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

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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
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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

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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

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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]

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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.

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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?

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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.

7

Witness Interviews in Internal Investigations: The UK Perspective

Caroline Day and Louise Hodges[1]

Introduction 7.1

Witness interviews are a key part of most corporate investigations. While documentary evidence can provide the underlying facts of a case, it is often the accounts given by witnesses that deliver the context and detail of what has happened. They can provide vital background information, shed light on the motivations of those involved and allow for an individual's credibility to be assessed. However, the timing, preparation, record taking, content and use of the interviews need careful consideration.

Witness interviews can serve a number of purposes in the context of a corporate investigation, including:

- to scope the investigation;
- to understand the facts and issues;
- to understand accountability and defences; and
- to assess the credibility of individuals and their accounts.

Interviews in this context can present particular difficulties because of the myriad employment, criminal, civil and regulatory issues that can arise, and the fact that the interests of the company and the witness are often not aligned. These interviews are typically conducted confidentially and can be premised on a need to maintain legal privilege and the duty of confidence owed between an employer and employee. This can often be at odds with the expectations of some authorities for the company to provide details of the witnesses' accounts. There is often a tension between a company's right to conduct its own enquiries into allegations

1 Caroline Day and Louise Hodges are partners at Kingsley Napley LLP. The authors would like to thank Will Hayes, an associate at Kingsley Napley LLP, for assistance with this chapter.

of wrongdoing, including interviewing its employees, and the suggestion by the authorities that its enquiries could (depending on how they are conducted) be detrimental to a criminal or regulatory investigation. In addition, following recent court judgments, the position surrounding legal privilege in the context of witness interviews has become more complex.

This chapter explores these issues, considers the practices that can be adopted when conducting interviews and highlights some of the benefits and risks of these different approaches. It considers the preparation and formalities that may be required for witness interviews in the United Kingdom, and identifies particular complexities that can arise in global investigations when multiple jurisdictions are involved.

7.2 Types of interviews

Broadly speaking, witness interviews in corporate investigations can be split into two categories: preliminary or scoping interviews, and substantive interviews. Generally, they should be distinguished from any employment or disciplinary interview.

Preliminary or scoping interviews may be appropriate at the outset of an investigation to seek background information, identify further sources of evidence, obtain a quick understanding and provide context to an allegation. These interviews will generally take place at the start of the investigation and, depending on the specific circumstances, may take place before any firm view has been reached on the terms of reference or extent of material that will be reviewed. They are more likely to be conducted with employees who may have knowledge of matters under investigation but are not at direct risk of any criticism. It may also be necessary to undertake interviews with whistleblowers at this stage.

See Chapter 19 on whistleblowers

Substantive interviews will generally take place after most, if not all, the relevant material has been reviewed. The purpose is to obtain a detailed understanding of what went on, to provide explanations of key documents in the case and, if necessary, to test the account given. These interviews will often be used to inform an understanding of any individual and corporate liability and any defences. The timing is important and can depend on a number of factors, including the available evidence, whether the authorities are already involved and whether civil and criminal proceedings are contemplated.

7.3 Deciding whether authorities should be consulted

The decision about whether to consult the authorities in advance of a witness interview is not dictated by statute; no statutory framework explicitly requires it and in general terms a company may manage its internal affairs and make enquiries as it sees fit. Therefore, this decision often rests on whether there is an implicit obligation on the company to notify the authorities under its regulatory reporting regime, or whether it is in the interests of the company to co-operate with the authorities by notifying them of any forthcoming interviews.

Regulated firms may be obliged to report a violation or allegation of wrongdoing. For example, the Solicitors Regulatory Authority's code of conduct requires a

law firm to report any allegation of serious misconduct promptly, fully co-operate with its investigation and report any material change about the firm.[2] Accountants may hold similar obligations under the requirements of their regulators. There are reporting requirements under the Listing Rules for those companies admitted to trading on a regulated market,[3] and those in the regulated sector are required to submit a suspicious activity report if they know or suspect (or have reasonable grounds for knowing or suspecting) that another person is engaging in money laundering or terrorist financing.[4] Financial institutions regulated by the UK Financial Conduct Authority (FCA) must under Principle 11 of the FCA's Principles for Businesses act in an open and co-operative manner and disclose anything relating to the firm of which the regulator would reasonably expect notice.

The FCA's expectations under Principle 11 extend to requiring a firm to consider notifying it of a decision to investigate conduct concerns at the earliest opportunity. In November 2015, the Director in Enforcement at the FCA, suggested during a speech[5] that self-reporting is the bare minimum that is required and that a firm should discuss the scope of its investigation with the FCA as early as possible. He identified witness interviews as a key area of risk, suggesting that firms be alive to the possibility that their own investigation could prejudice or hinder a subsequent FCA investigation, and that firms should discuss this with the FCA before taking action. A firm should therefore consider its regulatory obligations when assessing if, and when, to consult its regulator regarding any proposed witness interviews.

During a speech at the 2nd Annual GIR Live London conference,[6] the then Director in Enforcement at the FCA recognised that there are sometimes good reasons for firms to carry out their own investigations and that the FCA encourages this proactive approach and does not wish to interfere with a firm's legitimate procedures and controls. However, he reiterated that when conducting their own investigations, firms should ensure that they do not take steps that might prejudice or obstruct a subsequent FCA investigation and highlighted the importance of early communication in this regard.

The Serious Fraud Office (SFO) has similarly acknowledged that there are good and proper reasons for a company to carry out its own investigation[7] but has also referred to the potential dangers of an internal investigation 'churning up the

2 Solicitors Regulatory Authority (SRA) Code of Conduct, Chapter 10.

3 Also see Prospectus Rules and Disclosure and Transparency Rules.

4 Part 7 Proceeds of Crime Act 2002 and Part 3 Terrorism Act 2000.

5 Speech by Jamie Symington, then Director in Enforcement (Wholesale, Unauthorised Business and Intelligence), FCA, at the Pinsent Masons Regulatory Conference 2015 on 5 November 2015.

6 Speech by Jamie Symington, then Director in Enforcement (Wholesale, Unauthorised Business and Intelligence), FCA at the 2nd Annual GIR Live, London, 28 April 2016.

7 Speech by Alun Milford, then SFO General Counsel, at the 14th Annual Corporate Accountability Conference, Congress Centre, London, 9 June 2016 (as reported by GIR on 10 June 2016).

crime scene', which could include the taking of first statements from witnesses in a way that influences their testimony.[8]

Camilla de Silva, Joint Head of Bribery and Corruption at the SFO, commented in a recent speech that, in the context of the company handling the evidence: 'We need to understand the methodology, what's been captured and from where, the use of search terms and be provided with the metadata. [We a]ppreciate it's likely to be dynamic and not a complete set when you speak to us, so update us as you go along.' On contacting the SFO and the timing of this, she said: 'We will not be offering 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.' On consulting with the SFO, she said: 'We expect to discuss the scope of the investigation, to be notified of conduct which you uncover and what you ought to bring to our attention even if we don't ask, the sequencing of interviews and media contact.'[9]

See Chapter 3 on self-reporting to the authorities

Where the authorities are not yet aware of the allegations under review, it is likely that preliminary enquiries will be necessary before the company is in a position to reach a view as to whether to self-report. Where this includes witness interviews, it may be inappropriate for the authorities to be consulted in advance. This can create a tension between the authorities' expectations to be notified as well as the need for the company to bear in mind the risks of prejudicing a future investigation.

Where an investigating authority is already involved, it is prudent for the company to consult or inform it prior to undertaking interviews. Increasingly the SFO and the FCA have sought to impose restrictions on the conduct of interviews in corporate investigations or to prevent them from taking place. While a company cannot be prevented from undertaking its own interviews, there is risk of criticism if it proceeds without the consent of the authority, particularly where it could be suggested that it has prejudiced an investigation.

See Section 7.6

7.4 Providing details of the interviews to the authorities

The issues relating to co-operation with the authorities in the context of corporate investigations are explored in Chapters 9 and 10 on co-operating with authorities. When it comes to witness interviews, authorities often expect details of the interviews to be provided. It is therefore crucial to consider the purpose of the interview, its intended audience, record-keeping and, if appropriate, how this information is to be shared.

