Global Investigations Review

The Practitioner's Guide to Global Investigations

Volume I: Global Investigations in the United Kingdom and the United States

Third Edition

Editors
Judith Seddon, Eleanor Davison, Christopher J Morvillo,
Michael Bowes QC, Luke Tolaini, Ama A Adams, Tara McGrath

2019

The Practitioner's Guide to Global Investigations

Third Edition

Editors:

Judith Seddon

Eleanor Davison

Christopher J Morvillo

Michael Bowes QC

Luke Tolaini

Ama A Adams

Tara McGrath

GIR

Global Investigations Review

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

www.globalinvestigationsreview.com

The information provided in this publication is general and may not apply in a specific situation, nor does it necessarily represent the views of authors' firms or their clients. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of November 2018, be advised that this is a developing area.

Enquiries concerning reproduction should be sent to: gemma.chalk@lbresearch.com.
Enquiries concerning editorial content should be directed to the Publisher:
david.samuels@lbresearch.com

ISBN 978-1-78915-111-4

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

Acknowledgements

ALLEN & OVERY LLP

ANAGNOSTOPOULOS

ARCHER & ANGEL

BAKER McKENZIE LLP

BANQUE LOMBARD ODIER & CO LTD

BARCLAYS BANK PLC

BCL SOLICITORS LLP

BDO USA, LLP

BORDEN LADNER GERVAIS LLP

BROWN RUDNICK LLP

BRUNSWICK GROUP LLP

CADWALADER, WICKERSHAM & TAFT LLP

CLIFFORD CHANCE

CLOTH FAIR CHAMBERS

CMS CAMERON McKENNA NABARRO OLSWANG

CORKER BINNING

DEBEVOISE & PLIMPTON LLP

DECHERT LLP

FOUNTAIN COURT CHAMBERS

FOX WILLIAMS LLP

FRESHFIELDS BRUCKHAUS DERINGER

GIBSON, DUNN & CRUTCHER LLP

GOODWIN

GÜN + PARTNERS

HERBERT SMITH FREEHILLS LLP

HL CONSULTORIA EM NEGÓCIOS

HOGAN LOVELLS

KINGSLEY NAPLEY LLP

KNOETZL

LATHAM & WATKINS

MATHESON

NAVACELLE

NOKIA CORPORATION

OUTER TEMPLE CHAMBERS

PINSENT MASONS LLP

QUINN EMANUEL URQUHART & SULLIVAN, LLP

RAJAH & TANN SINGAPORE LLP

RICHARDS KIBBE & ORBE LLP

ROPES & GRAY INTERNATIONAL LLP

RUSSELL McVEAGH

SCHELLENBERG WITTMER LTD

SIMMONS & SIMMONS LLP

SKADDEN, ARPS, SLATE, MEAGHER & FLOM (UK) LLP

SOFUNDE OSAKWE OGUNDIPE & BELGORE

SULLIVAN & CROMWELL LLP

VON WOBESER Y SIERRA, SC

WALDEN MACHT & HARAN LLP

WILLKIE FARR & GALLAGHER (UK) LLP

WILMER CUTLER PICKERING HALE AND DORR LLP

Publisher's Note

The Practitioner's Guide to Global Investigations is published by Global Investigations Review (www.globalinvestigationsreview.com) – a news and analysis service for lawyers and related professionals who specialise in cross-border white-collar crime.

The Guide was suggested by the editors to fill a gap in the literature – namely, how does one conduct such an investigation, and what should one have in mind at various times?

It is published annually as a single volume and is also available online, as an e-book and in PDF format.

The volumes

This Guide is in two volumes.

Volume I takes the reader through the issues and risks faced at every stage in the life cycle of a serious corporate investigation, from the discovery of a potential problem through its exploration (either by the company itself, a law firm or government officials) all the way to final resolution – be that in a regulatory proceeding, a criminal hearing, civil litigation, an employment tribunal, a trial in the court of public opinion, or, just occasionally, inside the company's own four walls. As such it uses the position in the two most active jurisdictions for investigations of corporate misfeasance – the United States and the United Kingdom – to illustrate the approach and thought processes of those who are at the cutting edge of this work, on the basis that others can learn much from their approach, and there is a read-across to the position elsewhere.

Volume I is then complemented by Volume II's granular look at the detail of various jurisdictions, highlighting, among other things, where they vary from the norm.

Online

The Guide is available to subscribers at www.globalinvestigationsreview.com. Containing the most up-to-date versions of the chapters in Volume I of the Guide, the website also allows visitors to quickly compare answers to questions in Volume II across all the jurisdictions covered.

The publisher would like to thank the editors for their exceptional energy and vision in putting this project together. Together we welcome any comments or suggestions from readers on how to improve it. Please write to us at:
co-publishing@globalinvestigationsreview.com.

Preface

The history of the global investigation

Over the past decade, the number and profile of multi-agency, multi-jurisdictional regulatory and criminal investigations have risen exponentially. Naturally, this global phenomenon exposes corporations and their employees to greater risk of potentially hostile encounters with foreign law enforcement authorities and regulators than ever before. This is partly owing to the continued globalisation of commerce, as well as the increasing enthusiasm of some prosecutors to use expansive theories of corporate criminal liability to extract exorbitant penalties against corporations as a deterrent, and public pressure to hold individuals accountable for the misconduct. The globalisation of corporate law enforcement, of course, has also spawned greater coordination between law enforcement agencies domestically and across borders. As a result, the pace and complexity of cross-border corporate investigations has markedly increased and created an environment in which the potential consequences, both direct and collateral, for individuals and businesses are of unprecedented magnitude.

The Guide

To aid practitioners faced with the myriad and often unexpected challenges of navigating a cross-border investigation, this book brings together for the first time the perspectives of leading experts from across the globe.

The chapters that follow in Volume I of the Guide cover in depth the broad spectrum of the law, practice and procedure applicable to cross-border investigations in both the United Kingdom and United States. Volume I tracks the development of a serious allegation (whether originating from an internal or external source) through its stages of development, considering the key risks and challenges as matters progress; it provides expert insight into the fact-gathering stage, document preservation and collection, witness interviews, and the complexities of cross-border privilege issues; and it discusses strategies to successfully resolve cross-border probes and manage corporate reputation throughout an investigation.

In Volume II, local experts from national jurisdictions respond to a common set of questions designed to identify the local nuances of law and practice that practitioners may encounter in responding to a cross-border investigation.

In the first edition we signalled our intention to update and expand both parts of the book as the law and practice evolved. The Guide continues to expand and extend its reach, in both substantive and jurisdictional terms. For this hardback edition, it has even outgrown its original single-book format; the two original parts of the Guide now have separate covers, although the hard copy of the Guide should still be viewed – and used – as a single reference work. All chapters are, of course, made available online and in other digital formats.

In this third edition, we have revised extant chapters to reflect recent developments. Following the global trend of data privacy law considerations becoming weightier in corporate and government investigations – not least after the EU General Data Protection Regulation became directly applicable in all Member States – we have added a chapter on data protection for Volume I, and we have expanded the scope and number data protection questions in Volume II.

In the United Kingdom, an eagerly awaited Court of Appeal reversal has clarified English law on legal privilege, although it remains out of step with other common law jurisdictions in this regard. In the United States, the Department of Justice modified and permanently adopted its enhanced enforcement FCPA Pilot Program, in the form of the Corporate Enforcement Policy, offering a presumption of significant co-operation credit for companies that self-report, remediate and co-operate. In both the United States and the United Kingdom, the enforcement agencies have experienced significant turnover in senior staff, which will no doubt influence enforcement priorities and activity.

Volume II now covers 21 jurisdictions, including Australia, Canada and Mexico, and we expect subsequent editions to have an even broader jurisdictional scope. As corporate investigations and enforcer co-operation crosses more borders – witness the recent Petrobras, Rolls-Royce and Keppel Offshore international, 'global' settlements – we anticipate Volume II will become an increasingly valuable resource for our readers: the external and in-house legal counsel; compliance officers and accounting practitioners; and prosecutors, regulators and advisers operating in this complex environment.

Finally, *The Practitioner's Guide to Global Investigations* has welcomed Ama A Adams and Tara McGrath to the team of eminent editors who have reviewed the content for this edition.

Acknowledgements

The Editors gratefully acknowledge the insightful contributions of the following lawyers from Clifford Chance: Zoe Osborne and Oliver Pegden in London, Amy Montour and Mary Jane Yoon in New York, and Hena Schommer and Michelle Williams in Washington, DC. The Editors would also especially like to thank Clifford Chance associate Kaitlyn Ferguson in Washington, DC, and Chris Stott, senior attorney at Ropes & Gray in London.

Judith Seddon, Eleanor Davison, Christopher J Morvillo, Michael Bowes QC, Luke Tolaini, Ama A Adams, Tara McGrath
November 2018
London, New York and Washington, DC

Contents

Table of Cases

United Kingdom

United States

Australia

European Court of Human Rights

European Court of Justice

France

Germany

Hong Kong

Singapore

New Zealand

Table of Legislation

TABLE OF UK LEGISLATION

Statutes

Statutory Instruments

TABLE OF US LEGISLATION

CONSTITUTION

FEDERAL LEGISLATION

Federal Acts

US Code

Code of Federal Regulations (CFR)

Federal Rules

STATE LEGISLATION

Arizona:

California:

Connecticut:

Delaware:

District of Columbia:

Florida:

Illinois:

Indiana:

Maine:

Maryland:

Massachusetts:

Montana:

Nevada:

New Hampshire:

New Jersey:

New York:

Ohio:

Oregon:

Pennsylvania:

TABLE OF OTHER NATIONAL LEGISLATION

Japan:

Malaysia:

Russia:

Switzerland:

TABLE OF INTERNATIONAL TREATIES, CONVENTIONS AND AGREEMENTS

TABLE OF EUROPEAN LEGISLATION

Treaties and Conventions

Regulations

Directives

Decisions

1

Introduction

Judith Seddon, Eleanor Davison, Christopher J Morvillo, Michael Bowes QC, Luke Tolaini, Ama A Adams and Tara McGrath[1]

As an introduction to Volume I of the Guide, this chapter addresses UK and US law regarding two critical concepts that a corporate facing an investigation in either or both jurisdictions will need to consider at the outset: corporate criminal liability and double jeopardy. This chapter also sets forth in summary the priorities and challenges corporations face at each stage of an investigation – topics that are explored in more detail in the chapters that follow. One topic not explored, but likely to affect chapters in this guide with a European dimension, is the United Kingdom's decision to leave the European Union, scheduled for 29 March 2019. Considerable uncertainty remains surrounding the consequences, legal and otherwise, of that decision, which we hope will have become clearer by the next edition.

Bases of corporate criminal liability 1.1

When corporate misconduct that potentially implicates multiple jurisdictions is uncovered, a critical preliminary question is: what is the test, in each jurisdiction, for corporate criminal liability? Not all countries have corporate criminal liability, but for those jurisdictions that do, it typically rests on the premise that the acts of certain employees can be attributed to the corporation. However, the category of employees that can trigger corporate liability differs between jurisdictions – in some, it is limited to those with management responsibilities, whereas in others the category of employees who can trigger corporate liability is much broader. Generally speaking, the act triggering corporate liability must occur within the

1 Judith Seddon and Ama A Adams are partners at Ropes & Gray International LLP; Christopher J Morvillo and Luke Tolaini are partners, and Tara McGrath is a senior associate, at Clifford Chance; Eleanor Davison is a barrister at Fountain Court Chambers; and Michael Bowes QC is a barrister at Outer Temple Chambers.

scope of the employee's employment activities. The act must also generally be done in the interest of, or for the benefit of, the corporation. The difference between theories of liability across jurisdictions inevitably poses challenges and complicates a company's strategy for dealing with a global investigation, and in some instances can determine the outcome.

1.1.1 Corporate criminal liability in the United Kingdom

In the United Kingdom, there are two main techniques to attribute to a corporate the acts and states of mind of the individuals it employs.

The first is by use of the 'identification principle' whereby, subject to some limited exceptions, a corporate may be held liable for the criminal acts of those who represent its directing mind and will and who control what it does. The relevant test is set out in the leading case of *Tesco Ltd v. Nattrass*:

> *Where a limited company is the employer difficult questions do arise in a wide variety of circumstances in deciding which of its officers or servants is to be identified with the company so that his guilt is the guilt of the company. I must start by considering the nature of the personality which by a fiction the law attributes to a corporation. A living person has a mind which can have knowledge or intention or be negligent and he has hands to carry out his intentions. A corporation has none of these: it must act through living persons, though not always one or the same person. Then the person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company. There is no question of the company being vicariously liable. He is not acting as a servant, representative, agent or delegate. He is an embodiment of the company or, one could say, he hears and speaks through the persona of the company, within his appropriate sphere, and his mind is the mind of the company. If it is a guilty mind then that guilt is the guilt of the company. It must be a question of law whether, once the facts have been ascertained, a person in doing particular things is to be regarded as the company or merely as the company's servant or agent.*[2]

2 *Tesco Supermarkets Ltd v. Nattrass* [1972] AC 153; reaffirmed in *Attorney General's Reference (No. 2 of 1999)* [2000] 2 Cr App R 207 at 217-218 in which Rose LJ stated: '*Tesco v. Nattrass* is still authoritative … and it is impossible to find a company guilty unless its alter ego is identified. None of the authorities since *Tesco v. Nattrass* … supports the demise of the doctrine of identification: all are concerned with statutory construction of different substantive offences and the appropriate rule of attribution was decided having regard to the legislative intent, namely whether Parliament intended companies to be liable. There is a sound reason for a special rule of attribution in relation to statutory offences rather than common law offences, namely there is, subject to a defence of reasonable practicability, an absolute duty imposed by the statutes. The authorities on statutory offences do not bear on the common law principle in relation to manslaughter. Lord Hoffmann's speech in *Meridian* is a re-statement not an abandonment of existing principles … .'; and *Environment Agency v. St Regis Paper Co. Ltd* [2012] 1 Cr App R 177, at paras. 10-12 in which, at para. 12, Moses LJ said: 'It seems to us that as a matter of statutory construction it is impossible to impose criminal liability for a breach of Regulation 32(1)(g) to

It is for the judge to decide, as a matter of law, whether there is evidence on which a jury could be sure that a particular individual was a 'directing mind' within the *Tesco* principles; and, if there is such evidence, the jury must then be sure that the particular individual was in fact a directing mind for the purposes of his or her particular actions. A directing mind is not necessarily limited to board directors; it may also be found in a delegate who has full discretion to act independently of instructions from the directors. In short, under the identification principle, before a corporate can be found guilty of a criminal offence, someone who represents its directing mind and will must also be found guilty. There cannot be an aggregation of acts or omissions to attribute the company with criminal conduct; rather, the criminal act or omission must be performed by a single person who can be identified with the corporate for it to be liable.

The second technique of attributing liability to a corporate under English law is that of vicarious liability. Although, in general, in the United Kingdom a corporate entity may not be convicted for the criminal acts of its inferior employees or agents, there are some exceptions, the most important of which concerns statutory offences that impose an absolute duty on the employer, even where the employer has not authorised or consented to the criminal act.[3]

Most significantly, statutory developments in the United Kingdom, starting with the offence of corporate manslaughter under the Corporate Manslaughter and Homicide Act 2007, but more significantly the introduction of the Bribery Act 2010 and more recently Part 3 of the Criminal Finances Act 2017 (which came into force on 30 September 2017), represent a policy shift by introducing the strict liability offences of failure to prevent by an 'associated person' committed on behalf of the corporate, unless the corporate can demonstrate that it had adequate (or reasonable) procedures in place to prevent such an offence occurring. These statutes have broad jurisdictional reach. Under the Bribery Act for example, a corporate, falling within the definition of a commercial organisation under the Bribery Act, could be guilty even where no conduct occurred in, and where the associated person has no connection with, the United Kingdom.

The policy of the legislation to improve corporate governance is clear: Ministry of Justice guidance for the Bribery Act refers to the need for a corporate to create

---

the company in circumstances other than those where an intention to make a false entry can be attributed by operation of the rule in *Tesco Supermarkets*. There is, in our view, no warrant for imposing liability by virtue of the intentions of one who cannot be said to be the directing mind and will of St. Regis Paper Company.' The identification principle was reaffirmed by the Court of Appeal in *R v. A Ltd, X, Y* [2016] EWCA Crim 1469. Most recently the SFO was unsuccessful in having charges against Barclays Bank PLC reinstated through a voluntary bill of indictment, after all charges against the bank were dismissed in the Crown Court. The reasoning behind Lord Justice Davis's decision cannot be reported until the conclusion of the trial of the individuals, including Barclays' former chief executive officer, https://www.sfo.gov.uk/2018/10/26/barclays-plc-and-barclays-bank-plc/.

3 These statutory offences are referred by Rose LJ in *Attorney General's Reference (No. 2 of 1999)* [2000] 2 Cr App R 207 at 217-218, at footnote 2.

an 'anti-bribery culture'.[4] Similarly, a corporate is guilty of the offence of corporate manslaughter under the Corporate Manslaughter and Homicide Act 2007 if the way in which its activities are managed or organised causes a person's death where a duty of care was owed. Guidance issued for the corporate offences of failure to prevent the criminal facilitation of tax evasion, which closely mirrors the Bribery Act guidance, also refers to the culture of the organisation. For example, top level commitment should foster 'a culture within the relevant body in which activity intended to facilitate tax evasion is never acceptable'.[5] Each piece of legislation and accompanying guidance invites consideration of the corporate's culture – its attitudes, policies, systems and practices. The test for liability is closer to the test in the regulatory context where liability is based on broad principles and considers governance, and systems and controls. In respect of the new tax offences, the UK government has stated that it expects 'rapid implementation' with companies expected to have a clear time frame and implementation plan in place by the time the offences came into force.

