

Investigations round-up



July 2024

1 Introduction

Welcome to our latest investigations newsletter, bringing you up-to-speed on the latest trends and developments in this ever-evolving area.

The last six months have been busy in the investigations world. Focus by regulators and other stakeholders on workplace culture has continued to increase, with a corresponding need for organisations to ensure that any potential workplace misconduct they identify is properly addressed – often through an investigation. We have also seen the Solicitors Regulation Authority (**SRA**) publish draft guidance for lawyers conducting internal investigations, which will be of particular relevance for in-house legal teams, and the Financial Conduct Authority (**FCA**) has produced a controversial proposal publicly to announce its investigations at a much earlier stage than previously. Finally, on the technical side, we have seen an interesting decision in the Court of Appeal which will bolster arguments that legal advice privilege should cover investigation output.

We hope that you enjoy reading this round-up, and that you will share it with any of your colleagues who may find it useful.



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2 News

The rise of workplace investigations



In the post-pandemic world, stakeholders on all fronts are taking an increased interest in (i) workplace culture, (ii) diversity, inclusion and equality in the workplace, and (iii) how companies respond if these ideals are not upheld. This has led to an increased focus on the way in which any potential workplace misconduct, once identified, is addressed, managed, communicated and

resolved, either within an organisation, or by way of external review and investigation.

The societal shifts around expectations of workplace culture and accountability are also beginning to result in similar shifts in the regulatory sphere. Last September, the FCA introduced proposals for a new regulatory framework on diversity and inclusion in the financial sector, including expectations around how allegations of misconduct are investigated. It has also announced that it will publish an update in the autumn into how companies are detecting and dealing with sexual harassment, bullying and other non-financial misconduct. Similarly, the SRA has recently launched investigations into the conduct of individual lawyers, and the culture of law firms, following mainstream media reporting on the mental health crisis in the profession. We expect that other regulated professions will follow suit, meaning that organisations which do not adhere to contemporary societal expectations can expect not only the loss of employees and resultant claims, curtailed recruitment opportunities, and a downturn in investment and resulting profit but also, potentially, regulatory intervention and sanctions.

Accordingly, how companies respond to workplace whistleblowing and resulting investigations (whether internal or external) is crucial. We outline how organisations can best manage and address these risks in an article in our 2024 Dispute Resolution Yearbook, available [here](#).

SRA publishes draft guidance for firms and solicitors conducting internal investigations

On 1 March 2024, the SRA published [draft guidance](#) for solicitors and firms to follow when they conduct "internal investigations" (the **Guidance**). An "internal investigation" is broadly defined as "*a process done by an organisation or individuals within it to establish the facts relating to an allegation,*

a concern or misconduct about or related to that organisation or those within it."

The stated objective of the Guidance is to help solicitors and firms "*understand and manage regulatory risks and issues associated with conducting an internal investigation*". It applies to all firms and solicitors who conduct investigations, but is expressed to be of particular relevance for solicitors working in-house for an organisation conducting, or considering conducting, its own investigation.

The Guidance identifies key considerations both at the outset of an investigation, and for managing an investigation as it progresses. These include ensuring that:

- the appointed investigator is able to act with independence, which may be a particular challenge for in-house solicitors who are asked to conduct investigations into alleged wrongdoing within their employer;
- clear terms of reference are created at the outset, which cover who will conduct the investigation, its scope, how the facts will be investigated, what information will be shared with relevant parties and when, what the output will be, and whether and when there will be an opportunity for individuals against whom recommendations or findings are made to comment on the draft report or factual findings (i.e. Maxwellisation); and
- adequate support is provided to all those involved in the investigation process (a trend that you can read more about in our [November 2023 Investigations Round-up](#)).

The guidance remains in draft for now, and may change before it is published in final form, but is nonetheless key reading for all solicitors, and in particular for those working in-house.

FCA consults on early publication of its investigations

In February 2024, the FCA published [consultation paper 24/2](#), outlining controversial plans to the effect that, where the FCA opens an investigation into a firm, it will now make a public announcement that it has done so at the very outset of the investigation, where it considers this to be in the public interest. At present, investigations into firms are, save for in exceptional circumstances, only made public towards the end of the enforcement process.