There is no statutory duty on a company to co-operate with the authorities with respect to its witness interviews. Instead there is published guidance in the form of codes of practice, speeches and guidelines. This varies between regulators

8 David Green QC, then Director of the SFO, speaking at the GIR Roundtable: corporate internal investigations, 27 July 2015.

9 Speech by Camilla de Silva, SFO Joint Head of Bribery and Corruption, at the ABC Minds Financial Services conference, 15 March 2018.

but for the most part there is an expectation that details of witness accounts should be provided.

This issue is considered in the Code of Practice on Deferred Prosecution Agreements (the Code)[10] jointly issued by the SFO and the Crown Prosecution Service. The Code states at 2.8.2(i) that co-operation with the authorities will include identifying relevant witnesses, disclosing their accounts and the documents shown to them and, 'where practicable', making witnesses available for interview when requested. The SFO has made clear its expectation that for a deferred prosecution agreement (DPA) to be considered, co-operation must be forthcoming. In 2016, one of the SFO's Joint Heads of Bribery and Corruption at the time commented at a conference: 'There really is a pronounced difference now in the way companies are routinely approaching us – "we think we've got a problem and we're willing to work with you to find out, and if necessary resolve it", not "there's nothing to see here, good luck finding it."'[11] The former Director of the SFO noted in a speech in 2017 that a DPA would not be available to companies under investigation unless they offer 'genuine and demonstrable co-operation'.[12] More recently, during a speech in 2018, Camilla de Silva commented: 'the co-operation we want is with our investigation into the suspected offence, not the company. This means that, at the end of the process, the company will have helped us move that investigation forward and, in so doing, made it easier for us to investigate and, if appropriate, prosecute other suspects'.[13]

While the SFO has clearly set out its expectations to be told what witnesses have to say in interviews with particular emphasis on 'first accounts',[14] what is less clear is how the detail of the accounts should be imparted and the level of detail that is required. The SFO has been inconsistent in its approach. In the case of *SFO v. ICBC SB*[15] it was sufficient for oral reports of first-account witness evidence to be provided by the bank to the SFO to enable full co-operation to be established.[16] Alun Milford, then general counsel at the SFO, noted the bank's commitment to

10 SFO/CPS Deferred Prosecution Agreements Code of Practice, Crime and Courts Act 2013.

11 Speech by Ben Morgan, then Joint Head of Bribery and Corruption, SFO, at GIR Live New York, 15 September 2016, available at https://www.sfo.gov.uk/2016/09/15/ben-morgan-global-investigations-review-live/.

12 Speech by David Green QC, then Director of the SFO, speaking at the International Bar Association's anti-corruption conference in Paris on 13 June 2017 (as reported by GIR on 13 June 2017).

13 Speech by Camilla de Silva, SFO Joint Head of Bribery and Corruption, at the ABC Minds Financial Services conference, 15 March 2018.

14 Speech by Alun Milford, then SFO General Counsel, to an audience of compliance professionals at the European Compliance and Ethics Institute, Prague, on 29 March 2016.

15 *Serious Fraud Office v. Standard Bank Plc* (Now known as ICBC Standard Bank plc): Deferred Prosecution Agreement (Case No. U20150854).

16 Speech by Ben Morgan, then Joint Head of Bribery and Corruption, SFO, at the Managing Risk and Mitigating Litigation Conference 2015 on 1 December 2015.

supply all relevant non-privileged material and provision of summaries of witness first accounts as an example of its co-operation.[17]

Summaries of witness interviews were similarly supplied by Rolls-Royce in the context of its DPA reached in January 2017.[18] In his judgment, Sir Brian Leveson, President of the Queen's Bench Division, noted that the company had demonstrated 'extraordinary cooperation', referring to the disclosure of interview memoranda (on a limited waiver basis) as an example of this.[19] The judgment also made reference to the company 'co-operating with the SFO's requests in respect of the conduct of the internal investigation, to include the timing of and recording of interviews and reporting findings on a rolling basis.'[20] This was referenced further in a speech in 2016 by the then Joint Head of Bribery and Corruption: 'they made available to us written accounts of interviews that took place during the evidence gathering exercise, enabling us to understand both what had happened and the strength of the various accounts given about that'.[21] While the SFO acknowledged its acceptance of summary witness accounts instead of transcripts in the DPAs for Standard Bank and Rolls-Royce, at a conference in April 2017, Alun Milford refuted suggestions that it would be standard practice in all cases[22] and similarly commented in November 2017 that it is not the case that summaries will always be sufficient.[23]

In the case of *SFO v. XYZ Ltd*,[24] oral summaries were provided without the company's badge of 'genuine co-operation' being compromised. However, the SFO's decision to accept oral proffers in this case has recently been subject to judicial scrutiny. In *R (on the application of AL) v. SFO*,[25] a judicial review was brought against the SFO for failing to pursue XYZ Ltd for non-compliance with its DPA. The terms of the DPA required the company to disclose to the SFO all information and material in its possession that is 'not protected by a valid claim of legal professional privilege or any other applicable legal protection'. Having accepted oral summaries, and following a number of attempts to pursue the full set of notes, the SFO decided to cease pursuing the full set of notes. The SFO's position in defending the judicial review was that there was no need to obtain the interview notes because XYZ's claims of privilege were 'not obviously wrong',

17 Speech by Alun Milford, then SFO General Counsel, at the Handelsbatt Conference 2016, on 14 September 2016.

18 *SFO v. Rolls-Royce Plc*, Deferred Prosecution Agreement (Case No. U20170036).

19 *SFO v. Rolls-Royce Plc*, Deferred Prosecution Agreement (Case No. U20170036) at [121].

20 *SFO v. Rolls-Royce Plc*, Deferred Prosecution Agreement (Case No. U20170036) at [121].

21 Speech by Ben Morgan, then Joint Head of Bribery and Corruption, SFO, at at a seminar for General Counsel and Compliance Counsel from corporates and financial institutions, at Norton Rose Fulbright on 8 March 2017, available at: https://www.sfo.gov.uk/2017/03/08/the-future-of-deferred-prosecution-agreements-after-rolls-royce/.

22 Speech by Alun Milford, then SFO General Counsel, at GIR London Live, on 27 April 2017 (reported by GIR on 27 April 2017).

23 Speech by Alun Milford, then SFO General Counsel, at the Cambridge Symposium on Economic Crime 2017, Jesus College, Cambridge.

24 *SFO v. XYZ Limited*, Deferred Prosecution Agreement (Case No. U20150856).

25 *R (on the application of AL) v. Serious Fraud Office* [2018] EWHC 85.

and that it had exercised legitimate prosecutorial discretion in accepting the summaries. Although the application was quashed on the grounds that alternative remedies in the Crown Court were available, and therefore judicial review was not the appropriate action to take, the SFO was criticised in the judgment for not pursuing the disclosure. Mr Justice Green described the provision of summaries as an alternative as 'highly artificial' and questioned the SFO's decision not to take a more robust stance. The SFO was similarly criticised for its failure to challenge the assertion of privilege and require the notes in circumstances where it believed the material not to be privileged. The observations made by the High Court will no doubt encourage the SFO to take a robust approach to the disclosure of interview notes and claims to privilege, and we anticipate that the SFO is highly unlikely to accept oral summaries for key witnesses in future.

Despite the inconsistency in how details of accounts have been disclosed to the SFO, the SFO has been clear that in order to be considered for a DPA, co-operation is required. Alun Milford said in a recent speech. 'we have been clear and consistent that only co-operative companies will ever be offered the opportunity of entering into a DPA with us.'[26] In *(SFO) R v. Sweett Group PLC* (unreported), Sweett Group's refusal to hand over details of the witness interviews undertaken during its internal investigation was deemed unco-operative by the SFO. The level and extent of co-operation with the SFO will ultimately be determined case by case.

