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# The In-House Lawyer

THE WHITE-COLLAR CRIME ISSUE • STARTUPS • TECH IP • GLOBAL INVESTIGATIONS

## Out of the shadows

GCs and the global  
crackdown on corruption



Morgan Lewis

## White collar and related investigations – the trends you need to know

Chris Warren-Smith and Melanie Ryan, partners, Morgan, Lewis & Bockius



### Chris Warren-Smith

Partner, Morgan, Lewis & Bockius  
chris.warren-smith@  
morganlewis.com

### Melanie Ryan

Partner, Morgan, Lewis & Bockius  
melanie.ryan@morganlewis.com

Political and public pressures continue to drive significant changes in the approach to criminal corporate enforcement throughout the world. The UK has proved no exception and in September 2017 the Criminal Finances Act 2017 created another strict liability criminal offence for businesses, for failing to prevent facilitation of UK or foreign tax evasion.

Businesses already working hard to cope with the challenges of increased regulation also need to take account of the growing risk of criminal accountability and its consequences. This article considers the landscape in which changes have taken place in the UK over the past decade, how business and authorities are reacting and some of the things that businesses get right (and wrong) when investigating and handling the serious criminal and civil issues and reputational risks that can arise.

#### What are the main differences now compared to ten years ago?

The current political backdrop is very different to that of 2007, prior to the global financial crisis. At that time criminal enforcement in the UK against corporations was rare. The subsequent development of strong political and public attitudes towards bribery and corruption, tax evasion, economic sanctions, money laundering, terrorist financing and related issues has led to the gradual introduction of a range of new criminal offences for corporations. The UK now

has strict liability offences for corporations that fail to prevent bribery or facilitate tax evasion. Such defences as are available are challenging and involve showing the corporation had adequate or reasonable procedures in place to prevent the crime in question. Legislative focus on corporate criminality is on the rise across the developed world with a corresponding increased focus on individual accountability in the corporate context. In this climate it is not surprising that enforcement efforts are increasingly assisted by criminal and civil authorities in the UK working closely, and sharing information, with authorities in the US and elsewhere.

#### How much greater is the risk of UK criminal action against corporations?

Ten years ago, the existing legal framework meant that criminal prosecution in the UK was largely confined to individuals and, on occasion, smaller corporations. The legislative framework now in place gives various prosecutors the ability to bring criminal charges against businesses more easily in areas such as bribery, tax evasion, sanctions and money laundering. The risk of criminal conviction for a corporation carries with it additional legal sanctions to the regulatory and civil remedies already in existence, including in areas such as procurement and contractual terminations. The various UK agencies charged with criminal enforcement, although under review, are now better funded, have additional tools at their disposal and have an improved

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track record of pursuing corporate prosecutions against large institutions. The US criminal enforcement agencies continue to drive activity throughout the world, but corporations increasingly perceive themselves to be at risk of criminal prosecution in the UK and elsewhere outside the US.

#### **What are businesses doing to protect against these criminal risks?**

The level of awareness and preparedness to invest time and resource in managing these evolving criminal risks varies enormously from country to country and within the UK. Many global organisations have institutional programmes dealing with risk assessment and compliance in the UK and other territories relevant to their operations. Those organisations regularly review and update their crisis management programmes and their policies and procedures to be able to identify and manage the risks and issues that arise in different jurisdictions. A significant driver of issue identification continues to be whistleblowers and the more progressive organisations continue to develop and refine their whistleblowing procedures and protections. However, there is a wide disparity in approach and many businesses are yet to devote the time and resources needed to be able to identify and manage these new and developing risks.

#### **How are the authorities performing in the UK?**

In general, performance is improving but variable, both between and within the authorities. Overall, the investigating and prosecuting authorities have better processes and resources than in the past and the private sector is increasingly better prepared and equipped to work constructively with them. However, one particular challenge is that many of those in the public and private sectors are working from an experience base of civil enforcement and criminal prosecution of individuals so their experience of dealing with corporate criminality is frequently limited. In addition, the absence of a tried and tested approach to criminal investigations in some authorities can make it difficult for businesses to understand what is expected of them and how they should proceed. The overlap between agencies that exercise criminal powers and the different options and tools available to them can also be a cause of confusion and concern (for example, the Serious Fraud Office (SFO) and the Financial Conduct Authority (FCA) both have jurisdiction to investigate and prosecute certain criminal acts, but the SFO can enter into a deferred prosecution agreement with a corporate offender whereas the FCA cannot). The added prospect of a government review of criminal enforcement in the UK only adds to the uncertainty.

