Government Investigations 2021

Contributing editors
David M Zornow and Jocelyn E Strauber

LEXOLOGY
Getting The Deal Through

Publisher
Tom Barnes
tom.barnes@lbresearch.com

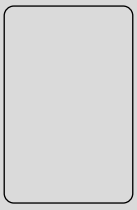
Subscriptions
Claire Bagnall
claire.bagnall@lbresearch.com

Senior business development manager
Adam Sargent
adam.sargent@gettingthedealthrough.com

Published by
Law Business Research Ltd
Meridian House, 34-35 Farringdon Street
London, EC4A 4HL, UK

First published 2014
Seventh edition
ISBN 978-1-83862-345-6

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112



Government Investigations 2021

Contributing editors
David M Zornow and Jocelyn E Strauber
Skadden, Arps, Slate, Meagher & Flom LLP

Lexology Getting The Deal Through is delighted to publish the seventh 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.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on Hong Kong.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

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.

LEXOLOGY®
Getting The Deal Through

London
July 2020

Reproduced with permission from Law Business Research Ltd
This article was first published in August 2020
For further information please contact editorial@gettingthedealthrough.com

Contents

England & Wales

Michael Drury and Natasha Sammy
BCL Solicitors LLP

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 agencies primarily responsible for the enforcement of laws and regulations applicable to businesses are as follows:

- 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 & Customs (HMRC); and
- the Insolvency Service, an executive agency of the Department for Business, Energy and Industrial Strategy.

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 enforcement authority of 'government agencies' listed above 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 not prosecuted by the other specialist agencies. It 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 for those offences.

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 financial services regulator. It uses a wide range of rule-making, investigative and enforcement powers (criminal, civil and regulatory) to regulate and take action against businesses and approved individuals that breach FCA principles and rules that are designed to meet its operational objective to protect consumers, protect and enhance the integrity of the UK financial system, 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 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 making it difficult for consumers to exercise choice. The CMA has joint responsibility with the SFO for investigating and prosecuting cartel offences. The law in relation to criminal cartel offences does not require proof of dishonesty.

Her Majesty's Revenue & Customs (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 Act and ancillary matters such as export control. 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 and prosecution of companies for breaches of insolvency legislation on behalf of the Department for Business, Energy and Industrial Strategy; and has civil enforcement powers, including the power to conduct confidential investigations into serious corporate abuse in relation to limited companies and limited liability partnerships.

Each of these agencies can pursue enforcement against both corporates and individuals. The majority of financial crime offences require a mental element (generally dishonesty) to be proved to achieve a conviction. Ordinarily, a company can only be convicted of an offence requiring a mental element through 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. 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 sections 45 and 46 of the Criminal Finances Act 2017. These are strict liability offences. As of June 2020, proposals to widen the range of such offences to include a failure to prevent fraud have not been carried forward.

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. However, the prosecution of a company should not be seen as a substitute for the prosecution of criminally culpable individuals. In all cases, sufficient evidence is required and public interest factors must be considered to justify 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 (but not

individuals), a deferred prosecution agreement (DPA) is available and in its use by the SFO has become a 'normal' outcome of investigations.

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 and there are statutory 'gateways' allowing information to be shared. By way of example, a target business may be the subject of SFO investigation in relation to fraud offences while simultaneously being under investigation by the FCA for regulatory breaches arising from the same conduct.

Generally, if an agency is conducting a criminal investigation, this tends 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 that also permit 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 (CAT), an independent judicial body, operates for the CMA. Its principal functions 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. CAT decisions are appealable to the Court of Appeal, but only on a point of law or penalty quantum.

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' Court, but the most serious offences (indictable-only offences) are transferred to the Crown Court. Appeals from Crown Court decisions may be made to the Court of Appeal (including by the prosecution except where acquittal by jury has taken place). 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.

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 be attributed to the company to establish guilt. 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 automatically follows. 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. Thus far, proposals to lower the threshold to prove corporate liability have not been carried forward but remain under active consideration.

A company may also be guilty of strict liability offences, such as an offence under section 7 of the Bribery Act 2010, where no mental element of the crime needs to be proved.