The FCA similarly expects regulated firms to provide notification of any significant matters that occur in the context of an internal investigation, in accordance with its Principle 11 obligation. While this does not explicitly apply to witness interviews, the FCA Enforcement Guide makes clear that if the FCA is ultimately asked to rely on submissions or an investigation report in the context of its own decision-making powers, it would ordinarily expect the firm to provide the underlying material, which could include notes of witness interviews, in addition to the report itself.[27] While the level of information will undoubtedly differ from case to case, the FCA has indicated that an oral report may not be sufficient and that information should be shared in a transparent manner, with a proper record.[28] Furthermore, if an individual is suspended, a firm must submit a Form C explaining the reasons for suspension.[29]

The guidance surrounding co-operation with the authorities and what is expected is evolving. In cases where the company or its employees are at risk of further investigation, prosecution or civil action, the company will want to consider the benefits that early co-operation may bring. However, whether it is in the interests of the company to co-operate will depend on the facts of each case.

26 Speech by Alun Milford, then SFO General Counsel, at the Cambridge Symposium on Economic Crime 2017, Jesus College, Cambridge.

27 FCA Enforcement Guide, para. 3.26.

28 Speech by Jamie Symington, then Director in Enforcement (Wholesale, Unauthorised Business and Intelligence), FCA, at the Pinsent Masons Regulatory Conference 2015 on 5 November 2015.

29 SUP 10.13 Changes to an approved person's details.

7.5 Identifying witnesses and the order of interviews

Where interviews are to be conducted, the company or its representatives, or both, should seek to interview all company personnel who were involved in the facts under investigation, including those who should have been involved by virtue of their position. Reporting lines of those involved should also be considered. The witness list may expand as more information becomes known, and therefore should be reviewed regularly.

Employees generally have a duty to co-operate and are likely to owe a duty of candour towards their employer, and a failure to comply could result in disciplinary action.

See Chapter 19 on whistleblowers

Where there is a whistleblower, it may be preferable to interview him or her at the start of the process. The structure of an investigation is very fact-specific, but, broadly, the order of other interviews should be based on the level of risk that the witness poses to the business, beginning with those who present the least risk to the company. For the most part this is likely to follow levels of seniority, starting with lower-level employees and leaving senior management until later. Timing considerations sometimes mean witness interviews need to be taken out of the normal order. For instance, it is generally advisable to ensure that any employees who may be about to leave the company (either permanently or for temporary absence such as maternity leave) are interviewed beforehand and while they still owe a duty to the company to co-operate. In circumstances where there are a number of individuals to be interviewed, consideration should be given to the creation of a 'leavers list'.

See Section 7.6

The benefit of this approach is that the company may be better positioned to obtain an overall sense of the extent of the issues before focusing on particular areas of risk. Lower-level employees are generally more likely to communicate openly, although it is important that sensitive or confidential information is not referred to unless strictly necessary as there is risk that information may be shared.

While it may be appropriate to conduct early interviews with senior employees to obtain initial accounts (particularly where there is likely to be more than one opportunity to interview), generally members of senior management should be interviewed when the investigation is further advanced. Typically, senior employees are more likely to pose a greater risk from the perspective of corporate liability and therefore it is important that any potential risks are identified beforehand. Under the principle of identification, in the United Kingdom a company can be criminally responsible for the actions of those employees that represent the 'directing mind and will' of that company,[30] generally restricted to board directors, the managing director and other senior officers who carry out management functions on the company's behalf.[31] The principle of identification is explored in more detail in Chapter 1.

30 *Lennards Carrying Co and Asiatic Petroleum* [1915] AC 705, *Bolton Engineering Co v. Graham* [1957] 1 QB 159 (*per* Denning LJ) and *R v. Andrews Weatherfoil* 56 Cr App R 31 CA.

31 *Tesco Supermarkets Ltd v. Nattrass* [1972] AC 153.

This can cause difficulties when interviewing board members and senior management who may be the 'client' for the purposes of the investigation but who may need to be interviewed in the context of their own involvement. For the most part this can be avoided by identifying the 'client' at the outset of the case as made up of a group of senior employees or board members with no involvement in matters under investigation. However, depending on the size of the company and the nature of the case, this is sometimes unavoidable and therefore the basis on which the interview is being conducted must be made clear to the witness.

See Chapter 5 on beginning an internal investigation at Section 5.2

See Section 7.8

There are a number of statutory exceptions to the principle of identification, and the government is currently examining the case for reform of the law on corporate liability for economic crime.[32] Under section 7 of the Bribery Act 2010, a corporate can be criminally liable for failing to prevent the acts of its employees or agents unless it can show that it had adequate procedures in place to prevent bribery from taking place. Two new corporate offences of facilitating tax evasion under the Criminal Finances Act 2017 also adopt a failure-to-prevent model, with criminal liability attaching for the acts of persons acting on the company's behalf unless the corporate can show it had reasonable prevention procedures in place. Similarly a corporate can be guilty of corporate manslaughter if the management or organisation of its activities causes a person's death, and amounts to a gross breach of a duty of care owed by the organisation to the deceased.[33] When the issues under investigation fall within the exceptions it can be difficult to identify the appropriate individual to interview on behalf of the company. Again, the purpose of the interview and the basis on which it is being conducted needs to be made clear from the outset.

Senior employees are also more likely to owe fiduciary duties to the company and potentially be liable for breaches of those duties and become defendants in civil proceedings by the company. As a result, these interviews should generally take place when the company is in a better position to identify the extent of any breaches.

See Chapter 5 on beginning an internal investigation

Relevant information could also be sourced through interviews with third parties including former employees, customers and contractors. The obvious benefit is that these witnesses may be more forthcoming where there is no risk of disciplinary proceedings. However, third parties cannot be required to attend an interview, and unless there is a contractual obligation requiring their attendance, they could refuse to attend. Even in circumstances where a contractual obligation exists this could be difficult to enforce, as could a confidentiality clause. The interview process itself is likely to notify the third party of the investigation and the subject matter under review and depending on the nature of the relationship, it may not be appropriate to interview him or her at that time, particularly when the decision on self-reporting is outstanding. The timing of these interviews would depend on the facts of each case.

32 Call for evidence: Corporate and Economic Crime – 13 January 2017 to 31 March 2017.

33 Section 1 Corporate Manslaughter and Corporate Homicide Act 2007.

7.6 When to interview

See Section 7.11 and Chapter 35 on privilege

The timing of interviews can be influenced by a number of factors, including the stage of the investigation and whether or not any record of interview would be covered by legal privilege. Scoping interviews usually take place at the outset of an investigation, most likely with a few individuals who have a general knowledge of the subject matter under investigation.

Substantive interviews are likely to be most effective once the bulk of any document review has taken place. This will allow for any key documents to be identified and put to the witness, and for questions to focus on the areas of risk. Furthermore it is best to plan for only one interview; while there may be circumstances where a second or third interview is appropriate, it is by no means guaranteed that the witness would agree.

Timing of the interviews can pose particular difficulties when there are competing considerations. For example, it may be necessary to delay when the company has a claim for injunctive relief against individuals, to avoid assets being dissipated in advance of a freezing order being granted. However, it could be that there is only a limited amount of time to interview an employee who is leaving the company or the company may need to speak to an individual at short notice to assist in an assessment of whether to self-report. Clearly such factors need to be prioritised.

It is important to allow for a degree of flexibility as certain factors outside the company's control can dictate when an interview should take place. Where the corporate investigation is likely to remain an internal review, there is little risk to the company conducting interviews to a timetable that suits it, although the company will wish to consider whether legal privilege would apply. Where there is suspicion of a criminal or regulatory violation and a formal investigation has commenced, there are a number of risks associated with conducting interviews in parallel with these investigations.

See Section 7.11 and Chapter 35 on privilege

As a general point, any interviews with individuals at risk of criminal exposure should be postponed until all evidence has been secured, to minimise the risk of evidence being destroyed. This is particularly important where a criminal or regulatory investigation is likely. Similar concerns apply where the individuals are potential defendants to civil proceedings by the company.

Both the SFO and the FCA place significant emphasis on the first accounts of witnesses, and take the view that they can help inform an understanding of what went on and allow for the accuracy or integrity of a witness to be tested.[34] However, depending on the facts of the case this view can often be misplaced; the first account given by a witness is not necessarily always the best one, particularly in complex investigations that span a number of years and where there is extensive underlying material. The quality of a witness's evidence can often be improved having been given the opportunity to review the evidence and recall the context.

34 Speech by Alun Milford, then General Counsel, SFO, speaking to an audience of compliance professionals at the European Compliance and Ethics Institute, Prague on 29 March 2016.