#### **How does the position compare to the US?**

The US has a much longer established and accepted culture of private sector investigation leading to companies and regulators obtaining facts and information on which prosecutions and regulatory decisions are based. In general, there is more certainty in the US about what will be treated as privileged as well as a greater preparedness of the US authorities to rely on the findings of private sector investigations. The US also has overlapping powers between the various authorities although there is, in general, greater certainty of process and in many cases, outcomes. It is important to be aware that there are aspects of the US criminal and civil processes which do not work well in tandem with those in the UK and possible areas of conflict need to be identified and managed at the outset where they arise.

#### **What do businesses get right?**

It is not possible to overstate the importance of taking time to prepare and focus the investigation at the outset and to develop a clear scope, plan and methodology. The most effective investigations are those that have a clear process focused around gathering facts on which the business can rely and make important decisions. The best possible outcomes tend to be achieved by a transparent and highly collaborative approach with the

prosecutors and regulators. Another often underestimated step is developing a clear strategy at the outset for initial and ongoing communications to each potentially affected internal and external stakeholder. A strategy which involves appropriate formal and informal communications can bear significant (and sometimes unforeseen) benefits.

#### What do businesses get wrong?

The best outcomes are rarely achieved where businesses conduct investigations to a preconceived outcome. Trying to fit facts to a particular story or for a particular purpose will almost always destroy trust and result in negative outcomes. Similarly, taking unnecessarily obstructive positions with prosecutors or regulators undermines trust, not to mention the ability to engage in otherwise constructive dialogue. The fast pace in which this area has developed also means it is easy to choose the wrong team; for example, a criminal expert may have vast experience defending individuals but may not have the necessary experience to engage with and assist a large organisation faced with a far-reaching investigation. Problems also arise when the decision-making body within the organisation lacks diversity and balance, or is influenced by internal political agendas.

#### What's next?

There continues to be uncertainty around enforcement of corporate criminality in the UK. The government is reviewing the criminal law enforcement agencies against a background of increased international criminal corporate enforcement and focus on individual accountability. New corporate offences are a possibility and the existing offences remain in some cases untested by the courts. Some of the relevant authorities continue to develop their approach to corporate criminal investigations while private sector litigation on the back of corporate criminality is becoming more common. The private sector is increasingly working better with public sector enforcement agencies, but can still experience a level of mistrust and uncertainty which can be frustrating. This whole area is dynamic and evolving and is ignored by businesses at their peril given the potentially serious implications should something go wrong. ■

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### Key tips on conducting corporate criminal investigations

#### Do

- Engage internal and external stakeholders early and maintain regular strategic communications where possible.
- Take time to align your approach to your organisation's corporate principles and culture.
- Identify all potential sanctions, outcomes and areas of potential reputational concern at the outset.
- Have a clear documented agreement of who at the company is the 'client' for the purposes of the investigation at the outset to ensure protection of confidentiality and legal privilege.
- Make sure the investigation team and process have integrity and independence in both perception and reality.
- Emphasise the importance of gathering accurate facts on which key decisions will be made.
- Use triage, scoping and case theory and continually review them against the facts.
- Choose your team carefully taking account of internal and external

resources and get the right balance, diversity and expertise.

- Take additional time to plan and get things right: scope, process, data transfer, privilege, interviews, etc.

#### Do not

- Prejudge the outcome and make the facts fit that outcome.
- Engage in unnecessary conflict with the prosecutors and regulators as this can lead to a loss of trust.
- Fail to keep a clear audit trail of work done, judgement calls and decisions made during the investigation, as this can undermine the integrity of the work and findings.
- Underestimate national and cultural differences and the importance of seeking local advice.
- Underestimate the potential impact of individual interests diverging from those of the corporation and identify and manage these risks at an early stage.
- Fail to assess and manage the risk of civil litigation in the UK arising from actions potentially giving rise to corporate criminality.