Government Investigations 2020

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Getting The Deal Through

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Lexology Getting The Deal Through is delighted to publish the sixth edition of *Government Investigations*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, David M Zornow and Jocelyn E Strauber of Skadden, Arps, Slate, Meagher & Flom LLP, for their continued assistance with this volume.

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ENFORCEMENT AGENCIES AND CORPORATE LIABILITY

Government agencies

1 What government agencies are principally responsible for the enforcement of civil and criminal laws and regulations applicable to businesses?

The six agencies primarily responsible for the enforcement of laws and regulations applicable to businesses are the following:

- the Crown Prosecution Service (CPS);
- the Serious Fraud Office (SFO);
- the Financial Conduct Authority (FCA);
- the Competition and Markets Authority (CMA);
- Her Majesty's Revenue and Customs (HMRC); and
- the Insolvency Service, an executive agency of the Department for Business, Energy and Industrial Strategy (BEIS).

Scope of agency authority

2 What is the scope of each agency's enforcement authority? Can the agencies pursue actions against corporate employees as well as the company itself? Do they typically do this?

The scope of the enforcement authority of the agencies mentioned under 'Government agencies' is determined by statutory provisions and memoranda of understanding between them. Generally, the CPS, supported by police investigators, will prosecute criminal offences committed by individuals and companies that are not prosecuted by the specialist agencies considered below. The CPS also prosecutes offences of tax fraud investigated by HMRC, if HMRC officers consider it necessary and appropriate to use criminal enforcement rather than using their civil enforcement powers.

The SFO is a specialist agency that investigates and, if appropriate, prosecutes both individuals and companies that commit serious or complex fraud, bribery and corruption, even where there is no corresponding regulatory offence. It also uses civil enforcement in relation to asset freezing and the recovery of the proceeds of crime.

The FCA is primarily a regulator of the financial services industry. It uses a wide range of rule-making, investigative and enforcement powers (criminal, civil and regulatory) to take action against businesses and individuals that breach FCA principles and rules that protect consumers, keep the financial services industry stable and resilient, and promote healthy and effective competition between financial services firms in the interests of consumers. It has become the de facto prosecutor for insider dealing.

The CMA has both a regulatory and enforcement function to promote competition and consumer law compliance. It investigates mergers that could restrict competition; conducts investigations into markets where there may be competition problems; investigates suspected breaches of UK and EU competition law; and enforces consumer-protection legislation to tackle market conditions that make it difficult for consumers to exercise choice. The CMA has joint responsibility with the SFO for investigating and prosecuting cartel offences against individuals. As of 1 April 2014, the law in relation to criminal cartel offences was amended by removing the dishonesty element. The motivation for removing the mental element of the offence was to reduce the evidential burden, making it easier to prosecute these offences. This has not resulted in a flood of prosecutions.

HMRC is responsible for the collection and regulation of taxes and the investigation of serious and organised fiscal crime, in particular, offences committed under the Customs and Excise Acts. It has both criminal and civil investigatory and enforcement powers. As with the other agencies, it is also vested with powers of compulsion.

The Insolvency Service deals with corporate misconduct through its investigation of companies; by investigating and prosecuting breaches of company insolvency legislation on behalf of BEIS; and has civil enforcement powers, including the power to conduct investigations into serious corporate abuse.

Each of these agencies can pursue enforcement against both corporates and individuals. The majority of financial crime offences require a mental element (mens rea) to be proved, which is generally applicable to individuals. Ordinarily, a company can only be convicted of an offence requiring a mental element implementing the 'identification doctrine'. The prosecution must first establish that an individual who was a 'directing mind and will' of the company (ie, a senior individual who could be said to embody the company through his or her actions and decisions – usually a director) committed acts amounting to a criminal offence and had the criminal intent to commit those acts. The individual's guilt is then attributed to the company without the need to prove anything further against the company. An exception to offences requiring a mental element – and a prosecution that can only be brought against a company – is an offence under section 7 of the Bribery Act 2010. This prescribes that a corporate can be prosecuted for failure to prevent bribery. Similarly, there is the more recently enacted offence of failure to prevent the facilitation of tax evasion pursuant to the Criminal Finances Act 2017. These are strict liability offences.