It may be that this model of corporate criminal liability expands, in due course, to all economic crimes; on 13 January 2017 the government issued a Call for Evidence (which ran until the end of March 2017) to examine whether the law on corporate criminal liability in the United Kingdom needs reform. The government said that it was seeking to establish whether there is evidence of corporate crime going unpunished because of the current impediments presented by the identification doctrine, as well as evidence on the costs and benefits of further reform, bearing in mind the significant changes made in certain sectors to tackle misconduct. This, it indicated, would inform government decisions over whether to make further reforms.[6] It set out five options for reform: amendment of the identification doctrine; a strict (vicarious) liability doctrine; a strict (direct) liability offence – effectively a widening of the current offence under section 7 of the UK Bribery Act (section 7 offence); incorporation of the failure-to-prevent wording into substantive offences, but with the burden on the prosecution to establish that the corporate had not taken adequate steps to prevent the unlawful conduct; and possible sector-by-sector regulatory reform (in the form of implementation in other sectors of similar arrangements to the new individual accountability regimes introduced for financial services in the United Kingdom). It is yet to be seen what impact political uncertainty in the United Kingdom will have on this thinking. In the deferred prosecution agreement (DPA) context, the current high threshold for establishing corporate criminal liability in the United Kingdom is a problem inherent in the DPA regime: to enter into a DPA, a prosecutor must satisfy the evidential test, which requires either that the evidential stage of the

4 Ministry of Justice Guidance on the Bribery Act 2010, issued pursuant to section 9 of the Bribery Act 2010.

5 Tackling tax evasion: Government guidance for the corporate offence of failure to prevent the criminal facilitation of tax evasion, 1 September 2017, at page 25.

6 Ministry of Justice, Corporate Liability for Economic Crime: Call for Evidence, Consultation Document, at p. 4.

Full Code Test in the Code for Crown Prosecutors is satisfied[7] or, that 'there is at least a reasonable suspicion based upon some admissible evidence that [the corporate] has committed the offence, and there are reasonable grounds for believing that a continued investigation would provide further admissible evidence within a reasonable period of time, so that all the evidence together would be capable of establishing a realistic prospect of conviction in accordance with the Full Code Test'.[8] For that reason many expected DPAs to be used principally for section 7 offences, where the identification principle does not present an obstacle to satisfying the evidential test. The prospect for DPAs to be used for the proposed failure to prevent the facilitation of tax evasion offence is specifically laid out in the government's guidance.[9] Both the first two DPAs in the United Kingdom were for section 7 offences, although XYZ Ltd – anonymised because of ongoing criminal proceedings against individuals – also accepted misconduct in relation to conspiracies to corrupt and to bribe. However, XYZ Ltd was a small company and, as Sir Brian Leveson, President of the Queen's Bench Division, found, 'there is no question but that XYZ spiralled into criminality as a result of the conduct of a small number of senior executives bending to the will of agents'.[10] In other words, the identification principle did not, in that case, present a problem. However, in *Rolls-Royce*, the DPA spanned three decades, and dealt with conduct much of which predated the introduction of the Bribery Act 2010 and which formed the basis of seven counts of conspiracy to corrupt and false accounting. The remaining five counts related to section 7 offences. We can conclude that in that case, despite being considerably larger than XYZ Ltd, the identification principle did not present evidential hurdles in reaching a settlement. At the time of writing, no individual has been charged. The Call for Evidence recognises that 'the effectiveness of the DPA as an alternative disposal is dependent on there being a realistic threat of prosecution', which, they conclude, 'lends weight to the suggestion that the "failure to prevent" model would offer a more realistic threat of successful prosecution than a case built on the application of the identification doctrine.'[11] The failure-to-prevent model as enacted in the Bribery Act and now the Criminal Finances Act is described in the Call for Evidence as having 'some clear advantages'. Apart from being readily applicable to offending by organisations of any size, the government is explicit in the power of the model to effect corporate cultural change by acting as 'an incentive to companies to include the

7 Namely that prosecutors must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction against each suspect on each charge. They must consider what the defence case may be, and how it is likely to affect the prospects of conviction. A case that does not pass the evidential stage must not proceed, no matter how serious or sensitive it may be.

8 DPA Code of Practice, at para. 1.2(i)(b) (https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/deferred-prosecution-agreements/).

9 Government Guidance, at p. 13. See footnote 5, above.

10 *SFO v. XYZ Ltd* Case No. U20150856, (Preliminary Redacted) Approved Judgment, dated 8 July 2016, at para. 34.

11 Ministry of Justice, Corporate Liability for Economic Crime: Call for Evidence, Consultation Document, at p. 23.

prevention of economic crime as an integral part of corporate governance and, should it afford a more realistic threat of prosecution, it might enhance the effectiveness of DPAs as an alternative to criminal prosecution'.[12]

1.1.2 Corporate criminal liability in the United States

The United States has long recognised principles of corporate liability based on common law and statutory bases.[13] The application of these concepts, however, has evolved over time and was most recently shaped by the global financial crisis of 2007–2008, where the spectre of industry and market collapse loomed large. Today, increasing emphasis on individual liability and corporate culture continues to shape and refine this area of law.

In the United States, the common law of agency plays an important role. Specifically, under principles of *respondeat superior*, a company may be held vicariously liable for the illegal acts of any of its agents (including employees and contract personnel) so long as those actions were within the scope of the agents' duties and were intended, even if only in part, to benefit the corporation.[14] An act is considered 'within the scope of an agent's employment' if the individual commits the act as part of his or her general line of work and with at least the partial intent to benefit the corporation.[15] The corporation need not receive an actual benefit and may be liable for these offences even if it directs its agent not to commit the offence.[16]

Moreover, even where no single employee has the requisite intent or knowledge to satisfy the *scienter* element of a crime, courts have recognised a 'collective knowledge doctrine' – where several employees collectively know enough to satisfy the intent or knowledge requirement, courts can impute this collective intent and knowledge to the corporation.[17] While historically courts have used the doctrine to establish knowledge on the part of a corporation, in recent years the doctrine has also been used to establish a corporation's intent (i.e., to establish whether the corporation acted wilfully).[18] This doctrine is not universally accepted and

12 Ibid. at p. 21.

13 Charles Doyle, Congressional Research Service, Corporate Criminal Liability: An Overview of Federal Law 1 (2013).

14 *Jones v. Federated Fin. Reserve Corp.*, 144 F.3d 961, 965 (6th Cir. 1998). See also *Hamilton v. Carell,* 243 F.3d 992, 1001 (6th Cir. 2001).

15 *United States v. Singh*, 518 F.3d 236, 249 (4th Cir. 2008) (citing *United States v. Automated Med. Labs.*, 770 F. 2d 399, 406–47 (4th Cir. 1985)).

16 *Automated Med. Labs.*, 770 F.2d at 407.

17 *United States v. Sci. Applications Int'l Corp.*, 555 F. Supp. 2d 40, 55–56 (D.C. Cir. 2008). See also *United States v. Bank of New England, N.A.*, 821 F.2d 844, 856 (1st Cir. 1987); *United States v. T.I.M.E.-D.C., Inc.*, 381 F. Supp. 730, 738–39 (W.D. Va. 1974).

18 See *United States v. Pac. Gas & Elec. Co.*, No 14-CR-00175-TEH, 2015 WL 9460313 (N.D. Cal. 23 December 2015). There, a grand jury charged the Pacific Gas & Electric Company with violating the Pipeline Safety Act after a gas line erupted causing several deaths and injuries. The company moved to dismiss on the basis that the grand jury received incorrect instructions on, *inter alia*, collective intent. In denying the motion to dismiss, the court held that the collective knowledge of the corporation's employees demonstrated that they wilfully disregarded their legal

some courts have limited it to circumstances where the company was flagrantly indifferent to the offences being committed.[19]

Additionally, beyond the common law principle of *respondeat superior*, some legislation imposes criminal liability for companies, including in the fields of environmental and antitrust law.[20] Such statutes have the dual effects of forcing companies to internalise the costs of their wrongdoing and of increasing the deterrent effect of the law or regulation. For example, in a field such as environmental law, where misconduct can have tremendous collateral and long-term consequences, the imposition of liability on the company acts as a strong incentive for corporate monitoring of employees and thorough due diligence and risk assessment.

Although corporate criminal liability has been a feature of US law since the nineteenth century,[21] the criminal prosecution of corporations slowed abruptly and significantly – although temporarily – following the ill-fated prosecution of Arthur Andersen in 2002; the conviction (subsequently overturned by the US Supreme Court) resulted in the firm's collapse and job losses for many thousands of innocent employees.[22] In the aftermath of the *Arthur Andersen* case, prosecutors became far more hesitant to unleash the brute force of criminal charges against companies.[23] Although limited prosecutions continued following *Arthur Andersen*, they were further reduced in number when, in the wake of the financial meltdown of 2007–2008, many feared that prosecuting big banks and large employers might lead to further economic turmoil.[24] This idea, that an entity might be 'too big to fail', is now widely rejected by both prosecutors and the public, and there has

---

duty to abide by the safety standards outlined in the Act. Id. at *3. Following a jury conviction on five counts, the company sought to have the case set aside; however, the court held that a reasonable juror could have found wilfulness beyond a reasonable doubt based on the evidence presented. *United States v. Pac. Gas & Elec. Co.*, No. 14-CR-00175-TEH, 2016 WL 6804575, at *3 (N.D. Cal. 17 November 2016). See also *United States v. FedEx Corp.*, 2016 U.S. Dist LEXIS 52438 (N.D. Cal. 18 April 2016) (denying FedEx's motion to dismiss, which was premised on the ground that the jury received incorrect instructions on collective intent and collective knowledge).

19 *T.I.M.E.-D.C., Inc.*, 381 F. Supp. at 740.

20 See, e.g., *United States v. Hopkins*, 53 F.3d 533 (2d Cir. 1995) (imposing a strict liability standard for a violation of the Clean Water Act); *United States v. Weitzenhhoff*, 35 F.3d 1275 (9th Cir. 1993). Contra *United States v. Ahmad*, 101 F.3d 386 (5th Cir. 1996) (suggesting that there is a mens rea requirement for violations of the Clean Water Act). See also James Swann and Alex Ruoff, Self-Referral Law Seen as Barrier to New Provider Agreements, Bloomberg BNA (5 May 2016), http://www.bna.com/selfreferral-law-seen-n57982070764/ (discussing the physician self-referral law's imposition of strict liability).

21 For a discussion of the history and development of corporate criminal liability in the United States, see Kathleen F. Brickey, Corporate Criminal Accountability: A Brief History and an Observation, 60 Wash. U. L.Q. 393, 404–15 (1982).

22 *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005). For a complete history of Arthur Andersen LLP, see Susan E. Squires et al., Inside Arthur Andersen: Shifting Values, Unexpected Consequences (2003).

23 See Gabriel Markoff, Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century, 15 U. Pa. J. Bus. L. 797, 805–07 (2013).

24 See Gretchen Morgenson & Louise Story, Behind the Gentler Approach to Banks by US, *N.Y Times*, 7 July 2011, at A1.

since been a marked uptick in prosecutions. Today, prosecutors are generally less willing to accept the prospect of dire collateral consequences as justification for not pursuing criminal charges against corporations and have required guilty pleas from large corporations, previously considered 'too big to jail'. As corporations survive – and even thrive – in the wake of guilty pleas, the spectre of the *Arthur Andersen* case recedes and the rigour with which prosecutors pursue companies continues to increase.[25]

In recent years, the United States has increasingly placed emphasis on an organisation's compliance culture and internal controls. The result is that self-reporting, full acceptance of responsibility and the disclosure of all relevant facts concerning culpable individuals (regardless of seniority) now form the basis on which the government awards co-operation credit. The Department of Justice's (DOJ) Justice Manual, the Security and Exchange Commission's (SEC) Seaboard factors, US Sentencing Guidelines and the 'Yates Memorandum', each of which is discussed in detail in later chapters, all reflect this pronounced shift in enforcement priorities. As a recent example, in late 2017 the DOJ introduced the Corporate Enforcement Policy, which creates a rebuttable presumption that the DOJ will grant a declination to a company in regard to Foreign Corrupt Practice Act (FCPA) violations where the company satisfies the requirements for voluntary self-disclosure, co-operation and remediation. The DOJ has also announced that it will use the Policy as non-binding guidance in criminal cases outside the FCPA context.

Although the price of attaining corporate co-operation credit is often painfully high, most companies have no choice but to tolerate it; co-operation typically provides the best prospect for a company to prevent a criminal charge, minimise financial penalties and avoid other harsh collateral consequences, such as the imposition of a monitor. Still, co-operation is not for the faint of heart, and any company operating in the United States or subject to US jurisdiction should carefully consider the far-reaching consequences – both good and bad – of setting off down the often treacherous path of co-operation. Once a company voluntarily discloses misconduct to the government, the ability to defend the case and control the process is effectively relinquished, and a company will find it very difficult to withhold sensitive, embarrassing or even harmful information. Given the highly uncertain alternative to co-operation, however, most companies accept and embrace this new reality from the start of an internal investigation and understand that factual findings far more often than not – if they involve potential criminal misconduct – will be presented to law enforcement.[26]

25 See, e.g., Peter J. Henning, Seeking Guilty Pleas From Corporations While Limiting the Fallout, N.Y. Times Dealbook (5 May 2014), https://dealbook.nytimes.com/2014/05/05/seeking-guilty-pleas-from-corporations-while-limiting-the-fallout/; Francine McKenna, Why the Ghost of Arthur Andersen No Longer Haunts Corporate Criminals, MarketWatch (21 May 2015), https://www.marketwatch.com/story/why-the-ghost-of-arthur-andersen-no-longer-haunts-corporate-criminals-2015-05-21.

26 U.S. Dep't of Justice, Justice Manual 9-28.700 (2015).

Double jeopardy 1.2

Another key question in any global investigation – where misconduct crosses borders and where more than one enforcement authority may seek to assert jurisdiction – is the extent to which different authorities can sanction the same or similar conduct. While domestic constitutional provisions on double jeopardy are similar between nation states, no universally accepted international norm exists and the protection afforded by the laws in one country may offer no protection in another. This can present a major difficulty to achieving a satisfactory global settlement for a client.

The doctrine of double jeopardy is that a person should not be tried twice for the same offence.[27] Its underlying objective is to bring finality to criminal proceedings against individuals and companies in specific circumstances. Double jeopardy applies to criminal proceedings, but has been held by the European Court of Human Rights (ECtHR) to encompass an administrative penalty, in circumstances where that penalty was classified as a criminal penalty because of the nature of the charges and the severity of the punishment.[28]

In the United Kingdom, there are two essential conditions for the doctrine to apply. First, the case must be 'finally disposed of' and second, any penalty imposed must actually have been enforced or be in the process of being enforced. The rationale for the doctrine is that it confers protection on the person (individual or corporate) from the risk of repeated prosecution by the State with its greater resources.[29] Reflecting similar concerns, the concept of double jeopardy in the United States is rooted in the Fifth Amendment to the US Constitution, which reads in relevant part: 'nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb'.[30] These twenty words have generated tens – if not hundreds – of thousands of pages of case law and are worthy of a treatise in themselves. Distilled to its essence, however, double jeopardy in the United States applies to prohibit subsequent prosecution or multiple punishments of an individual or corporation for the same conduct.[31] Nevertheless, the doctrine of double jeopardy is complicated by the question of dual sovereignty, which holds that double jeopardy's bar against successive prosecution for the same conduct does not apply when the prior prosecution was brought by a separate sovereign,

27 The *ne bis in idem* or double jeopardy principle is well established both in EU law and under the European Convention on Human Rights. The phrase is derived from the Roman law maxim *nemo debet bis vexari pro una et eadem causa* (a man shall not be twice vexed or tried for the same cause).

28 *Grande Stevens and Others v. Italy* (4 March 2014) Application Nos. 18640/10, 18647/10, 18668/10 and 18698/10. The judgment is not final.

29 The protection is not absolute. A second trial is permitted in defined circumstances. In the United Kingdom, a prosecutor will seek a retrial if a jury has been unable to reach a verdict in the initial trial. A further trial in murder cases may also be permitted in circumstances where compelling new evidence comes to light.

30 U.S. Const. amend. V.

31 See generally Ernest H. Schopler, Annotation, Supreme Court's Views of Fifth Amendment's Double Jeopardy Clause Pertinent to or Applied in Federal Criminal Cases, 50 L. Ed. 2d 830 (2012).

for example, the US government is not barred from bringing a case where a state or another country has already prosecuted the defendant for the same conduct or *vice versa*.

1.2.1 Double jeopardy in the United Kingdom

In England, the principle of double jeopardy is well established and has its origins in 12th-century common law and ecclesiastical law. The modern principle of double jeopardy in English law was set out by the Divisional Court in *Fofana v. Deputy Prosecutor Thubin Tribunal de Grande Instance de Meaux, France*:

> *The authorities establish two circumstances in English law that offend the principle of double jeopardy:*
> *(1) Following an acquittal or conviction for an offence, which is the same in fact and law* – autrefois acquit *or* convict*; and*
> *(2) following a trial for any offence which was founded on 'the same or substantially the same facts', where the court would normally consider it right to stay the prosecution as an abuse of process and/or unless the prosecution can show 'special circumstances' why another trial should take place.*[32]

The Divisional Court referred expressly to the United Kingdom's adoption of Article 54 of the Schengen Convention and its underlying rationale.[33] This is particularly important, as Article 54 states that a person (or company) whose case has been 'finally disposed of' by one Contracting Party may not be prosecuted by another for the 'same acts', provided that any penalty imposed has been enforced or is in the process of being enforced.[34]

Throughout the judgment, the Court stressed the need to look at the underlying acts behind each charge, rather than the label of the charge itself. In the event, the Court stayed the extradition proceedings on the basis that, although the extradition offence specified in the warrant was not based exactly, or solely, on the same facts as those charged in the UK indictment, there was such significant overlap between them as to require the proceedings to be stayed.[35]

In the case of DePuy International Limited, the Serious Fraud Office (SFO) applied the double jeopardy principle and confirmed that it will likely arise where there is or has been an investigation into the defendant's conduct by another authority overseas and the essence of a criminal offence in England and Wales is the same offence for which the defendant already faces trial, or has been acquitted or convicted. DePuy was a UK subsidiary of Johnson & Johnson, a US company that self-reported to the DOJ and the SEC bribery of foreign officials by DePuy, as well as other offences that did not involve the company, under the FCPA. Johnson

32 [2006] EWHC 744 (Admin), Judgment, at para. 18.

