GOVERNMENT INVESTIGATIONS

United Kingdom - England & Wales

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Government Investigations

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Quick reference guide enabling side-by-side comparison of local insights, including into enforcement agencies; forms of liability; requirements and trigger events for investigations; whistle-blower and employee protections; document preservation and production (including data protection, privacy, and legal privilege limitations); investor notification; cooperation with enforcement agencies; resolution of investigations; potential civil and criminal penalties; and recent trends.

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ENFORCEMENT AGENCIES AND CORPORATE LIABILITY

Government agencies

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 civil and criminal laws and regulations applicable to businesses are as follows:

- the Serious Fraud Office (SFO);
- the Financial Conduct Authority (FCA);
- the Competition and Markets Authority (CMA);
- His Majesty's Revenue & Customs (HMRC);
- the Insolvency Service, which is an executive agency of the Department for Business, Energy and Industrial Strategy; and
- the Crown Prosecution Service (CPS), which is the principal prosecuting agency in England and Wales.

There are also other agencies with responsibilities outside the central areas of financial crime (fraud, bribery and corruption, money laundering, market abuse, etc) where there may be large-scale corporate investigations, including in relation to the environment, health and safety and other 'regulatory' areas where similar issues arise.

Law stated - 30 May 2023

Scope of agency authority

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 the relevant '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 not prosecuted by 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

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offences does not require proof of dishonesty.

HMRC is responsible for the collection and regulation of taxes and customs or duties, and the investigation of serious and organised fiscal crime, in particular offences committed under the Customs Excise and Management Act and ancillary matters such as export control. It has both criminal and civil investigatory and enforcement powers and, unusually, has the discretion outside the court's jurisdiction to resolve suspected criminality by way of a civil settlement. They are able to do so either under the Contractual Disclosure Facility (CDF) pursuant to Code of Practice 9 (in relation to any suspected tax offence) or by entering into a compound settlement with the taxpayer in respect of certain offences (a process known as 'compounding'). Both processes involve the payment of a penalty in lieu of potential prosecution, in addition to the payment of any outstanding tax and interest.

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. It 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 are the more recently enacted offences 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, subject to a defence of having 'adequate' (or 'reasonable') procedures to prevent the offending.

At the time of writing (May 2023), a proposed new failure to prevent fraud offence has been included in the Economic Crime and Corporate Transparency Bill, which is currently working its way through the UK Parliament. This proposed new offence broadly follows the same model as the bribery and facilitation of tax evasion offences, namely strict liability subject to a reasonable procedures defence (currently, the offence is only intended to apply to 'large' organisations). The government also has plans to reform the 'identification doctrine' so that it applies more widely to 'senior management'; however, there are as yet no detailed provisions on this proposed reform.

Guidance on corporate prosecutions has been issued by the prosecuting agencies, such as that of the CPS , 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 and met 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 is available and in its use by the SFO has become a ‘normal’ outcome of investigations.

Law stated - 30 May 2023

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Simultaneous investigations

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.

Law stated - 30 May 2023

Civil forums

In what forums can civil charges be brought? In what forums 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, in appeal cases, to 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 (ie, 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.

Law stated - 30 May 2023

Corporate criminal liability

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 senior employees

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(typically board directors) who are its ‘directing mind and will’. This is called the identification principle. These acts and state of mind will be attributed to the company to establish criminal liability. All elements of the offence must be proved against the ‘directing mind and will’ and, once proven, 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 management and decision-making structures, leaving small and medium companies at greater risk of prosecution.

A company may also be guilty of strict liability offences, such as an offence under section 7 of the Bribery Act 2010 (which prescribes that a corporate can be prosecuted for failure to prevent bribery), when its agents bribe a person intending to gain business or an advantage for the company and no mental element of the crime needs to be proved. Similarly, there are the more recently enacted offences of failure to prevent the facilitation of tax evasion pursuant to sections 45 and 46 of the Criminal Finances Act 2017 . These strict liability offences are subject to a defence of having 'adequate' (or 'reasonable') procedures to prevent the offending.

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Law stated - 30 May 2023

Bringing charges

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

The Code for Crown Prosecutors (the CPS guidance), also applicable to the SFO and other prosecutors, sets out the general principles that agencies should follow when deciding to pursue a prosecution against a corporate or individual. Prosecutors must first be satisfied that there is sufficient admissible 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.

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INITIATION OF AN INVESTIGATION

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Investigation requirements

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 unlawful 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 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 nature and severity of the harm, the implications of the misconduct, the extent of lack of fitness or propriety, and the public interest.