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/), also applicable to the SFO and other prosecutors, sets out the general principles that agencies should follow when deciding whether to prosecute (a corporate or individual). Prosecutors must first be satisfied that there is sufficient evidence to provide a 'realistic prospect of conviction'. If satisfied, prosecutors must then consider whether a prosecution is required in the public interest. In relation to corporate prosecutions, particular 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 their 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, a body 'self-reports' potentially criminal conduct, there are circumstances suggesting that a crime may have been committed, or where there is evidence of a regulatory breach. However, the different agencies also apply their own specific criteria.

The Serious Fraud Office (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 Financial Conduct Authority (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 an issue, or increasingly as a result of market intelligence.

The FCA and Competition and Markets Authority (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?

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 the information provided by the whistle-blower or their identity. However, where possible, agencies try to accommodate the understandable desire of whistle-blowers to remain anonymous, using public interest immunity to resist disclosure applications by interested parties in the case 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 but acknowledges that it cannot guarantee anonymity, stating in its published materials:

> *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 whistle-blowing procedures, and to make senior management accountable for delivering these.*

No other agency operates 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 agency is conducting the investigation. Generally, the commencement of a police investigation into a business or individual would not be publicly acknowledged (unless information is released as an investigative tool for the purposes of witness or victim appeal). Such information should only be publicly acknowledged when a decision has been made to prosecute in the criminal courts. The reasonable expectation of privacy when being subject to a police investigation was confirmed by the Court of Appeal in May 2020 (*ZXC v Bloomberg LP* [2020] EWCA 611). In reality, however, press reporting means that an investigation by the police or other regulatory or investigative agency frequently becomes known to the public. Naming suspects in the press has recently given rise to a number of court challenges rooted in privacy and confidentiality; the press can be expected to be more careful than has hitherto been the case.

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

As of October 2013, the FCA can 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 generally be possible to seek anonymity of the business, but this is changing for individuals and especially in 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.

The CMA, FCA and SFO commonly publish press releases detailing the outcome of its investigations. This is intended to have a deterrent effect as well as providing an opportunity for authorities to prove their effectiveness and instil public confidence.

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 seek to gather information from other parties either voluntarily or by using their compulsory powers. That could include specific covert techniques but will not inevitably do so.

The next stage of the investigation will usually involve the investigating agency contacting the target business to advise that an investigation has commenced. The agency will likely request the disclosure of documents and seek to interview relevant witnesses, either voluntarily or using powers designated to the particular agency by statute (eg, the Serious Fraud Office (SFO) using its powers under section 2 of the Criminal Justice Act 1987).

There is no law requiring agencies to inform businesses that investigative steps are being taken. It is not uncommon for agencies with dual regulatory and enforcement functions to gather evidence for enforcement action against a target business under the auspices of its regulatory or supervisory function (notably the Financial Conduct Authority (FCA) or Her Majesty's Revenue & Customs). For this reason, it is essential to consider the impact of all responses provided to an authority irrespective of the context in which it is provided.

If an 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 a dawn raid) without notice.

Any covert investigations, such as surveillance and the interception and collection of communications data, must be undertaken in accordance with the Regulation of Investigatory Powers Act 2000 or the Police Act 1997 (for physical surveillance and the use of covert human sources), and under the Investigatory Powers Act 2016 (the IP Act – for

electronic surveillance). The IP Act can be used by specified government agencies on the basis 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.

Specific covert techniques, include:

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

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 interviews with relevant employees. However, doing so as part of an internal investigation carries a risk. The SFO suggests businesses should carefully consider whether it is best to interview 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 business 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 and documented by the business. Although the position is open to dispute, 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. The Courts' continuing need to deal with privilege arising in the context of government and corporate investigations has been apparent in two 2020 cases, *Civil Aviation Authority v R (on behalf of the application of JET2.com Ltd)* [2020] EWCA Civ 35, and *Sports Direct International plc v The Financial Reporting Council* [2020] EWCA Civ 177. In summary, the cumulative effects of the rulings are:

- confirmation that the 'dominant purpose' test applies to any legal advice privilege claim;
- regarding communications sent to multiple recipients (ie, lawyers and non-lawyers or legal advice contained within a chain of communications), legal advice from a lawyer maintains its privileged status;
- email attachments need to be separately assessed for privilege in document review; and
- privilege cannot be asserted for non-privileged documents merely because they are attached to privileged communications.