Guidance on corporate prosecutions has been issued by the prosecuting agencies (www.cps.gov.uk/legal/a_to_c/corporate_prosecutions/) and applies to all prosecutors, including the SFO. Generally, the guidance provides that a company should not be treated differently from an individual simply because of its non-human personality. At the same time, prosecution of a company should not be seen as a substitute for the prosecution of criminally culpable individuals. In every case, sufficient evidence is required and then public interest factors must be considered for both the prosecution of both individuals and companies. Examples of factors tending against prosecution of companies include the availability of civil or regulatory remedies that are likely to be effective and proportionate, and evidence of a genuinely proactive approach having been adopted by the company when offending is brought to its

attention, such as self-reporting and remedial actions, including the compensation of victims. In the case of corporates (and not individuals), a deferred prosecution agreement (DPA) is available as an outcome (see 'Notification before investigation').

Simultaneous investigations

3 Can multiple government entities simultaneously investigate the same target business? Must they coordinate their investigations? May they share information obtained from the target and on what terms?

Agencies can and do work together. For example, the same target business may be under investigation by the SFO in relation to fraud offences while simultaneously being under investigation by the FCA for regulatory breaches. Generally, if an agency is conducting a criminal investigation, this will tend to take precedence over any civil or regulatory investigation (but there is no statutory impediment to criminal and regulatory actions, or civil proceedings for that matter, continuing in parallel). The extent to which agencies will investigate together and share information is dependent on their particular memoranda of agreement, but there are frequently used statutory gateways permitting such exchanges.

Civil fora

4 In what fora can civil charges be brought? In what fora can criminal charges be brought?

Agencies whose remit includes both regulatory and enforcement functions have powers to impose administrative penalties through regulatory tribunals. The FCA, for instance, can take civil or regulatory action, such as imposing fines against companies and individuals, and withdrawing or limiting their authorisations through their regulatory tribunal process – the Regulatory Decisions Committee and then the Upper Tribunal. The Competition Appeal Tribunal, an independent judicial body, operates for the CMA. The principal functions of the Tribunal are to hear appeals in respect of decisions concerning the competition rules, consider applications for review of merger and market investigations, and determine claims for damages. Competition Appeal Tribunal decisions are appealable to the Court of Appeal only on a point of law or quantum of penalty.

Certain agencies, including the SFO, can institute civil recovery proceedings in the High Court for the purpose of recovering money and other property obtained through unlawful conduct.

Criminal prosecutions always commence in the magistrates' courts, but the most serious offences (indictable-only offences) are transferred to the Crown Court. Appeals from decisions of the Crown Court may be made to the Court of Appeal. Exceptionally, further appeals may be made to the Supreme Court on important points of law.

Corporate criminal liability

5 Is there a legal concept of corporate criminal liability? How does the government prove that a corporation is criminally liable for the acts of its officers, directors or employees?

In the eyes of the law, a company is a legal 'person' and thus capable of being prosecuted for the acts or omissions of the natural persons it employs, unless a statute indicates otherwise. A company may also be guilty of strict liability offences, such as an offence under section 7 of the Bribery Act 2010 (see 'Scope of agency authority'), where no mental element of the crime needs to be proved.

For offences requiring a mental element, a company is liable for the acts and state of mind of its company officers (or potentially its senior employees) who are its 'directing mind and will'. These acts and state of mind will then be attributed to the company. All elements of the offence must be proved against the 'directing mind and will' (ie, the individual who can be shown to direct the company) and, once achieved, the company's liability will follow. This is a matter of some concern to prosecutors who believe that the doctrine makes it very difficult to prosecute large companies with complicated corporate structures.

Bringing charges

6 Must the government evaluate any particular factors in deciding whether to bring criminal charges against a corporation?

The Code for Crown Prosecutors (www.cps.gov.uk/publications/code_for_crown_prosecutors/), which is also applicable to the SFO, sets out the general principles that agencies should follow when deciding whether to prosecute a person (company or individual) with an offence. Prosecutors must first be satisfied that there is sufficient evidence to provide a 'realistic prospect of conviction'. If satisfied, prosecutors must then go on to consider whether a prosecution is required in the public interest. In relation to corporate prosecutions, additional public interest factors must be considered. The CPS guidance states:

> *The more serious the offence, the more likely it is that prosecution will be needed in the public interest. Indicators of seriousness include not just the value of any gain or loss, but also the risk of harm to the public, to unidentified victims, shareholders, employees and creditors and to the stability and integrity of financial markets and international trade. The impact of the offending in other countries, and not just the consequences in the UK, should be taken into account.*

Agencies whose remit includes both regulatory and enforcement functions apply further criteria to the decision as to whether to bring criminal, civil or regulatory proceedings. The FCA, for example, takes into account factors including the seriousness of the misconduct, the person's compliance history and his or her level of cooperation.