Nonetheless, the SFO and FCA have increasingly sought to place restrictions on interviews of key suspects in corporate investigations and may seek to prevent them altogether.

In such circumstances it may be prudent for a company to seek to agree an approach with the authorities prior to conducting any interviews.

The authorities are also increasingly sensitive to the risks of witness contamination, and a company whose conduct of witness interviews has caused prejudice to a criminal or regulatory investigation could be subject to serious criticism. At best this could involve comment or views that are unhelpful for the company; at worst this could include allegations of perverting the course of justice. In 2016, the then-Director in Enforcement at the FCA, observed that firms must take care not to take steps that might prejudice an FCA investigation and suggested that in certain circumstances it may prefer that a firm does not commission its own investigation, for example, in criminal investigations where alerting the suspects could have adverse consequences.[35] Mark Steward, Director of Enforcement and Oversight at the FCA has commented on the importance of an 'independent public body investigation' being able to conduct itself without 'the crime scene being trampled over.'[36] The SFO has similarly made clear that corporate investigations that 'trample over the crime scene' are unhelpful and that integrity of evidence, especially regarding witness accounts, should be respected,[37] and has noted that internal investigations may result in first statements of witnesses being taken, delivered or recorded in a form which may be less than full and accurate, as opposed to recording the account by way of a transcript.[38] Camilla de Silva, during a recent speech, commented: 'The data needs to be identified, collected, preserved and analysed in a way that does not tip off potential suspects into deleting data and protects its integrity and continuity.'[39]

Witness interviews should always be conducted in a manner that minimises the risk of contamination or prejudice.

When a criminal or regulatory investigation is anticipated or already under way, a company may wish to consider engaging with the authorities at an early stage to avoid any criticism that might follow. However, engaging with the authorities may not necessarily be appropriate in every case and runs the risk of loss of control. Each case will need to be assessed on its specific facts and surrounding circumstances.

35 Speech by Jamie Symington, then Director in Enforcement (Wholesale, Unauthorised Business and Intelligence), FCA at the 2nd Annual GIR Live London, 28 April 2016.

36 Speech by Mark Steward, Director of Enforcement and Oversight at the FCA, at the 14th Annual Corporate Accountability Conference, Congress Centre, London, 9 June 2016 (as reported by GIR on 10 June 2016).

37 Speech by Ben Morgan, then Joint Head of Bribery and Corruption at the SFO, at the Global Anti-Corruption and Compliance in Mining Conference 2015 on 20 May 2015.

38 David Green QC, then Director of the SFO, speaking at the GIR Roundtable, 27 July 2015.

39 Speech by Camilla de Silva, SFO Joint Head of Bribery and Corruption, at the ABC Minds Financial Services conference, 15 March 2018.

7.7 Planning for an interview

Interviews in the context of a corporate investigation can be conducted by various people: internal or external lawyers, accountants, forensic experts, specialist investigators, HR or compliance officers, and others. Careful thought should be given to who is best placed to undertake them.

As a general rule, where a company is engaged in a corporate investigation into allegations of criminal or regulatory misconduct, it is preferable to have lawyers (internal, external or both) present at interviews to take notes and identify the key risk areas, to enable confidentiality, and for any claim to privilege to be strengthened. Generally it is preferable for the same person or persons to conduct the interviews of those witnesses who provide similar types of information. This will allow for consistency of approach and for the credibility of witnesses to be more readily assessed. It is also preferable to have two interviewers present to allow for one to take notes while the other asks questions.

Where external lawyers have been instructed, they should generally conduct the interviews. External lawyers often bring (and importantly are seen to bring) expertise, objectivity and independence, which can be very important when assessing the credibility of the investigation. Although it can bring a degree of formality that can make the experience more daunting for the witness, the use of external lawyers will strengthen a claim to legal privilege.

Where external lawyers have not been instructed, the company may consider resourcing the process internally either by using compliance personnel, internal auditors or HR officers or by using in-house lawyers. Either way, those conducting the interview should not have had any involvement in the allegations under review. While the use of non-lawyers may decrease the levels of concern among employees, in general they may be less skilled in conducting these types of interviews and less familiar with the issues that may arise. In-house lawyers will have a good understanding of the business and legal advice given to the company will generally be privileged in the United Kingdom. However, the protection of legal privilege will not apply to advice given by in-house lawyers in the context of European Commission related investigations,[40] and it may be necessary in those circumstances to engage external lawyers.

See Section 7.11 and Chapter 35 on privilege

Where forensic experts (internal or external) are also engaged it may be prudent to involve them in interviews with key individuals. If so, it is generally advisable for these interviews to be conducted alongside internal or external lawyers to ensure that the contents can be covered by the company's confidentiality and privilege, as appropriate, and to strengthen a claim to this privilege.

Prior to the interview, a core bundle of documents relevant to the particular witness should be prepared. Consideration should be given to whether the witness is given access to documents, either before or during an interview, or as part of staged disclosure, and what documents, if any, should be put to the witness. Referring to documents can be a very useful tool to assist in refreshing a witness's

40 *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v. European Commission*, Case C-550/07 P.

memory and to allow for specific comment. Key documents can be put to provide a better understanding of its content and to give an opportunity for the witness to provide explanation.

In general, copies of confidential or sensitive documents should not be given to witnesses where there is a risk these could be shared or used contrary to the company's interests. In complex matters, providing pre-interview disclosure will enable the witness to prepare; however, where documents are provided to the witness, this should be done on a restricted and confidential basis with the requirement that they are either returned or destroyed at the conclusion of the interview. It is preferable that a witness is not given documents that he or she has not previously seen.

See Chapters 5 and 6 on beginning an internal investigation and Chapter 11 on production of information to the authorities

The provision of documents may give rise to data protection issues, particularly in light of the company's obligations under the data protection principles[41] and where multiple jurisdictions are involved.

A detailed interview plan can be useful to ensure that all relevant questions are put to the witness, although the interviewer should not feel restricted by this. In general, topics should be addressed in a chronological order that develops facts in a logical way.

Regarding the provision of topics in advance of an interview, it is generally helpful to indicate the main areas that may be covered to assist the witness to prepare, particularly where the subject matter is complex. However, giving a list of detailed questions is generally not appropriate, and a witness who has had the opportunity to script his or her answers is less likely to be considered credible. Furthermore, questions are likely to evolve as the interview progresses. There is also a risk that the questions might be shared.

Interviewers should ask questions in a measured and courteous manner with a clear and professional tone. There is little point in adopting an aggressive approach or engaging in lengthy cross-examination; this is unlikely to be effective and could give rise to criticism, or employment or personal injury claims. A skilled interviewer will seek to put the witness at ease before addressing the key topics. Where there are two interviewers, different interviewing styles can often be effective.

Conducting the interview: formalities and separate counsel 7.8

Professional obligations can affect how witness interviews are conducted. Solicitors have a general duty to act in their client's best interests,[42] they must not take unfair advantage of a third party,[43] and they must not take unfair advantage of an opposing party's lack of legal knowledge where they have not instructed a lawyer.[44] These duties do not always align and it is therefore important to balance the competing requirements.

41 Article 5 of the General Data Protection Regulation.

42 Principle 4 of the SRA mandatory principles.

43 Chapter 11 SRA Code of Conduct.

44 Chapter 11 SRA Code of Conduct.

The interviewer should be satisfied that the witness understands the basis on which he or she is being interviewed, the purpose of the interview and the use that could be made of the information provided, because this may impact its admissibility.

In the United States, an *Upjohn* warning is given at the start of the interview, where lawyers are present. This practice is often adopted in many investigations in the United Kingdom, even where there is no involvement of US authorities at that time. The warning sets out that:

- The lawyers represent the company and not the employee/witness.
- Privilege in the interview belongs to the company and not the employee.
- The company might choose to waive its privilege and disclose matters discussed in interview to the authorities.

Upjohn warnings derive from the case of *Upjohn Co v. United States,*[45] where it was held that the privilege that attaches to communications between a company's lawyers and its employees is the company's privilege, and not that of its employees. While there is no formal requirement for these warnings to be given in the United Kingdom, it is considered best practice to do so.