The position regarding privilege remains far from resolved: in both cases permission has been sought to appeal to the Supreme Court in relation to some aspects of the rulings.

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?

Even 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 itself a criminal offence. Section 2(16) of the Criminal Justice Act 1987 provides that a person who knows that the police or 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. Extreme caution is required in the destruction of any material during an ongoing investigation, even where company policies operating normally provide for that.

Persons or entities regulated by the FCA or CMA also have a duty to cooperate with investigations which includes the preservation of material.

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), failure to comply would constitute a contempt of court. Generally, the criteria for issuing a notice are that (1) there are reasonable grounds for suspecting that wrongdoing has occurred and (2) there is a reasonable belief that the recipient of the notice is in possession of relevant information.

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.

The statutory framework for data processing for the purpose of law enforcement is contained in Part 3 of the Data Protection Act 2018. When processing data for law enforcement purposes a competent law enforcement authority must adhere to several guiding principles (ie, to process the data lawfully and fairly), the purpose of the processing must be specified, explicit and legitimate, the personal data processed must be adequate and not excessive to the purpose for which it was processed, the data must be accurate, not be kept longer than is necessary and processed in a manner that ensures appropriate security of the data. As a result, careful scrutiny is required by law enforcement agencies to establish the basis and purpose of its decision to process data.

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 applies to 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 at a later stage. In these circumstances, the material will be subject to independent review and must be returned if it is later determined to be privileged without the investigative team having sight of it.

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 privilege cannot be claimed in respect of communications between in-house lawyers and employees. The scope of legal professional privilege in relation to internal investigations was clarified by the Court of Appeal in *Eurasian Natural Resources Corporation(ENRC)* [2018] EWCA Civ 2006, which confirmed that notes between company lawyers and its employees were protected on the basis that the purpose of heading off, avoiding or settling litigation was a purpose that ought to be protected by litigation privilege (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 in 'reasonable contemplation', documents produced by the internal investigation will be protected.

Production orders granted by a court can be challenged 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. In those circumstances, 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 a 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 those questions. 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 personally.

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 maintains the right not to incriminate himself 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 an interview 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) the employee 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 as of right, although they are generally given a reasonable opportunity to arrange this. Such representation should be independent of the representation 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 separate representation.

In February 2018, the SFO amended its guidance regarding the process for inviting and handling requests for compelled witnesses to be accompanied by a lawyer to ensure that lawyers acting for a corporate suspect do not also attend with compelled witnesses, reducing the risk that confidential information will 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 the conduct of a single employee.

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 common-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, a criminal offence. This is an area where care is required.

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.

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. It is always open to a target business to report wrongdoing to the authorities at any time. There are obvious advantages in doing so.

In relation to Serious Fraud Office (SFO) and Crown Prosecution Service (CPS) investigations, companies that wish to avoid prosecution and enter into a deferred prosecution agreement (DPA) will generally have to self-report any 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 results with the prosecutor); agree to provide appropriate restitution; and implement a programme of training and culture change (which may include the appointment of an independent monitor). Since their introduction in February 2014, DPAs remain relatively rare, although they have more recently increased in number and are now a well-recognised feature of SFO prosecutions and an 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. Businesses now have a 'rule book' to determine whether to pursue a DPA, noting that there are circumstances in which a business may wish to pursue a civil settlement. Self-reporting has often been used by businesses to negotiate a civil settlement rather than plead to a criminal charge or enter into a DPA.

However, cooperation does not guarantee that a prosecution will be avoided or that a business will be invited to enter into a DPA. If prosecuted, cooperation is likely to be an important mitigating factor taken into consideration to reduce a financial penalty and the business may to agree a basis of plea with the prosecution to reduce culpability.

A key issue is what it means to give 'full cooperation' and the extent to which full cooperation requires a waiver of legal professional privilege. 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 regarding how a business positions itself, taking into account potential civil claims, reputational management and pure business drivers.

The outcome of *Tesco* and *Rolls-Royce* led to criticism as to whether the admitted liability has been properly established in the DPA and its effect on individuals. In *Tesco*, a DPA was approved in circumstances where individuals whose culpability was said to give rise to Tesco's liability were found to have no case to answer, and in *Rolls-Royce* no individual who might have been regarded as the controlling mind of the company 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 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 reduced financial punishment.