INITIATION OF AN INVESTIGATION

Investigation requirements

7 What requirements must be met before a government entity can commence a civil or criminal investigation?

Generally, investigations are commenced when a complaint is made, there are circumstances suggesting that a crime may have been committed or where there is evidence of a regulatory breach. However, the agencies also apply their own specific criteria. The SFO, for example, considers factors such as whether the apparent criminality undermines the UK public limited company's commercial or financial interests in general, and in the City of London in particular, whether the actual or potential financial loss involved is high, whether the economic harm is significant or whether a new type of fraud is involved, before deciding whether it will commence an investigation. The FCA will commence an investigation where 'serious misconduct' (defined as conduct likely to cause harm to market integrity and consumers, and undermine the confidence in the financial system) is suspected or has taken place, taking into account the following factors: the nature and severity of the harm, the implications of the misconduct, the extent of lack of fitness or propriety, and the public interest.

Triggering events

8 What events commonly trigger a government investigation? Do different enforcement entities have different triggering events?

This depends on the agency conducting the investigation. Usually a complaint, anonymous or otherwise, will have been made to the particular agency or referred to it by another agency. However, agencies often commence investigations following reports in the media as a result of a company self-reporting a particular issue, or increasingly as a result of market intelligence.

The FCA and CMA, which both have regulatory functions, will often commence an investigation after identifying a problem during a standard audit or compliance check.

Whistle-blowers

9 What protections are whistle-blowers entitled to?

The policy on protection for whistle-blowers is dependent on the agency concerned and the company from which the whistle-blower originates. Generally, it is not possible for an agency to guarantee confidentiality and anonymity, as there is a possibility that a court will order the disclosure of this information provided by the whistle-blower or his or her identity. However, where possible, agencies try to accommodate the understandable desire to remain anonymous, using a claim for public interest immunity to resist disclosure to the parties to the proceedings or the public.

The SFO says it will maintain confidentiality unless the target business has a genuine need to know or the court orders disclosure.

Similarly, The FCA undertakes to do all it can to protect the identity of a whistle-blower. It cannot guarantee anonymity.

The FCA states:

> *Research showed that introducing financial incentives for whistle-blowers would be unlikely to increase the number or quality of the disclosures we receive from them . . . We therefore propose not to introduce financial incentives, but to press ahead with the regulatory changes necessary to require firms to have effective whistleblowing procedures, and to make senior management accountable for delivering these.*

No other bodies operate a financial incentive scheme.

In relation to protection from employers, the Public Interest Disclosure Act 1998 protects whistle-blower employees from detrimental treatment by their employers. In cases where an employee is subjected to detrimental treatment following the disclosure of certain information (including the commission of a criminal offence), the employee can bring a case before an employment tribunal.

Investigation publicity

10 At what stage will a government entity typically publicly acknowledge an investigation? How may a business under investigation seek anonymity or otherwise protect its reputation?

This depends on which entity is conducting the investigation. The fact that the police have commenced an investigation into a corporate or individual should not generally be publicly acknowledged (unless information is released as an investigative tool for the purposes of witness or victim appeal). This information should only be publicly acknowledged when a decision has been made to prosecute a corporate or individual in the criminal courts. In reality, however, press reporting means that an investigation by the police or another regulatory or investigative body frequently becomes known to the public.

The SFO and CMA often publicise the fact that an investigation has been opened and this information is available on their respective websites.

As of October 2013, the FCA is able to issue warning notices that are publicly available. These notices detail the reasons that enforcement action is being taken and will only be published when an investigation has been completed.

In short, if a business is being investigated by the SFO, CMA or FCA, it will not be possible to seek anonymity, save in the most exceptional cases, for example, where the privacy rights of minors are in issue. It is standard practice to engage a suitably experienced PR consultant in cases where publicity is likely to be a factor influencing the rights and obligations of a company or an individual.

EVIDENCE GATHERING AND INVESTIGATIVE TECHNIQUES

Covert phase

11 Is there a covert phase of the investigation, before the target business is approached by the government? Approximately how long does that phase last?

Prior to the target business being advised of an investigation, agencies may obtain information from other parties either voluntarily or by using their compulsory powers.

The next stage of the investigation will usually involve the investigating agency making contact with the target business to advise them that they have commenced an investigation. The agency will then request the disclosure of documents and seek to interview relevant witnesses, either voluntarily or using powers designated to the particular agency by statute (in the case of the SFO by using the powers under section 2 of the Criminal Justice Act 1987). There is no law requiring businesses to be informed of such steps. If an investigating agency considers that its investigations are to be best advanced by the use of covert techniques and not informing the business, then they will adopt that approach, including the execution of a search warrant (ie, conducting a dawn raid) without notice.