The witness should be reminded of the confidential nature of the interview and, where appropriate, be told that it is a fact-finding exercise. However, where a company has decided to waive privilege prior to the interview and provide details to the authorities, the *Upjohn* warning may need to be strengthened. The company could consider whether to give a more formal caution, similar to that given by the police when investigating suspects, although this would rarely be required. If necessary, the witness should be told that while not part of a disciplinary process, the information provided could inform a decision on whether to instigate disciplinary action.

See Section 7.9

The company should consider whether its own legal advisers can advise the witness or whether to allow the witness to have their own lawyer in attendance. The company may wish to offer to pay for the independent legal adviser. Clearly a company cannot prevent its employees obtaining legal advice of their own volition and expense; however, it can control who can be present in an internal interview. If an authority investigation is under way, the witness may have contractual rights or rights under an insurance policy (D&O insurance) to fund an independent legal adviser. Former employees may have an indemnification or contractual right as part of their exit package.

Those witnesses who appear to be at little risk of criminal or regulatory exposure are unlikely to need independent counsel to protect them against any risk of self-incrimination, and the provision of an *Upjohn* warning or a similarly worded preamble should suffice. However, a company may nonetheless offer separate legal advice to these witnesses if this would allay their concerns or ensure that appropriate advice is given (including from an employment or civil perspective). Perhaps

45 *Upjohn* Co. *v. United States,* 449 U.S. 383 (1981).

most importantly, an independent adviser's role will assist preparation and increase the likelihood that the individual will give their best account. Moreover, it is often not easy to predict where risks may be at an early stage.

The provision of separate counsel is particularly important where there may be a conflict of interest between the company and a witness. This can arise where a witness is a whistleblower or at risk of criminal or regulatory investigation or where the company could be implicated in corporate wrongdoing. In these circumstances the interests of the company and the witness may not align and it would be prudent to consider suggesting independent counsel. While this might delay the interview to allow advice to be given, it ensures that the witness has had the opportunity to obtain his or her own legal advice and, depending on the facts, could make the interview more effective. However, the involvement of an independent legal adviser could also result in the witness being less inclined to attend the interview or answer questions, although an employee would then be at risk of disciplinary action for not co-operating.

The decision when to offer independent legal advice can also depend on the account given by the witness, and it may be appropriate to stop interviews if witnesses give an account that indicates that the company has a potential civil claim against them or that they are making potentially criminal admissions.

Ultimately it would be difficult for witnesses to assert that they had not been fully informed where they had been separately represented, or that the interviewer or company had taken an unfair advantage.

Conducting the interview: whether to caution the witness 7.9

Where a witness may be suspected of involvement in a criminal offence, a caution may be considered. A caution is used by police officers and other investigators when conducting interviews of suspects to ensure that any resulting account (or refusal to answer questions) is admissible in criminal proceedings.[46]

Section 67(9) of the Police and Criminal Evidence Act 1984 (PACE) provides that 'persons other than police officers who are charged with the duty of investigating offences' shall have regard to the relevant provisions of the PACE Codes of Practice, and Code C 10.1 of the Codes sets out the requirement to caution.

This duty applies to SFO investigators,[47] but is not restricted to state authorities and can also apply to private store detectives[48] and commercial investigators who are appointed by a company to investigate its employees for the commission of criminal offences.[49] Importantly, however, it does not apply in the context of an internal investigation where the sole purpose is to determine what recommendations should be made to an internal disciplinary panel.[50] It is therefore unlikely to apply in circumstances where an employer investigates allegations that could give

46 Code C, 10.1 PACE Codes of Practice.

47 *R v. Director of the Serious Fraud Office, ex p Saunders* [1988] Crim LR 837.

48 *Bayliss* (1993) 98 Cr App R 235.

49 *Twaites and Brown* (1990) 92 Cr App R 106.

50 *R v. Welcher* [2007] EWCA Crim 480.

rise to disciplinary action and where the sole purpose of the investigation was to inform the company how to respond.

Where criminal offences are being considered, section 67(9) would only apply if the investigator was charged with investigating or charging criminal offences at the time.[51] This scenario would arise in circumstances where the interviews had been delegated to those conducting the investigation and where they were effectively acting on behalf of a criminal authority. It would require the authorities to sanction the taking of a suspect's account with a view to it being used in a criminal trial. In light of the authorities' general reluctance for a company to conduct interviews with suspects, particularly when it involves obtaining first accounts, it is unlikely that this situation would arise, and therefore a caution is unlikely to be required.

7.10 Conducting the interview: record-keeping

A record can be kept of a witness interview in a number of ways. It could be audio-recorded and transcribed. A verbatim record would exist, removing the risk of any challenge to the accuracy of what was said, and the recording would capture the tone and any pause or emphasis, which can often give context and allow for an overall assessment. However, it could affect the witness's account by adding an element of formality, potentially having an unsettling effect on the interviewee and making him or her less forthcoming. More importantly, there is significant uncertainty over whether legal privilege would apply to a recording, particularly where the interview has been conducted as a fact-finding exercise. Even where privilege can be properly asserted, it is likely to be challenged by the authorities, and where a transcript exists, the authorities are likely to request a copy.

See Section 7.11 and Chapter 35 on privilege

An alternative approach is for the legal adviser to prepare a note of what the witness has said. Legal privilege is more likely to apply in circumstances where notes contain some form of legal comment, advice and analysis. This may include the lawyer's own impressions and assessment of the interview. Alternatively two sets of notes could be prepared, one containing the factual account and one containing the lawyer's own views. If so, at a minimum, the authorities are likely to seek a copy of the factual account.

See Section 7.11

The company will need to decide whether to provide the witness with a copy of the note. Where it is likely to rely on the witness's testimony in civil proceedings, it may be helpful to agree a note at an early stage to limit any future challenge to its accuracy. This carries the risk that it may be passed on and any applicable privilege would be waived, and may cause issues if the account is materially disputed.

Where proceedings are anticipated, there are some advantages in preparing a witness statement at an early stage. If the witness decides at a later date not to co-operate or for whatever reason he or she is no longer able to assist, the company may be able to rely on the evidence given, or compel the witness to attend and give evidence having already taken a record of the witness's evidence. However,

51 *R v. Seelig* [1992] 1 WLR 148 and *Joy v. Federation against Copyright Theft* [1993] Crim LR 588.

even if privilege can be maintained, it is likely the authorities would nevertheless seek a copy.

Legal privilege in the context of witness interviews 7.11

Legal privilege in the context of witness interviews raises a number of complex issues and a claim to privilege will be closely scrutinised by the authorities. Over the past few years, the SFO has claimed that it does not want to undermine legal privilege, which is respected as a legal principle and fundamental right. However, in a speech in 2018, Camilla de Silva, Joint Head of Bribery and Corruption at the SFO, noted: 'Recent cases have highlighted that the SFO will challenge overly ambitious claims to privilege and, in specific circumstances, are obliged to do so.'[52] In March 2016, Alun Milford, then General Counsel of the SFO, made it very clear that the SFO will view 'false' or 'exaggerated' claims to privilege as unco-operative, and notwithstanding his acknowledgement that a claim may be well founded, where a company discloses details of witness accounts it will be viewed as a significant mark of co-operation.[53] Furthermore, a company's decision to structure its investigation so as not to attract privilege will be viewed as significant co-operation. Camilla de Silva noted: 'We are not interested in material that is genuinely privileged. We do however reserve the right to question, probe and where necessary challenge assertions of privilege which are[,] in our view, excessive.'[54]

During a speech in September 2016, the then Joint Head of Bribery and Corruption at the SFO acknowledged that it was impossible to make a single statement about access to evidence (to include witness interviews) that would apply to any situation without further thought being necessary. He highlighted factors to be considered to include the circumstances during which the witness first account took place; the extent to which contemporary records, written summaries or oral summaries accord with or differ from the SFO's understanding of the case; the stage of any internal investigation at the time of self-reporting; and the quality and impact of other co-operative steps that the company may take.[55] It is clear, however, that if a company chooses not to co-operate with the SFO, it is much more likely that the company would not be offered the opportunity to receive a DPA, with Camilla de Silva stating that the SFO will only invite a company to enter into DPA where that company has 'genuinely cooperated with the

52 Speech by Camilla de Silva, Joint Head of Bribery and Corruption, at the 12th International Pharmaceutical and Medical Device Compliance Congress, Vienna, 14 May 2018.