33 Id. at para. 14.

34 In the United Kingdom, the decision to leave the EU adds further uncertainty to the recognition of double jeopardy principle in its application to convictions in other Member States.

35 *Fofana*, Judgment, at para. 29. See footnote 32, above.

& Johnson agreed to a DPA with the DOJ covering the FCPA violations and a civil sanction with the SEC that encompassed criminal and civil fines amounting to US$70 million.

The DOJ informed the SFO of the criminal conduct and the SFO commenced an investigation into DePuy and Mr Dougall, the company's marketing manager. The SFO took the view that the DPA agreed by the parent company with the DOJ had the legal character of a formally concluded prosecution that punished the same conduct that had formed the basis of the SFO investigation. It determined that the rule against double jeopardy prevented any further criminal sanction being applied in the United Kingdom and instead pursued the company using a civil route to obtain the proceeds of crime. The civil sum obtained by the SFO took into account the global settlement in the United States, including the civil fines paid and recovered of £4.8 million.

Whether a DPA under the United Kingdom's regime would qualify for double jeopardy protection remains an open question. Although entry into a DPA does not constitute a criminal conviction, it does become the final disposal of specific intended criminal proceedings on its expiry and is almost certain to include the enforcement of a fine against the corporate subject. Furthermore, prosecution may follow in the event of a breach of the DPA.

Double jeopardy in the United States 1.2.2

As noted above, the Fifth Amendment to the US Constitution contains a double jeopardy clause. Generally speaking, the double jeopardy clause prohibits the US federal government, or any individual state, from twice prosecuting someone for the same conduct if that person has already been acquitted or convicted (or after certain mistrials once a jury has been empanelled and 'jeopardy has attached').[36] It also prohibits courts from imposing multiple punishments for the same conduct, which may be covered in multiple charges in an indictment.[37] The double jeopardy clause of the Fifth Amendment – unlike its privilege against self-incrimination – applies to both individuals and corporations.[38]

The US Supreme Court, however, has recognised a significant exception to the double jeopardy clause, known as the 'dual sovereignty' doctrine. Pursuant to this doctrine, double jeopardy does not prohibit the federal government from prosecuting a person previously convicted or acquitted by a state, or *vice versa*, or one state from prosecuting a person convicted or acquitted by another.[39] In other words, under this doctrine the US federal government can prosecute individuals and entities for the exact same conduct that they have previously been tried for in

36 See U.S. Const. amend. V; *Martinez v. Illinois*, 134 S. Ct. 2070, 2074.

37 See *Breed v. Jones*, 421 U.S. 519, 528 (1975).

38 See *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977) (applying double jeopardy to corporate defendants without discussing their status as corporations); *United States v. Sec. Nat'l Bank*, 546 F.2d 492, 494 (2d Cir. 1976).

39 *United States v. Lanza*, 260 U.S. 377, 385 (1922).

one of the states, regardless of whether they were convicted or acquitted in that prior case.[40]

To blunt the potentially harsh impact of the dual sovereignty exception, the DOJ has adopted a policy that precludes the initiation of federal prosecution following a prior state (or federal) prosecution based on substantially the same facts. The Dual and Successive Prosecution Policy (the Petite Policy) seeks 'to vindicate substantial federal interests through appropriate federal prosecutions, to protect persons charged with criminal conduct from the burdens associated with multiple prosecutions and punishments for substantially the same act(s) or transaction(s), to promote efficient utilization of Department resources, and to promote coordination and cooperation between federal and state prosecutors'.[41] To overcome this policy, federal prosecutors must not only comply with the standards applicable for commencing any federal prosecution (i.e., that the defendant's conduct constitutes a federal offence and that the admissible evidence probably will be sufficient to obtain and sustain a conviction by an unbiased trier of fact), but they must also obtain the approval of the appropriate Assistant Attorney General and establish that (1) the matter involves a substantial federal interest; and (2) the prior prosecution left that federal interest 'demonstrably unvindicated'. It is the second of these two factors that provides the greatest protection against successive prosecutions, as, under this policy, the DOJ 'will presume that a prior prosecution, regardless of result, has vindicated the relevant federal interest'.[42] While this presumption can, of course, be overcome (and the policy lists the factors relevant to make such an assessment),[43] federal prosecutors traditionally reserve such challenges for those cases where it perceives the preceding result to have been manifestly unjust.

Notably, the Petite Policy does not expressly preclude the DOJ from bringing criminal charges based on the same conduct previously prosecuted by a foreign sovereign. Nevertheless, similar, if not identical, principles are at play whether the prior prosecution was brought by a state or federal government, or a foreign sovereign. Counsel endeavouring to persuade the DOJ to defer to the foreign result certainly should be prepared to demonstrate why a successive prosecution would contravene that policy. The DOJ will, of course, consider if US interests have been sufficiently redressed by the foreign prosecution.[44] And, in the cases of

40 Notably, the Supreme Court very recently declined to extend the dual sovereignty doctrine to successive prosecutions by Puerto Rico and the United States, concluding that the question of separate sovereignty requires an assessment of the source of the power to punish. *Puerto Rico v.* Sanchez Valle, 136 S. Ct. 1863 (2016). There, the Court held that successive prosecutions may be brought only where two prosecuting authorities derive their power to punish from independent sources; if those authorities draw their power from the same ultimate source, successive prosecutions are prohibited.

41 U.S. Dep't of Justice, Justice Manual 9-2.031 (1999).

42 Id.

43 Id.

44 See *Thompson v. United States*, 444 U.S. 248, 248 (1980) (noting that there is an exception to the Petite Policy where US prosecution would serve 'compelling interests of federal law enforcement').

corporate criminal activity, it is likely that the DOJ will seek to extract a penalty based on the harm to its interests.

Still, if a prior prosecution by a foreign sovereign has resulted in adequate penalties proportionate to the conduct, the DOJ may well decline or defer the prosecution or, perhaps, offset any US fines or penalties by the amounts paid abroad, particularly in the corporate context. This is particularly likely in the wake of the DOJ's new policy, announced in May 2018 and since incorporated into the DOJ's Justice Manual, to discourage the 'piling on' of multiple penalties by the DOJ and foreign and domestic agencies when they are investigating the same corporate misconduct.[45] The policy articulates certain factors to be used when determining whether the imposition of multiple penalties would nevertheless serve the interest of justice, and therefore there is no certainty that prior prosecution by a foreign sovereign will result in no or lenient punishment by the United States.

The double jeopardy clause generally does not restrict the ability of the US government to pursue successive criminal and administrative remedies for the same conduct.[46] Indeed, while it is more common for administrative investigations to run in parallel with DOJ investigations, double jeopardy is not offended when a criminal prosecution follows the imposition of an administrative sanction (or *vice versa*). As the Supreme Court held in *Hudson v. United States*, the double jeopardy clause does not apply to non-criminal penalties.[47] Though the Court in *Hudson* recognised that criminal charges following in the wake of stinging administrative penalties could potentially implicate double jeopardy concerns, a defendant mounting such a challenge must establish by the 'clearest proof' that the administrative penalty was so punitive as to render it criminal for double jeopardy purposes – a very high hurdle indeed.[48]

The application of double jeopardy in the EU and under the ECHR 1.2.3

Increased focus on combating overseas corruption following the signing of the Organisation for Economic Co-operation and Development's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, has resulted in a rise in multiple prosecutions. A person or company engaging in overseas corruption faces the prospect of prosecution in any signatory country where he, she or the company may have sufficient involvement, either by citizenship or place of incorporation, or as a place where relevant acts took place.

The picture is evolving on both the supranational and national levels, and this is discussed below. The double jeopardy principle is set out in Article 54 of the

45 US Dept. of Justice, Justice Manual §1-12.100; Deputy Att'y Gen. Rod Rosenstein, Remarks to the New York City Bar White Collar Crime Institute (9 May 2018), available at https://www.justice.gov/opa/speech/deputy-attorney-general-rod-rosenstein-delivers-remarks-new-york-city-bar-white-collar.

46 See *Hudson v. United States*, 522 U.S. 93, 96 (1997).

47 Id. at 99.

48 See id.

1985 Schengen Agreement.[49] On 29 May 2000 the United Kingdom adopted Article 54 of the Schengen Convention and so it presently forms part of the United Kingdom's domestic law.[50] The rationale for the application of the principle across the European Union was made clear in *R v. Gozutok and Brugge*,[51] as permitting finality in criminal proceedings and also engendering mutual trust in national criminal justice systems by requiring that each Member State recognise the criminal laws in force in the others even when the outcome would be different if its own national law had been applied.

The Council Framework Decision 2009 on the prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings (the EU Framework Decision)[52] sets out measures to prevent situations where the same person is subject to parallel criminal proceedings in different Member States in respect of the same facts that might lead to the final disposal of those proceedings in two or more Member States.

The EU Framework Decision is constitutionally binding on the United Kingdom as a Member State and as such must be taken into account by the SFO in its decision whether to open a criminal investigation. The double jeopardy principle is not a bar to a criminal investigation however, and the SFO has very wide discretion in deciding whether to carry out an investigation.[53]

1.2.4 European human rights jurisprudence

1.2.4.1 European Court of Human Rights (ECtHR)

Article 4 of Protocol 7 to the European Convention on Human Rights (ECHR) specifically recognises the double jeopardy principle.[54]

---

49 Article 54: 'A person whose trial has been finally disposed of in one contracting party may not be prosecuted in another contracting party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing contracting party.'

50 2000/365/EC: Council Decision of 29 May 2000 concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen acquis.

51 [2003] 2 CMLR 2.

52 2009/948/JHA.

53 Section 1(3) of the Criminal Justice Act 1987; 'The Director may investigate any suspected offence which appears to him on reasonable grounds to involve serious or complex fraud.' See also *R (Corner House) v. Director of the SFO* [2008] EWHC 714 (Admin), at para. 51.

54 'Article 4 – Right not to be tried or punished twice

1 No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

2 The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

3 No derogation from this Article shall be made under Article 15 of the Convention.'

The importance of the principle was emphasised in the ECtHR's Chamber judgment in the case of *Grande Stevens and Others v. Italy*.[55] Here, the applicants received an administrative penalty from Consob, the Italian Companies and Stock Exchange Commission, in respect of providing false or misleading information concerning financial instruments. The penalty took the form of substantial fines and various banning orders. Subsequently, the applicants were committed for trial before the Turin District Court in respect of criminal allegations of market abuse arising out of the same facts.

The applicants argued before the ECtHR that the subsequent criminal proceedings were in breach of Article 4 as the applicants had already been subject to a penalty that was akin to a criminal penalty, even though it was imposed as an administrative penalty. The court accepted their argument and ruled that the administrative penalty should be considered a criminal penalty for the purposes of the ECHR and that Article 4 prevented the criminal proceedings from taking place on the grounds of double jeopardy.[56]

The Court of Justice of the European Union (CJEU) 1.2.4.2

2018 saw three further cases arising in Italy where the principle of double jeopardy was considered, again in relation to administrative penalties imposed by Consob which were severe enough to be considered criminal in nature. All these cases were referred to the CJEU by Italy's Supreme Court of Cassation for a preliminary ruling considering Article 50 of the Charter of Fundamental Rights of the European Union and Article 4, Protocol 7 ECHR.

In the *Ricucci* matter,[57] the defendant had been fined €10.2 million by Consob, as well as being convicted in criminal proceedings resulting in a sentence of four years' imprisonment for alleged market manipulation. The Rome District Court subsequently pardoned Ricucci in a final judgment.

Ricucci challenged Consob's fine in Rome's Court of Appeal, which reduced it to €5 million in 2009. He then took his appeal to Italy's Supreme Court of Cassation, where he argued that his 2008 criminal conviction and subsequent pardon should negate any Consob proceedings. The Court of Appeal asked the CJEU whether the *ne bis in idem* principle in Article 50 gives individuals a direct right that can be applied to negate dual proceedings. The Court also asked the CJEU whether the *ne bis in idem* principle precludes Italy's law allowing

55 *Grande Stevens and Others v. Italy* (4 March 2014) Application Nos. 18640/10, 18647/10, 18668/10 and 18698/10. The judgment is not final.

56 In March 2015, France's Constitutional Court ruled that Airbus executives could not be prosecuted for insider trading because they had been cleared over similar administrative charges by France's Financial Markets Authority, the AMF. In reaching its decision the Court gave considerable weight to the decision of the ECtHR in the *Grande Stevens* case.

57 Case C-537/16: Judgment of the Court (Grand Chamber) of 20 March 2018 (request for a preliminary ruling from the Corte suprema di cassazione – Italy). See also https://globalinvestigationsreview.com/article/1168169/cjeu-italian-defendants-should-not-face-double-jeopardy.

administrative proceedings to be brought for market manipulation after a defendant has been finally convicted.

The CJEU held that dual proceedings can be pursued if they meet 'an objective of general interest' – in this case, to protect the European Union's financial interests. However, the national legislation must also ensure that proceedings and the severity of penalties are limited to 'what is strictly necessary' where dual proceedings are to be pursued. Italy's market manipulation law did not respect the principle of proportionality, and the CJEU ruled that, if a criminal penalty already punishes misconduct in an 'effective, proportionate and dissuasive manner', administrative proceedings of a criminal nature are gratuitous and so go beyond 'what is strictly necessary'.

In two other cases, *Di Puma* and *Zecca*,[58] appeals were made against Consob fines, with the defendants arguing that they should not face administrative charges for insider trading when a criminal court had found no misconduct. The appeals court asked the CJEU whether, in light of *ne bis in idem*, a court would violate an EU directive that requires Member States to provide 'effective, proportionate and dissuasive penalties' for insider trading if it did not bring administrative sanctions after a criminal court found no wrongdoing.

The CJEU determined in its preliminary ruling that not bringing administrative sanctions after a criminal court has found no misconduct is in accordance with EU law because of the principle of *res judicata*. It ruled that a defendant who is cleared of a criminal charge, should not be the subject of administrative proceedings for the same matter.

The CJEU has considered the application of the double jeopardy principle to the Schengen Agreement in the context of an individual under investigation in Poland and Germany for allegations of extortion.[59] In this case it upheld the German prosecutor's decision that the double jeopardy principle did not apply. The matter had not been finally disposed of as no detailed investigation had taken place.

On 15 November 2016, the CJEU rejected an appeal brought by two applicants who were penalised by the Norwegian Tax Authority for failing to pay tax in 2008 and then convicted of aggravated tax fraud in 2009 by the National Authority for Investigation and Prosecution of Economic Crime. The applicants claimed they were being prosecuted twice for the same misconduct in violation of double jeopardy rules. Rejecting the application, the court held that ECHR double jeopardy rules are not violated where the contracting party could satisfy the court that dual proceedings are sufficiently connected in time and space so as to represent a coherent whole, rather than two sets of proceedings.[60]

58 Joined Cases C-596/16 and C-597/16, *Di Puma and Zecca*.

59 Case C-486/14, *Kossowski*, 29 June 2016.

60 *Case of A and B v. Norway* (Applications nos. 24130/11 and 29758/11) 15 November 2016, lovdata.no/static/EMDN/emd-2011-024130.pdf.

Double jeopardy in France 1.2.5

Recent developments in France continue to warrant a special mention as the issue of double jeopardy and its application has come before the courts on a number of occasions recently. The appellate courts have recently considered the extent to which domestic law will recognise convictions in the United States as a bar to prosecution, as well as the status of US DPAs in domestic proceedings. On 18 June 2015 a criminal court in Paris acquitted four French corporates that were accused of paying bribes in connection with the United Nations' Oil-for-Food Programme on the grounds that they (or their corporate parents) had already signed DPAs with the DOJ. The rationale given was that it was inconsistent with French international obligations to prosecute the companies for a second time on what the Court found to be the same facts. The prosecutor's appeal against the acquittal was successful and in February 2016 a Paris court fined Total SA €750,000 for corrupting foreign officials.

At the time of writing, criminal proceedings in France against Total are being pursued in relation to separate Iranian corruption conduct that allegedly occurred in 2013. In relation to the same matters, Total entered into a US$245.2 million, three-year deferred prosecution agreement with the DOJ and disgorged US$153 million in an SEC cease-and-desist order. The DPA expired in November 2016.[61]

On 26 February 2018, the Court of Cassation in Paris upheld a decision to fine Swiss energy company Vitol €300,000 for making corrupt payments to the Iraq government as part of the United Nations Oil-For-Food programme.[62] The Court rejected Vitol's argument that it was protected from criminal proceedings in France because it had already been punished in the US. The Court found that double jeopardy did not apply because the company had pleaded guilty to a different charge in US proceedings[63] and stated that France must maintain its right to punish companies that break French law. In its ruling, the Court of Cassation considered double jeopardy protections enshrined in both France's Penal Code and the Charter of Fundamental Rights of the European Union. It concluded that both those protections fail to immunise a company from being prosecuted twice if part of the offence occurred within France and if the misconduct is prosecuted

61 The Court of Cassation will hear appeals from another 14 companies accused of wrongdoing as part of the UN Oil for Food scheme, with more double jeopardy arguments likely to feature in 2019. See https://globalinvestigationsreview.com/article/1168159/vitol-decision-shakes-double-jeopardy-defence-in-france.

62 The fine was in addition to a US$17.5 million sanction Vitol received in the United States in 2007 as part of a plea agreement entered to resolve identical allegations.

63 The company pleaded guilty to a single count of grand larceny in the New York State Supreme Court and paid a US$17.5 million fine, US$4.5 million of which was donated to the state of New York. Vitol admitted in the US plea deal that corrupt payments were made through its employees in France. In total, the company said it paid US$13 million to Iraqi officials between 2001 and 2002 hidden in oil contracts awarded to the company as part of the Oil-For-Food programme.

by a country that is not bound by French or EU law, such as the United States.[64] This significantly weakens the double jeopardy defence, in circumstances where some of the misconduct occurred in France.

These cases demonstrate the potential unfairness to a corporate that has effectively admitted the offence in another jurisdiction to obtain a DPA and then finds those admissions being used against it in a jurisdiction that does not recognise the DPA under the double jeopardy doctrine.