Any covert investigations, such as covert surveillance and the interception and collection of communications data, must be undertaken in accordance with the Investigatory Powers Act 2016 (the IP Act). The IP Act can be used by specified government agencies on the grounds of national security, and for the purposes of detecting crime, preventing disorder, public safety, protecting public health or in the interests of the economic wellbeing of the United Kingdom.

There is no time limit on how long a phase of covert investigations will last.

12 What investigative techniques are used during the covert phase?

As set out in 'Covert phase', before advising a target business of an investigation, agencies may obtain information by interviewing witnesses or requesting the disclosure of documents from other parties.

In relation to specific covert techniques, these include:

- intercepting communications (intercepted communications are not admissible in criminal or regulatory proceedings in the United Kingdom);
- conducting covert human intelligence;
- conducting intrusive surveillance; and
- obtaining communications data.

Investigation notification

13 After a target business becomes aware of the government's investigation, what steps should it take to develop its own understanding of the facts?

Aside from document retrieval and review, the obvious step is to conduct employee interviews. Doing that as part of an internal investigation does carry a risk. The SFO has suggested that corporates carefully consider whether it is best to do so or to limit the ambit of internal investigation to document review only. Any final decision will need to take into account the facts and circumstances of the case, and the corporate concerned, bearing in mind any obligation or duty owed to its employees and shareholders.

If an internal investigation is decided upon, its parameters should be carefully considered. Although the position is open to dispute (see 'Providing evidence'), particularly in light of the decision in the case of *The Director of the Serious Fraud Office v Eurasian Natural Resources Company (ENRC)* [2018] EWCA Civ 2006, the employment of external lawyers may enable the business to assert that legal professional privilege can be claimed. Otherwise, the business investigation may be (and in practice, often is) disclosable to the authorities.

Evidence and materials

14 Must the target business preserve documents, recorded communications and any other materials in connection with a government investigation? At what stage of the investigation does that duty arise?

When a target business has been informed that an investigation has commenced, there is no legal duty to preserve material; however, the destruction of evidence is in itself a criminal offence. Section 2(16) of the Criminal Justice Act 1987 provides that a person who knows that the police or the SFO are conducting or may conduct an investigation into allegations of serious or complex fraud and destroys, conceals, falsifies or otherwise disposes of relevant documents (or causes the same) is guilty of an offence. There is also the general common law offence of conspiracy (agreement) or attempting to pervert the course of justice that might apply if any material is destroyed.

Persons or entities regulated by the FCA or CMA have a duty to cooperate with investigations; this includes the preservation of documents.

Providing evidence

15 During the course of an investigation, what materials – for example, documents, records, recorded communications – can the government entity require the target business to provide? What limitations do data protection and privacy laws impose and how are those limitations addressed?

Some agencies have the power to issue notices compelling a person to answer questions about matters relevant to an investigation, or to otherwise furnish information or to produce documents (including information recorded in any form). 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 regarding the offence. The agencies may also apply to a court for a search and seizure warrant. To issue the warrant, the court must be satisfied that the company has failed to comply with an obligation to produce documents or would do so such that to give notice may seriously prejudice the investigation.

In general, data protection and privacy laws are overridden by statutory powers of the government agencies to investigate unlawful conduct and regulatory breaches. The protections that do exist remain important in ensuring that public authorities' actions are proportionate and consistent with the Human Rights Act 1998.

16 On what legal grounds can the target business oppose the government's demand for materials? Can corporate documents be privileged? Can advice from an in-house attorney be privileged?

As a general rule, 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. This includes material subject to legal advice privilege and litigation privilege (commonly known together as legal professional privilege). However, it is often impractical to identify privileged material at the time of seizure, such that potentially privileged material may need to be seized for the data separation to occur later. In these circumstances, the material is subject to independent review and must be returned if it is later determined to be privileged.

The rules governing legal professional privilege apply to both external and in-house counsel, except in cases relating to European Commission law (typically cartels or competition cases), where in-house lawyers cannot claim legal professional privilege over internal communications with employees. Recently, the scope of legal professional privilege in relation to internal investigations was clarified by the Court of Appeal, which overturned the first instance High Court decision that litigation privilege would not apply to documents shared between the Eurasian Natural Resources Corporation and its then legal advisers (see also 'Investigation notification').

The effect of this ruling was to confirm that corporates are able (and in fact encouraged) to undertake internal investigations in the knowledge that, where proceedings are being reasonably contemplated, documents produced by the internal investigation will be protected.

Production orders granted by a court can be challenged at court if, for example, the information in the application made to the court contains incorrect or inadequate information, as can determinations about whether seized material is or is not privileged.

