evidence in a criminal investigation. The conditions that must be satisfied in order for an individual to qualify for receipt of a no action letter are similar to those that apply in relation to SOCPA agreements.

13.2 Describe the extent of cooperation, including the steps that an entity would take, that is generally required of entities seeking leniency in England and Wales, and describe the favourable treatment generally received.

Companies that wish to avoid prosecution or be invited to enter into a DPA will generally have to: self-report their misconduct (ideally before the prosecutor discovers the misconduct); commit to resolving the issue; co-operate fully and/or agree to conduct any further investigation (and share the results of the investigation with the prosecutor); and agree to provide appropriate restitution and implement a programme of training and culture change (this may include the appointment of an independent monitor). However, there are no guarantees that a company which co-operates will avoid prosecution or be invited to enter into a DPA but, if

prosecuted, it is likely to result in a reduced financial penalty and the company may be able to work with the prosecution in agreeing the basis of plea (see question 14.1 below).

14 Plea Bargaining

14.1 Can a defendant voluntarily decline to contest criminal charges in exchange for a conviction on reduced charges, or in exchange for an agreed upon sentence?

Plea bargains, in the sense of an agreement as to sentence, are not recognised. However, it is open for a defendant to agree with the prosecution to plead guilty on the basis of particular facts ('the basis of plea') and/or to agree to plead guilty to particular charges. Further, in cases of serious or complex fraud, defendants may enter into agreements with the prosecution which include a joint submission as to sentence, i.e., the agreed aggravating and mitigating features, the appropriate sentencing authorities and the applicable sentencing guideline.

14.2 Please describe any rules or guidelines governing the government's ability to plea bargain with a defendant. Must any aspects of the plea bargain be approved by the court?

The prosecution may agree a basis of plea and/or the selection of charges as long as they reflect the seriousness and extent of the offending and they give the court adequate powers to sentence. However, a basis of plea is always subject to the approval of the court, which will consider whether it is fair and in the interests of justice. It is open to the court to reject a basis of plea where it does not represent a proper plea on the basis of the facts set out in the papers. The same applies to agreements in cases of serious or complex fraud: the judge retains the absolute discretion to refuse to accept the plea agreement and to sentence otherwise than in accordance with the sentencing submissions.

15 Elements of a Corporate Sentence

15.1 After the court determines that a defendant is guilty of a crime, are there any rules or guidelines governing the court's imposition of sentence on the defendant? Please describe the sentencing process.

The sentencing process should never represent a mathematical calculation: judges must reflect on all of the circumstances to determine the appropriate sentence. Generally, however, the route to determining sentence is: first, the court determines whether there is a statutory minimum or mandatory sentence; secondly, the court follows or has regard to guidelines issued by the Sentencing Council or the Court of Appeal; and finally, the court determines the seriousness of the offence, taking into account all aggravating and mitigating features. The court will then decide the appropriate sentence from which it may make deductions or additions based on the defendant's personal circumstances (e.g., financial circumstances or assistance given to the authorities: see question 13.1 above). Finally, the court may make a deduction for a plea of guilty (generally, between 10% and one-third).

In cases of financial crime, however, a mathematical calculation is, to a certain degree, inevitable. The Sentencing Council guidelines

on cases of fraud (applicable only to individuals) propose sentence bands based on the value of the offence (the amount gained or lost or intended to be gained or lost). The final determination of sentence is then based on the nature of the offending conduct and other aggravating or mitigating circumstances.

15.2 Before imposing a sentence on a corporation, must the court determine whether the sentence satisfies any elements? If so, please describe those elements.

Generally, the court must have regard to the purposes of sentencing: punishment; reduction of crime (including by deterrence); reform and rehabilitation; and reparation. In relation to companies, the court will have regard to factors such as turnover/profit, co-operation with the authorities, and actions taken to provide redress. Further, the Sentencing Council has published guidelines in relation to certain offences applicable to companies. For example, the guidelines in relation to Corporate Manslaughter set out the principles relevant to assessing the seriousness of the offence, the level of financial penalties and additional sentencing powers available to the court; and the recent draft guidelines in relation to fraud, bribery and money laundering (applicable to both individuals and companies) indicate the appropriate fine based on the value of the offence and the culpability of the offender.

16 Appeals

16.1 Is a guilty or a non-guilty verdict appealable by either the defendant or the government?

Defendants may appeal a verdict of guilty after a contested trial. The prosecution cannot appeal a not-guilty verdict but may apply for a retrial in relation to certain serious offences if there is new and compelling evidence of guilt and it is in the interests of justice for there to be a retrial.