1.2.6 Conclusion

At first sight, the doctrine of double jeopardy appears to be a substantial protection against repeated prosecution in respect of the same conduct. However, although the doctrine may in some circumstances protect against a similar prosecution within the state, or member group such as the European Union, it may well fail to protect against a prosecution brought by a separate state. France's decision not to apply the principle in circumstances where part of the offence occurred within its sovereign territory is a significant restriction on its scope.

As many countries do not recognise a foreign conviction for the purposes of double jeopardy, it is not possible to reassure a corporate client that a criminal settlement in one jurisdiction will qualify as a settlement in others as well. Further, entering into a DPA in one jurisdiction may risk damaging the client's interests in another if the DPA is not recognised as a bar to prosecution, but the admissions it made to secure the DPA are admissible against it in other jurisdictions.

The picture is uncertain and many questions remain unanswered. These include:

- Should there be international recognition of criminal convictions for the purposes of double jeopardy, to encourage global settlements?
- Should DPAs be given the status of a criminal conviction for the purposes of double jeopardy?
- Should regulatory sanctions qualify for the purposes of double jeopardy?

Until these issues are resolved, a corporate client will only be able to place very limited reliance on the double jeopardy principle as a bar to further prosecution in respect of the same conduct. At present, the only safe course will be to seek to negotiate a global settlement with all the states most likely to take an interest in the conduct, before admitting guilt in any state. Whether this is practicable will vary from case to case.

In relation to individuals, an issue of note was recently referred to the CJEU stemming from a dispute between Hungary and Croatia in the case of *AY*.[65] The

64 Note that as France is a civil law jurisdiction, lower courts are not strictly bound to follow the Court of Cassation's decision.

65 Judgment in Case C-268/17 *AY (Arrest warrant — witness)*. The Court analysed whether any of the grounds for optional non-execution provided for in Article 4(3) of the framework decision applied in the *AY* case and concluded they did not. Those grounds relate to: (1) the decision of the executing judicial authority not to prosecute for the offence on which the European arrest warrant is based; (2) the fact that, in the executing Member State, the judicial authorities have decided to

Croatian court had sought a preliminary ruling on whether the double jeopardy principle under EU law means Member States may refuse to enforce European arrest warrant (EAW) requests in cases where its investigations treated individuals as witnesses and not suspects. Specifically, Croatia asked whether Hungary could refuse to enforce two EAW requests it issued for an individual, named only as AY to prevent damage to reputation, after AY was treated as a witness rather than a suspect in an investigation conducted by the Hungarian prosecutor's office. In its judgment of July 2018, the CJEU stated that execution of an EAW cannot be refused on the ground that a prosecutor had closed a criminal investigation where during that investigation, the requested person was interviewed as a witness only. The Court stated that the judicial authorities of the Member States must adopt a decision on any EAW communicated to them.

The stages of an investigation 1.3

Issues that at first glance may appear to be isolated or technical can quickly spread across borders and escalate into multifaceted threats to businesses, reputations and careers. Even within jurisdictions, different enforcement authorities operate within their own, often complex, legal and technical frameworks. Any investigation, whether an internal fact-finding inquiry aimed at establishing the size and nature of a problem or one commenced by an enforcement authority, is inevitably a dynamic process. There can be no 'one-size-fits-all' approach and the scope of an investigation can change significantly as it progresses.

Nonetheless, it is possible to identify three broad, and often overlapping, phases to an investigation, namely the commencement, information-gathering and disposal phases. Particular challenges arise, and sometimes recur, at each of these.

Conducting and handling investigations, limiting the damage they cause and bringing them to as swift and efficient a conclusion as possible is an art rather than a science. It requires advisers to anticipate, balance and respond to a wide variety of challenges, and to appreciate the potential ramifications of every interaction with a diverse cast of characters.

---

halt proceedings in respect of the offence on which the warrant is based; and (3) the fact that a final judgment has been passed on the requested person in a Member State, in respect of the same acts, which prevents further proceedings. The Court determined the first and third grounds were irrelevant in the case. The Court concluded that an interpretation according to which the execution of a European arrest warrant could be refused where that warrant concerns the same acts as those that have already been the subject of a previous decision, without the identity of the person against whom criminal proceedings are brought being considered relevant, would be manifestly too broad and would entail a risk that the obligation to execute the warrant could be circumvented. As that ground for non-execution constitutes an exception, it must be interpreted strictly and in the light of the need to promote the prevention of crime. The investigation by the Hungarian authorities was conducted, not against AY, but against an unknown person, and the decision that closed that investigation was not taken in respect of AY. The Court concludes from this that the second ground for non-execution does not apply either. See also https://globalinvestigationsreview.com/article/1166589/croatian-case-to-clarify-eaw-double-jeopardy-rules.

1.3.1 Commencement

When deciding whether or how to commence an investigation, or how best to respond to one already commenced by an enforcement authority, it is axiomatic that the very first task to be carried out must be to establish as precisely as possible the size and shape of the problem. Which corporate entities and individuals are regarded as subjects of the investigation? Which offences are they thought to have committed, and which regulatory provisions might they have infringed? Are any other local or foreign agencies investigating (or likely to investigate) this misconduct?

In some cases (typically those involving alleged breaches of regulatory requirements), the answers will be self-evident from notices confirming the commencement of an investigation or the appointment of investigators, and there may be opportunities to seek to establish more detail through scoping discussions. However, in other cases (typically those involving alleged criminal misconduct), the investigators will not necessarily provide details or opportunities for discussions. In some cases, the first indication an individual or entity receives of an investigation by an enforcement authority will be a requirement to attend an interview or provide documents, or, worse still, a knock at the door from investigating officers. In all cases – whether or not enforcement authorities are already aware of alleged misconduct – steps must be taken immediately upon discovery of the alleged misconduct to preserve and to avoid the destruction or deletion (inadvertent or otherwise) of documents that are, or could become, relevant. In large multinational organisations, identifying the custodians of these documents, drafting and disseminating appropriately inclusive document-retention notices, gathering the material and suspending automatic deletion policies is a substantial undertaking in itself.

Where authorities are not already aware of apparent misconduct, considering whether, when and how to disclose matters to them will be an immediate priority. In some cases, specific regulatory obligations will require disclosures. In others, it may be appropriate to voluntarily report matters to maximise the prospects of a consensual resolution on favourable terms. Both types of disclosures require careful handling. Consideration must be given to potential consequences, both for those individuals or corporates already implicated in alleged misconduct, and for those that may become so. Where information is disclosed voluntarily, wider considerations about whether co-operation will be appropriate and would be likely to encourage the relevant enforcement authority to curtail its investigation (and on which terms) should be borne in mind. Identifying the potential risks and benefits will typically involve assessing the enforcement policy and posture of each agency involved (and often of individual investigators) and its ability and propensity to pass information to other investigating or prosecuting authorities (both within and between jurisdictions).

These assessments will inform the answers to a number of practical questions:

- Should an initial notification be made before a full internal investigation has been undertaken?
- What should be disclosed at the end of the internal investigation and to whom?
- Should information be disclosed to the authorities orally rather than in writing?
- Will investigators regard anything less than unfettered access to witnesses' first accounts and other underlying documents as true co-operation enabling them to contemplate a negotiated outcome?
- Is it feasible to maintain claims to legal professional privilege or challenge investigators' actions or demands while still seeking to claim that the subjects of the investigation are co-operating?

Choices made at this stage about how much information and control to relinquish over the investigative process and the robustness of the line to be taken with investigators in relation to issues such as privilege can be crucial in setting the tone for the rest of the investigation, and any proceedings that flow from it.

Since the second edition of this text, the Court of Appeal has allowed ENRC's appeal against the first instance decision, upholding its claim to litigation privilege over the disputed documents, including notes of witness interviews.[66] Under the leadership of the new Director of the SFO, Lisa Osofsky, the SFO decided not to appeal that decision. Given the importance of privilege in the context of global investigations, the decision has been welcomed by lawyers across the globe – the Court of Appeal's judgment aligns the law more closely with the law of privilege in the United States and its clear articulation of the applicability of litigation privilege in the context of a criminal investigation is likely to mean that the SFO will be less aggressive in making assertions that privilege claims by companies over documents created during the course of internal investigations are ill-founded. However, it is unlikely that the SFO will be any less willing to request waivers of privilege, particularly since the Court of Appeal judgment was clear that its decision should not 'impact adversely' on the deferred prosecution regime in the United Kingdom, and emphasising the relevance of waiver to an assessment of a corporate's co-operation in reaching resolutions.[67] Therefore, decisions as to the approach taken by a company to privilege, regardless of whether privilege can properly be asserted or not, will continue to be crucial decisions that set the tone and, possibly, direction of an investigation.

In cases involving allegations made by or against directors or employees, early determinations need to be made as to whether any specific whistleblower

66 *SFO v. ENRC* 2018 EWCA Civ 2006.

67 See *SFO v. ENRC* 2018 EWCA Civ 2006 at paras. 115–117, in particular: 'In any event, to determine whether a DPA is in the interests of justice, and whether the terms of the particular DPA are fair, reasonable and proportionate, the court must examine the company's conduct and the extent to which it cooperated with the SFO. Such an examination will consider whether the company was willing to waive any privilege attaching to documents produced during internal investigations, so that it could share those documents with the SFO . . .'

protection legislation or rules have been engaged and whether action should be taken to suspend or dismiss those individuals.

1.3.2 Information gathering

Once the scope of an investigation has been determined, the process of gathering and analysing relevant information, whether in documentary or electronic form or in the form of witnesses' accounts, commences. Since the advent of the European investigation order (introduced in England and Wales from 31 July 2017), the process of gathering information across borders will be a much simpler and quicker process for enforcement authorities in Europe.[68]

In substantial cross-border investigations, the task of collating relevant material, ascertaining whether it is responsive to requirements to produce documents or provide information (or whether it should otherwise be produced to demonstrate a co-operative stance), and filtering it to remove material exempt from disclosure is time- and resource-intensive. It often requires specialist technical input and expertise. Information should not be treated as a readily portable commodity, and careful consideration should be given to applicable data protection and other confidentiality constraints before information is transferred between jurisdictions or produced to investigating authorities.[69]

Witness interviews during internal investigations raise no fewer questions. When should interviews take place? Who should be present? What material and questions is it appropriate to put to them during such interviews? Should they be represented (and, if so, at whose expense)? Taking a wider view across all jurisdictions in which action could be taken, and from the individual's perspective, is it in the interests of subjects of the investigation to provide information voluntarily, or should they insist on being compelled to do so?

---

68 See Criminal Justice (European Investigation Order) Regulations 2017. There are at the time of writing proposals for European production and preservation orders that would, respectively, allow electronic evidence to be requested directly from a service provider in the European Union or oblige a service provider to preserve specific data. In the United Kingdom, the Crime (Overseas Production Orders) Bill is making its way through Parliament, which would, if enacted, allow a UK court, subject to certain requirements, on the application of an appropriate officer (which would include, among others, a police officer, a member of the SFO or a person appointed by the FCA) and provided that an international co-operation agreement were in place, to make an order against a person in that jurisdiction.

69 Recent developments in the United Kingdom and United States are relevant. In the United Kingdom, a decision by the Administrative Court in September 2018 *R (on the Application of KBR Inc) v. The Director of the Serious Fraud Office* [2018] EWHC 2368 (Admin) extended section 2 notices, served in the United Kingdom, extraterritorially to foreign companies in respect of documents held outside the jurisdiction when there is a sufficient connection between the company and the jurisdiction. In the United States, following the successful appeal by Microsoft of orders holding it in contempt for failure to comply with a warrant requiring it to produce the contents of a customer's email account stored on a server outside the United States, Congress enacted on 23 March 2018 the Clarifying Lawful Overseas Use of Data Act (CLOUD Act), providing expressly for extraterritorial application and thereafter the United States obtained a fresh warrant against Microsoft.

Of course, where investigations by the authorities have already begun, investigating authorities will be keen to interview individuals who are suspects. Depending on the nature of the investigation and the allegations against them, it may be open to individuals to remain silent in response to questions (although this course of action may limit their options in any proceedings flowing from the investigation). Conversely, it may serve such individuals' interests to proactively volunteer information to secure more lenient treatment by authorities, or ultimately the courts.

Disposal 1.3.3

As the information gathering progresses, and evidence is assimilated and understood, a decision will need to be reached as to whether this may be resolved through negotiation, or whether the individual or corporate disputes the allegations entirely or is unprepared to reach any resolution or enter into any settlement that requires admissions of misconduct.

Where settlement is an option, from economic, commercial and reputational standpoints, settling with as many investigating authorities as quickly and on the most favourable terms possible is likely to be preferable. Particularly in regulatory enforcement investigations involving corporates, it is often clear from the commencement phase that this will be the most likely outcome, and dialogue throughout the investigation will have to be directed towards this outcome.

It should not be assumed that the process leading to a negotiated disposal is a smooth or simple one. Even in cases involving only one enforcement authority, the legislation and rules governing settlement and the calculation of penalties are complex. Although the discounts available for early settlement are potentially significant, the processes leading to them can involve successive rounds of proposals, counterproposals, representations and negotiations. In criminal investigations, in jurisdictions where it is possible to achieve negotiated outcomes as an alternative to prosecution, although the degree of scrutiny varies depending on which jurisdiction is concerned, such settlements will also be examined by a judge.

Complexity is multiplied where multiple authorities or jurisdictions are involved, or where it is possible that a finding, even if it does not involve any admission of liability, may fuel subsequent litigation from third parties such as erstwhile customers, employees or shareholders.

Although major investigations are unlikely to have progressed to the disposal stage without attracting at least some publicity, it is at this stage that press and political interest will peak. Enforcement authorities usually must make the outcomes of investigations public (and indeed corporate entities themselves may be obliged to do so if their securities are listed).

Other difficult questions arise with negotiated disposals. What will be the size of the fines, if any? For individuals, is there the prospect of imprisonment or other career-threatening penalties? Will it be possible to settle with all interested investigating authorities? For the corporate to bring matters to a close, will it be necessary to assist authorities in their pursuit of individuals? Will the disposal of

the investigations mark the end of the matter, or simply the start of a new phase of litigation or the commencement of a long process of reporting to a monitor and heightened levels of regulatory scrutiny or supervision? What can be said publicly by the subjects of the investigations?

With these themes in mind, we turn now to a detailed consideration of each stage in the chapters that follow.

3

Self-Reporting to the Authorities and Other Disclosure Obligations: The UK Perspective

Amanda Raad, Judith Seddon, Sarah Lambert-Porter, Chris Stott and Matthew Burn[1]

Introduction 3.1

Whether, when and how a company should report potential misconduct requires an increasingly 'global' (in all senses of that word) view of the risks and benefits involved. Around the world, enforcement actions in relation to bribery and money laundering are on the rise, international co-operation between authorities is being expanded and enhanced, and a growing number of jurisdictions are moving towards deferred prosecution agreements (DPAs) and formalised or protected whistleblowing regimes, as part of a general and growing trend towards incentivising corporate self-reporting.[2]

A corporate's voluntary decision to self-report requires directors to evaluate the potential benefits and risks involved in doing so, while complying with their duties under the Companies Act 2006 to consider and act in the best interests of the company as a whole.[3] Key benefits of self-reporting include the ability to manage the timing and content of the information being provided to the authorities, the potential for securing a DPA, reducing any financial penalties, minimising

1 Amanda Raad and Judith Seddon are partners, and Sarah Lambert-Porter, Chris Stott and Matthew Burn are associates, at Ropes & Gray International LLP in London.

2 In Lisa Osofsky's first speech as Director of the SFO on 3 September 2018, she referred to the fact that the 'increasingly multijurisdictional and complex' nature of SFO cases makes co-operation to achieve global settlements all the more important. She said that '[s]trengthening and deepening the relationships that make this happen is going to be a major focus for me,' and listed the newcomer countries to DPAs as part of that focus. (Lisa Osofsky, SFO Director, speech at the Cambridge International Symposium on Economic Crime 2018, Jesus College, Cambridge, 3 September 2018, available at www.sfo.gov.uk/2018/09/03/lisa-osofsky-making-the-uk-a-high-risk-country-for-fraud-bribery-and-corruption/.

3 Companies Act 2006, s.172.

or managing reputational fallout, and achieving an earlier and more predictable resolution than may otherwise be possible. Particular risks include potential disruptive and damaging action by investigating authorities, damage to share prices, the removal or suspension of senior management,[4] costly internal investigations (including potential regulator involvement and the potential loss or waiver of privilege over key material) and potential civil litigation. Neither the benefits nor the risks are easily quantifiable. The stakes for individuals (usually directors) are also higher than ever in the United Kingdom – those working in firms regulated by the Financial Conduct Authority (FCA) or the Prudential Regulation Authority (PRA) will need to consider their potential liability under the (relatively) new individual accountability regimes in addition to criminal and civil liability.

Frequently, questions as to how to deal with internal disclosures made by whistleblowers and, in those circumstances, whether, when and how to self-report matters to authorities, go hand in hand. Similarly, where a corporate operates in multiple jurisdictions, any trigger of mandatory reporting obligations in one jurisdiction warrants careful consideration regarding corresponding mandatory or voluntary reporting in others – particularly in light of authorities' increasingly collaborative approach to (formal and informal) sharing of information.

The decisive and effective management of the risks and benefits of self-reporting, which typically involves balancing complex questions of fact and (criminal, regulatory and employment) law is critical and can help to conclude swiftly or pre-empt regulatory intervention. All of these considerations play out against the backdrop of an obvious tension between self-reporting with sufficient speed to obtain or maximise co-operation credit and the chance of a DPA on the one hand, and taking the time to investigate an allegation sufficiently to understand whether, when and what to report on the other. The recent Court of Appeal decision in the *ENRC* case[5] emphasises the importance (for the purposes of asserting legal privilege) of recording clearly and in good time the points at which a firm considers that it is involved in the self-reporting process and that litigation or criminal prosecution is reasonably in contemplation.