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

Employee testimony

17 May the government compel testimony of employees of the target business? What rights against incrimination, if any, do employees have? If testimony cannot be compelled, what other means does the government typically use to obtain information from corporate employees?

Where a company is suspected of committing a criminal offence, an agency cannot arrest or compel a business to attend an interview. The company can, however, be invited to nominate a duly authorised representative to attend an interview and answer questions on its behalf. Additionally, certain agencies (including the SFO and HMRC) may, in the circumstances described above, issue a notice compelling any person to answer questions or otherwise furnish information.

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.

In circumstances where investigators have concluded that there are reasonable grounds to suspect an individual of having committed a crime, where necessary and appropriate, he or she can be arrested by the police for the purpose of conducting an interview. In such circumstances, the interview will normally take place at a police station. Whether arrested or not – and, in many cases, interviews are arranged by appointment, thereby avoiding arrest – the individual will have the right not to incriminate him or herself.

18 | Under what circumstances should employees obtain their own legal counsel? Under what circumstances can they be represented by counsel for the target business?

All persons interviewed under caution (ie, after being arrested or attending to be interviewed by appointment) have a right to be represented by a solicitor during questioning. If an employee is interviewed by those conducting an internal investigation in equivalent circumstances (ie, there is a suspicion of wrongdoing) they should obtain or be offered independent legal representation.

Persons who receive a notice compelling them to answer questions as witnesses are not entitled to legal representation, although they are generally given a reasonable opportunity to arrange this. Such representation should be independent of the representative of their employer. In circumstances where a target business, as well as one or more of its employees, is under investigation, the employee should seek independent representation. Recently amended SFO guidance deals with the process for inviting and handling requests for compelled witnesses to be accompanied by a lawyer. This guidance seeks to ensure that lawyers acting for a corporate suspect do not also attend with compelled witnesses to prevent the potential for confidential information to be shared between witnesses and suspects during the investigative stage.

It is also advisable for an employee who has been compelled as a witness to obtain independent counsel, even if the business is not under investigation and the investigation relates to a single employee's conduct.

Sharing information

19 | Where the government is investigating multiple target businesses, may the targets share information to assist in their defence? Can shared materials remain privileged? What are the potential negative consequences of sharing information?

There is nothing to prevent businesses from sharing information but, in practice, it is often preferable to keep matters confidential. Every case will be different and will require careful consideration of the facts and the potential for future conflicts of interest to arise. If sharing is to take place, a joint-interest privilege agreement would be the norm.

The possible negative consequences of sharing are that a business may inadvertently share information that may assist the investigating agency or there may be compelled disclosure in respect of that information. A business could also potentially undermine its position in relation to the other businesses under investigation by sharing information. Ill-considered sharing could also interfere with the investigation and the business could be in danger of perverting the course of justice, which in itself is a criminal offence.

Investor notification

20 | At what stage must the target notify investors about the investigation? What should be considered in developing the content of those disclosures?

In many instances, the fact of an investigation will have been made public by the investigating agency; for example, the SFO often announces on its website when a business is under investigation (see 'Investigation publicity').

If an investigation has not been made public by the investigating agency, then a company listed on the stock market has a duty to inform investors that an investigation has commenced. If the company is a private limited company, in principle the same duty does not apply, and the decision about whether to notify investors will be a commercial one.

Any disclosure should be kept factual and should, in most cases, be very brief, simply setting out the fact that an investigation has commenced and that the business is cooperating fully.

COOPERATION

Notification before investigation

21 | Is there a mechanism by which a target business can cooperate with the investigation? Can a target notify the government of potential wrongdoing before a government investigation has started?

There are mechanisms by which a target business can cooperate and these depend on the agency conducting the investigation.

In relation to SFO and CPS investigations and prosecutions, companies that wish to avoid prosecution and enter into a DPA will generally have to self-report their misconduct (ideally before the prosecutor discovers the misconduct); commit to resolving the issue; cooperate fully and agree to conduct any further investigation (and share the result of the investigation with the prosecutor); and agree to provide appropriate restitution and implement a programme of training and culture change (which may include the appointment of an independent monitor). Despite their introduction in February 2014, DPAs remain relatively rare, though they are an increasingly important part of the armoury for prosecuting agencies.

Following the DPAs in respect of *Standard Bank Plc*, *XYZ Ltd*, *Rolls Royce* and *Tesco*, a clear precedent for the terms of a DPA has now been established, with Lord Justice Leveson having approved each of them. Companies now have a 'rule book' to determine whether a DPA is something they wish to pursue, noting that there are still circumstances in which a business may wish to pursue a civil settlement. Self-reporting has been used by businesses, often to negotiate a civil settlement rather than a criminal prosecution. There are no guarantees that a company that cooperates will avoid prosecution or be invited to enter into a DPA but, if prosecuted, cooperation is likely to benefit from a reduced financial penalty and the company may be able to work with the prosecution in agreeing the basis of plea.