53 Speech by Alun Milford, then SFO General Counsel, to an audience of compliance professionals at the European Compliance and Ethics Institute, Prague on 29 March 2016.

54 Speech by Camilla de Silva, Joint Head of Bribery and Corruption, at the Herbert Smith Freehills Corporate Crime Conference 2018, 21 June 2018.

55 Speech by Ben Morgan, then Joint Head of Bribery and Corruption at the SFO at 3rd Annual GIR Live New York on 15 September 2016, available at https://www.sfo.gov.uk/2016/09/15/ben-morgan-global-investigations-review-live/.

SFO" and that 'the DPA Code provides that co-operation will include identifying relevant witnesses, disclosing their accounts and the documents shown to them'.[56]

However, there is a risk that disclosing information relating to witness interviews could result in a waiver of privilege more generally. Ultimately the information could be shared with authorities in other jurisdictions or be disclosable in civil, or other, proceedings that may not be in the company's best interests. While this risk may in part be mitigated by a limited waiver agreement, this would not necessarily extend to other jurisdictions, and there is a risk that confidentiality may in due course be lost. The Law Society of England and Wales provides guidance to lawyers about their duty to act in the best interests of clients, including maintaining their claim to privilege.

The law surrounding legal privilege and records of interviews is complex and evolving. It has recently been made more complicated by the narrow interpretation of privilege that has been taken in several recent court decisions. These cases are summarised below.

See chapter 35 on privilege

It was held in *The RBS Rights Issue Litigation*[57] that the interview notes prepared by the bank's legal representatives were not subject to legal advice privilege (it was accepted that litigation privilege did not apply). The court found that, for the purposes of legal advice privilege, the 'client' consists only of those employees authorised to seek and receive legal advice from the lawyer. In relation to interviews with witnesses, it found that privilege does not extend to information provided by employees and ex-employees outside the client group. Furthermore, it was held that in order for the lawyers' working notes of the interviews to attract legal advice privilege, the notes must contain 'some attribute or addition such as to betray or at least give a clue as to the trend of advice being given to the client by its lawyer.'[58] The court held that the bank had failed to demonstrate this.

This judgment was followed by the High Court in *Director of the SFO v. ENRC*.[59] At first instance, Mrs Justice Andrews rejected ENRC's argument that legal advice privilege applied to lawyers' notes of interviews, and found that the question of whether legal advice privilege applied was an evidential one as to whether the notes demonstrated the legal analysis and 'tenor' of the advice.[60] In her judgment, Andrews J referred to examples of the type of evidence required to attract legal advice privilege, to include a qualitative assessment of the evidence or any thoughts about its importance or relevance to the inquiry, or indications of further areas of investigation that the author of the notes considered might be fruitful. It was noted in the judgment that the betrayal of further lines of investigation would not in itself have been sufficient to render the notes privileged.[61]

56 Speech by Camilla de Silva, Joint Head of Bribery and Corruption, at the Herbert Smith Freehills Corporate Crime Conference 2018, 21 June 2018.

57 *The RBS Rights Issue Litigation* [2016] EWHC 3161 (Ch).

58 *The RBS Rights Issue Litigation* [2016] EWHC 3161 (Ch) at [107].

59 *Director of the SFO v. ENRC* [2017] EWHC 1017 (Ch).

60 *Director of the SFO v. ENRC* [2017] EWHC 1017 (Ch) at [97].

61 *Director of the SFO v. ENRC* [2017] EWHC 1017 (Ch)at [180].

Applying the case of *Three Rivers (No. 5)*,[62] Andrews J held that legal advice privilege would only apply to communications between the lawyer and those authorised by the company to obtain legal advice on its behalf, and therefore not to employees or former employees more widely.[63]

Andrews J's decision was appealed, and although the Court of Appeal did not need to reach a decision on issues relating to legal advice privilege (because of its decision on litigation privilege, see further below in this section), it nevertheless gave its view (*obiter*) on how it would have decided those issues. The Court would have found that *Three Rivers (No. 5)* had been correctly interpreted by Andrews J (and by courts on other occasions) as having created a general rule that, in a corporate context, only the communications of those employees authorised by the company to seek and receive legal advice on its behalf are capable of attracting legal advice privilege.[64] On this basis, Andrews J was right to conclude that the interview notes were not covered by legal advice privilege. Significantly however, the Court gave a strong indication that it felt *Three Rivers (No. 5)* had been wrongly decided and would have been in favour of departing from that case had it been open to it to do so, although ultimately it felt this is a question that only the Supreme Court can determine.[65]

In addition, it had been argued by ENRC that the interview notes constituted lawyers' working papers and as such were covered by legal advice privilege. While Andrews J had rejected this argument at first instance, the Court of Appeal declined to give a view.[66]

ENRC's claim for litigation privilege was also rejected by Andrews J at first instance, who was not satisfied that, on the facts, litigation was in reasonable contemplation at the pertinent times or that, in any event, the dominant purpose of the documents coming into existence was for use in the conduct of litigation. The High Court held that an SFO investigation was seen as a preliminary step and that a prosecution only becomes a real prospect once evidence is discovered to substantiate the allegation, or where the accusations appear to be true.[67]

The Court of Appeal took a different approach to the availability of litigation privilege to ENRC's interview notes and disagreed with Andrews J's conclusion of the facts, holding that at the time the documents came into existence, ENRC did reasonably contemplate a prosecution by the SFO.[68] While the Court did not necessarily disagree with Andrews J's view that an SFO investigation in itself could not constitute adversarial litigation for the purposes of litigation privilege, it was of the view that:

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

63 *Director of the SFO v. ENRC* [2017] EWHC 1017 (Ch) at [180].

64 *Director of the SFO v. ENRC*[2018] EWCA Civ 2006 at [123] and [133].

65 *Director of the SFO v. ENRC* [2018] EWCA Civ 2006 at [130].

66 *Director of the SFO v. ENRC* [2018] EWCA Civ 2006 at [142].

67 *Director of the SFO v. ENRC* [2017] EWHC 1017 (Ch) at [150 to 163].

68 *Director of the SFO v. ENRC* [2018] EWCA Civ 2006 at [93].

> *When the SFO specifically makes clear to the company the prospect of its criminal prosecution (over and above the general principles set out in the [Self-Reporting] Guidelines), and legal advisers are engaged to deal with that situation, as in the present case, there is a clear ground for contending that criminal prosecution is in reasonable contemplation.*[69]

In addition, although the Court did not accept ENRC's alternative argument that once an SFO investigation is in reasonable contemplation so too is a prosecution, it held that in this case the evidence 'pointed clearly towards the contemplation of a prosecution if the self-reporting process did not succeed in averting it'.[70] Furthermore, the Court did not feel that the uncertainty a company inevitably experiences when faced with whistleblower allegations is a bar to litigation privilege.[71] Finally, the Court deemed as erroneous Andrews J's suggestion that litigation privilege cannot apply until a defendant either knows the full details of what is likely to be unearthed or a decision to prosecute has been taken.[72]

As to whether the dominant purpose of the documents coming into existence was for conduct of the litigation, the Court of Appeal was satisfied that this requirement was met in this case and disagreed with Andrews J that ENRC had always intended to show the documents to the SFO, even though it had indicated that it would give full and frank disclosure. It held that just because solicitors prepare a document with the ultimate intention of showing it to the opposing party, that does not automatically deprive the preparatory legal work that they have undertaken of litigation privilege.[73] Of particular importance was the Court's view that documents prepared for the dominant purpose of avoiding or settling litigation are just as much covered by litigation privilege as those prepared for defending it.[74] The Court of Appeal concluded that the interview notes were covered by litigation privilege, as a prosecution by the SFO was in reasonable contemplation at the time they came into existence, and they were created for the dominant purpose of resisting or avoiding it.

ENRC provides very helpful guidance and several principles of wider application to assist corporates who find themselves in similar situations. However, it also highlights the extent to which questions of litigation privilege in the context of internal investigations turn on the facts (as indeed is the case with all questions of privilege).

Three other recent cases also illustrate the importance of the facts of the case when it comes to establishing the status of privilege, and a company should consider this throughout the internal investigation so it can better judge whether the notes of a witness interview are likely to be privileged at any stage.

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69 *Director of the SFO v. ENRC* [2018] EWCA Civ 2006 at [96].