The stated purpose behind the move to early publication of investigations into firms is "to increase transparency about [the FCA's] enforcement work and its deterrent effect and to disseminate best practice". It is proposed that firms will "normally" be given advance notice of an announcement of an investigation "of no more than 1 business day". The FCA has expressly stated that when it weighs up whether an early announcement would be in the public interest, the potential impact of the announcement on the firm will not be a relevant factor. Given specific legal considerations concerning information about individuals, the FCA does not propose to announce investigations into named individuals in the same way.

The paper and the proposals it contains have already been criticised by a variety of bodies within the government, the City of London and the wider financial services sector. Most notably, in an unusual intervention by the government into FCA policymaking, the former Chancellor of the Exchequer expressed his disapproval of the plan and called for the FCA to reconsider. Criticisms include the potential for the proposals:

- (i) to undermine the principle that firms should be considered innocent until proven guilty in a way that could cause serious and premature

reputational and financial damage to the subjects of FCA investigations;

- (ii) negatively to impact the UK's competitiveness in the financial services sector and reputation for fair process; and
- (iii) to undermine the relationship between the FCA and the firms it regulates and to reduce collaboration.

The FCA has indicated that it will listen carefully to the feedback it has received, and it remains to be seen whether the proposals will go ahead in their current form.

3 Cases

New Court of Appeal commentary on the application of legal advice privilege to investigations work

A recent Court of Appeal decision, *Al Sadeq v Dechert LLP & Others* [2024] EWCA Civ 28, provides, amongst other things, some comfort as to the applicability of legal advice privilege in the context of an investigation. Legal advice privilege protects communications passing between lawyer and client for the dominant purpose of giving or receiving legal advice. Questions are sometimes raised as to its applicability in an investigations context where the work of a law firm involves *fact finding*, as opposed (or in addition) to *providing legal advice*.

The investigation at issue here was conducted by the law firm Dechert into a suspected fraud, on the instruction of the sovereign wealth fund of Ras Al Kaimah. The Court of Appeal confirmed that Dechert had been engaged to bring their lawyers' skills to the investigatory process and to conduct it through lawyers' eyes, against a backdrop of being instructed to provide legal advice in relation to the suspected fraud. It was therefore satisfied that legal advice privilege

would attach to the Dechert work product at issue.

It should, however, be remembered that legal advice privilege is generally not as useful as litigation privilege in an investigations context. This is because, unlike litigation privilege, legal advice privilege only operates to protect communications between the (narrowly) defined client group with an organisation (those individuals tasked with obtaining and receiving the relevant legal advice) and the lawyer. It will not operate to protect communications with those outside the client group, and therefore will not generally protect notes of fact-finding interviews by lawyers with witnesses, including individuals within the organisation who fall outside the defined client group. Litigation privilege, which operates to protect communications between lawyer or client and third parties, is of greater assistance in this regard – but the threshold test for it to apply must be satisfied first.

4 Our Investigations Practice

At Travers Smith, we are experts in supporting clients at times of crisis, including when dealing with significant potential reputational risk. We can guide you through any investigation, however complex, contentious or sensitive. Our lawyers have market-leading experience in regulatory and internal investigations, enforcement actions and disciplinary proceedings across a range of sectors.

You can read more about our Investigations offering [here](#). Please get in touch to explore how we can help you to be prepared.

Some recent examples of our investigations work:

- Appointed by NatWest Group to undertake an independent review

into account closure arrangements at Coutts in two phases: the first covering the decision to close the Coutts accounts of a prominent individual and the circumstances surrounding a potential breach of confidentiality relating to their customer information; the second covering a wider sample of Coutts' account closures over a two-year period.

- Carrying out an investigation on behalf of a private equity company into two of its portfolio companies, acquired in 2021. The investigation concerned alleged misconduct by an employee of one the portfolio companies, pertaining to relationships with subcontractors on a key customer account, as well as the alleged manipulation of revenue recognition.
- Carrying out multiple investigations for a PRA authorised and FCA regulated business into allegations of bullying and harassment.
- Advising a technology business on a barrister-led investigation into allegations of wrongdoing.
- Undertaking a complex and wide-ranging independent investigation into alleged director misconduct within a multinational company. The investigation spans multiple jurisdictions.
- Carrying out an investigation for a FTSE250 business following anonymous whistleblowing allegations being received about the conduct of certain senior executives.

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