This chapter examines how authorities are using and interpreting self-reporting and whistleblowing frameworks in the United Kingdom, and identifies key considerations for corporates and their advisers. The extraterritorial reach of several pieces of key legislation (most notably the Bribery Act 2010 (UKBA)) and the comparatively aggressive stance of UK investigating and prosecuting authorities (principally the Serious Fraud Office (SFO)) mean that developments in the country are of interest to corporates operating around Europe and the Middle

4 Alun Milford, then General Counsel at the Serious Fraud Office, said in a speech in September 2017 that in all DPA judgments to date, a key element has been the extent of reform in the corporate, including the removal of senior managers who were either implicated in, or should have been aware of, the criminality concerned, available at www.sfo.gov.uk/2017/09/05/alun-milford-on-deferred-prosecution-agreements/.

5 *Serious Fraud Office (SFO) v. Eurasian Natural Resources Corp. Ltd* [2018] EWCA Civ 2006.

East, even if they are based, or undertake most of their activities, outside the United Kingdom.

Culture and whistleblowing 3.2

The importance of culture 3.2.1

Self-reporting and whistleblowing are increasingly considered to be fundamental to the 'culture' of an organisation. In the wake of the financial crisis and well-publicised corporate scandals, UK regulators and enforcement authorities remain concerned with promoting cultural change across financial institutions and corporates. Particular emphasis is placed on the need for meaningful challenge by (and of) senior management in addition to appropriately robust whistleblowing procedures, which employees are expected to use without fear of reprisal.

See Chapter Chapter 18 on whistleblowing

In a nod to the SEC's Whistleblower Programme, the FCA asks firms to consider adopting internal procedures that encourage workers to blow the whistle internally about matters relevant to the functions of the FCA or PRA.[6] What is more, in response to recommendations by the Parliamentary Commission on Banking Standards in 2013, the FCA and the PRA published new rules, which have made it a requirement (since 7 March 2017) for in-scope firms to allocate responsibility for whistleblowing under the individual accountability regimes (i.e. the Senior Managers Regime, and the Senior Insurance Managers Regime) to a 'whistleblowers' champion', who must be a non-executive director.[7]

The whistleblowers' champion is responsible for overseeing the effectiveness of internal whistleblowing procedures, including arrangements for protecting whistleblowers against detrimental treatment, preparing an annual report to the board, and reporting to the FCA where, in a case contested by the firm, an employment tribunal finds in favour of a whistleblower. Selection of the whistleblowers' champion should involve careful consideration of the proposed individual's standing and role within the firm, as well as the capacity, resources and access (e.g., to people and information) necessary to effectively discharge the responsibility for 'ensuring and overseeing the integrity, independence and effectiveness of the firm's policies and procedures on whistleblowing and for ensuring staff who raise concerns are protected from detrimental treatment'.[8] As a result of this new whistleblowing regime, the significance of whistleblowers will likely only increase.

Whistleblowing also features in the UKBA framework – under section 7 of the UKBA, a relevant corporate firm commits an offence where a person associated

6 SYSC 18.2.2 G.

7 FCA Policy Statement PS15/24 containing the FCA rules applicable to deposit takers with assets over £250 million. The rules are set out in the FCA Handbook at: SYSC 18.1, SYSC 18.31, and SYSC 18.4 and 18.5. The PRA rules are set out in its Policy Statement PS24/15, the PRA General Organisational Requirements Rulebook (applicable to CRR firms) and its Whistleblowing Rulebook (applicable to solvency II firms) and PRA Supervisory Statement SS 39/15 (applicable to deposit takers with assets greater than US$250 million, PRA designated investment firms and insurers).

8 SYSC 18.4.4.R.

with it bribes another person, intending to obtain or retain business or a business advantage for the firm. The firm has a 'defence' if it can show that it had in place 'adequate procedures' to prevent such bribery. The Ministry of Justice published statutory guidance on 'adequate procedures' in March 2011, pursuant to section 9 of the UKBA.[9] That guidance recommends that adequate procedures should include procedures for reporting bribery 'including "speak up" or "whistleblowing" procedures.'[10] In addition, in the context of self-reporting, the SFO has been keen to emphasise the various avenues by which it may come to hear of alleged criminal conduct, including 'from whistleblowers and disgruntled business rivals … . Any such source can give us, or more particularly the Director, reasonable grounds to suspect the commission of an offence involving serious fraud, bribery or corruption and, with it, the power to open a criminal investigation.'[11]

The DPA Code of Practice (DPA Code)[12] sets out public interest factors for and against prosecution, which, the Director of the SFO has stated, were designed to incentivise self-reporting and effective compliance controls, and to encourage corporates to demonstrate that they are 'serious about behaving ethically.'[13] Consistent with the emphasis on good corporate governance is the fact that, among other things, a self-report is relevant at later stages in the UK criminal justice process. The Sentencing Council's Definitive Guideline,[14] which was introduced in October 2014 in relation to the sentencing of corporates for fraud, bribery and money laundering offences, and which is considered in setting financial penalties under a DPA, takes into account to a corporate's culture in the event of a conviction.[15] Further, the amended Public Contracts Regulations 2015, introduced in February 2015, allow blacklisted companies to bid for public contracts if they can prove (among other things) that they have 'clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities'.[16]

9 Ministry of Justice 'Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing', available at www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf, March 2011.

10 Ibid. at para. 1.7.

11 Alun Milford, then General Counsel at the SFO, speech at the Cambridge Symposium on Economic Crime 2014, Jesus College, Cambridge ('The Use of Information to Discern and Control Risk'), 2 September 2014, available at www.sfo.gov.uk/2014/09/02/alun-milford-use-information-discern-control-risk/.

12 Deferred Prosecution Agreement Code of Practice issued by the Director of Public Prosecutions and Director of the SFO pursuant to the Crime and Courts Act 2013, available at www.cps.gov.uk/sites/default/files/documents/publications/dpa_cop.pdf.

13 DPA Code, s.2.

14 Sentencing Council's Definitive Guideline 'Corporate Offenders: Fraud, Bribery and Money Laundering, available at www.sentencingcouncil.org.uk/wp-content/uploads/Fraud-bribery-and-money-laundering-offences-Definitive-guideline2.pdf.

15 A culture of wilful disregard for the commission of offences will lead to a corporate being placed at the most culpable end of the spectrum and facing the heaviest fines available.

16 The Public Contracts Regulations 2015, Regulation 57(15).

Whistleblowing 3.2.2

The SFO launched its whistleblowing hotline (SFO Confidential) in 2011. Press reports indicate that the take-up of cases has been low, however: despite receiving 2,508 reports in the 12 months to 30 June 2014, the SFO was reported to have accepted only 12 cases for investigation.[17] This was no doubt a function of the constraints on the SFO's resources, among other factors. The FCA managed 1,106 cases from whistleblowers in 2017, taking further action in 121 of these. The FCA has previously indicated that it expects to see an increase in the proportion of reports that lead directly to enforcement action or other intervention, or that provide intelligence of significant value.[18]

While whistleblower reports in the United Kingdom account for a proportion of the investigations commenced by the SFO, they are by no means the majority. They have led to some relatively high-profile successful prosecutions, although to date these have largely concerned individuals rather than corporate organisations.[19] More are expected to follow, including some of the SFO's current flagship investigations and prosecutions into large corporates. In September 2013, the SFO commenced criminal proceedings against Gyrus Group Limited, the UK subsidiary of Olympus Corporation in connection with a worldwide fraud valued at approximately US$1.7 billion. That investigation flowed from the widely publicised whistleblowing disclosure made by Michael Woodford, the former CEO of Olympus, although the investigation has since been discontinued following a Court of Appeal judgment in February 2015, which ruled that English law does not criminalise the misleading of auditors by the company under audit. Separately, in December 2012, the SFO started an investigation into Rolls-Royce plc following a whistleblower report, which, despite the company having concluded a DPA with the SFO in January 2017,[20] remains ongoing and has not, at the time of writing, yielded any criminal charges against individuals. The investigation into ENRC by the SFO was also influenced by whistleblower allegations first made to the company by email and then published in the media a few months later.[21]

The evolution of the link between self-reporting and a DPA 3.3

DPAs are now an established feature of the UK investigations landscape. The new Director of the SFO, Lisa Osofsky, recently spoke of her commitment to bringing the most complex and difficult cases of crimes to trial or, if in the public

17 'Questions over SFO funding as whistleblowers not followed up', The Times, 7 April 2015.

18 See www.fca.org.uk/static/documents/how-we-handle-disclosures-from-whistleblowers.pdf.

19 See, for example, prosecutions of individuals associated with Torex Retail PLC: https://www.sfo.gov.uk/2013/06/21/final-conviction-torex-retail-false-accounting-case/.

20 *Serious Fraud Office v. Rolls-Royce plc and Rolls-Royce Energy Systems Inc.* (Case No: U20170036), paras. 21 and 22, available at www.judiciary.uk/wp-content/uploads/2017/01/sfo-v-rolls-royce.pdf).

21 *Serious Fraud Office (SFO) v. Eurasian Natural Resources Corp. Ltd* [2018] EWCA Civ 2006, at paras. 16-17.

interest, to resolution through DPAs.[22] At the time of writing, four years and four DPAs after the introduction of the regime, not all the questions typically contemplated by corporates wishing to know whether self-reporting will lead to a swifter and potentially more favourable – negotiated – outcome have been answered. However, there are some useful indications as to the SFO's stance and, equally importantly, the courts', in the cases decided (including those where DPAs have not been concluded), and in the operation of prosecution guidance in ongoing investigations and negotiations that may lead to further DPAs.

The DPA Code sets out prosecutors' expectations for self-reporting. A key factor when deciding whether a DPA is appropriate, to be weighed with other factors relating to the nature and seriousness of the offending, is whether the corporate has been 'genuinely proactive' in its approach.[23] This is measured by reference to the factors including the timing of a corporate's self-report, and how comprehensive, relevant and useful the material is (particularly in the context of any potential action to be taken against individuals).

The DPA Code makes clear that the SFO (or Crown Prosecution Service (CPS)) expects to be 'notified' of wrongdoing 'within a reasonable time of the offending conduct coming to light' for a DPA to be a realistic option.[24] There is some significance to the use of the word 'notified' in this context, which replaced the word 'reported' originally included in the draft of the DPA Code. In short, prosecutors expect to receive an initial notification of circumstances giving rise to concerns that criminal wrongdoing may have occurred. They do not expect to receive a completed investigation report. Indeed, as is set out in the DPA Code, they expect to be involved in the investigation at the planning stage, and certainly before any witness interviews are conducted.[25] In cases where significant historic wrongdoing that is not already known to prosecutors and which may suitably be resolved through a DPA comes to light, firms should consider making an initial notification to the SFO (or CPS, if appropriate) when they file suspicious activity reports (SARs) or other statutory reports (whether in the United Kingdom or abroad).

The timing of notification relative to details entering the public domain is of particular importance. At the time of writing, Rolls-Royce remains the highest-value DPA concluded in the United Kingdom. That it was still possible for the SFO to conclude a DPA with Rolls-Royce in 2017 despite some details of wrongdoing being already known to the SFO illustrates that this is just one factor informing a prosecutor's approach and does not by itself determine whether a DPA will follow. However, as Sir Brian Leveson, President of the Queen's Bench Division, noted in respect of Rolls-Royce, the case was anomalous in this regard,

22 Lisa Osofsky, speech at the Cambridge International Symposium on Economic Crime 2018, Jesus College, Cambridge, 3 September 2018, available at www.sfo.gov.uk/2018/09/03/lisa-osofsky-making-the-uk-a-high-risk-country-for-fraud-bribery-and-corruption/.

23 DPA Code, para. 2.8.2.

24 DPA Code, para. 2.8.1(v).

25 DPA Code, para. 2.9.2.

and it was necessary for the company to provide 'extraordinary' co-operation and to notify the SFO of matters 'of a different order' to those it would otherwise have known to obtain credit for self-reporting in the context of DPA negotiations.[26] Absent such extraordinary co-operation and disclosure, it is clear that a failure to notify the SFO of matters before they become public (or before negative headlines are threatened or imminent) will jeopardise the prospects of successfully negotiating a DPA.

The decision of the SFO in December 2015 to prosecute Sweett Group plc for the corporate offence of failure to prevent bribery under section 7 of the Bribery Act 2010 also illustrates this. Sweett self-reported to the SFO upon learning that a newspaper intended to publish allegations of involvement in bribery in connection with Middle Eastern construction consultancy agreements. Although informal discussions about DPAs did commence at one stage of the SFO's investigation, they were unsuccessful; and Sweett was deemed to have been unco-operative for much of the investigation, leading ultimately to conviction and the imposition of a fine of £2.25 million in February 2016. Sweett's experience contrasts starkly with that of Standard Bank plc, with which the SFO agreed the first DPA in the United Kingdom in November 2015.[27] The SFO, and subsequently the court, highlighted and commended Standard Bank for reporting concerns to the SFO within weeks of the suspicious payment, and within days of filing a SAR.

The court's judgments in respect of Standard Bank and the other corporates with which DPAs have been concluded (and published) to date[28] have added some colour to the indications in the DPA Code as to what a corporate must do when self-reporting to demonstrate 'genuine and proactive' co-operation. This has manifested itself largely through pragmatic decisions by firms to waive privilege on a limited basis, to make material available voluntarily (i.e. without requiring the SFO to use powers of compulsion). In all cases it has been crucial to show clear separation from the individuals alleged to have been involved in wrongdoing and commitment to providing material to be used in prosecutions against them (although in no case yet concluded has such material contributed to their convictions).

Finally, in early 2018, the CPS sent a useful reminder that self-reporting, however promptly, is only one factor influencing whether a DPA may be available. In *R v. Skansen Interiors Ltd*[29] – the first contested case in relation to the corporate 'failure to prevent' offence under section 7 of the UKBA – Skansen was prosecuted despite self-reporting to the National Crime Agency (NCA) and provided extensive co-operation to the SFO in the ensuing criminal investigation, including by

26 *Serious Fraud Office v. Rolls-Royce plc and Rolls-Royce Energy Systems Inc.* (Case No: U20170036), paras.21 and 22., available at www.judiciary.uk/wp-content/uploads/2017/01/sfo-v-rolls-royce.pdf.

27 *Serious Fraud Office v. Standard Bank plc* (Case No: U20150854), (www.judiciary.uk/wp-content/uploads/2015/11/sfo-v-standard-bank_Final_1.pdf).

28 i.e., the company known as 'XYZ' and Rolls-Royce plc – details of the DPA with Tesco Stores Limited being subject to reporting restrictions pending the outcome of the trial of the individuals concerned, which, at the time of writing, is ongoing.

29 *R v. Skansen Interiors Limited*, unreported.

disclosing privileged material. Skansen argued in court that its policies and procedures were adequate for a small company with operations only in the United Kingdom and a staff of 30, but the jury returned a guilty verdict, finding that the policies and procedures in place were insufficient for the purposes of the 'adequate procedures' defence. The CPS justified its decision to prosecute rather than pursue a DPA on grounds that Skansen was a dormant company and could neither pay a fine, nor comply with the terms of any DPA, and that it wanted to send a message more generally to smaller companies as regards the importance of having effective anti-bribery and corruption procedures in place, rather than relying on 'company values' to establish proper compliance and conduct.

The new Director of the SFO has set out the sorts of issues that the SFO will be considering under her leadership in determining whether a resolution short of trial is appropriate:

> *[W]e must analyse whether the company has a credible and colourable defence under Section 7 [of the UKBA]. Has the company engaged in proactive efforts to clean house and to reform? Has the company instilled the right controls? Are these backed by demonstrable commitment at the appropriate level? The SFO will want assurance that companies are doing everything they can to ensure the crimes of the past won't be repeated long after the watchful eye of the prosecutor moves on to another target.*[30]

3.4 Key self-reporting requirements in the United Kingdom

Considerations for reporting may broadly be broken down into two categories – matters firms must report under legislation or regulation, and matters they may choose to report in the hope of bringing about an earlier or more favourable resolution to an investigation. These are examined separately below.

3.4.1 Anti-money laundering and terrorist financing reporting obligations

The sections of the United Kingdom's anti-money laundering and counter-terrorist financing legislation dealing with reporting are among the most stringent of their type in the world.

In outline, the Proceeds of Crime Act 2002 imposes specific obligations on businesses operating in the 'regulated sector' to make SARs to the NCA where they know or suspect, or have reasonable grounds for knowing or suspecting, that another person is engaged in money laundering.[31]

The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (MLTF Regulations) require firms

30 Lisa Osofsky, SFO Director, speech at Cambridge International Symposium on Economic Crime 2018, Jesus College, Cambridge, 3 September 2018, available at www.sfo.gov.uk/2018/09/03/lisa-osofsky-making-the-uk-a-high-risk-country-for-fraud-bribery-and-corruption/.

31 The Proceeds of Crime Act (POCA), ss.330 and 331.

that are 'relevant persons'[32] to appoint a nominated officer and to ensure that anyone who is working in the firm, handling relevant business, and has the requisite suspicion in relation to money laundering will make an internal report to the nominated officer, who is then obliged to consider whether to file a SAR.[33] This means that there are (internal) reporting obligations on the individuals working in those firms. For businesses operating in the regulated sector, information triggering reporting obligations is likely to have come to them as a consequence of customer due diligence and monitoring obligations imposed by the Money Laundering Regulations 2007 and the MLTF Regulations.

SARs may include a request to the NCA for 'appropriate consent' to enable the reporter to do a particular act in relation to the property concerned, which might otherwise amount to the commission of a money laundering offence.[34] Such SARs have historically been referred to as 'consent SARs', although they are now referred to by the NCA as 'requests for a defence against money laundering' or 'DAML SARs'.

There is a corresponding reporting and consent regime in relation to terrorist financing under the Terrorism Act 2000.[35] In addition, authorities may impose specific obligations on financial institutions, in particular, to report dealings with certain 'designated persons'.[36]

The relatively low threshold for making a SAR and the natural desire of businesses and the individuals within them to avoid liability (which can include potentially lengthy periods of imprisonment for individuals) means the NCA receives very substantial volumes of DAML SARs, placing a significant strain on its resources. On average, the 25 dedicated staff of the relevant section of the NCA receives 2,000 SARs per working day, with some 100 reports seeking consent to proceed with a financial transaction.[37]

The volume of SARs, together with the need for the NCA to consult with other enforcement authorities potentially interested in the information (of which there will be many), typically means that the NCA is not in a position to provide consent, or to confirm whether the reporter has 'appropriate consent' to proceed (in NCA parlance, whether the reporter has a 'defence against money laundering') much before the end of the seven-working-day notice period following the filing of a SAR.[38] This can lead to practical problems during the notice period itself and, if applicable, during the following moratorium period (which may now be

32 A firm will be a 'relevant person' if it falls within the MLTF Regulations' definitions of: (1) credit institutions; (2) financial institutions; (3) auditors, insolvency practitioners, external accountants and tax advisers; (4) independent legal professionals; (5) trust or company service providers; (6) estate agents; (7) high value dealers; (8) casinos. (MLTF Regulations, regulation 8).