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 Competition and Markets Authority (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 as a matter of law. 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 imposed as conditions of a DPA, and these typically include restitution, change in business practices and the appointment of an independent monitor. Voluntary disclosure is generally regarded as a precondition of such agreements.

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 so, the more credit will be given and the better the overall outcome is likely to be.

Cooperation requirements

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

Cooperation requirements for a target business will vary according to which agency it is dealing with and the particular circumstances of the case. However, there is, in effect, a minimum expectation that a target business will go above and beyond legal requirements to receive credit for cooperation. Notwithstanding that, credit is not guaranteed.

In general terms, a business should commit to resolving any misconduct and preserve and provide relevant documents associated with doing so; agree to conduct or cooperate fully with any further investigation; agree to provide appropriate restitution or disgorge its profits from the misconduct; implement a programme of training and culture change within the business; and agree to cover investigation costs.

Practically, this requires consideration of 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.

The SFO have specifically published 'Corporate Cooperation Guidance' (https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/sfo-operational-handbook/corporate-co-operation-guidance/) to assist in the assessment of what full cooperation requires.

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 policies. Most businesses have employment contracts that require employees to cooperate with an internal investigation or external investigation in circumstances where the target business is cooperating.

In relation to fees, in many cases, a business will pay the legal fees of its employees for independent legal representation of those who are being interviewed voluntarily, compelled to answer questions or interviewed under caution. It is likely to be beneficial for all parties for employees to be legally represented when answering questions related to the target business.

In the case of directors and company officers, businesses often have insurance to cover this cost. The fact that a business pays its employees' legal fees is not a relevant consideration for the government entity to consider when 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?

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 counsel acting on behalf of the business, 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 or dismissal. 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?

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 may be 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 potential outcomes of a government investigation dependant on which agency has conduct of the investigation.

If the investigation is criminal in nature, the business or employee could be charged and prosecuted through the criminal courts. This could result in a guilty plea or in the event of a not guilty plea, a trial. 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 according to the test set out in the Code for Crown Prosecutors. There are also circumstances in which the Serious Fraud Office (SFO) may decide to pursue a civil settlement rather than a criminal prosecution.

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

As a regulator, the Financial Conduct Authority (FCA) has mechanisms for resolving investigations that include the imposition of a financial penalty through the FCA disciplinary process. It also 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 a criminal offence or regulatory breach or enter into a deferred prosecution agreement (DPA). The position is the same if the business wants pursue immunity with the SFO or CPS or leniency with the Competition and Markets Authority (CMA).

Any admission of culpability in criminal 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, leaving there only those arguments regarding the quantum of damages applicable.

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 several variables, including the nature of the regulatory breach, the culpability of the business, the extent of cooperation provided in the investigative phase and other mitigating circumstances, such as early acceptance of wrongdoing.

In addition, the SFO, CPS, HMRC and FCA have powers to bring proceedings to recover the proceeds of crime by way of a civil recovery order from the High Court pursuant to the Proceeds of Crime Act 2002. In such circumstances, the action is against the property sought to be recovered and no criminal conviction is required.

In addition to this sanction, the FCA has the power to:

- withdraw or limit authorisation to trade;
- censure firms and individuals via public statements;
- apply to a court to freeze assets; and
- seek 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, corporate admission of bribery offences can result in 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 common law, depending on the offence. While these set out available penalties with regard to businesses, the level of financial penalty is determined with reference to consideration of case law and the Sentencing Council's Fraud, Bribery and Money Laundering Offences: Definitive Guideline (https://www.sentencingcouncil.org.uk/publications/item/fraud-bribery-and-money-laundering-offences-definitive-guideline/).

Ultimately, decisions regarding sentencing are 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 in an 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.

When sentencing businesses, the court will determine the level of culpability (lesser, 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, making adjustments for increasing seriousness or reflecting 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 corporate 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 the public sector context, businesses that have a negative finding recorded against them are prohibited from tendering for contracts.

