Fountain Court CHAMBERS

Internal investigations – overview of principal considerations*

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AUTHOR

Robin Lööf
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I. Introduction – internal investigations in the UK

There is no generalised obligation on UK companies to provide for internal investigations in their internal procedures. Rather, it has been a combination of the influence of US corporate practices on the one hand, and, on the other, the increased risk of corporate enforcement action with the advent of the 2010 Bribery Act and the reform of financial regulation post-financial crisis, which have led to the development of a now mature internal investigations industry and practice. At this point, the practice is so ingrained in corporate governance that many large companies have increasingly well-resourced in-house investigations teams.

This essay will focus on aspects of the internal investigation itself which either have presented and / or still present particular challenges in the English context and will, hopefully, be of interest to an Italian reader. It will therefore not deal directly with some wider issues pertaining more to investigations by authorities, such as the vexed issue of the rules of corporate criminal liability and the various settlement options available to the authorities. To be sure, the risk of enforcement action is often an important driver of internal investigations and may condition the manner in which they are conducted. However, many if not most internal investigations are conducted and concluded without the involvement of any enforcement authority. It is therefore valuable to consider them on their own terms, beginning with why they should be conducted.

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II. Why conduct an internal investigation?

Often ignored at the start of many internal investigations – the need for one being taken for granted – or only dealt with perfunctorily, why to conduct an internal investigation should be the first question asked by any corporate officer contemplating how to handle a case of suspected wrongdoing in the company's operations. In England & Wales[1], an adequately reasoned answer will determine important features of the legal framework for the internal investigation, particularly in relation to privilege and data privacy. It will also provide a guide to important aspects, such as how to handle interviews with key individuals.

There are essentially two broad objectives that companies pursue by means of internal investigations. First, a company may wish to conduct an internal investigation as part of a defensive strategy to deal with a threatened enforcement action or lawsuit based on alleged wrongdoing in its operations. Second, a company may wish to conduct an investigation into suspected wrongdoing as part of internal risk management and disciplinary process.

These two broad objectives are by no means mutually exclusive and many investigations will be motivated by elements of both. Although one objective will generally dominate, this balance may well evolve as a result of findings or, indeed, external or internal developments. Keeping the question of the objectives of the internal investigation under review, and making it clear when the answer evolves, may be critical.

III. Privilege and confidentiality of internal investigations

A central issue in an internal investigation is whether and to what extent what it uncovers will be protected by legal professional privilege. Material covered by privilege is in principle inviolate, inaccessible to third parties including prosecutors and other enforcement authorities.[2] English law affords privilege to confidential communications between clients and lawyers seeking and providing legal advice, as well as lawyers' "working papers"[3] which may reveal "*the trend of advice*".[4] The rules take a wide view of what counts as "legal advice" and include within this ambit any "*advice as to what should prudently and sensibly be done in the relevant legal context*".[5]

The manner in which privilege applies in the context of internal investigations will mainly be determined by (A) who conducts the internal investigation and (B) the objectives pursued.

A. The personal requirement for privilege

English law is relatively generous as to who counts as a lawyer for the purposes of privilege. Not only will privilege apply to communications with external counsel, but also to communications with in-house counsel[6], assuming that the individual in question is a registered lawyer (principally either a solicitor or a barrister), and therefore regulated as such.[7] However, privilege does

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1 This essay is confined to internal investigations subject to the law of England & Wales; Scotland and Northern Ireland have distinct legal systems.

2 See, *e.g.*, *R v Derby Magistrates' Court, ex p. B* [1996] AC 487 (House of Lords); in *Three Rivers District Council and others v Governor and Company of the Bank of England (No. 6)* [2005] 1 AC 610 (House of Lords), Lord Scott of Foscote stated: "… *if a communication or document qualifies for legal professional privilege, the privilege is absolute. It cannot be overridden by some supposedly greater public interest*" (at 646D, paragraph 25).

3 *Lyell v Kennedy* (1884) 27 ChD 1 (Court of Appeal).

4 *Ventouris v Mountain* [1991] 1 WLR 607 (Court of Appeal), at 615F (*per* Bingham LJ).

5 *Balabel v Air India* [1988] Ch. 317 (Court of Appeal), 330 (*per* Taylor LJ). Recent authority has somewhat complicated this. In *R (Jet2.com Ltd) v Civil Aviation Authority* [2020] QB 1027 (Court of Appeal), following consideration of a wealth of prior case law it was held that in order to benefit from privilege, the request and provision of legal advice had to be the "dominant purpose" of the communication between client and lawyer. While this is unlikely to be an issue in relation to communications between the client and a lawyer, difficulties will arise in relation to what can be described as "mixed motive communications" such as where an e-mail is sent to a number of people with a view to receiving, say, commercial, public relations, *and* legal input. In these circumstances the e-mail may not be covered by privilege on the basis that seeking legal advice was merely one of and not dominant among the purposes behind the e-mail. English lawyers are therefore likely to caution against such multi-purpose and multi-recipient correspondence in the context also of internal investigations.

6 *Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners (No 2)* [1972] 2 Q.B. 102.