33 MLTF Regulations, regulations 19 and 20.

34 POCA, ss.335 and 336.

35 The Terrorism Act 2000 (TACT), ss.21A (duty for the regulated sector) and 19 (duty outside the regulated sector) and s.21ZA (consent).

36 Counter-Terrorism Act 2008, Schedule 7, para. 12, and Terrorist Asset Freezing Act 2010, s.19.

37 Law Commission's Consultation Paper, July 2018.

38 POCA, ss.335 (appropriate consent) and 336 (nominated officer consent).

extended to up to six months on the application of investigating authorities).[39] Transactions will not be able to proceed. The risk of tipping off or committing other offences also leads to difficulties when communicating with customers, counterparties and others. The courts have been reluctant to interfere to accelerate this process.[40]

At the time of writing, the Law Commission is considering responses received as part of a consultation on the effectiveness of the United Kingdom's suspicious activity reporting regime for money laundering. It has proposed changes including amending the current threshold to require reporting only where there are reasonable grounds to suspect money laundering and further practical guidance on the meaning of 'suspicion'.

In practice, a firm's decision whether and when to file SARs to comply with reporting obligations or to secure defences to substantive offences must form one part of wider strategic calculations about self-reporting. In many cases, it will be clear which enforcement authorities will be interested in investigating the circumstances that have given rise to knowledge or suspicion of (or reasonable grounds to suspect) money laundering. In such cases, it can make sense to consider providing the information set out in the SAR to the relevant enforcement authorities. Doing so when filing a SAR with the NCA (or soon after) can help to secure maximum credit for proactively bringing matters to the attention of the authorities and to expedite obtaining consent to proceed with a transaction.

3.4.2 Other mandatory reporting obligations prescribed by legislation

A company will be subject to a variety of reporting obligations, depending on the nature of its operations, the sector in which it is involved, and the extent (and by which authorities) it is regulated. Each authority will have its own requirements as to the timing, format, content and process for mandatory reports. The key sectoral requirements include reporting:

- financial sanctions breaches, to the Office for Financial Sanctions Implementation (OFSI) (on behalf of Her Majesty's Treasury);
- (for financial institutions) the corporate offences of failure to prevent the facilitation of UK or foreign tax evasion under the Criminal Finances Act 2017, to Her Majesty's Revenue and Customs (HMRC);[41] and

39 Note, however, that there are no provisions in TACT for consent to be given within any specified time period. Firms who have made a report to the NCA pursuant to their obligations under TACT must *not* proceed with any related transaction or activity until such time as the firm is contacted by the NCA or a law enforcement agency. This can mean longer delays for the reporting firm.

40 See *National Crime Agency v. N* [2017] EWCA Civ 253; and *Lonsdale v. Natwest* [2018] EWHC 1843 (QB), for example.

41 The term 'corporate offences' refers to the 'failure to prevent the facilitation of tax evasion' offences created by s.45 (in relation to UK tax) and s.46 (in relation to foreign tax) of the Criminal Finances Act 2017, pursuant to which a financial institution is required to report on any failure to prevent the criminal acts of its employees and other associated persons who have intentionally facilitated tax evasion while providing a service for or on its behalf.

- data security breaches under the General Data Protection Regulation (GDPR), within 72 hours of becoming aware of the breach, to the Information Commissioner's Office (ICO), and, in some cases, to the data subjects concerned.

Self-reporting obligations in DPAs and regulatory and private agreements 3.4.3

Separately, corporates may have self-imposed reporting obligations. It is common for certain reporting obligations to be built into DPAs, ongoing monitorship agreements or other agreements with regulators in relation to historic criminal or regulatory failings, for example. Where a firm has a history of such failings, it is also not uncommon for parties to key transactional and financial agreements to insist on similar reporting obligations, often tied to the corporate's mandatory reporting requirements to particular authorities. In all cases, these obligations may have short reporting windows, which should be familiar to the corporate and acted on without undue delay.

Separately, corporates may be obliged to bring the fact of an investigation, or the circumstances giving rise to it, to the attention of a host of potentially interested parties. These may include regulators, contractual counterparties, markets on which they are listed, affected customers and insurers. There is a relatively high likelihood of variations in contractual arrangements and legal and regulatory frameworks (for example, in relation to conditions for contracting with government entities under applicable public procurement legislation) across the jurisdictions in which corporates operate. Conducting an early analysis of the potential collateral impact of historic wrongdoing and any investigation, prosecution or negotiated outcome, will therefore often be prudent.

Self-reporting to the FCA and PRA 3.4.4

The FCA is responsible for the conduct of firms authorised under the Financial Services and Markets Act 2000. Of particular relevance is the FCA's responsibility for ensuring that the firms and individuals regulated by it establish and maintain effective, proportionate and risk-based systems and controls to ensure that they cannot be used for the purposes of financial crime.[42]

The FCA's Handbook contains detailed rules and guidance on its requirements in this area. These provisions supplement the overarching obligations on regulated firms and individuals to maintain an 'open and co-operative' relationship with the FCA and to 'disclose … appropriately anything relating to the firm of which [the relevant regulator] would reasonably expect notice.'[43] In practice, these broad principles-based requirements oblige regulated firms and individuals to notify the FCA or the PRA, or both, not only of circumstances that may amount to breaches of rules set out in the FCA Handbook or the PRA Rulebook, but also of investigations and other matters that may affect the fitness and propriety of individuals, or

42 This was expressly stated by the FCA in its AML annual report 2015/16.

43 PRIN 2.1.1 R, Principle 11 (Relations with Regulators).

the ability of firms to satisfy the threshold conditions required to be authorised to carry on particular regulated activities.

In recent years, the FCA has increasingly used its enforcement powers against firms and individuals for deficiencies in financial crime systems and controls. It continues to do so enthusiastically, with approximately 75 such investigations open at the time of writing, and looks set to continue in this vein, having identified the area as one of its strategic enforcement priorities in its most recent Annual Report.[44] A number of enforcement cases pursued by the FCA in relation to financial crime systems and controls have been based to a significant degree on failures proactively to bring matters to the FCA's attention.[45] Looking more widely across the FCA's regulatory purview, in a number of other cases substantial penalties have been imposed on firms and individuals simply for failing to comply with obligations to notify the regulator.[46]

In a number of other areas, firms and individuals must proactively bring particular matters to the attention of the FCA, which may in due course give rise to intensified supervision, or enforcement investigations, or both. Key examples include obligations to file suspicious transaction reports under the Market Abuse Regulation and requirements for firms to notify the FCA (or PRA, as appropriate) of breaches of the Conduct Rules by senior managers, certified persons or other employees. The timescales for such notifications and the level of detail required also vary significantly depending on the circumstances.

The FCA also acts as the UK Listing Authority, meaning that companies listed in the United Kingdom (and their directors) must behave in an open and co-operative manner.[47] Although the wording of the requirement imposed on listed companies differs from that imposed on regulated firms and individuals (it does not include an express requirement to notify the FCA of matters of which

44 FCA 2017/2018 Annual Report, available at www.fca.org.uk/publication/annual-reports/annual-report-2017-18.pdf.

45 For example, in 2015 the FCA fined The Bank of Beirut (UK) Ltd (Bank of Beirut) £2.1 million, prevented it from acquiring new customers from high-risk jurisdictions for 126 days, and fined two approved persons at the bank. The FCA noted that Bank of Beirut had also repeatedly provided the FCA with misleading information after it was required to address concerns regarding its financial crime systems and controls, including by indicating that it had completed remedial actions when it had not.

46 For example, Goldman Sachs International was fined £17.5 million in 2010 (one of the largest fines ever imposed, by that time) for failing to notify the Financial Services Authority (FSA) (the predecessor to the FCA) that it was under investigation for fraud in the United States, available at www.fca.org.uk/publication/final-notices/goldman_sachs_int.pdf. Similarly, the FSA fined Prudential plc £31 million and publicly censured its CEO in 2013 for its failure to inform the FSA (in its capacity as the UK Listing Authority (UKLA)) about its proposed acquisition of AIA from AIG for $35.5 billion in early 2010. Again, this was one of the heaviest fines ever imposed at that time. The FSA found that Prudential had failed to deal with the UKLA in an 'open and co-operative manner' (in breach of Listing Principle 6) when it made a decision not to notify the regulator (allegedly due to fears that doing so might cause a leak) until after the facts were leaked to the media in February 2010, available at www.fca.org.uk/publication/final-notices/fsa-pru-plc.pdf.

47 LR 7.2.1 R, Listing Principle 2.

it would reasonably expect notice), listed companies and their directors should expect to have to notify the FCA of potentially significant investigations under these obligations.

None of the mandatory reporting obligations described above exists in a vacuum. The FCA in particular collaborates closely with other enforcement authorities within the United Kingdom and internationally. The FCA reiterated its commitment to information sharing and collaboration in its most recent annual report:

> *We continue to collaborate domestically and internationally with law enforcement agencies, the Government and other regulators to prevent financial crime. In particular, we are helping to develop and strengthen public and private sector partnership working to support the Government's economic crime reform programme. We also continue to contribute to the Government's Joint Fraud Taskforce.*[48]

Indeed, notwithstanding its ability to prosecute criminal offences, there have been several examples in recent years of cases in which it has supplied information to and otherwise coordinated its action with other authorities, including, notably, the SFO.[49]

The remainder of this chapter will consider self-reporting in relation to the SFO and, to the extent relevant, the FCA, in relation to financial crime issues.

Voluntary self-reporting to the SFO 3.5

The SFO's decision to prosecute a corporate body will be governed by a combination of the 'Full Code Test' in the Code for Crown Prosecutors,[50] the Guidance on Corporate Prosecutions,[51] and (in relevant cases) the Joint Prosecution Guidance of the Director of the SFO and the Director of Public Prosecutions on the Bribery Act 2010 (the Joint UKBA Guidance).[52]

The SFO will prosecute if there is a realistic prospect of conviction on the evidence, and it is in the public interest to do so. The fact that a corporate has reported itself will be a relevant consideration to the extent set out in the Guidance

48 FCA Annual Report and Accounts 2017/2018, at p. 24.

49 By way of recent example, the FCA did not impose a financial penalty on Tesco plc or Tesco Stores in early 2017 for engaging in market abuse, partly because Tesco Stores had entered into a DPA with the SFO, pursuant to which it would pay £128.9925 million. The FCA explained that it had also taken into account 'the exemplary co-operative approach' taken by Tesco plc and Tesco Stores with both the FCA and the SFO. See the FCA Final Notice, available at www.fca.org.uk/publication/final-notices/tesco-2017.pdf.

50 The Code for Crown Prosecutors, available at www.cps.gov.uk/publication/code-crown-prosecutors.

51 The joint guidance issued by the Director of Public Prosecutions, the Director of the Serious Fraud Office and the Director of the Revenue and Customs Prosecutions Office Guidance on Corporate Prosecutions, available at www.sfo.gov.uk/?wpdmdl=1457.

52 Bribery Act 2010: Joint Prosecution Guidance of The Director of the Serious Fraud Office and The Director of Public Prosecutions, 30 March 2011, available at www.sfo.gov.uk/?wpdmdl=1456.

on Corporate Prosecutions. That Guidance explains that, for a self-report to be a public interest factor tending against prosecution, it must form part of a 'genuinely proactive approach adopted by the corporate management team when the offending is brought to their notice.'[53] The SFO has stated expressly that self-reporting is no guarantee that a prosecution will not follow, and that each case will turn on its own facts.[54]

In appropriate cases the SFO may use its powers under proceeds of crime legislation as an alternative (or in addition) to prosecution.[55] If the SFO uses those powers, it will publish its reasons, the details of the illegal conduct and the details of the disposal.

3.5.1 Advantages of self-reporting

3.5.1.1 Co-operation credit

Most corporates will consider that the primary advantage of making a voluntary self-report is co-operation credit, particularly if the corporate is seeking a DPA. Speaking in June 2018, Camilla de Silva, the SFO's Joint Head of Bribery and Corruption, said: 'The SFO will only invite a company to enter into an agreement to defer prosecution where the company has genuinely co-operated with the SFO.'[56] This statement reflects the DPA Code, which lists co-operation as an additional public interest factor tending against prosecution.[57] As noted earlier, the DPA Code is clear that the co-operation has to be 'genuinely proactive' and lists as examples of co-operative behaviour 'identifying relevant witnesses, disclosing their accounts and the documents shown to them … [and] where practicable it will involve making the witnesses available for interview when requested.'[58]

The Guidance on Corporate Prosecutions also lists co-operation as a factor tending against prosecution, but instructs prosecutors to 'establish whether sufficient information about the operation of the company in its entirety has been supplied in order to assess whether the company has been proactively compliant' before taking co-operation into account as a factor, and stresses that '[t]his will include making witnesses available and disclosure of the details of any internal investigation.'[59]

53 Guidance on Corporate Prosecutions, para. 32 ('Additional public interest factors against prosecution').

54 SFO's statement of policy and revised guidance on corporate self-reporting, October 2012.

55 See the Attorney General's Guidance for prosecutors and investigators on their asset recovery powers under s.2A of the Proceeds of Crime Act 2002, available at www.gov.uk/guidance/asset-recovery-powers-for-prosecutors-guidance-and-background-note-2009.

56 Camilla de Silva, SFO Joint Head of Bribery and Corruption, speech at the Herbert Smith Freehills Corporate Crime Conference 2018, available at www.sfo.gov.uk/2018/06/21/corporate-criminal-liability-ai-and-dpas/.

57 Para. 2.8.2(i).

58 Ibid.

59 Guidance on Corporate Prosecutions, p. 8.

In approving DPAs between the SFO and each of Standard Bank, XYZ Ltd[60] and Rolls-Royce, Sir Brian Leveson, President of the Queen's Bench Division, spoke approvingly of the co-operative stance adopted by each of those firms.

Even if a corporate reports at an early stage and takes every step to co-operate with the SFO, it may still not be considered eligible for a DPA because other factors ward against it, for example where the behaviour in question has caused a significant level of harm to victims, or a substantial adverse impact to the integrity or confidence of markets.[61]

Following conviction or a guilty plea, a corporate is still likely to receive some benefit from its co-operation credit when it comes to sentencing. The Sentencing Council's Definitive Guideline sets out a multi-step process to assist courts in determining the appropriate fine. The first step is to establish the harm caused by the offending. For example, for a bribery offence, the starting point for the calculation is the 'harm figure' – the gross profit from the contract obtained. Once a harm figure has been determined, the court has to establish the 'culpability' factor by reference to a scale in the Definitive Guideline (from 'A' for high culpability down to 'C' for lesser culpability). Each level of culpability has attached to it a range of multipliers to apply to the harm figure. For instance, culpability level 'A' has a multiplier range of 250 per cent to 400 per cent. In determining exactly which multiplier to apply, the court must take into account many factors. Notably, co-operation with the investigation is listed in the Definitive Guideline as a factor that will tend to reduce the culpability multiplier.

Arguably, corporates in the regulated sector have less scope for truly voluntary self-reporting because the requirement in Principle 11 of the FCA's Principles of Business require a regulated firm to 'disclose to the FCA appropriately anything relating to the firm of which that regulator would reasonably expect notice.'[62] The FCA sets out in its Decision Procedure and Penalties Manual (DEPP) a non-exhaustive list of factors it will consider when deciding to issue a financial penalty or public censure. Included on the list of factors is 'how quickly, effectively and completely the person brought the breach to the attention of the FCA or another relevant regulatory authority'.[63] If the FCA does choose to take action against a firm, DEPP includes provisions for determining the appropriate level of financial penalty, which operate similarly to the Sentencing Council's Definitive Guideline. DEPP states that a factor to consider when deciding whether to increase or decrease any fine is 'the conduct of the firm in bringing (or failing to bring) quickly, effectively and completely the breach to the FCA's attention'.[64]

60 *Serious Fraud Office v. XYZ Limited* (Case No: U20150856), available at www.sfo.gov.uk/download/xyz-final-redacted/?wpdmdl=13285.

61 DPA Code, para 2.8.1 (vii)

62 PRIN 2.1.1 R. An equivalent obligation to notify the PRA is set out in Fundamental Rule 7.

63 DEPP 6.2.1 (2)(a)

64 DEPP 6.5A.3 (2)(a)

3.5.1.2 Demonstrating culture and the strength of systems and controls

As noted earlier, the UK government and regulatory and enforcement bodies continue to be concerned with corporate culture. Effective self-reporting will clearly indicate a good corporate culture. Firms that have taken the necessary steps to institute a good culture supported by robust systems and controls will expect that any matters involving wrongdoing are quickly reported internally via its whistleblowing procedures and escalated and reported to the relevant authorities, as appropriate.

Conversely, for firms in the regulated sector, the failure to identify and self-report wrongdoing could indicate that its systems and controls are inadequate. The FCA Handbook states that a regulated firm:

> *must establish, implement and maintain adequate policies and procedures sufficient to ensure compliance of the firm including its managers, employees and appointed representatives (or where applicable, tied agents) with its obligations under the regulatory system and for countering the risk that the firm might be used to further financial crime.*[65]

There are a number of examples of the FCA taking enforcement action in recent years against regulated firms for having inadequate systems and controls.[66]

3.5.1.3 Information control

Firms often think that choosing to self-report will enable them to retain control over the information that they disclose. In practice, however, the SFO and FCA's insistence on effective and complete self-reporting means that firms will have to provide as complete an account as possible of the wrongdoing concerned, and hand over any investigative work-product already created. Public companies will also have to give careful consideration to their obligations to make market announcements.