70 *Director of the SFO v. ENRC* [2018] EWCA Civ 2006 at [97].

71 *Director of the SFO v. ENRC* [2018] EWCA Civ 2006 at [98].

72 *Director of the SFO v. ENRC* [2018] EWCA Civ 2006 at [100].

73 *Director of the SFO v. ENRC* [2018] EWCA Civ 2006 at [102] and [112].

74 *Director of the SFO v. ENRC* [2018] EWCA Civ 2006 at [102], [113] and [118].

In *Bilta & Ors v. RBS & Anor*,[75] the High Court's Chancery Division was concerned with the status of documents created during an internal investigation carried out by RBS's solicitors, relating to a tax dispute with Her Majesty's Revenue & Customs (HMRC). The documents included transcripts of interviews with employees and ex-employees that had come into existence following HMRC sending RBS a letter claiming there were sufficient grounds to deny it a certain amount of input tax. Bilta and various other claimants subsequently sought disclosure of these documents, which was resisted by RBS on the basis that they were subject to litigation privilege. The Court held that the documents were indeed protected by litigation privilege. As to whether litigation could be said to be reasonably in contemplation at the time the documents came into existence, the sending of HMRC's letter was considered significant and found to have marked a 'watershed moment', and was likened to a letter before claim. While RBS may also have hoped to dissuade HMRC from proceeding, it was found that this was only a subsidiary purpose subsumed into the dominant purpose.

In *R (for and on behalf of the Health and Safety Executive) v. Paul Jukes*,[76] following a fatality at work, solicitors instructed by the employer concerned carried out an investigation. A statement was obtained from the appellant Mr Jukes, a former manager, as part of the internal investigation, after the Health and Safety Executive (HSE) had begun its investigation but before it commenced proceedings. This statement was relied on heavily during the subsequent prosecution of the appellant, and following his conviction he appealed, partly on the basis that the trial judge had been wrong to allow the prosecution to rely on the statement, as it was protected by privilege. The Court of Appeal did not accept this argument and found that at the time the statement was made there was no evidence that anybody within the company knew what the company's and the HSE's investigations would unearth, such that it could be said that prosecution by the HSE was reasonably in contemplation. It was held that the statement was not therefore protected by litigation privilege.

In *Jukes*, the Court of Appeal approved part of the first instance *ENRC* decision. The Court of Appeal in *ENRC* addressed this potential issue but felt that its conclusions were not invalidated by *Jukes*, on the basis that the endorsement of Andrews J's judgment in that case had been *obiter*.

Notes of interviews and the status of privilege were further considered by the High Court in *R (on the application of AL) v. SFO*.[77] A judicial review was brought against the SFO for failing to pursue an anonymised company, XYZ Ltd, for non-compliance with its DPA through not disclosing the full interview notes, having instead accepted oral proffers.[78] The SFO's position was that there was no need to obtain the interview notes because XYZ's claims of privilege were 'not

See Section 7.4

75 *Bilta & Ors v. RBS & Anor* [2017] EWHC 3535 (Ch).

76 *R (for and on behalf of the Health and Safety Executive) v. Paul Jukes*, [2018] EWCA Crim 176.

77 *R (on the application of AL) v. SFO*, [2018] EWHC 856 (Admin).

78 *SFO v. XYZ Ltd* (Case No. U20150856).

obviously wrong',[79] and that it had exercised legitimate prosecutorial discretion in accepting the oral proffers. In the judgment, the SFO was criticised for (among other things) its failure to challenge the assertion of privilege and require the notes in circumstances where it believed the material not to be privileged. It was found that, even if the assertion of privilege could be made out (which, in light of recent case law, the court said was not supported), by providing oral summaries the privilege had been waived. The judgment noted the SFO's failure to fully consider whether to require XYZ to waive privilege over the notes, given its contractual duty to co-operate under the DPA,[80] and whether privilege had been waived, even on a limited basis.

At the time of writing and in the absence of any further judicial interpretation, those conducting internal investigations should therefore be conscious that a claim to privilege of records of interviews with those outside the client group could be subject to challenge, notwithstanding the helpful decision of the Court of Appeal in *ENRC*, and whether a claim to privilege will be successful will depend on the facts of each case. Where the records could be said to form part of the lawyer's working papers in the context of advice, a claim to legal advice privilege would be strengthened if the notes contained sufficient legal analysis, assessment as to relevance and the 'tenor' of the legal advice. Legal advice privilege will also attach to material that forms part of the continuum of the lawyer–client communications even where those documents do not expressly seek or convey legal advice.[81] For litigation privilege to apply, however, litigation must be in reasonable contemplation, and the dominant purpose of the interviews must be the conduct of that litigation. This will depend on the facts of the case, but where litigation is in contemplation, this should be documented to assist in defending any challenge to a claim for privilege.

See Chapter 35 on privilege

Factors that may strengthen a claim to privilege over interview notes include where, for example, notes arise from interviews with likely potential defence witnesses in contemplated litigation or where interviews are conducted with a view to assessing the potential risk the witness may pose in likely proceedings.

Those conducting investigations may wish to consider the timing of witness interviews in the context of when the likelihood of litigation (civil or criminal) is clearer, in the absence of which there is a risk that claims to privilege of records of witness interviews will be challenged.

Where privilege can be established, the best position may be to ensure that any notes taken during interviews are done so as to strengthen a claim to privilege and to leave any decision on whether to waive privilege until the course of the investigation and interests of the authorities are clearer.

79 *R (on the application of AL) v. SFO* at [7].

80 *R (on the application of AL) v. SFO* at [26].

81 *Balabel v. Air India* [1988] 1 Ch 317.

Conducting the interview: employee amnesty and self-incrimination 7.12

As a general point an employer cannot provide amnesty from criminal or regulatory action. Similarly an agreement cannot prevent disclosures to regulators or inhibit criminal investigations.

While in theory amnesty against internal disciplinary action could be offered, this is very rare. More commonly, discussions take place with a view to the employee leaving under the terms of a settlement agreement, which can include a financial settlement and avoids the employee being dismissed. Such discussions can take place 'without prejudice', or they may take place as 'protected conversations' and therefore should not take place during a witness interview. These discussions, providing they meet the required criteria, cannot be used as evidence in unfair dismissal proceedings,[82] although, unless the without prejudice rule can genuinely apply, they could be used in whistleblowing or discrimination claims.

See Chapter 13 on employee rights

Though in theory it is possible for an employer to agree a certain course of action (for example, to retain an employee and waive the right to bring disciplinary action), this would not be advisable in circumstances where facts are not yet known or understood. If an amnesty is given, the employer would want to ensure that any waiver against disciplinary action related to closely defined and identifiable incidents only.

Employers also need to be wary of consistency. Where two employees have committed misconduct, allowing one employee to remain and dismissing another would support an unfair dismissal claim that the dismissed employee may bring. The employer would need to justify the difference in treatment, which may be easier to do when an employee has left under the terms of a settlement agreement.

An employee may also seek to claim privilege against self-incrimination and refuse to answer questions on that basis, particularly where he or she is advised by independent counsel. While there may be clear advantages to this approach from a criminal or regulatory perspective, this in itself would not provide a defence against dismissal. An employer could reach a decision to dismiss on the basis of the information that it had at that time. Though it cannot compel employees to answer questions, their failure to do so could be deemed to be unco-operative and in breach of the terms and conditions of employment, resulting in further grounds for disciplinary action. A dismissal for gross misconduct can still be fair in circumstances where a decision has been made not to prosecute, or where the employee has been acquitted of criminal charges for the same offence.[83] Acts that could constitute gross misconduct are broader than criminal offences and the requirement that gross misconduct be 'fair' is lower than the criminal standard of proof.[84]

82 Section 111A Employment Rights Act 1996.

83 *Okhiria v. Royal Mail* UKEAT/0054/14/LA.

84 A dismissal for gross misconduct is 'fair' if the employer believed that the employee was guilty of gross misconduct, if it had reasonable grounds on which to base that belief, and if it had carried out as much investigation as was reasonable in the circumstances of the particular case: *British Home*

In addition to employment considerations, it is always possible for an employer to agree not to pursue civil claims against an employee in return for information being provided. However, as set out above, this should generally not be offered until full facts have been established.