7 See, *e.g., Dadourian Group International and others v Simms and others* [2008] EWHC 1784 (Ch) (High Court) where the solicitor had been struck off.

not extend to the work of non-lawyers, even if they provide substantively legal advice or services.[8] It follows that the choice of who conducts an internal investigation is often determinative of the extent to which a company will ultimately be able to keep findings confidential.

As mentioned above, many large companies have in-house investigative teams that handle most investigations. Organisationally, these tend not to be attached to the General Counsel's office, but rather to, either, Internal Audit or a separate Compliance function. Therefore, even if individual members of the in-house investigation team happen to be registered lawyers, the presumption will be that they are not fulfilling a legal function and therefore their work will not be privileged.[9] It would follow that an investigation carried out by such a team will not be privileged. However, where a non-legal in-house investigative team reports the findings of an investigation to a member of the General Counsel team, and the General Counsel team then advises the Board on the legal implications of those findings, that advice will be privileged. For these reasons, and because their findings are vulnerable to forced production or disclosure, it is often good practice for in-house investigative teams to limit themselves to making strictly factual findings, and refrain from drawing any conclusions as to the potential legal qualifications or consequences of those findings.

As a matter of practice, for internal investigations into issues of a particular gravity or sensitivity, or which may result in material findings for the company as a whole, external lawyers are often retained. Whether external counsel is retained to conduct the whole investigation, or merely to advise on findings of an in-house investigative team, their advice (in the form of correspondence, reports, *etc*.) will be unambiguously privileged. It is worth noting in this regard that the English law of privilege does not protect pre-existing non-privileged material by virtue of being somehow included in a lawyer's file, or referred to or relied upon in an advice.[10] For example, a copy of a pre-existing, non-privileged e-mail annexed to a privileged advice is not covered by the privileged status of the advice itself.

While comparatively generous in many respects, English privilege law is very restrictive in one major (and surprising) respect of great importance for corporate clients: the definition of the "client". This follows from the Court of Appeal's affirmation in *Three Rivers (No 5)* that, absent litigation in prospect (see below), privilege only applies to "*communications between client and adviser*" to the exclusion of "*documents communicated to a client or his solicitor for advice to be taken upon them*".[11] In practice, this meant that in the *Three Rivers* case, where the lawyers were instructed by a dedicated unit within the Bank of England, only that unit was the "client". It followed that not even communications between the lawyers and the Governor of the Bank of England were privileged.[12]

In the context of an internal investigation, most individuals the lawyers interact with (employees, contractors, etc.) will provide them with documents and information upon

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8 *R (Prudential PLC) v Special Commissioner of Income Tax* [2013] 2 AC 185 (House of Lords) (concerning accountants who were tax law experts).

9 English law recognises that if a lawyer employed in a non-legal function (*e.g*. as a compliance or audit officer) is asked to advise on a matter of law, that advice will be privileged: *Minter v Priest* [1930] AC 558 (House of Lords). However, it would need to be very clear that the advice sought is truly *legal* and not an aspect of her / his regular duties (see, e.g. *The Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Limited* [2019] 1 WLR 791 (Court of Appeal)). For completeness' sake, it should be said that the opposite is also true: communications with lawyers may not be privileged if it is clear it was not concerned with the seeking and providing legal advice (construed broadly): *R (Jet2.com Ltd) v Civil Aviation Authority.*

10 *Ventouris v Mountain* [1991] 1 WLR 607, applied in, e.g., *Financial Reporting Council Limited v Sports Direct International* [2020] 2 WLR 1256 (Court of Appeal), at 1276 *et s*.

11 *Three Rivers District Council and others v Governor and Company of the Bank of England (No. 5)* [2003] QB 1556 ("Three Rivers (No. 5)"), 1579B (paragraph 26) and 1575A (paragraph 19).

12 *Ibid.* at 1580H-1581B (paragraph 31). This significant restriction on the scope of corporate privilege has been contested since *Three Rivers (No. 5)* was decided. Calls for it to be reversed by the Supreme Court are frequent. In the recent case of *R (Jet2.com) v Civil Aviation Authority* [2020] QB 1027, Hickinbottom LJ noted stated that "*on the basis of both principle and practical application, I respectfully doubt both the analysis and conclusion of this court in* Three Rivers (No 5) *on this issue; and, had it been in this court's power, I too would be disinclined to follow it.*" (at 1056B, paragraph 57).

which advice will then be provided. In principle, they will therefore not be considered the "client" and these exchanges, as well as records of them, will not be covered by privilege.[13]

These basic rules of privilege are referred to as "legal advice privilege." English law has a separate privilege regime which may apply to an internal investigation depending on the objective it pursues. Where it applies, "litigation privilege" affords a much wider scope of protection on communications with individuals who are not the "client".

B. The impact of objective on privilege

It has long been considered a vital aspect of the fairness of legal proceedings that litigants are able to prepare their respective cases safe in the knowledge that such preparations are protected from outside scrutiny.[14] This has resulted in privilege being afforded to a wider range of communications where they are prepared for the "*dominant purpose*" of being used in anticipation of any form of adversarial litigation.[15] Perhaps needless to say, a criminal prosecution is very much considered adversarial litigation.[16]

Where preparing for or conducting litigation are their dominant purpose, communications not only between the lawyer and the "client", but also between lawyer or client and third parties will be covered by privilege.