Law stated - 30 May 2023

Triggering events

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

Law stated - 30 May 2023

Whistle-blowers

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. The FCA recently set out actions to improve the confidence of whistleblowers who contact them.

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In relation to protection from employers, the Public Interest Disclosure Act 1998 inserted new sections into the Employment Rights Act 1996 to protect whistle-blower workers (employees and consultants) from detrimental treatment by their employers. In cases where a worker is subjected to detrimental treatment following the disclosure of certain information (including the commission of a criminal offence), the worker can bring a case before an employment tribunal.

Law stated - 30 May 2023

Investigation publicity

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 subject to a criminal investigation was confirmed by the Supreme Court in February 2022 (ZXC v Bloomberg LP [2022] UKSC 5). Nonetheless, press reporting means that an investigation by the police or other regulatory or investigative agency frequently becomes known to the public. ZXC v Bloomberg represents a high point in the court challenges rooted in privacy and confidentiality that deter the press from identifying suspects. That decision however must be read in the light of the recent High Court judgment in R (on the application of Marandi) v Westminster Magistrates' Court [2023] EWHC 587 (Admin) which recentres the principle of 'open justice', and makes it more difficult for even non suspects to maintain anonymity.

In short, the law is far from clear and each case will be heavily dependent on the circumstances applicable and the article 8 privacy rights of the suspects, and potentially other connected parties, especially family members likely to be affected. This is one area where expert advice is required and needs to be sought immediately.

The SFO and the CMA often publicise the fact that an investigation has been opened, making information available on their websites. Care is taken to avoid naming individuals.

The FCA can issue warning notices that are publicly available. Warning notices will only be published when the investigation phase has been completed and further action is proposed. These notices detail the reasons that enforcement action is being taken and the disciplinary action that the FCA proposes to take.

In short, if a business is being investigated by the SFO, the CMA or the FCA, it will not generally be possible to seek the anonymity of the business. However, as above, the situation is less clear for individuals and especially in exceptional cases, for example, where the privacy rights of minors are at issue. It is standard practice to engage a suitably experienced public relations consultant in cases where publicity is likely to be a factor influencing the rights and obligations of a company or an individual.

The CMA, the FCA and the 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 transparency, and instil public confidence.

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EVIDENCE GATHERING AND INVESTIGATIVE TECHNIQUES

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Covert phase

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 of compulsion 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 FCA or HMRC). 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 intelligence sources (CHIS)), 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 may last.

Law stated - 30 May 2023

What investigative techniques are used during the 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);
- the use of human sources (ie, CHIS);
- conducting intrusive surveillance;
- obtaining communications data; and
- computer penetration.

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Investigation notification

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 the retrieval and review of relevant documents and electronic data, the obvious step is to conduct interviews with relevant employees as part of an internal investigation. However, doing so carries a risk. The SFO suggests businesses should carefully consider whether it is best to interview employees or to limit the ambit of an 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 internal 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 was 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.

Law stated - 30 May 2023

Evidence and materials

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 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. 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.

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Providing evidence

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 an offence. Generally, the criteria for issuing a compulsion notice are that there are reasonable grounds for suspecting that wrongdoing has occurred and that there is a reasonable belief that the recipient of the notice is in possession of relevant information or documents.

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 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;
- the data must not be kept longer than is necessary; and
- the data must be processed in a manner that ensures its appropriate security.

As a result, careful scrutiny is required by law enforcement agencies to establish the basis and purpose of their decision to process data.

A company has data protection obligations of its own under the UK General Data Protection Regulation to its customers and its staff. Notwithstanding the power of law enforcement bodies, the company must ensure that it meets its obligations and that sharing personal data is permitted within the regime applicable to law enforcement bodies. Even greater restrictions are applicable to the sharing of personal data outside the United Kingdom.

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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 without the investigative team having sight of it if that material 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

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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.

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.

Law stated - 30 May 2023

Employee testimony

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.

Certain agencies (including the SFO and HMRC) may 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 generally 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 under caution, during which the individual does not have to respond to the questions. In such circumstances, the interview will normally take place at a police station. Whether arrested or not – and, in many cases, interviews can be arranged by appointment, thereby avoiding arrest – the individual maintains the right not to incriminate himself or herself.

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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 from the authorities compelling them to answer questions, including where they have been identified 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.

Law stated - 30 May 2023

Sharing information

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 include inadvertent loss of privilege. 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.

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Investor notification

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

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may have 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.