7.13 Considerations when interviewing former employees

In general, unless there is a contractual commitment to do so, former employees can simply refuse to attend a witness interview. It is important to bear this in mind when negotiating an employee's exit, although in reality (depending on the specific contract terms), once the employee has left there may be little a former employer can do to require attendance, even if it enjoys the benefit of a contractual commitment from the employee to co-operate in any future investigation or proceedings. Former employees regulated by the FCA have a duty under Statements of Principle and Code of Practice for Approved Persons (APER) Principle 4 to co-operate with the regulators.[85] It is unlikely that this provision would require them to assist with an internal investigation, and if asked, they could fairly argue that their duty was to the regulator.

Where a former employee is interviewed there are some protections available in respect of whistleblowing, discrimination or victimisation, should they arise in the conduct of the interview or how he or she is treated afterwards. An employer should be wary of giving assurances of anonymity to a former employee in respect of information given, although this could be given on a need-to-know basis. Anonymity should not be guaranteed where regulatory obligations exist or where it could inhibit any criminal investigation, and assurances that any statement provided would not be disclosed to criminal or regulatory authorities should not be given.

See Chapter 5 on beginning an internal investigation and Chapter 11 on production of information to authorities

Data protection issues may also arise if the account or statement given by a former employee contains personal data. Care also should be taken in global investigations that data protection rules from other relevant jurisdictions are considered.

See Chapter 40 on data protection

7.14 Considerations when interviewing employees abroad

Interviewing witnesses abroad can present particular difficulties in global investigations. Statutory employment law is generally of geographical rather than universal jurisdiction and, as a result, statutory employment laws of the jurisdiction where an employee is based will always apply, even if the employment contract is governed by English law. Nonetheless the governing law of the contract should also be considered, as should any rights or protections under that contract.

Stores Ltd v. Burchell [1978] UKEAT 108_78_2007. In a criminal trial the standard of proof required is to prove guilt 'beyond a reasonable doubt'.

85 The Statement of Principle 4 (see APER 2.1A.3 R) is in the following terms: 'An approved person must deal with the FCA, the PRA and other regulators in an open and cooperative way and must disclose appropriately any information of which the FCA or the PRA would reasonably expect notice.'

When planning interviews abroad it is crucial that the law and procedure relevant to those jurisdictions are considered. The employment documents (the staff handbook, for example) should be reviewed to ensure that procedures are followed. It is important to consider whether the employee or employer is covered by any regulatory rules within that jurisdiction (as well as the United Kingdom) to ensure compliance with any parallel reporting obligations.

It would be wise to engage local legal advice on local laws and local culture, which should be factored into the interview strategy. Clearly the interviews should comply with local laws, and in particular those relating to employment, data protection, privacy and privilege. While the English rules of privilege determine whether privilege applies in this jurisdiction, authorities from other jurisdictions may also have an interest, and advice should be sought on how privilege is determined in those jurisdictions.

A witness's procedural rights in the jurisdiction where he or she is based, as well as in the United Kingdom, should also be considered. Compliance with local laws as well as collective consultation and representation rules should be factored in. In addition, the employer should take advice on whether the employee abroad is covered by UK statutory employment rights.

Issues often arise regarding access to documents, particularly where there are restrictions on the movement of information from one jurisdiction to another.[86] Employees may also have a right to access and correct notes and files identifying them.[87] The applicable directives, regulations or rules should be considered in advance to ensure compliance with data protection laws.

See Chapter 5 on beginning an internal investigations and Chapter 40 on data protection

Finally, maintaining confidentiality can be particularly difficult when interviewing witnesses abroad. Where witness interviews span a number of countries, the risk of information being shared or leaked is greater and measures should be put in place to ensure that confidentiality remains.

Key points 7.15

Witness interviews are a key part of most internal investigations and can provide vital information for the investigation. Internal investigation interviews can take the form of either preparatory interviews at the outset of an investigation or substantive interviews likely to take place once a review of relevant material has taken place.

There can be a tension between the right of a company to investigate allegations of wrongdoing and undertake witness interviews as part of its review, and the expectations of the authorities to be consulted prior to it doing so. Enforcement agencies may seek to restrict how the interviews are conducted or suggest that they be postponed until the authorities have conducted their own investigation.

86 The General Data Protection Regulation sets limits on the collection and use of personal data within the EU. The provisions were supplemented by the Data Protection Act 2018 (passed 23 May 2018).

87 Right of access by the data subject, Article 15 of the General Data Protection Regulation.

Witness interviews should be conducted in a manner that minimises the risk of contamination or prejudice.

UK Enforcement agencies have stated that a refusal to provide details of the accounts given by witnesses in internal investigations could be construed as unco-operative or a breach of regulatory requirements. The provision of this information and the form in which it would be provided needs to be balanced with the need to ensure confidentiality in an investigation and to maintain legal privilege.

Where a company is investigating allegations of criminal or regulatory misconduct, it is preferable to have lawyers (internal, external, or both) present at interviews to take notes and identify the key risk areas that may arise, and to enable confidentiality and for privilege to be asserted, as appropriate. Where external lawyers have been engaged it is preferable for them to conduct the interviews; they often bring (and, importantly, are seen to bring) expertise, objectivity and independence. Preferably there should be two interviewers to ensure all relevant information is captured.

Interviews can be recorded in a number of ways: by recording and transcribing the interview; by counsel preparing notes of the interview; and with the preparation of a witness statement. UK and overseas enforcement agencies are likely to seek details of the accounts provided, and consideration should be given to ensuring legal privilege is capable of being asserted. How an interview is recorded, the privilege that may attach to that record, and whether or not to provide details of the witness's account will depend on the circumstances of each case.

Legal privilege in the context of witness interviews raises a number of complex issues and a claim to privilege will be closely scrutinised by the authorities. Notes of interviews with witnesses who fall outside the 'client' group may attract litigation privilege if circumstances allow, but the facts of each case must be carefully considered. There is a risk that disclosing information relating to witness interviews could result in a waiver of privilege more generally.

When conducting the interview, lawyers should be satisfied that the witness understands the basis on which he or she is being interviewed, the purpose of the interview, and the use that could be made of the information provided. While there is no formal requirement to do so, it is best practice for the witness to be given an *Upjohn* warning at the outset and to remind the witness of confidentiality. Where a company has decided to waive privilege prior to the interview, the *Upjohn* (or similar) warning may need to be strengthened. It is unlikely that a formal caution, similar to that given by the police when investigating suspects, would be required.

The company should consider whether its own legal advisers can give advice to the witness or whether to offer (and to pay for) separate independent legal advice, particularly where there may be a conflict of interest between the company and the witness and where the witness is at risk of criminal or regulatory investigation, or where the company could be implicated in corporate wrongdoing.

In general, a company cannot provide a witness with amnesty from criminal or regulatory action. Similarly an agreement cannot prevent disclosures to regulators or inhibit criminal investigations. Amnesty against internal disciplinary

action is rare and while it is always possible to agree not to pursue civil claims in return for information being provided, this should generally not be offered until the full facts have been established.

Interviewing witnesses abroad can present particular difficulties in global investigations. It is crucial that the law and procedure relevant to those jurisdictions are considered and that any relevant regulatory rules are complied with. It would be wise to engage local counsel to advise on local laws, regulatory rules and culture to ensure compliance. Any applicable directives or regulations surrounding access to documents should also be considered in advance to ensure compliance with data protection laws. Measures should be put in place to seek to ensure confidentiality.

Appendix 1

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Caroline specialises in serious fraud and financial crime. She represents corporates and individuals in complex global investigations. She has conducted numerous internal investigations on behalf of companies in relation to allegations of financial crime and misconduct including fraud, theft, corruption, money laundering and environmental crime. She advises companies and individuals subject of investigations and prosecutions by various agencies including the Serious Fraud Office (SFO), the Financial Conduct Authority (FCA), HM Revenue and Customs (HMRC), the Crown Prosecution Service (CPS) and the Competition and Markets Authority (CMA, formally the Office of Fair Trading). Caroline has a particular interest in cross-border cases and her experience extends to MLA requests and extradition. Caroline has been recognised in GIR's 100 'Women in Investigations 2018', and sits on the committee of the Fraud Lawyers Association (FLA).

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