The circumstances which lead to the launch of an internal investigation are often such that the company representatives will not consider litigation to be likely. In these cases, litigation privilege will not apply and the internal investigation will be covered by the "legal advice privilege" regime described above.

However, in many circumstances which trigger an internal investigation, the company and those advising them will be uncertain as to whether litigation will follow.This will be the case even where the internal investigation is triggered by contact from a prosecution authority when it cannot be known whether a prosecution will follow in due course. Practitioners had long assumed that where an internal investigation was conducted in circumstances where a prosecution might well follow, litigation privilege applied. Following a High Court ruling that severely restricted the application of litigation privilege in internal investigations, the Court of Appeal essentially endorsed this position in *ENRC v Director of the Serious Fraud Office*: "*when the [Serious Fraud Office] specifically makes clear to the company the prospect of its criminal prosecution …, 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.*"[17]

The position in English law can therefore be summarised as where an internal investigation is conducted under the threat, or is motivated by the risk, of prosecution (or other litigation) litigation privilege will apply. Critically, this means that where information is sought from, or interviews conducted with, employees or representatives of the client company, or indeed individuals external to it, those exchanges, as well as the records of those exchanges, are covered by privilege.

C. Privilege and foreign material

English law adopts the principle of *lex fori* to the issue of whether foreign material is covered by privilege.[18] Lawyers practising

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13 See, *e.g.*, In re *RBS Rights Issue Litigation* [2016] EWHC 3161 (Ch.) (High Court).

14 See, *e.g.*, *Three Rivers District Council and others v Governor and Company of the Bank of England (No. 6)* [2005] 1 AC 610 (House of Lords), 654H-655A (paragraph 52): "[In adversarial proceedings] *each party should be free to prepare his case as fully as possible without the risk that his opponent will be able to recover the material generated by his preparations*" (*per* Lord Rodger of Earlsferry).

15 *Waugh v British Railways Board* [1980] AC 521 (House of Lords).

16 Not all English legal proceedings are "adversarial" for these purposes. For instance, family proceedings are deemed "inquisitorial" and therefore litigation privilege will not apply in relation to them: *Re L (a Minor) (Police Investigation: Privilege)* [1997] AC 16 (House of Lords).

17 *The Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Limited* [2019] 1 WLR 791 (Court of Appeal), 829F (paragraph 96) (*per* Sir Geoffrey Vos C).

18 *Lawrence v Campbell* (1859) 4 Drew 485 (Court of Queen's Bench); *Re Duncan* [1968] P. 306 (High Court); In re *RBS Rights Issue Litigation* [2016] EWHC 3161 (Ch.) (High Court).

abroad (external as well as in-house) are treated in the same as their English counterparts would have been.[19] English law can even be said to be more generous to lawyers practising abroad in that little inquiry will be made into their status or regulatory regime, and communications with them will be privileged even though these might not be covered by privilege in their home jurisdiction.[20] The principle appears also to extend litigation privilege to communications prepared in anticipation of foreign litigation, again regardless of their status in the foreign jurisdiction.[21] This means that even though a document or piece of information would not be privileged in the jurisdiction where it was obtained, it will still be covered by privilege for the purposes of any proceedings conducted under English law as long as it fulfils the relevant criteria.

The major caveat to this is that if confidentiality in the material has already been lost in another jurisdiction (because it could not be maintained as a matter of local law), a claim to privilege in an English court is likely to fail as confidentiality as a matter of fact is a *sine qua non* of privilege.[22]

For foreign companies conducting an internal investigation into a matter which may find itself the subject of judicial proceedings before English courts, maintaining confidentiality is therefore critical.

IV. Managing data protection in internal investigations

The EU's General Data Protection Regulation ("GDPR")[23] brought in significant changes to how internal investigations need to be organised. The major impact has been the need in principle to serve each individual whose personal data is to be processed with a notice to that effect. Required by article 14[24] of the GDPR, these "Data Protection Notices" are in practice sent to all individuals (generally employees) whose e-mails and other documentation are collected for review for the purposes of the investigation. Notably, these notices require the data subject to be informed of the purpose and the legal basis for the processing.

The need to state the purpose and legal basis for the processing emphasises the need to have a clear idea of the reasons and objectives for the investigation. It is difficult to rely on the data subject's prior or general consent in these circumstances. Typically, therefore, companies will rely on the processing being "necessary for the purposes of the legitimate interests pursued by the [company]".[25] Those legitimate interests need to be spelled out in the notice sent to the data subjects. Further considerations apply when there is or may be a need to transfer the data outside of the UK and the EU.[26] Importantly, the company's legitimate interests are not a

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19 *R (Prudential PLC) v Special Commissioner of Income Tax*.

20 *PJSC Tatneft v Bogolyubov & Ors* [2021] 1 WLR 403 (High Court). In this case, it was argued that the advice at issue had been provided by Russian in-house lawyers whereas in Russia, only advice from registered "Advocates" benefited from the Russian equivalent of privilege. Moulder J held that "*legal advice privilege extends to communications with foreign lawyers whether or not they are 'in-house' … and the court will not enquire into how or why the foreign lawyer is regulated or what standards apply to the foreign lawyer under the local law. The only requirement in order for legal advice privilege to attach is that they should be acting in the capacity or function of a lawyer …. There is no additional requirement in my view that foreign lawyers should be 'appropriately qualified' or recognised or regulated as 'professional lawyers'."* (at 416H-417B, paragraph 57).