See Chapter 37 on publicity and chapter 39 on protecting corporate reputation

Given the stance adopted by the FCA and SFO, perhaps the only true benefit to self-reporting is that the corporate has some control over the timetable (as compared, for instance, with a dawn raid) and is therefore able (having taken advice on any market abuse risks) to notify key stakeholders of the self-report and to prepare an appropriate media strategy.

3.5.2 Risks of self-reporting

For many companies, the primary driver behind self-reporting is the opportunity to secure a DPA. It should be clear from the analysis above, however, that self-reporting in the United Kingdom does not guarantee a DPA or even necessarily leniency in sentencing (depending on whether other public interest factors are at play). It is also clear that a firm may only be able to gauge its prospects of

65 SYSC 6.1.1R

66 For example, the FCA's fine of Bank of Beirut, discussed above.

success relatively late in a process during which the firm will usually have provided a significant amount of information, documents, investigation reports and even witnesses for interview.[67]

Perversely, therefore, a firm's efforts to secure maximum co-operation credit may actually put it in a worse position than it began in, especially if it has provided information or evidence about an issue or facts that may not otherwise have come to light or been obtainable by the authority. There is an ever-present risk that by the time the corporate has visibility as to the direction in which the SFO or the court is leaning, it may have assisted prosecutors in building a strong case against itself, often at significant financial and other cost, for little or no benefit. Corporates therefore need to evaluate the risks and costs inherent in making self-reports very carefully. Some key risks and practical considerations are set out below.

Interest and potential investigation in other jurisdictions 3.5.2.1

There is always a risk of contagion: it is the nature of complex bribery, fraud, and corruption that it crosses borders and can implicate authorities in multiple jurisdictions. Self-reporting to a regulator in one jurisdiction may draw the attention of other regulators, domestically or abroad. Matters are frequently complicated because the benefits and risks of reporting are seldom consistent or certain across jurisdictions, and authorities in different countries seldom have the same procedures, techniques or demands in conducting their investigations and taking enforcement action.

Increasingly, regulators are sharing information and seeking to collaborate in enforcement actions. As long ago as 2010, the US Department of Justice (DOJ) and the SFO worked together in investigating BAE Systems plc,[68] and such co-operation has since become routine. International co-operation often goes beyond formal mutual legal assistance requests, to encompass informal intelligence sharing (sometimes in advance of formal investigation in any jurisdiction), coordination or division of responsibility or issues for enforcement, and even formal programmes by which to enhance understanding and assist with capacity or resourcing. At a symposium in September 2016, Sir David Green QC, then Director of the SFO, explained that: 'All [SFO] cases have a significant international dimension. We have invested real effort in building strong co-operative relations with foreign agencies in key financial centres across the globe. This involves secondments, rolling discussions, exchange of information and coordinated activity.'[69]

67 In the United Kingdom, court approval is required for a DPA, which means that even if the SFO recommends a DPA after extensive co-operation, the court may reject it.

68 See the DOJ's expression of gratitude to the SFO for its assistance in its press release, March 2010, available at www.justice.gov/opa/pr/bae-systems-plc-pleads-guilty-and-ordered-pay-400-million-criminal-fine.

69 Sir David Green QC, former Director of the SFO, speech at the Cambridge Symposium on Economic Crime 2016 at Jesus College, Cambridge, 5 September 2016, available at

While there are legal limits to the extent of information sharing and collaboration between authorities, firms need to be strategic in their conduct across all countries. It is important to take heed of cases such as *United States v. Allen*,[70] in which the US Court of Appeals for the Second Circuit held that the prohibition against the use (and derivative use) of a defendant's compelled testimony will apply even where the testimony had been compelled by a foreign authority, such as the FCA. The DOJ therefore needs to ensure that it avoids its own investigation becoming 'tainted' by compelled testimony when it is collaborating or exchanging information with other countries' authorities – a particular concern as regards the United Kingdom, where the provision of evidence or interviews is commonly compelled. This also means that there is a risk that, by providing to the DOJ reports or information derived from compelled testimony (even by inadvertence, as part of routine updates or reports on progress or developments in parallel investigations), a firm may risk negating any co-operation credit that they might have established in other ways.

3.5.2.2 Privilege issues and authorities' involvement in the internal investigation

Legal advice in relation to internal investigations

A key concern for all firms considering and investigating suspicions or allegations of wrongdoing is to establish clearly at the outset that its board, or any committee with oversight of internal investigations, is authorised to seek and receive legal advice in relation to the investigation to ensure that updates to these bodies and related documents will be protected by legal professional privilege. This authorisation is important because English law on the question of who is the 'client' for the purposes of legal professional privilege remains rooted in the House of Lords decision in *Three Rivers No. 5*, such that the 'client' was not the corporation itself but only those officers and employees of the corporation who were 'authorised' to communicate with the corporation's lawyers.[71] In its September 2018 judgment in the *ENRC* case, the Court of Appeal made a number of interesting comments on the latter rule. The court noted in particular that this rule was more appropriate for the 19th century than the 21st century, that its application may result in a disadvantage to modern multinational corporations (where the information required to obtain legal advice would often be in the hands of people not charged with obtaining it),[72] and that it would have been in favour of departing from *Three Rivers No. 5* if it had been open to it to do so. Significantly, however, those comments were *obiter* on the basis that only the Supreme Court can reverse or depart from the decision in *Three Rivers No. 5*.

---

www.sfo.gov.uk/2016/09/05/cambridge-symposium-2016/.

70 *United States v. Allen*, No. 16-898 (2d Cir. 2017).

71 *Three Rivers District Council and Others v. The Governor and Company of the Bank of England* [2003] EWCA Civ 474 (*Three Rivers No. 5*).

72 Especially as compared with smaller corporations, which the Court noted was the typical size and structure of the corporations involved in the 19th century cases considered in *Three Rivers No. 5*.

Material generated during internal investigations

A significant concern in the context of internal investigations centres on the material generated during an internal investigation, including any investigation work and work-product that may have preceded the self-report. This material typically includes interview notes and summaries of key documents and issues.

The UK authorities are adamant that to self-report in any meaningful sense, firms must provide them with sufficiently detailed information about the wrongdoing. The SFO states: 'All supporting evidence including, but not limited to emails, banking evidence and witness accounts, must be provided to the SFO's Intelligence Unit as part of the self-reporting process.'[73] In practice, the SFO's Intelligence Unit will not always want every email that has been identified during an internal investigation. A key question for a company considering a self-report is thus whether or not it is prepared to disclose its full interview notes; the privileged status of which has been subject to heated debate in the UK in recent years.

By way of context, a good starting point is the April 2018 decision of the High Court in *R (AL) v. Serious Fraud Office*.[74] The case arose out of the SFO's investigation of a company anonymised as 'XYZ Limited', during which the SFO had accepted 'oral proffers' of the first account interviews that had been conducted by another anonymised firm, ABC LLP, the external firm engaged by XYZ to conduct an internal investigation. Having entered into a DPA with the corporate entity in 2016, the SFO turned its attention to a number of individuals, including AL, whose defence team repeatedly asked the SFO to obtain the complete notes of AL's first account interview with ABC LLP. The SFO asked XYZ to disclose the interview notes but ultimately accepted ABC LLP's refusal to do so on the basis that they were privileged. Despite declining to exercise its judicial review jurisdiction (as it felt that disclosure disputes were best dealt with in the Crown Court), the High Court took the unusual step of stating that if it had chosen to exercise its judicial review jurisdiction, it would have found for AL. In *obiter* comments, Mr Justice Green, giving the judgment of the court, was critical of the SFO's acceptance of ABC LLP's claims that the current law of privilege was unclear pending the (then undecided) *ENRC* appeal. In Green J's view, the 'law as it stands today is settled. Privilege does not apply to interview notes.' In support of that statement, Green J cited the decision in *Three Rivers No.6* and concluded that the SFO had 'erred' as it had 'simply accepted the assertion of privilege made by ABC LLP even though it is the SFO's own case that privilege does not apply and the SFO's position is supported by current case law' and that the SFO had therefore not fulfilled its duty to 'assess claims of privilege properly and not cursorily and superficially.'

The thrust of the *XYZ* decision appeared to be in line with Mrs Justice Andrews' first instance decision in *ENRC*. However, as noted already, a few months later, in September 2018, the Court of Appeal overturned her decision and handed

73 www.sfo.gov.uk/publications/guidance-policy-and-protocols/corporate-self-reporting/.

74 *R (AL) v. Serious Fraud Office* [2018] EWHC 856 (Admin).

down a judgment that does not sit comfortably with *XYZ*.[75] The Court of Appeal rejected Mrs Justice Andrews' decision that litigation privilege will only apply in criminal or regulatory proceedings at the point where a company had uncovered evidence of wrongdoing that meant that a criminal prosecution or enforcement again was likely to follow. The Court of Appeal reiterated the established principle that litigation privilege may be claimed over documents that had been created at a time when litigation was in 'reasonable contemplation' and for the purposes of that litigation. Such determinations are necessarily fact-specific. Notably, the Court of Appeal held that, on the *ENRC* facts, the interview notes generated during the course of its internal investigation were subject to litigation privilege on the basis that (1) they had been brought into existence after ENRC's external counsel (who were conducting an investigation) had advised that there was a real and serious risk of law enforcement and regulatory intervention, including criminal prosecution, and (2) the notes were, in the Court of Appeal's estimation, drafted to assist any future defence of such proceedings.

The SFO has maintained for some time that firms wishing to co-operate with the SFO need to give serious consideration to waiving privilege, and that it is ready to challenge any overly broad claims to privilege. Speaking in June 2018, Camilla de Silva, the SFO's Joint Head of Bribery and Corruption, struck a more nuanced tone and urged firms to enter into a dialogue with the SFO 'about the basis and scope of any claim to [privilege] and the shape of its internal investigation and timing of interviews. Such dialogue makes the process eminently more efficient for all concerned. We are not interested in material that is genuinely privileged.'[76]

Following the Court of Appeal judgment in *ENRC*, it is open to any company that has conducted an initial investigation and received clear legal advice that the information unearthed may amount to a criminal offence or a regulatory failing[77] to claim that any material generated in the course of that initial internal investigation will be subject to litigation privilege. If that is the case, then, by its own admission, the SFO will not seek such material because it would be, in the words of Camilla de Silva, 'genuinely privileged'.[78]

In practice – and despite the SFO's invitation to a 'dialogue' – companies are likely to come under pressure from the SFO to disclose interview transcripts (given the judgment in *XYZ*, it is highly unlikely that summaries will be acceptable) as part of the self-reporting process. The Court of Appeal's judgment in *ENRC* made it clear that nothing it said about privilege should adversely impact

75 *Director of the Serious Fraud Office v. Eurasian Natural Resources Limited (Law Society intervening)* [2018] EWCA Civ 2006.

76 Camilla de Silva (Joint Head of Bribery and Corruption, SFO), speech at Herbert Smith Freehills Corporate Crime Conference, 21 June 2018, available at www.sfo.gov.uk/2018/06/21/corporate-criminal-liability-ai-and-dpas/.

77 Indeed it is not clear on what other basis such a company would self-report.

78 Camilla de Silva (Joint Head of Bribery and Corruption, SFO), speech at Herbert Smith Freehills Corporate Crime Conference, 21 June 2018, available at www.sfo.gov.uk/2018/06/21/corporate-criminal-liability-ai-and-dpas/.

the DPA regime and, furthermore, that maintaining claims to privilege may adversely affect prospects of obtaining a DPA.[79] The Court also noted: 'Had the court been asked to approve a DPA between ENRC and the SFO, the company's failure to make good on its promises to be full and frank would undoubtedly have counted against it.'[80]

In deciding whether to acquiesce in providing witness accounts, a company will need clear advice as to the risks involved in waiving litigation privilege, even on a limited basis, at such an early stage, particularly before it is clear whether a settled resolution is likely and especially where multiple authorities may be involved. The shield of litigation privilege is clearly of paramount importance to any company defending criminal or regulatory enforcement proceedings where, very commonly, civil litigants will be waiting in the wings.

See Chapter 35 on privilege

Involvement of authorities in internal investigation

Having ensured that the internal investigation is suitably established for the purposes of privilege, another critical concern for any corporate will be the likelihood of potential involvement in, or loss of control of the scope, timing and conduct of, its own investigation into the matters concerned. The former Director of the SFO, Sir David Green QC, made it clear that the SFO might specify particular areas or issues to be included in the firm's investigation, how the investigation ought to be conducted in relation to particular issues or persons, and to provide updates to the SFO, usually within agreed time frames.[81] Sir David Green QC explained the SFO's influence or imposition into internal investigations as being necessary to avoid 'churning up the crime scene' and compromising the SFO's own investigation.

Similar sentiment (if not criticism) was expressed by Mark Steward, the FCA's Head of Enforcement, who referred to 'the crime scene being trampled over.' While he was Director of the SFO, in June 2016, Sir David Green QC also suggested that the SFO's influence or control over internal investigations might usefully be formalised so that it would be akin to the FCA's use of 'skilled persons investigations' (also known as section 166 investigations) of regulated firms.[82] The latter involves the FCA requiring the firm to engage (and pay for) an independent 'skilled person' (typically a law firm or forensic accountants, depending on the subject matter), approved by the FCA, to investigate and report to the FCA on areas or issues of concern specified by the FCA.[83]

---

79 *Director of the Serious Fraud Office v. Eurasian Natural Resources Limited (Law Society intervening)* [2018] EWCA Civ 2006, at paras. 115-117.

80 Ibid.

81 Sir David Green QC, former SFO Director, speech at GIR Roundtable Discussion on Corporate Internal Investigations, 27 July 2015.

82 Sir David Green QC, former SFO Director, speech at a Q&A session organised by The Fraud Lawyers Association and the European Fraud and Compliance Lawyers Association in London, 17 June 2016. (See http://globalinvestigationsreview.com/article/1036163/david-green-sfo-can-learn-from-fca-approach-to-internal-investigations).

83 s.166, Financial Services and Markets Act 2000.

This approach and degree of involvement in internal investigations by UK authorities is far greater than is the case in the United States, where authorities allow (if not encourage) firms to conduct internal investigations without much intrusion, on the basis that they can provide direction where necessary and that the firms will share the output and provide updates at agreed points.

3.5.2.3 Impact on witness interviews

In addition to influencing the scope of an internal investigation, UK authorities may also influence a firm's ability to conduct witness interviews after self-reporting, whether by prohibiting the firm from conducting interviews with certain individuals, or by requiring the firm to delay such interviews until after the authority has interviewed the individuals concerned. In approving the various DPAs to date, Sir Brian Leveson highlighted the assistance provided by firms to the SFO in relation to witness interviews.[84] In relation to the Rolls-Royce DPA, for example, Leveson P noted the high levels of co-operation from Rolls-Royce as regards its witnesses, pointing out that when the SFO commenced its own investigation, not only did it have access to Rolls-Royce's internal investigations and interview notes (Rolls-Royce having made a limited waiver of its claims for legal professional privilege over them), but Rolls-Royce also deferred certain interviews until after the SFO had completed interviews of them.

3.5.2.4 Scrutiny, including potential monitoring obligations

A DPA or settled resolution will always include a number of non-financial terms and conditions. While these will often be fact-dependent and tailored to the wrongdoing involved and the state of the firm's remediation at the point of agreement, the DPA Code includes a list of terms that may be agreed as part of a DPA, including requirements for putting in place a robust compliance or monitoring programme, or both, which may include the appointment of an independent monitor.[85]

While the imposition of a corporate monitor is not compulsory, the DPA Code provides lengthy guidance as to monitors' roles and appointment, and notes that the imposition of a monitor 'must always be fair, reasonable and proportionate.'[86] Where a monitor is required, the costs to the firm can be significant. Not only will the firm have to pay the monitor's fees, but it will also have to pay the costs associated with the selection, appointment and reasonable 'monitoring' costs of the prosecutor during the monitoring period. There are indirect or non-financial costs, too. The monitor must be given complete access to all relevant aspects of the firm's business and the firm will need to allocate resources to ensure that the monitor is provided with the information and co-operation required and to

84 It is unclear whether high levels of co-operation also influenced Sir Brian Leveson's view of Tesco, because the DPA judgment remains subject to reporting restrictions at the time of writing.

85 DPA Code, para. 7.10(iii).

86 DPA Code, paras. 7.11 to 7.22.

establish the systems and controls necessary to effect the remediation agreed with the regulator.

These costs have attracted a degree of judicial and corporate scepticism and criticism in the United Kingdom and the United States. In the *Innospec* case,[87] for example – where a UK subsidiary agreed with the SFO to plead guilty to corruption charges as part of the first 'global settlement' relating to similar conduct prosecuted by US authorities against its parent entity, and the first joint US–UK monitor was appointed – District Judge Huvelle gave a colourful criticism of the role of monitors, saying: 'It's an outrage that people get US$50m to be a monitor . . . . It's a boondoggle for some of these people.'[88] Lord Justice Thomas (the judge in the English case) chose instead to characterise the imposition of a monitor as 'an expensive form of 'probation order', which he considered 'unnecessary for a company which will also be audited by auditors well aware of the past conduct and whose directors will be well aware of the penal consequences of any similar criminal conduct.'[89]

See Chapter 32 on monitorships

Such criticism notwithstanding, the appointment of a monitor is likely to feature regularly in DPAs in the future, as had previously been the case in civil recovery orders[90] or criminal court orders,[91] which were the SFO's preferred means of imposing monitorships before the introduction of the DPA regime provided it with a statutory basis for doing so. Indeed, in early 2017, the then SFO General Counsel, Alun Milford, explained that 'an integral part of any DPA discussion is the question of corporate reform. As such, monitors aren't something the SFO has set its face against, but as we've seen from the judgments, there are different ways of achieving that sort of process.'[92]

The four DPAs reached to date clearly demonstrate this flexibility in the SFO's approach to monitorships. While the SFO required Standard Bank to commission and submit to an independent review of its existing compliance programme by PwC, and to implement PwC's recommendations (perhaps less onerous than a

87 See https://www.sfo.gov.uk/cases/innospec-ltd/.

88 Christopher M. Matthews, 'Judge Blasts Compliance Monitors at Innospec Plea Hearing,' (18 March 2010), https://globalinvestigationsreview.com/article/jac/1019218/judge-blasts-compliance-monitors-at-innospec-plea-hearing.