A key developing issue is the extent to which cooperation requires the waiver of legal professional privilege (see 'Investigation notification' and 'Providing evidence'); investigating agencies suggest that it does, or that the company's investigations do not give rise to legal professional privilege claims. In any event, careful consideration is required as to how a business positions itself (taking into account potential civil claims), reputational management and pure business drivers.

Recent criticism of DPAs are linked to whether the admitted liability has been properly established and its effect on individuals. The most recent cases have been a DPA by Tesco in circumstances where individuals whose culpability was said to give rise to Tesco's liability were all found to have no case to answer, and Rolls-Royce where no

individual who might have been regarded as the controlling mind of the company (see 'Corporate criminal liability') was prosecuted at all. This has reinforced the sense that the DPA is effectively a corporate tool to allow alleged wrongdoing to be consigned to the pages of history by the payment of money.

Any formal cooperation by an individual with the CPS or the SFO resulting in either leniency in sentencing (sections 73 and 74) or immunity from prosecution (section 71) is governed by the Serious Organised Crime and Police Act 2005. It is also possible for a business to cooperate informally, without seeking immunity from prosecution and this will usually result in a reduced sentence.

In general terms, a business that cooperates with an FCA investigation will receive a significant reduction in any financial penalty and the opportunity to have substantial input in the wording of any published final notice.

Under the Enterprise Act 2002, the CMA may grant criminal immunity to individuals and civil immunity to businesses in relation to cartel investigations in certain circumstances. Where immunity is not available but a business cooperates with an investigation, the CMA can apply leniency to any civil sanction.

Voluntary disclosure programmes

22 Do the principal government enforcement entities have formal voluntary disclosure programmes that can qualify a business for amnesty or reduced sanctions?

Each agency has a form of voluntary disclosure programme that may result in immunity from prosecution or a reduced sanction. It is important to bear in mind that these programmes are within the discretion of the agency and are not guaranteed. In the case of businesses, a DPA is possible if a business admits to criminal conduct but avoids prosecution by entering into an agreement with the prosecuting authority (subject to court approval). Along with paying a significant financial penalty, other steps are normally necessary as conditions of a DPA, and these typically include restitution, changes in business practices and the appointment of a monitor. Voluntary disclosure is generally regarded as a precondition of such agreements.

See 'Notification before investigation'.

Timing of cooperation

23 Can a target business commence cooperation at any stage of the investigation?

Yes. If a business decides to cooperate in an investigation, the earlier it does this, the better the outcome is likely to be.

Cooperation requirements

24 What is a target business generally required to do to fulfil its obligation to cooperate?

As stated in 'Notification before investigation', this is dependent on the agency it is dealing with and the particular circumstances of the case. In general terms, a business should commit to resolving the issue; cooperate fully or agree to conduct any further investigation (and share the result of the investigation with the prosecutor); agree to provide appropriate restitution or disgorge its profits from the misconduct; implement a programme of training and culture change within the business; and pay the SFO's costs. Practically, this requires consideration and the likelihood of a waiver of legal professional privilege. Notably, cooperation does not cease upon the grant of a DPA. Rather, the company undertakes to maintain its cooperation throughout the lifetime of the agreement, which can include an obligation to cooperate with overseas law enforcement.

Employee requirements

25 When a target business is cooperating, what can it require of its employees? Can it pay attorneys' fees for its employees? Can the government entity consider whether a business is paying employees' (or former employees') attorneys' fees in evaluating a target's cooperation?

This largely depends on the business and its own policies. Most businesses have employment contracts that require employees to cooperate with an internal investigation.

In relation to fees, in many cases, a business will pay the legal fees of its employees who have been interviewed voluntarily, compelled to answer questions or interviewed under caution. In the case of directors and company officers, businesses often have insurance to cover this type of situation. The fact that a business pays its employees' legal fees is not a relevant consideration for the government entity to consider in evaluating its cooperation.

Why cooperate?

26 What considerations are relevant to an individual employee's decision whether to cooperate with a government investigation in this context? What legal protections, if any, does an employee have?

As outlined in 'Employee testimony', if an employee refuses to cooperate in an SFO or HMRC investigation, they can be compelled to provide information, subject to the proviso that a compelled testimony cannot generally be used as evidence against that individual. An employee will be able to seek independent legal advice to make an informed decision about cooperating but, in practice, given the powers of compulsion, there is usually no alternative to cooperating.