21 *Re Duncan* [1968] P. 306, at 311F-G.

22 See, *e.g.*, *Bourns Inc. v Raychem Corp (No 3)* [1999] 3 All ER 154 (Court of Appeal), at 167-168.

23 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation). Following the UK's exit from the EU, the substance of the GDPR has been incorporated into UK law as the "UK GDPR" by virtue of section 3 of the European Union (Withdrawal) Act 2018 and the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019.

24 This article applies if the data is to be collected from a source other than the data subject her- / himself, *e.g.* where e-mails are collected from a company server. If the data is to be collected from the data subject her - / himself article 13 applies.

25 Article 6(1)(f) of GDPR

26 See Chapter V of GDPR. The European Commission issued an adequacy decision for the UK dated 28 June 2021. This decision contains a sunset clause which provides for it automatically to expire on 27 June 2025, and for the Commission continuously to monitor any changes and developments to the UK's legal framework.

blanket basis for transferring personal data to third countries.

This means that unless a narrow set of exemptions apply[27], an internal investigation can no longer be carried out "covertly". Employees can of course be subject to contractual obligations of confidentiality but this may not prevent leaks and cannot abrogate data subjects' right to lodge a complaint with a data protection authority. Companies therefore need to take into account this risk of discovery and / or that employees who feel targeted will use data protection procedures against the company.

Companies also need to ensure that the data processing needed for an investigation is conducted in accordance with the principle of "data minimisation".[28] This means it should be proportionate and the minimum necessary to achieve the purpose of the investigation. This will typically require greater care and, likely, separate treatment of data that employees themselves have marked or filed as "personal". Also, companies can (no longer) collect data "just in case" – each data collection needs to be justified with reference to the reason for the investigation. Ensuring strict compliance with "data minimisation" will reduce the risk of employee complaints.

V. Interviews in internal investigations

Interviews are often a critical, and sensitive, aspect of an internal investigation. How they are prepared, carried out, and recorded are not only matters of great importance but also matters where English law and practice differ from those of other jurisdictions.

A. Preparing for the interview

Two organisational questions tend to impose themselves in the preparation of interviews, often because the prospective interviewee raises them her- / himself: First, should the interviewee be provided with her or his personal lawyer? Second, should the interviewee be provided with an agenda for, or a list of topics to be covered in, the interview and / or copies of any documents to be raised? Having a clear idea of the purpose of the internal investigation greatly assists in dealing with these issues. Also, from a practical perspective, they are often linked.

In relation to whether an interviewee should be provided with separate legal representation, there is no hard and fast rule. There is no express guidance in legislation, case law or regulatory pronouncements. However, a sensible best practice has developed whereby employees who, at the time of being interviewed, are known to be at risk of legal or disciplinary repercussions are offered their own representation. This assessment obviously requires those conducting an internal investigation to have a clear and dynamic understanding of its objectives and, relatedly, possible outcomes.

There are both practical and legal reasons for providing an interviewee at legal or disciplinary risk with separate legal representation. Practically, an individual who has the opportunity to prepare for, and be assisted at, an interview is more likely to provide considered and thorough answers to difficult questions – it is unlikely to be in the company's interest for an employee whom it has cause to suspect of misbehaviour to provide vague or ambiguous answers. The investigative team is also likely to find interacting with the interviewee through her / his lawyer to be both more efficient and less likely to lead to misunderstandings. Finally, the employee is less likely to feel aggrieved at the process, and the chances of maintaining a good relationship beyond the investigation are increased.

From a legal perspective, although a company cannot force an employee to attend an interview, it may well treat a refusal to do so as a disciplinary violation which may even justify an employee's dismissal.[29] Most employees will therefore consider themselves

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27 This would be the case if the company is legally obliged to keep the processing confidential (article 14(5)(d) of GDPR). This would generally only be the case if the processing is carried out following some form of production order by an enforcement authority.

28 Article 5(1)(c) of GDPR.

29 In addition, absent discrimination, damages for unfair dismissal are capped at the lesser of GBP £89,493 or one year's gross pay, which is not a significant deterrent for a company of any size (see section 124(1ZA) of the Employment Rights Act 1996).

obliged to attend an interview in the context of an internal investigation conducted by their employer. In light of this power imbalance, in the absence of separate legal representation for the employee-interviewee, there is a chance that a court or tribunal will consider the manner in which the interview was conducted to have been unfair and rule it inadmissible, in whole or in part.[30] To the extent, therefore, that a company wishes to ensure that it can rely on the record of a potentially sensitive interview with an employee, it is advisable to provide the employee with separate legal representation.

In relation to whether an interviewee should be provided with advance notice of the topics of the interview and / or copies of documents to be raised, the first thing to say is that for the reasons already set out above, providing some form of advance information is likely to make the interview more productive.

At the same time, companies will be concerned about the confidentiality of any lines of inquiry and preliminary findings of the internal investigation. Here again, the provision of separate legal representation makes things easier: an undertaking from the interviewee's lawyer to maintain confidentiality and to destroy or delete any documents provided following the interview will enable the company to provide advance information while protecting the confidentiality of the internal investigation.