Law stated - 30 May 2023

COOPERATION

Notification before investigation

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 SFO investigations and other investigations where the prosecution decision lies with the CPS, companies that wish to avoid prosecution and enter into a deferred prosecution agreement (DPA) must generally:

- 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, the frequency of DPAs has steadily increased in number. They are now a well-recognised feature of SFO prosecutions and an important part of its armoury, especially where the offence of a corporate's failure to prevent bribery as defined in section 7 of the Bribery Act 2010 is concerned (given the lack of a need to demonstrate guilty knowledge by the corporate).

Following the DPAs in respect of Standard Bank Plc , XYZ Ltd , Rolls-Royce , Tesco and more , 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 and the advantages of doing so. 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. The number of cases suggest, however, that a DPA is the 'go to' outcome for many when an investigation suggests that criminal charges will follow.

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 agree on a basis of plea with the prosecution to reduce culpability. This can be important in safeguarding the reputation of the business. Most notably, the SFO investigation into the mining group Glencore Energy ended in a guilty plea. Whether a DPA is agreed with be fact dependent.

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

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itself, taking into account potential civil claims, reputational management and pure business drivers.

The outcome of Tesco, Rolls-Royce, Serco and more recently Bluu Solutions and G4S 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. In Serco, two senior executives were cleared in April 2021 on the basis of insufficient evidence despite the company having entered into a DPA. In January 2023, two former directors of Bluu Solutions and Tetris Projects were acquitted of bribery offences in relation to which these organisations had entered into DPAs. In March 2023, the SFO offered no evidence against three executives of G4S, following an earlier DPA, leading one of the defendants to describe the DPA process as akin to 'G4S signing a false confession'. Such outcomes reinforce 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 SFO or the CPS 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 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.

Law stated - 30 May 2023

Voluntary disclosure programmes

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.

Law stated - 30 May 2023

Timing of cooperation

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.

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Cooperation requirements

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 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 in some circumstances potentially the 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 has specifically published its Corporate Co-operation Guidance to assist in the assessment of what full cooperation requires.

Law stated - 30 May 2023

Employee requirements

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. Many businesses have employment contracts that require employees to cooperate with an internal 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 for 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.

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Why cooperate?

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, many 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 employees should be given a warning to the effect that the lawyers represent the company and not the employee, that any privilege belongs to the company, and that the company may choose to waive its privilege and share information with investigating authorities.

Law stated - 30 May 2023

Privileged communications

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.

Law stated - 30 May 2023

RESOLUTION

Resolution mechanisms

What mechanisms are available to resolve a government investigation?

There are numerous potential outcomes of a government investigation, depending upon which agency conducts 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 SFO may decide to pursue a civil settlement rather than a criminal prosecution.

The CPS and SFO are also able to enter into deferred prosecution agreements (DPA) 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 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.

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Admission of wrongdoing

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, and effectively to enter into a DPA. The position is the same if the business wants to pursue immunity with the SFO or CPS, or leniency with the Competition and Markets Authority.

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 only those arguments regarding the quantum of damages applicable.

Law stated - 30 May 2023

Civil penalties

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 depends on 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, the CPS, HMRC and the 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.

Law stated - 30 May 2023

Criminal penalties

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.

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Sentencing regime

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, the Sentencing Council's Fraud, Bribery and Money Laundering Offences: Definitive Guideline and the Sentencing Act 2020 in force since 1 December 2020, which consolidates all sentencing procedure into a single Sentencing Code.

Ultimately, decisions regarding sentencing are a matter for the judge. For offences such as fraud, bribery and money laundering the sentencing provisions 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 Sentencing Council's guideline sets out the sentencing process to be followed by the court, including a compulsory obligation to first consider making a compensation order in an 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 (for offences committed before 1 December 2020) or section 125 of the Sentencing Code (for offences committed after 1 December 2020) 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.

Law stated - 30 May 2023

Future participation

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 may be prohibited from tendering for contracts.

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UPDATE AND TRENDS

Key developments of the past year

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

The SFO's travails continue.

March 2022 saw the quashing of the conviction of Paul Bond in the Unaoil bribery trial, arising from the same disclosure failures which had led to the overturning of the conviction of Zaid Akle, another defendant in the same trial. A third quashed conviction followed shortly afterwards. These failures related to the non-disclosure of the SFO's dealings with a third-party, David Tinsley (an ex-DEA agent), who represented Unaoil's owners and who, in communications with the SFO, said that he could persuade various alleged co-conspirators to plead guilty in return for a more lenient deal for his own clients.

