

Business and specialist crime

Tackling increased risk from criminal investigations

Regulators, HMRC, investigation agencies and private prosecutors are pursuing more cases than ever before against corporate bodies, directors and executives



In the wake of the financial crisis, huge cuts in government spending took resources away from the police, HMRC, regulators and the SFO. There was a dramatic reduction in the largest criminal investigations of corporations and directors.

The tide has now turned in the opposite direction, with a flood of sophisticated and well resourced regulatory and criminal investigations. The criminal process, when used properly, can be a highly effective means, not only of deterring and punishing serious misconduct, but also of recovering large sums for regulators and HM Treasury.

A diverse group of agencies are now willing to prosecute serious criminal offences, including fraud, bribery and money laundering.

The statutory fraud guideline fixes the “starting point” sentence, for “medium” involvement in a £1m fraud, at five years’ imprisonment. The stakes in criminal fraud cases have never been higher.

Early action to address corporate risk

Companies and individuals need to recognise the unique risk of a criminal investigation to reputation, finances and liberty and to ensure prompt and effective engagement with investigators and prosecutors from the beginning.

Potential conflicts of interest between the company, and its directors and senior staff, demand expert scrutiny from the earliest stages of any investigation.

Private prosecutions on the rise

Although there has been an increase in larger investigations, smaller and medium-size fraud enquiries remain under-resourced. This often means that companies falling victim to fraud see their reports to the police stuck in the in-tray for months or even years, only to be told in the end that it is a “civil matter”.

Since the Court of Appeal ruled in 2014 that private prosecutors can pursue confiscation proceedings, there has been renewed interest in private prosecution, for fraud and criminal conduct, by companies and senior management.

Not only can the criminal process be procedurally more straightforward and cost-effective than for civil claims, it is also possible to pierce the corporate veil and pursue individual defendants for criminal conduct.

Financial Conduct Authority baring its teeth

The FCA now turns more than ever to the criminal process. It has built its reputation on successfully prosecuting high-profile insider dealing cases but has now added several investment fraud cases to its portfolio. We predict that this trend is set to continue. The FCA has also proved determined to pursue and enforce confiscation orders and breaches of Restraint Orders.

Deferred Prosecution Agreements to remain rare

After a very slow start, the SFO recently announced that there will be a number of “significant” DPAs in 2017. While the SFO has shown some activity in this area, the only other “designated prosecutor”, the CPS, shows little enthusiasm. We therefore see DPAs remaining rare for the foreseeable future.

Companies and senior executives targeted for ‘failing to prevent’ crime

The government is consulting on new offences of “failing to prevent” a raft of fraud and economic crimes, including those committed overseas. Currently only bribery and tax evasion are captured by failing to prevent offences and few prosecutions have actually taken place. Failing to prevent is likely to be broadened in scope to include fraud, false accounting and money laundering.

The future and legal strategy

We predict a big increase in criminal, regulatory and fraud investigations of companies, directors and executives, with a focus on cases where consumers, financial institutions or the exchequer have suffered substantial loss. It would be wise to review D&O (directors and officers) cover, as many policies are wholly inadequate to fund a long investigation, let alone a jury trial.

When faced with a criminal investigation, corporate clients naturally turn first of all to their commercial solicitor for advice, but there is an increasing demand for pre-charge involvement of specialist counsel, with experience and expertise in serious fraud and regulatory investigations.



By (from top) Sarah Clarke; Chris Daw QC; Anthony Haycroft, Serjeants’ Inn Chambers