Even where an employee does not have separate legal representation, arrangements can be made to enable her / him to consult documents in advance of the interview, for instance by a bundle being made available to be consulted, if necessary in the presence of a third person.[31]

There may exist a sense that there is investigative advantage to conducting surprise interviews. The theory is that the spontaneous reaction of an interviewee who is unaware of what to expect, particularly one who may be guilty of wrongdoing, is revelatory, not least because she / he would not have been able to prepare exculpatory explanations.[32] At the early stages of the development of internal investigations, it therefore happened that employee interviews were carried out without prior warning.

If ever it was generally deemed acceptable, UK practice now frowns upon such interviews "by ambush".[33] From a practical perspective, an individual suddenly confronted with questions about events and documents often dating back years is unlikely to yield very useful information. There is also a significant risk that genuine lack of recollection may be misinterpreted as obfuscation and it is doubtful that interviewers are able reliably to tell the difference. Furthermore, an employee subjected to such an interview is unlikely to remain very cooperative as the investigation progresses. On the contrary, she / he is likely to come out feeling aggrieved which may permanently damage the employment relationship.

B. Conducting the interview

There are as many styles and approaches to conducting interviews as there are interviewers. There is, in any event, no particular UK guidance on how interviews in internal investigations should be conducted.

For external counsel conducting interviews, there is however consistency of approach in the provision of a number of notices to the interviewee at the start of an interview in the context of an internal investigation. Originally

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30 The courts have a common law discretion to exclude evidence in criminal proceedings (see *R v Sang* [1980] AC 402 (House of Lords)); discretion to exclude evidence in civil proceedings exists under the Civil Procedure Rules r32.1(2) although it is less likely to be exercised.

31 Organising interviews in the context of the COVID-19 pandemic which from early 2020 have made in-person meetings more or less impossible, made these arrangements even more complicated. However, even here technological work-arounds can be found to enable prospective interviewees to consult documents prior to the interview.

32 The Serious Fraud Office places considerable weight on obtaining "first accounts" of significant witnesses, which is why it prefers companies to "de-conflict" interviews in advance (see below).

33 They are in any event often impossible post-data collection as compliance with GDPR will in most circumstances impose some form of advance notice to individuals affected.

34 449 U.S. 383 (1981).

derived from the US Supreme Court case of *Upjohn Co. v. United States*[34] these notices serve to ensure that the interviewee does not labour under any misapprehension as to the context and purpose of the interview, the roles the persons present, and the use that may be made of the information obtained. The notices provided will normally cover the following topics:

- The background and context of the interview.

- The role of the interviewer(s) as counsel to the company and *not* the interviewee. It must be clear to the interviewee that the lawyer(s) conducting the interview is(are) not there to advise her / him. This is particularly important where the interviewee is a senior employee or a director of the client company. In the event that there is confusion on this point, a situation may arise where a joint retainer is inferred and the company ends up sharing the confidentiality and, where applicable, privilege in the interview.[35]

- The fact that the interview is confidential and, where applicable, privileged to the company. The interviewee should be told that she / he cannot disclose the content of the exchanges during the interview with anyone (except, where relevant, her / his legal representative).

- The fact that it will be for the company to decide whether it will share the information derived from the interview with third parties, including enforcement bodies and / or regulators.

These notices are to be distinguished from the "caution" given to interviewees against whom there are reasonable grounds to suspect have committed an offence. The obligation to caution applies to interviews conducted by police as well as by persons "other than police officers who are charged with the duty of investigating offences or charging offenders".[36] The courts have held that non-governmental, commercial investigators can fall within this category and that this will be a question of fact in each case.[37] In the absence of clear authority, it is generally deemed in practice that a person conducting an interview in the context of an internal investigation for a company is *not* obliged to caution an interviewee, even if she / he has reasonable grounds to suspect the interviewee of criminal conduct. It could of course be argued that "investigating offences" is at least incidental to an internal investigation. However, many (if not most) internal investigations are commissioned defensively by companies in circumstances where there are concerns the company may be liable (criminally or otherwise), in order to clarify the extent of any liability. A representative of a potentially liable person is unlikely to be under a "duty of investigating offences" in the sense of the law, not least because that connotes a degree of investigative objectivity.

This means, in essence, that an employee interviewed in an internal investigation does not have to be told that she / he has the right to remain silent. This would in any event be a little incongruous as a refusal to answer questions asked on behalf of the employer regarding the employee's conduct on its behalf is likely to constitute a disciplinary violation.

Equally, there is no obligation to inform the interviewee of a right to be assisted by a lawyer. First of all, subject to the considerations set out above, there is no such right in the context of an internal investigation. Second, to the extent that the company has decided to offer such assistance, it will have been dealt with in advance of the interview.

This is not to say that an internal investigation could not have the "investigating offences" as its focus. If, *e.g*. a company has been defrauded and it commissions an internal investigation in order to identify those

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35 *R (Ford) v Financial Services Authority* [2011] EWHC 2583 (Admin) (High Court).

36 Section 67(9) of the Police and Criminal Evidence Act 1984. See also Code of Practice for the detention, treatment and questioning of persons by Police Officers, "Code C" issued pursuant to section 66 of the Police and Criminal Evidence Act 1984. (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/903473/pace-code-c-2019.pdf).