16.2 Is a criminal sentence following a guilty verdict appealable? If so, which party may appeal?

Defendants may appeal any sentence not fixed by law. The Attorney General may refer sentences in relation to certain serious offences to the Court of Appeal for review (see question 16.3).

16.3 What is the appellate court's standard of review?

Appeals against conviction will be allowed if the conviction is 'unsafe', usually as a result of some error or irregularity at trial. Appeals by the defendant against sentence will be allowed when, for example, the sentence is wrong in law, wrong in principle or manifestly excessive. Referrals of sentence by the Attorney General will be allowed if the sentence is 'unduly lenient'.

16.4 If the appellate court upholds the appeal, what powers does it have to remedy any injustice by the trial court?

Where an appeal against conviction is allowed, the conviction is quashed and the appellant may be retried or acquitted. Where an appeal against sentence is allowed, the Court of Appeal may substitute a different sentence.



Guy Bastable

BCL Burton Copeland
51 Lincoln's Inn Fields
London WC2A 3LZ
United Kingdom

Tel: +44 207 430 2277
Fax: +44 207 430 1101
Email: gbastable@bcl.com
URL: www.bcl.com

Guy Bastable is a partner specialising in business crime, regulatory enforcement, serious crime and compliance. He is a recognised leading expert in the UK in relation to criminal fraud/business crime and corporate manslaughter/health and safety.

He has acted in numerous large and complex business crime cases involving all types of fraud, bribery and corruption, financial regulation (insider dealing/market abuse), and money laundering. He also provides expert advice in relation to anti-money laundering and anti-corruption compliance and the recovery of the proceeds of crime.

In addition, he has particular expertise in fatal accidents, corporate manslaughter, Coroners' inquests, health and safety, and fire safety, having acted for a number of substantial organisations.

As such, Guy regularly advises corporates on crisis management and the conduct of an internal investigation, and he is a co-author of the Oxford University Press's *"Money Laundering Law and Regulation: A Practical Guide"* and the Serious Fraud Office's *"Economic Crime - A boardroom guide to prevention and compliance"*.



Shaul Brazil

BCL Burton Copeland
51 Lincoln's Inn Fields
London WC2A 3LZ
United Kingdom

Tel: +44 207 430 2277
Fax: +44 207 430 1101
Email: sbrazil@bcl.com
URL: www.bcl.com

Shaul Brazil is a partner specialising in business crime and regulatory enforcement. He has particular experience in serious fraud, overseas corruption and contentious financial services regulation. His practice also encompasses cartel defence, extradition and mutual legal assistance, money laundering and all matters relating to the proceeds of crime.

Shaul has acted in numerous high profile investigations and prosecutions brought by agencies including the Serious Fraud Office, the Financial Services Authority (now Financial Conduct Authority), and the US Department of Justice.

Shaul regularly speaks at conferences on business crime and regulatory issues, has authored various articles on similar topics, and has contributed to publications including Oxford University Press's *"Money Laundering Law and Regulation: A Practical Guide"* and the Serious Fraud Office publication *"Serious Economic Crime: A boardroom guide to prevention and compliance"*.



BCL is a market leader in the UK in the areas of domestic and trans-national business crime and regulatory enforcement, providing discreet, effective and expert advice to commercial organisations, directors, senior personnel and high profile/high net worth individuals. Our reputation has been established over many years through our unremitting drive to help our clients by providing a supportive service and guidance through the legal minefield, whilst focusing at all times on achieving a pragmatic solution rather than troubling them with dense legal problems and process.

Our expertise covers all areas of criminal/regulatory law including commercial and tax fraud, corruption, sanctions offences, cartel activity, financial regulation and money laundering, extradition, corporate manslaughter, health and safety, fire safety, product safety, and environmental law. We also advise in the areas of anti-money laundering and anti-corruption compliance.

Current titles in the ICLG series include:

- Alternative Investment Funds
- Aviation Law
- Business Crime
- Cartels & Leniency
- Class & Group Actions
- Commodities and Trade Law
- Competition Litigation
- Corporate Governance
- Corporate Recovery & Insolvency
- Corporate Tax
- Dominance
- Employment & Labour Law
- Enforcement of Competition Law
- Environment & Climate Change Law
- Insurance & Reinsurance
- International Arbitration
- Lending and Secured Finance
- Litigation & Dispute Resolution
- Merger Control
- Mergers & Acquisitions
- Mining Law
- Oil & Gas Regulation
- Patents
- PFI / PPP Projects
- Pharmaceutical Advertising
- Private Client
- Product Liability
- Project Finance
- Public Procurement
- Real Estate
- Securitisation
- Shipping Law
- Telecoms, Media and Internet
- Trade Marks



59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255
Email: sales@glgroup.co.uk

www.iclg.co.uk