In July 2022 came the independent review conducted by the former Director of Public Prosecutions, Sir David Calvert-Smith, into the Unaoil failings, which was published alongside another report prepared by Brian Altman KC on the disclosure failings which led to the collapse of the Serco trial in 2021. The reports laid bare a catalogue of deficiencies at all levels of the SFO and detailed individual, managerial and leadership weaknesses, as well as fundamental flaws in systems and controls in the disclosure process. Lisa Osofsky, Director of the SFO (and whose conduct featured heavily in the Unaoil failings) described the reviews as a 'sobering read'.

The SFO had a notable win with its successful prosecution of Glencore for serious bribery offences. Following guilty pleas, in November 2022 Glencore was ordered to pay almost £300 million in fines, confiscation and costs. It remains to be seen, however, whether successful prosecutions of individuals will follow. Following a number of convictions of individuals in the summer of 2022, in relation to four separate matters, and a further success early in 2023 with convictions of executives of Balli Steel for fraud offences following the company’s collapse in 2013, the SFO’s perennial problems caused by preferencing corporates over individuals returned to the fore.

In January 2023, two former directors of Bluu Solutions and Tetris Projects were acquitted of bribery offences in respect of which these organisations had earlier entered DPAs. Their defence was that these payments represented legitimate introduction fees that were commonplace in industry. The SFO agreed that the payment of introduction fees was fine in principle, while continuing to allege that these payments represented bribes. Those counts which had not already been rejected by the judge were speedily dismissed by the jury. And while the SFO did win its first ever DPA-related conviction (after 16 attempts), this related to an individual who pleaded guilty to receiving bribes from those Bluu/Tetris directors subsequently acquitted of paying them.

Then, in March 2023, the SFO offered no evidence against three executives of G4S, again following an earlier DPA, in relation to alleged fraud in connection with electronic monitoring services. One of the acquitted defendants described the DPA process as akin to 'G4S signing a false confession'.

The SFO’s preoccupation with corporates has undoubtedly led to perverse outcomes: entirely innocent individuals being hung out to dry in the rush to agree corporate settlements; paradoxically, potentially guilty individuals walking away free due to that same pre-occupation with corporate settlements; and, considered from the opposite perspective, organisations being severely punished, whether following guilty pleas or DPAs pursued for commercial reasons, where no individuals were subsequently found to have committed any wrongdoing.

With a new Director of the SFO (and Director of Public Prosecutions) due later this year, whether a change of management will see a change of approach remains to be seen. Successive directors of the SFO have led the calls for the reform of corporate criminal liability to make it easier to ‘hold corporates to account’. At the time of writing (May

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2023), a proposed new failure to prevent fraud offence has been included in the Economic Crime and Corporate Transparency Bill, which is currently working its way through the UK Parliament. This proposed new offence broadly follows the same model as the previously introduced bribery and facilitation of tax evasion offences, namely strict liability for offending committed by 'associated persons' subject to a reasonable procedures defence (currently, the offence is only intended to apply to 'large' organisations). The government also has plans to reform the 'identification doctrine' so that it applies more widely to 'senior management'; however, there are as yet no detailed provisions on this proposed reform.

Other reforms on the agenda, and contained in the Economic Crime and Corporate Transparency Bill, include proposals for the reform Companies House to make the Registrar of Companies a more active gatekeeper and introduce other changes aimed at improving the comprehensiveness and reliability of data; reforming the Proceeds of Crime Act 2002 to improve law enforcement's ability to deal with cryptoassets; and extending the SFO's ability to use its compulsory 'section 2' powers during the pre-investigation stage. This Bill follows on from the Economic Crime (Transparency and Enforcement) Act 2022 which was designed to tackle economic crime and sanctions evasion. Key provisions included a new register of overseas entities that own UK property and their beneficial owners, provisions to strengthen unexplained wealth orders, and sanctions reform that provides for a 'strict liability' approach to the imposition of monetary penalties.

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Jurisdictions

Jurisdiction	Firm
Australia	Nyman Gibson Miralis
Greece	GIANNIDISKOURELEAS Law Firm
Hong Kong	Perun Consultants Ltd
India	Trilegal
Italy	Studio Legale Pisano
Japan	Oh-Ebashi LPC & Partners
Singapore	Norton Rose Fulbright
Turkey	Bozoğlu Izgi Attorney Partnership
United Kingdom - England & Wales	BCL Solicitors LLP
USA	Cravath, Swaine & Moore LLP

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