37 *R v Bayliss* (1994) 98 Cr App R 235 (Court of Appeal).

responsible, the individuals conducting interviews in that context, whether in-house or external, may well be caught by the statutory definition and therefore be obliged to caution interviewees they have reasonable grounds to suspect of involvement in the fraud.

C. The record of interview

The records of interviews carried out in the context of internal investigations is the focus of much litigation. This is for the obvious reason that interviews of key individuals are of great interest to third parties interested in the subject matter of the internal investigation. This can be various law enforcement bodies, but also parties opposing the relevant company in litigation and who, under English civil procedure rules, would be entitled to disclosure of all relevant documents in the hands of the company. As the company having conducted the internal investigation is entitled to withhold any privileged material, much of this litigation has focused on whether records of interviews are privileged.[38]

What is clear is that in English law, the form of the interview record has no bearing on whether it is protected by confidentiality or privileged; what matters is the status of the interview itself. It follows that the fact that a lawyer is responsible for making a note will not make the record of an otherwise unprivileged exchange privileged.[39] Equally, there is no need for a lawyer to have had any input into the making of it in order for the record of a privileged interview to be covered by that privilege. Consequently, even a video-recording of a privileged interview is covered by that privilege.

Despite this, there is a tenacious reluctance in internal investigations practice to live-record interviews (be it by transcription, or audio- or video recording); the preference for lawyers' notes in various formats persists. Two main reasons are often provided. First, interviewees may find the fact of recording intimidating and may therefore be less forthcoming. Second, it is in the interest of an interviewee who is at legal or disciplinary risk for there to be arguable ambiguity in what was said.

This second point is linked to another feature where the UK practice of internal investigations differs from some continental jurisdictions: There is no obligation for the interviewee to be provided with a copy of and asked to approve the record of the interview. In fact, doing so is the exception. Of course, nothing prevents an interviewee from making notes of an interview her- / himself and if an interviewee is separately represented, an important function of the interviewee's lawyer will be to ensure that there is a record of the interview.

VI. Reporting and self-reporting

The question of whether and, if so, when a company that has discovered wrongdoing in its operations should self-report to the authorities is a matter of constant debate in the UK and elsewhere. For present purposes it is helpful to consider, first, the circumstances when reporting is mandatory and, second, what the consequences of reporting are for the conduct of an internal investigation.

A. Is reporting mandatory?

Entities regulated by the UK's Financial Conduct Authority ("FCA") are bound by Principle 11 of the FCA's Handbook which states that regulated firms "must disclose to the FCA appropriately anything relating to the firm of which that regulator would reasonably expect notice."[40] The FCA interprets this widely and will require firms to report to them

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38 For example, much of the documentation sought by the Serious Fraud Office from ENRC in the litigation referred to above consisted of records of interviews conducted by its external counsel in the context of a wide-ranging internal investigation.

39 See, *e.g., Parry and Whelan v News Group Newspapers Ltd* [1990] 140 NLJ 1719 (Court of Appeal). Adopting the US practice of including in the note a statement that it contains the "mental impressions" of the lawyer-note taker makes no difference in this regard, see In re RBS *Rights Issue Litigation.*

40 The FCA Handbook (https://www.handbook.fca.org.uk/handbook), PRIN 2.1.1.

41 See FCA annual statistics for fines imposed at https://www.fca.org.uk/news/news-stories/2020-fines.

any issues of significance, both materialiy but also relating to the integrity of its operations. FCA enforcement action for violations of Principle 11 are relatively frequent.[41]

This means that companies in the regulated sector must in principle report any reasonably suspected wrongdoing to the FCA at an early stage, and the FCA will expect updates as any internal investigation progresses.

In addition, from March 2016 the FCA has rolled out the Senior Managers and Certification Regime ("SMCR") which, in short, requires firms to allocate certain particularly sensitive functions to identified and specifically approved individuals.[42] These individuals can be held personally liable for failures of or weaknesses in a regulated entity's procedures.[43] Of particular relevance here, being responsible for compliance as well as anti-money laundering are functions covered by SMCR. The individuals concerned will therefore be personally concerned that suspected wrongdoing is promptly reported and addressed.

Another category of companies for which reporting to the authorities may be effectively compulsory are listed companies. Matters which may have a significant impact on the price of publicly traded shares must be disclosed pursuant to the UK's Market Abuse Regulation[44] "as soon as possible". Companies of this size will also likely need to take into account reporting requirements in other jurisdictions, notably the US where companies issuing US securities are required to correct any "material" misstatements in its published accounts.[45]

In essence, therefore, listed companies which uncover issues which could have an impact on their share price are in principle required to disclose them to the market.

As a matter of practice, companies required to report or disclose matters the subject of an internal investigation to a particular authority or in a particular way, generally take the sensible view that reports should be made to *all* authorities potentially interested in the issue. The idea is that it is better for the company to inform these authorities itself rather than them finding out through contacts with other authorities or from press reports. To take a concrete example, no-one is required to report anything to the UK's Serious Fraud Office ("SFO"). However, a company regulated by the FCA which becomes aware of suspected criminality in its operations and is therefore obliged to report it to the FCA, will generally take the view that it should also inform the SFO (as well as any foreign enforcement bodies) which may ultimately be competent to prosecute.