UPDATE AND TRENDS

Key developments of the past year

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

Prosecution and convictions for offences involving dishonesty in England and Wales should, henceforth, be significantly easier given the April 2020 ruling of the Court of Appeal in *R v Barton & Booth* That ruling removed any doubt about how a prior Supreme Court decision concerning the meaning of dishonesty in the civil sphere might apply to criminal or regulatory proceedings.

Put simply, and there is debate among lawyers about the true effect of the new test, the law has now shifted significantly in that dishonesty is to be objectively assessed with reference to the standards of society rather than including, as has been the case for the past 30 years, a subjective assessment of a defendant's own belief of what is dishonest. Previously the test was whether the defendant's conduct was objectively dishonest by the standards of reasonable and honest people, and, if so, whether the defendant also realised that his or her conduct was dishonest by the standards of those same people.

Practically speaking, defences to allegations based on what is subjectively said to be honest industry practice, custom or norm will be harder to argue. The effect is, of course, to enable a defendant to be convicted of a crime even when they genuinely believe that their conduct is honest (on the basis the law now assesses dishonesty only by an objective measure of what society expects).

The Financial Conduct Authority (FCA), in its business plan published 7 April 2020, has identified new priority areas of work for the year ahead. Within a small budgetary increase and with additional fund allocation to deal with EU withdrawal matters, the FCA is ensuring its regulatory approach fits within express priorities, which are to:

- enable effective investment consumer decisions;
- ensure consumer credit markets work well;
- make payments safe and accessible;
- deliver fair value in a digital market age; and
- transform how the FCA works and regulates with reference to the need for speedy decision-making, prioritisation of end outcomes, intelligence and information and forging stronger links with global partners.

Given the timing of the business plan, the FCA did have the opportunity to adapt its approach in light of the coronavirus pandemic. However, the overall influence of covid-19 is not obviously apparent. Certainly, the priority to ensure 'consumer credit markets work well' foreshadows the inevitable increase in borrowing and of credit extension that the pandemic will have brought. As part of this objective, the FCA will seek to ensure that companies provide clear and simple information about any financial products offered and that consumers do not become overburdened with debt. It remains to be seen if the FCA will further revise its annual position (rather than publishing individual guidance documents on such issues) as one of the most difficult business years in history progresses. But, certainly, the new business plan evinces a desire to protect consumers: businesses that seek to exploit the difficulties created by covid-19 can certainly expect to be investigated.

As described in the answers to the substantive questions, the field of legal professional privilege continues to be a very active battle ground between regulators and those being investigated.

Finally, with the UK's withdrawal from the EU as of midnight 31 January 2020 and a heavy reliance by investigative agencies on mutual legal assistance provisions with its EU counterparts, the fate of prosecutions that involve multiple European jurisdictions is extremely uncertain.

To date, the UK has had as had access to European Investigation Orders, European Arrest Warrants and access to databases to use as part of its investigative armoury.

During the Brexit transition period, the UK will maintain its ability to access those measures until 31 December 2020. However, the landscape for mutual legal assistance in a post-Brexit era is extremely unclear and undoubtedly will be a key consideration in ongoing EU–UK negotiations as to the future. Logically, the UK will have to maintain working relationships and agreements with countries on an individual basis to provide the equivalent to EU member states. However as political agendas and ill-feeling come into play, it may well be that agencies will need to start making tactical decisions about those countries from which information to assist an investigation will be swiftly provided.

Coronavirus

35 What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

As at June 2020, the Corporate Insolvency and Governance Bill is currently making its way through Parliament and, when implemented will introduce wide reaching changes to the UK's insolvency regime. The Bill will introduce a series of temporary and permanent measures designed to protect businesses that are struggling as a result of the pandemic.

Temporary measures will include the suspension of wrongful trading provisions removing the threat of personal liability for directors for financial losses incurred during the pandemic, and restrictions to the use of statutory demands and winding up petitions served within a specified period.

Permanent provisions contained in the Bill will allow a business to obtain a 20-day moratorium to enable exploration of restructuring and investment options, impose a new restructuring procedure enabling businesses in financial difficulty to propose a restructuring plan that compromises certain creditors subject to conditions, and in circumstances where a business has engaged in both the moratorium and restructuring procedures, it will no longer be permissible for its suppliers to terminate or vary contracts affecting payment terms. In effect, this will preserve the supply of goods and services to a failing business, maximising the opportunity for its rescue or sale as a going concern.