89 *R v. Innospec Ltd* [2010] Lloyd's Rep. F.C. 462, at para. 49.

90 For example, the civil recovery orders between the SFO and Balfour Beatty plc in October 2008; Macmillan Publishers Ltd in July 2011; and Oxford Publishing Ltd in July 2012. See www.sfo.gov.uk/press-room/press-release-archive/press-releases2008/balfour-beatty-plc.aspx; www.sfo.gov.uk/press-room/latest-press-releases/press-releases2011/action-on-macmillan-publishers-limited.aspx; and www.sfo.gov.uk/2012/07/03/oxford-publishing-ltd-pay-almost-1-9-million-settlement-admitting-unlawful-conduct-east-african-operations/ respectively.

91 For example, in relation to Mabey & Johnson in September 2009, as well as Innospec Ltd in March 2010. See https://star.worldbank.org/corruption-cases/sites/corruption-cases/files/documents/arw/Mabey_Johnson_UK_SFO_Press_Release_Sentencing_Sep_25_2009.pdf and https://www.sfo.gov.uk/cases/innospec-ltd/, respectively.

92 Alun Milford, then SFO General Counsel, speech at GIR Live London in April 2017, www.globalinvestigationsreview.com/article/1144199/gir-live-london-dpas-the-new-normal.

monitorship),[93] it did not require an independent monitor in its DPA with XYZ, opting instead for a form of 'self-monitoring' for the first time, with the company's Chief Compliance Officer being required to report to the SFO on its anti-bribery and corruption policies and their implementation within one year, and annually for the duration of the DPA.[94] The approach in the Rolls-Royce DPA was different again – some four years before the DPA was agreed, Rolls-Royce had appointed Lord Gold to conduct an independent review of (and report on and make and oversee the implementation of recommendations regarding) the company's anti-bribery and corruption compliance infrastructure. In approving the DPA, which required the continuation of Lord Gold's work and the production by him of a final report to the SFO after implementation, Leveson P described Lord Gold as a 'quasi monitor'.[95] Finally, while the details of the Tesco Stores DPA have not been made public owing to ongoing reporting restrictions, it is clear from the FCA's final notice in relation to Tesco that the DPA requires the appointment of Deloitte as an independent monitor to conduct a review, provide a report and implement recommendations in relation to a number of specific areas of concern.[96]

The current Director of the SFO, Lisa Osofsky, is very familiar with monitorships, and, presumably, their benefits, having led the DOJ-imposed money laundering and sanctions monitorship of HSBC Bank as part of its December 2012 DPA.[97] It is likely that she will be in favour of increasing their use, even if implemented in the United Kingdom in a 'quasi-monitor' manner, as described above.

3.6 Practical considerations, step by step

3.6.1 Reaching the decision

Sometimes the decision to self-report may be clear-cut or the only sensible option (particularly where a whistleblower has made serious allegations). More often, however, it will be necessary to conduct an internal investigation to test the information underlying the concerns and to ensure that any report made to authorities is as complete and accurate as possible. How long this takes will depend on a

93 PwC was given the role of producing a report on Standard Bank's anti-bribery and corruption systems, controls, policies and procedures, the recommendations in respect of which the bank was then obliged to implement (to PwC's satisfaction) and within a year of that report. *Serious Fraud Office v. Standard Bank plc*, available at www.judiciary.uk/wp-content/uploads/2015/11/sfo-v-standard-bank_Final_1.pdf.

94 *Serious Fraud Office v. XYZ Limited* (Case No: U20150856), available at www.sfo.gov.uk/download/xyz-final-redacted/?wpdmdl=13285.

95 *Serious Fraud Office v. Rolls-Royce plc and Rolls-Royce Energy Systems Inc.* (Case No: U20170036), at para. 43, available at www.judiciary.uk/wp-content/uploads/2017/01/sfo-v-rolls-royce.pdf.

96 FCA Final Notice, Tesco plc and Tesco Stores Ltd (28 March 2017), at para. 4.10, available at www.fca.org.uk/publication/final-notices/tesco-2017.pdf.

97 *United States of America v. HSBC USA N.A. and HSBC Holdings plc* (Cr. No 12-763), 10 December 2012, available at www.sec.gov/Archives/edgar/data/83246/000119312512499980/d453978dex101.htm.

range of factors, including where and when the alleged conduct took place, how many individuals are alleged to have been involved, and the availability of relevant documents and individuals for interview. It is critical to ensure that the decision to self-report is taken by directors who are independent of the underlying events or issues, and that the decision is taken in conjunction with appropriate legal advisers and is suitably documented. One of the first steps in this process must be to immediately preserve all relevant documents, and to ensure that the investigation is carefully scoped and proceeds expeditiously.

There is no one 'correct' approach to investigating disclosures, allegations or whistleblowers' reports. What is necessary and appropriate when following up on a disclosure will vary significantly depending on factors including the jurisdictions, personnel and business areas implicated. Several key principles may, however, help corporates to respond decisively and consistently, and to protect their interests when they receive disclosures of alleged misconduct.

Clear communication 3.6.1.1

Clear communication underpins a successful response to a disclosure, particularly where a whistleblower is involved. Carefully delineated channels must be in place to enable staff receiving disclosures (whether through a dedicated hotline or other less formal channels) to escalate them quickly and to the right people. In particular, policies and procedures should name a designated member of the senior management of the corporate (probably in its legal or compliance function) who should have a direct reporting line to the board or audit committee. Provision should also be made for how to deal with disclosures naming members of the board or the designated senior manager responsible for handling whistleblowing reports.

Even, dispassionate investigation 3.6.1.2

Not every disclosure or whistleblowing report will justify the expenditure of time and resources on comprehensive internal investigations or involve reports to authorities. It is clearly important to guard against complacency or undue cynicism when evaluating issues, or reports by whistleblowers. Level-headedness and even-handedness pay dividends. Allegations should be viewed dispassionately and, where possible, empirically tested by reference to readily available documents, or by means of interviews with relevant individuals (who should be apprised of the importance of confidentiality).

Clear protocol and structure 3.6.1.3

Where initial enquiries show disclosures or allegations to be well founded, firms' responses should be guided by clear protocols. These should set out the circumstances in which external legal counsel should be instructed (which may well be advisable at an early stage to ensure the preservation of any applicable privilege, as discussed above). They may also deal with how and when other external specialist resources (such as forensic IT consultants or accountants) may be required and

instructed, and how such selection and instruction should occur (which should involve instruction by legal counsel, again to maintain privilege as far as possible).

Appropriate senior individuals within the organisation's human resources function should also be identified to coordinate its approach towards the whistleblower (if there is one) and to deal with any disciplinary action in relation to other employees that may be necessary. The FCA and PRA's new whistleblowing rules require some regulated firms to have enhanced their existing whistleblowing procedures, including the appointment of a whistleblowers' champion since 7 March 2016.

3.6.1.4 Senior management involvement

Once notified of the fact of serious issues or allegations made in a whistleblowing report, it is paramount that the firm's senior management is kept apprised of the progress of enquiries. Once evidence emerges that establishes that complaints appear to be well founded, the window within which firms may receive maximum credit for self-reporting actual or suspected misconduct to the appropriate authorities is relatively short.

3.6.2 Once the decision has been made

Where corporates determine that it is necessary to make a report to authorities, the main challenges facing them are to demonstrate that any self-report (1) has been made in a timely fashion, (2) has been made genuinely voluntarily (i.e., not simply because public disclosure or a regulatory or criminal investigation is imminent), and (3) contains enough information to enable the authority to make a meaningful and informed assessment as to how to proceed.

A firm should aim to be the first to self-report to maximise credit. Generally, authorities will acknowledge that internal investigations into complex matters that may have occurred many years ago take time and give credit for initial notifications based on certain key facts having been established, with an indication that a fuller report will follow the completion of a more thorough investigation.

3.6.3 Documenting the decision

Regardless of whether the decision is to report or not, it is important for the firm's board to ensure that the issue or allegation is investigated, properly considered with appropriate advice and properly documented. The board must also ensure that appropriate remediation steps are taken, not only to mitigate the risks of criminal, regulatory and civil action, but also to demonstrate the firm's cultural responsiveness and change.

Firms must be careful in documenting the steps taken in reaching their decisions, so as to preserve privilege as far as possible and with regard to the likelihood of such documentation subsequently becoming subjected to external scrutiny or publicity, the latter being particularly likely where the firm is a public company.

Nature of approach to the authorities 3.6.4

Self-reports to authorities are not generally made in a set format, but instead usually take the form of a preliminary notification (typically verbal) soon after receiving notice of potential wrongdoing followed by a more detailed written or oral report after further investigation. The nature and scope of disclosures to authorities vary significantly between, and often within, jurisdictions and may depend on whether the issues cross borders. Specifically, whether it is possible to preserve any applicable privileges by providing reports orally rather than in writing will depend on the circumstances.

Timing of approach (DPAs) – what is a reasonable time 3.6.5

The SFO requires self-reporting to be made within a reasonable time of an organisation becoming aware of the issue, and certainly before the SFO becomes aware of it by some other means, and before the firm is threatened with investigation or action by other bodies or authorities, including threatened leaks to the press.

Beyond the impact it may have on securing a DPA, the timing of a self-report will also have a bearing on the decision to prosecute and the level of any potential penalties. The Sentencing Council Definitive Guideline states that concealing an offence may result in the imposition of heavier penalties. The Guidance on Corporate Prosecutions expressly states that failing to report within a reasonable time will be a 'public interest' factor weighing in favour of prosecution, whereas a 'genuinely proactive approach involving self-reporting and remedial action' will be a factor tending against prosecution.[98]

The SFO's expectations as regards timing has become somewhat more realistic over time. While SFO Director, Sir David Green QC, stated in 2013 that '[c]ommon sense suggests that an initial report of suspected criminality should be made to the SFO as soon as it is discovered.'[99] Some three years later (in March 2016), the then SFO General Counsel, Alun Milford, said that it is reasonable for a firm to undertake an initial assessment before doing so,[100] a view that was echoed three months later by Matthew Wagstaff, SFO Joint Head of Bribery and Corruption, when he said that it is unrealistic to expect a firm to pick up the telephone to the SFO at the very moment it first becomes aware of potential wrongdoing.[101] More recently, in March 2018, Camilla de Silva, the SFO Joint Head of Bribery and Corruption, commented that the SFO 'will not be offering

98 Bribery Act 2010: Joint Prosecution Guidance of The Director of the Serious Fraud Office and The Director of Public Prosecutions (30 March 2011).

99 Sir David Green QC, former SFO Director, speech at the Pinsent Masons and Legal Week Regulatory Reform and Enforcement Conference, 24 October 2013, available at www.sfo.gov.uk/2013/10/24/pinsent-masons-legal-week-regulatory-reform-enforcement-conference-2/.

100 Alun Milford, then SFO General Counsel, speech at the European Compliance and Ethics Institute, Prague, on 29 March 2016, available at www.sfo.gov.uk/2016/03/29/speech-compliance-professionals/.

101 Matthew Wagstaff (SFO Joint Head of Bribery and Corruption), speech at the 11th Annual Information Management, Investigations Compliance eDiscovery Conference, London, on 18 May 2016, available at www.sfo.gov.uk/2016/05/18/role-remit-sfo/.

DPAs in cases of a late conversion to the joys of co-operating; DPAs are a reward for openness – the sooner you come in, self-report and the more you are open with us, the more you have to be rewarded for.'[102] In August 2018, Lisa Osofsky began her tenure as SFO Director. In speeches to date, she has indicated that the SFO will be open to firms investigating allegations of misconduct before reporting.[103]

The DPA Code states that, in considering whether a self-reporting corporate body has been genuinely proactive, prosecutors will consider whether it has provided 'sufficient information, including making witnesses available and disclosing the details of any internal investigation, about the operation of the corporate body in its entirety.'[104] In practice, however, where a self-report needs to be made quickly, it may make sense to make a report without all of this material and to provide further material as and when available, or in line with a timetable agreed with the SFO.

3.6.6 Managing other regulators

Whatever format is used to report matters to authorities, corporates and their advisers should assume that information provided to one enforcement authority will be passed to others, and that referrals may be made where authorities have parallel jurisdiction over some or all aspects of the corporate's activities. In cases where the SFO does not prosecute a self-reporting corporate, the SFO reserves the right to prosecute the firm for any unreported violations of the law, and may provide information on the reported violation to other bodies (such as foreign police forces or authorities) through the relevant gateway.

The above notwithstanding, corporates should not assume that disclosure to one authority necessarily means that other relevant authorities are aware of the matter – full assessments must be made as to whether it is necessary or appropriate to make separate notifications to other specific authorities (whether in the same jurisdiction or elsewhere) who might expect to be told of the alleged misconduct or of the fact of other investigations by or at the behest of enforcement authorities. The significant fine imposed by the FSA on Goldman Sachs for failing to notify it of a fraud investigation in the United States is particularly instructive in this regard.[105]

102 Camilla de Silva (Joint Head of Bribery and Corruption, SFO), speech at ABC Minds Financial Services conference, 15 March 2018, available at www.sfo.gov.uk/2018/03/16/camilla-de-silva-at-abc-minds-financial-services/.

103 Lisa Osofsy, SFO Director, speech at the American Bar Association's London White Collar Crime conference alongside Sandra Moser (acting chief of the DOJ's Fraud Section), 8 October 2018.

104 DPA Code, available at www.sfo.gov.uk/publications/guidance-policy-and-protocols/corporate-self-reporting/.

105 See above, footnote 46, available at www.fca.org.uk/publication/final-notices/goldman_sachs_int.pdf.

Appendix 1

About the Authors

Amanda Raad
Ropes & Gray International LLP

Amanda N Raad, a US lawyer who is also admitted as a solicitor in England and Wales, serves as co-chair of Ropes & Gray's award-winning global anti-corruption and international risk practice. Amanda has substantial experience negotiating with US regulators on behalf of companies and individuals concerning cross-border matters involving corruption, money laundering and other forms of financial fraud. These matters are often subject to scrutiny by foreign regulators given their multi-jurisdictional nature.

In addition, Amanda proactively works with clients across industries and geographies to identify and mitigate risk. Finally, Amanda advises clients on corporate social responsibility, supply chain compliance and responsible sourcing. Amanda regularly publishes on cross-border issues and is a frequent speaker at conferences, including on sexual misconduct and investigations. Amanda is listed in *GIR*'s Women in Investigations 2018, *Chambers UK*, *The Legal 500 UK*, and *New York Super Lawyers*.

Judith Seddon
Ropes & Gray International LLP

Judith Seddon specialises in all areas of national and international white-collar crime, fraud, corruption, and regulatory and criminal investigations and prosecutions. She has deep experience and expertise in advising corporates, financial institutions and individuals in internal investigations and when facing complex investigations and prosecutions, domestically and cross-border, as suspects and as witnesses. She has worked, and is working on, some of the most complex and high-profile investigations and prosecutions. Judith is consistently ranked as a band 1 leading practitioner by *The Legal 500* and *Chambers*. *The Legal 500* describes her as 'a leading solicitor in the field with excellent judgement and analytical skills'; *Chambers* describes Judith as 'excellent', with one client commenting 'she has such a sensible and strategic approach to really quite complex issues.' *Who's Who Legal* 2018 named Judith 'Business

Crime Lawyer of the Year', and lists her as one of a shortlist of 10 'Thought Leaders'. They describe her as 'one of the most highly regarded investigations lawyers in the United Kingdom, highlighted for her "brilliant" work on behalf of both corporates and individuals'.

Sarah Lambert-Porter

Ropes & Gray International LLP

Sarah Lambert-Porter is a senior associate in Ropes & Gray's litigation and enforcement practice group, based in London.

Sarah's practice focuses primarily on financial crime including bribery and corruption, terrorist financing, money laundering, fraud, and other misconduct and regulatory failings. She has substantial experience advising financial institutions in relation to internal investigations as well as complex cross-border contentious regulatory matters, and criminal investigations and prosecutions. Sarah also advises in relation to the UK's Senior Managers and Certification Regime.

Sarah was previously seconded to a global financial institution to assist with the design and implementation of controls in relation to the Senior Managers and Certification Regime.

Sarah joined Ropes & Gray in 2018 from a magic circle firm in London.

Chris Stott

Ropes & Gray International LLP

Chris Stott is a member of Ropes & Gray's litigation and government enforcement practice group, based in London. Chris focuses his practice on criminal, contentious regulatory and internal investigations.

Chris has over 10 years' experience advising and representing individuals and corporations in connection with investigations and prosecutions by criminal and regulatory enforcement authorities in the United Kingdom and numerous other jurisdictions.

Chris also assists clients with designing and implementing effective compliance and governance arrangements to anticipate and respond to regulatory change.

Chris was previously seconded to a multinational bank to advise the bank as a whole and any senior executives on its Senior Managers and Certification Regime implementation programme.

Chris joined Ropes & Gray in 2018 from a magic circle firm in London.

Matthew Burn

Ropes & Gray International LLP

Matthew Burn is a member of Ropes & Gray's litigation and enforcement practice group, based in London. Matthew's practice focuses on corporate and financial crime defence, contentious regulatory matters and internal investigations. Matthew has extensive experience advising both corporations and individuals facing complex cross-border investigations and prosecutions relating to allegations of bribery and corruption, money laundering, fraud and other types of misconduct or regulatory failings.

Matthew was previously seconded to a global financial institution and a leading professional services firm to assist with internal and regulatory investigations.

Matthew joined Ropes & Gray in 2018 from a magic circle firm in London.

Ropes & Gray International LLP
60 Ludgate Hill
London
EC4M 7AW
United Kingdom
Tel: +44 20 3201 1500
Fax: +44 20 3201 1501
judith.seddon@ropesgray.com
amanda.raad@ropesgray.com
chris.stott@ropesgray.com
sarah.lambert-porter@ropesgray.com
matthew.burn@ropesgray.com

Visit globalinvestigationsreview.com
Follow @giralerts on Twitter
Find us on LinkedIn

ISBN 978-1-912377-34-3