Even for companies and circumstances where reporting is not legally required, there may be instances where it is *de facto* imposed. This results principally from the obligation on members of regulated professions to report suspicions of money laundering[46] of which they became aware in the course of a regulated activity.[47] This means that if a regulated entity conducts an internal investigation which gives rise to suspicions of money laundering (by it or someone else), the entity is obliged to make a suspicious activity report ("SAR") to the National Crime Agency ("NCA"). This is over and above any reporting obligation it may have to the FCA pursuant to Principle 11.

However, the obligation to submit a SAR is relevant also to non-regulated companies to

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42 The FCA Handbook, SUP 10C.

43 See the FCA's Enforcement Guide, EG 2.11.1.

44 Following its exit from the EU, the UK effectively retained Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC.

45 As interpreted in the Securities and Exchange Commission's Rule 405, made pursuant to the Securities Act 1933.

46 The evidential threshold is low, with "suspicion" being defined as *"a possibility, which is more than fanciful, that the relevant facts exist. A vague feeling of unease would not suffice. But the statute does not require the suspicion to be 'clear' or 'firmly grounded and targeted on specific facts', or 'based upon reasonable grounds'."* (*R v Da Silva* [2007] 1 WLR 303 (Court of Appeal)).

47 Section 330 of the Proceeds of Crime Act 2002 ("POCA").

48 Section 333A of POCA.

the extent that the findings of the internal investigation that give rise to the suspicion of money laundering come to the attention of a regulated professional working on its behalf, such as its auditors or lawyers working on a corporate transaction. Although the submission of a SAR cannot be disclosed to anyone,[48] including the company concerned, in such circumstances the company can assume that the relevant regulated professional will submit a SAR, and may well take the view that it should itself report the relevant findings to the authorities.

Another situation is where a company can establish that it has, will or may receive a benefit (*e.g.* money flows) from suspected unlawful activity into the UK. In those circumstances, were the suspected unlawful activity to be ultimately established, the company would be liable for money laundering.[49] In those circumstances, a company can seek consent from the NCA to proceed and receive immunity from money laundering liability[50], where a lack of response equals consent.[51] Although these so-called Defence Against Money Laundering ("DAML") requests are not compulsory they are commonly made.

It should be noted that even though a non-regulated company submits a DAML request to the NCA (or suspects that a SAR or a DAML request will be submitted by someone else), it is not obliged to make any further reports, *e.g.* to the SFO. The NCA receives hundreds of thousands of SARs and DAML requests annually[52] and companies may take the risk of not reporting, in the hope that the report is not picked up and investigated.

This nevertheless leaves a lot of companies and a lot of situations where reporting any adverse suspicions or findings to the authorities is genuinely optional. The considerations that may go into deciding whether or not to report are manifold and case specific. However, companies that do decide to self-report generally do so with a view to achieving a resolution more favourable than if the relevant authorities discovered and investigated the issues themselves.

Whether mandatory or voluntary, reporting suspected misconduct to the authorities has implications for the conduct of a related internal investigation and may significantly restrict a company's discretion as to how it should be handled.

B. Reporting and the conduct of internal investigations

The first major implication relates to the timing of any report in relation to the conduct of an internal investigation. The authorities generally expect reports to intervene early. Regulated entities are, as we have seen, obliged to report issues to the FCA promptly. The SFO, for its part, expects a company wishing to benefit from a deferred prosecution agreement ("DPA") to report suspected wrongdoing "within a reasonable time of those suspicions coming to light".[53] While this does not preclude a company from taking some initial investigative steps, *e.g.*, to corroborate the basic circumstances of an allegation, it is clear that the authorities expect to be informed of suspected wrongdoing prior to any significant internal investigative steps are taken.

The second major implication of reporting suspicions on the conduct of internal investigations is the level of oversight that the authorities will expect to have over it. The

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49 In particular pursuant to section 329 of POCA.

50 Section 338 of POCA.

51 Section 335 of POCA.

52 573,085 SARs and 62,408 DAML requests according to the latest NCA's UK Financial Intelligence Unit Suspicious Activity Reports Annual Report 2020 (https://www.nationalcrimeagency.gov.uk/who-we-are/publications/480-sars-annual-report-2020/file).

53 See the SFO "Guidance for Corporates – Deferred Prosecution Agreements" (https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/guidance-for-corporates/deferred-prosecution-agreements-2/).

54 See FCA Handbook, EG 3.11 "FCA approach to firms conducting their own investigations in anticipation of enforcement action" (https://www.handbook.fca.org.uk/handbook/EG/3/11.html).

55 See https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/guidance-for-corporates/corporate-co-operation-guidance/.

FCA expressly recognises that "there are good reasons for firms wishing to carry out their own investigations" [54], and invites firms to discuss the scope of such investigations and how they could be of use to the FCA's own investigation. The SFO is more prescriptive. Its "Corporate Co-operation Guidance" sets out detailed expectations in terms of the gathering and preservation of documentary evidence.[55] In relation to interviews, the SFO Guidance states that companies should" consult in a timely way with the SFO before interviewing potential witnesses or suspects, taking personnel/HR actions or taking other overt steps", so-called "de-conflicting."