In relation to internal investigations by company counsel, for example, most employees will have employment contracts that require them to cooperate with an internal investigation. Any refusal to do so may result in disciplinary proceedings. The individuals will often be told that there is no privilege attached to the information they are providing to the company and that the company may indeed consider disclosing this material to investigating agencies.

Privileged communications

27 How does cooperation affect the target business's ability to assert that certain documents and communications are privileged in other contexts, such as related civil litigation?

See 'Providing evidence'.

If a business cooperates with an investigation, this does not mean that privileged documents will be provided. Privileged information can only be obtained by the investigating agency if the business has waived privilege. Once privilege has been waived in relation to one investigation, a business cannot assert privilege over the same material in related litigation. Privilege is generally considered waived even if the information has been handed over inadvertently.

RESOLUTION

Resolution mechanisms

28 What mechanisms are available to resolve a government investigation?

There are numerous possible outcomes of a government investigation and the outcome will depend on which agency has conducted the investigation.

If the investigation is criminal in nature, then the business or employee could be charged and prosecuted through the criminal courts. This will result in a guilty plea or in the event of a not guilty plea, a trial at the Crown Court. Of course, it may be that once the investigation is completed there is insufficient evidence or it is not in the public interest to prosecute. There are also circumstances in which the SFO may decide to pursue a civil settlement rather than a criminal prosecution.

The CPS and the SFO are also able to enter into DPAs with businesses, thus allowing the business an opportunity to resolve the issue without being prosecuted (but effectively admitting wrongdoing at a corporate level).

As a regulator, the FCA has mechanisms for resolving investigations. In the majority of cases involving businesses, a financial penalty is imposed through the FCA disciplinary process, but it has a range of sanctions at its disposal, including suspending or prohibiting businesses and employees from undertaking regulated activities.

Admission of wrongdoing

29 | Is an admission of wrongdoing by the target business required? Can that admission be used against the target in other contexts, such as related civil litigation?

An admission of wrongdoing is required if the business wants to plead guilty to an offence or regulatory breach. The position is the same if the business wants to enter into a DPA or pursue immunity or leniency with the CMA.

Any admission of culpability in proceedings brought by a government agency can be used in related civil litigation and will often, as a consequence, result in liability being agreed in the civil proceedings, with any arguments remaining concerning only the quantum of damages.

Civil penalties

30 | What civil penalties can be imposed on businesses?

The main civil penalty that can be imposed against businesses or individuals is a financial penalty. The quantum of any financial penalty will depend on a number of variables, including the nature of the regulatory breach, the culpability of the business, any cooperation provided during the investigation and other mitigating circumstances, such as an early acceptance of wrongdoing.

In addition to this sanction, the FCA has powers:

- withdrawing a business's authorisation;
- censuring firms and individuals through public statements;
- applying to a court to freeze assets; and
- seeking restitution orders.

Criminal penalties

31 | What criminal penalties can be imposed on businesses?

Businesses and individuals can incur unlimited fines, individuals can face imprisonment and company directors can be disqualified from acting as directors. Although not strictly a penalty, one consequence of admission of bribery offences by a corporate is disbarment from public procurement competitions.

Sentencing regime

32 | What is the applicable sentencing regime for businesses?

Businesses guilty of criminal offences are sentenced according to statutes or the common law, depending on the offence. While these set out the penalties available, with regard to businesses, the level of financial penalty is determined by mandatory consideration of case law and the Sentencing Council's Fraud, Bribery and Money Laundering Offences: Definitive Guideline (see www.tinyurl.com/sentencing-council).

Ultimately, the final decision on a sentence is a matter for the judge. For offences such as fraud, bribery and money laundering, the guidelines have been in force since 1 October 2014 and cover the following offences:

- fraud;
- money laundering;
- bribery;
- fraudulent evasion of value added tax;
- fraudulent evasion of duty;
- false accounting; and
- the common law offences of conspiracy to defraud, and cheating the public revenue.

The guidelines set out the sentencing process to be followed by the court, including a compulsory obligation to first consider making a compensation order by such amount as the court sees fit. Priority is to be given to compensation payments over any other financial penalty levied against businesses in sentencing, and the reasons for a court declining to make a compensation order should be given if one is not made.

If the prosecution has requested confiscation, or the court thinks it appropriate, after prioritising and dealing with compensation, the court must deal with or take into account confiscation when assessing any other financial order or fine to be levied against corporate offenders.