During the pandemic, investigators have been beset with difficulties in contacting individuals and reviewing hard-copy materials, born of the need to protect personnel and the difficulties of working in close proximity to others. Resources have necessarily been reprioritised to tackle the immediate impact of covid-19, especially in Her Majesty's Revenue & Customs (HMRC) and the police. Common experience has been that HMRC is often content to wait for responses to outstanding investigative queries.

All Crown Court trials were halted for a while, and those that have recommenced now operate with 'social distancing' constraints. The number of trials therefore remains severely limited. Commentators believe it will take many months, if not years, for the backlog of criminal cases before courts to be cleared.

Nonetheless, on 7 May 2020, the Serious Fraud Office (SFO) issued a statement vowing to continue its investigation of fraud and bribery cases during the pandemic. Even before the effect of covid-9 had become apparent, the pace of case progression at the SFO had fallen far below commentator expectations. The statement therefore set out an ambitious intent where access to the court system to obtain orders or commence prosecutions will be less than straightforward and distancing measures make dawn raids and interviews (voluntary or compelled) and the recovery of documents, if not impossible, then very difficult (especially for an organisation where, like many others, employees will have continued to work from home through spring and summer 2020).

On 2 June 2020, the SFO published a response to the 2019 independent Crown Prosecution Service inspectorate criticism of how long it takes to develop a case. The SFO's response cited the re-allocation of resources and further staff training to develop case management skills as steps being taken to increase efficiency.

The SFO aspiration to continue as a robust crime-fighting force during and post pandemic is plainly there and the organisation has to react positively to its inspectorate but the targets look hard to achieve.

The FCA has specifically adapted its approach to take into account the pandemic (rather than attempting to proceed with business as normal). On 6 May 2020, the FCA issued a statement 'Financial Crime Systems and Controls during Coronavirus Situation' in which it acknowledged a likely increase in fraud and consumer exploitation, including cyber-enabled fraud, and that the pandemic may have led to operational challenges for firms in relation to their financial systems and controls. While explicitly advising that firms should not change their risk appetite to address these issues, the FCA accepts in its statement that firms may need to prioritise in this period causing delays to activities, such as due diligence reviews or reviews of transaction monitoring.

The statement makes clear that in light of covid-19 the FCA will consider delays to be reasonable if the activity is risk assessed and there is a clear plan to return to review as usual as soon as reasonably possible. Such flexibility and allowances from the FCA has been welcomed, but the prudent firm will make sure any decisions outside the norm are well documented so as to avoid future investigative action.

BCL Solicitors LLP

Michael Drury
mdrury@bcl.com

Natasha Sammy
nsammy@bcl.com

51 Lincoln's Inn Fields
London, WC2A 3LZ
United Kingdom
Tel: +44 20 7430 2277
www.bcl.com

Other titles available in this series

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Appeals
Arbitration
Art Law
Asset Recovery
Automotive
Aviation Finance & Leasing
Aviation Liability
Banking Regulation
Business & Human Rights
Cartel Regulation
Class Actions
Cloud Computing
Commercial Contracts
Competition Compliance
Complex Commercial Litigation
Construction
Copyright
Corporate Governance
Corporate Immigration
Corporate Reorganisations
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Defence & Security Procurement
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
Drone Regulation
e-Commerce
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Compliance
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gaming
Gas Regulation
Government Investigations
Government Relations
Healthcare Enforcement & Litigation
Healthcare M&A
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Joint Ventures
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Litigation Funding
Loans & Secured Financing
Luxury & Fashion
M&A Litigation
Mediation
Merger Control
Mining
Oil Regulation
Partnerships
Patents
Pensions & Retirement Plans
Pharma & Medical Device Regulation
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Private M&A
Product Liability
Product Recall
Project Finance
Public M&A
Public Procurement
Public-Private Partnerships
Rail Transport
Real Estate
Real Estate M&A
Renewable Energy
Restructuring & Insolvency
Right of Publicity
Risk & Compliance Management
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
Sovereign Immunity
Sports Law
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Technology M&A
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

Also available digitally

lexology.com/gtdt

an LBR business

ISBN 978-1-83862-345-6