The final major consideration relates to privilege. Neither the FCA nor the SFO requires a company to waive privilege in relation to relevant materials. However, the guidance from both authorities makes it clear that waiver of privilege will be to the company's credit. The SFO's Corporate Co-operation Guidance in particular notes that such waiver is a factor in favour of a DPA. Among other things, the SFO is concerned with its ability to comply with its disclosure obligations in any follow-on prosecutions of individuals. Indeed, the SFO has been strongly encouraged by the High Court to put pressure on any co-operating company to waive privilege over privileged material which may assist an individual defendant in presenting a defence.[56]

The issue of how a company should manage relations with individuals, in particular employees, who are the subject of adverse findings following an internal investigation is the final subject of this essay.

VII. Finalising the internal investigation and managing adverse findings against individuals

Recent years have seen a number of cases where a company has conducted an internal investigation in co-operation with the SFO, entered into a DPA, and the SFO has then been unsuccessful in subsequent prosecutions against individuals singled out as responsible for criminal wrongdoing.[57] The perceived unfairness of this situation is compounded by the lack of any jurisdiction of the court to order the redaction of a final DPA to remove reference to individuals who are subsequently acquitted.[58]

This has shone a bright light on what appears to be the practice of not allowing employees concerned, either directly or through their legal representatives, to have any direct input into the overall findings of an internal investigation, other than their participation in any interviews conducted.

This situation is in contrast with the practice in some other areas. Indeed, individuals singled out for criticism in official inquiries have a well-established right to be given the opportunity to make representations prior to the publication of the final report.[59] In addition, individuals to be identified (directly or indirectly) and criticised in a FCA notice relating to a regulated entity are in principle entitled to receive advance warning and time to make representations.[60]

In circumstances where the findings of an internal investigation may have criminal repercussions for individuals, it may be risky to share them with those individuals. Indeed, where such sharing can be said to make a

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56 See *R (on the application of AL) v SFO* [2018] EWHC 856 (Admin) (Divisional Court).

57 See, *e.g.*, Robin Lööf, "Corporate agency and white collar crime – an experience-led case for causation-based corporate liability for criminal harms" [2020] Criminal Law Review 275.

58 *Serious Fraud Office v Tesco Stores Limited* [2019] 1 WLUK 176 (Sir Brian Leveson P, sitting as a Crown Court judge). In approving the latest DPA, entered into between the SFO and Amec Foster Wheeler Energy Limited, Edis LJ (sitting as a Crown Court judge) sought to take the sting out of this perceived unfairness by stating that he had made "*no findings of any kind against any individual",* later on adding that *"[i]n a DPA application, the court is concerned with two areas of factual material: that concerning the commission of the offences; and that concerning the situation and conduct of the suspect after the offences were committed, during the investigation and its current situation. In neither area can the court make any findings of fact. It is dependent on the information with which it is supplied, and relies on the prosecutor to make enquiries and to satisfy itself that the court is being asked to proceed on an accurate statement of the relevant facts." (Director of the Serious Fraud Office v Amec Foster Wheeler Energy Limited*, judgment of 1 July 2021 (unreported), at paragraphs 1 and 12)

59 This process is referred to as "Maxwellisation", following principles clarified in litigation brought by Robert Maxwell against the process adopted, and conclusions arrived at, by a Board of Trade inquiry; see, in particular, In re *Pergamum Press Ltd*. [1971] Ch 388 (Court of Appeal) and *Maxwell v Department of Trade and Industry* [1974] QB 523 (Court of Appeal).

60 Section 393 of the Financial Services and Markets Act 2000.

criminal investigation more difficult, in a worst-case scenario the company and / or its representatives risk criminal liability for obstructing the course of public justice. This is no doubt why the SFO, in its Corporate Co-operation Guidance, instructs entities conducting an internal investigation to "[r]efrain from tainting a potential witness's recollection, for example, by sharing or inviting comment on another person's account or showing the witness documents that they have not previously seen."

Those conducting internal investigations in the UK should nevertheless consider how to incorporate the wider perspectives of individuals concerned into the finalisation of the findings at the end of internal investigations. Companies and their advisers should of course be wary of compromising the independence of the investigation or be seen to be colluding with individuals who are naturally out to protect their own interests. Companies and their advisers need also be mindful of the obvious danger that individuals subject to criticism will seek to justify themselves. Having said all that, those individuals closest to the facts investigated often have valuable insights and can provide indications as to additional, potentially important, avenues of inquiry. Working out ways for the findings of an internal investigation to be informed by such insights, without compromising its independence, would not only contribute to greater fairness to all concerned, but also to the quality of those findings. This would contribute to achieving the objective sought by conducting the internal investigation in the first place.

ABOUT THE AUTHOR

Robin Lööf
Call Date: 2009

Robin is an experienced junior specialising in commercial crime and financial regulation. He primarily acts for companies and individuals facing criminal and/or regulatory investigations, particularly in relation to corruption, money laundering, sanctions violations, and market manipulation.

Robin is also a member of the Paris Bar and is polylingual. Clients describe Robin as "excellent" and "extremely hard-working and clever" in The Legal 500.