In sentencing corporate offenders, the court will determine the offender's culpability level (low, medium or high) and calculate harm in accordance with the provided guidance. This information is used to determine the appropriate starting point and range for a financial penalty for that offence, making adjustments in increasing seriousness or for mitigating factors to determine the level of fine to be imposed. Finally, the court should determine the level of fine in accordance with section 164 of the Criminal Justice Act 2003 to reflect the seriousness of the offence and take the financial circumstances of the offender into account. To this end, companies are expected to provide annual accounts for the three years prior to the sentence to assist the court in making an accurate assessment.

Future participation

33 | What does an admission of wrongdoing mean for the business's future participation in particular ventures or industries?

This will depend on the particular wrongdoing proved or admitted and the nature of the business's activities. Inevitably, there will be reputational implications for the business that will require careful management. In certain sectors (eg, the public sector), businesses that have a negative finding recorded against them are prohibited from tendering for contracts.

UPDATE AND TRENDS

Emerging trends

34 | Are there any emerging trends or hot topics that may affect government investigations in your jurisdiction in the foreseeable future?

Economic crime – proposals for UK reform

On 8 March 2019, the Parliamentary Treasury Committee published a unanimously agreed report on 'Economic Crime – Anti-money laundering supervision and sanctions implementation'. The report made several recommendations concerning how the UK government should deal with the threat of economic crime in a post-Brexit era and observed that it was still not possible to quantify its true scale.

The report also referred to the long-standing debate and proposed legislative reform of corporate criminal liability to overcome problems created by the current 'identification principle', with a view to strengthening economic crime enforcement. Given the Bribery Act offences of failing to prevent bribery and corruption, and the offence of failing to prevent the facilitation of tax evasion, it seems only a question of time before a new general offence of failing to prevent economic crime appears on the statute book, although some would doubtless feel concerned about the lowering of the threshold required to establish criminal liability.

In terms of money laundering, the report concentrated on what it regarded as the currently fragmented approach to anti-money laundering supervision, a function of the many agencies that have adopted a lacklustre approach to their supervisory responsibilities. Among the comments, the report highlighted the need for increased confidence in the suspicious activity report regime to be gained by greater information sharing between the public and private sectors, and a centralised database of politically exposed persons. The privacy implications of the latter did not appear to trouble the Parliamentary Treasury Committee.

The report referenced the apathy of the Office of Financial Sanctions Implementation (OFSI), apparent from its lack of enforcement action, and called upon the government to review its effectiveness on the basis that public enforcement is necessary for OFSI to have a deterrent effect.

The CMA – more powers

In a letter dated 21 February 2019, CMA chairman Andrew Tyrie wrote to the UK Secretary of State for Business, Energy and Industrial Strategy Greg Clark making recommendations for change following a wide-ranging CMA review of its competition and consumer law powers.

Notably, Andrew Tyrie conceded that the CMA no longer had the expertise required to deal with the most complex cases of collusion or cartels and referred to the SFO as a more 'natural' recipient, commenting that individual criminal responsibility in competition law was 'difficult and costly to apply and invoked relatively rarely', thereby justifying the proposal on the basis that the SFO 'routinely brings criminal prosecutions'.

The letter further suggested that the CMA redirect its focus to director disqualification, a power given to the CMA in 2002 but seldom used, notably only three times since 2014.

The SFO responded to the CMA proposal by confirming that its standard case acceptance criteria will not change to suit. That does not appear to suggest a plethora of competition law cases will be prosecuted any time soon.

The General Data Protection Regulation and internal investigations

Following the Court of Appeals ruling in *SFO v ENRC* [2018] EWCA Civ 2006, the issue of privilege and its application to the product of internal investigations has dominated headlines.

A less discussed (albeit equally important) development in the sphere of internal investigations is data protection and the impact of the EU General Data Protection Regulation (GDPR), which came into effect on 25 May 2018, having direct and extraterritorial reach across EU member states. The GDPR also impacts internal investigations of corporations doing business in the European Union or processing the personal data of EU subjects (employees or customers) outside the European Union. In other words, a corporation with no EU presence can remain subject to the GDPR on the basis that goods and services are offered to individuals present in the European Union (irrespective of their nationality).

The GDPR is capable of imposing multimillion-dollar or -pound fines (determined by a proportion of worldwide turnover) where its requirements are not met. In effect, it creates a mechanism to bolster data protection-related enforcement. While not a bar to internal investigations, conducting these investigations without considering GDPR compliance and consequences could result in large financial penalties as a function of the investigation itself.

Those processing personal data in the context of internal investigations will need to comply with their obligations, including having a lawful basis for processing data (article 6 of the GDPR).

This is a highly technical area, in relation to which strict substantive requirements apply and must continue to be monitored throughout the investigation to ensure that a lawful basis in EU data protection terms can be achieved in its conduct.

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