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PERSPECTIVES

NAVIGATING CORPORATE DISPUTES STEMMING FROM REGULATORY VIOLATIONS AND ENFORCEMENT ACTIONS

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Regulatory investigations and enforcement action frequently and increasingly give rise to a broad range of civil claims for damages.

With the availability of litigation funding, the growth in claimant-focused law firms, the developing competition class action regime, and the wide scope of documentary disclosure which may be ordered, the UK is an attractive jurisdiction for consumers and businesses pursuing claims in connection with public findings of corporate misconduct.

The types of claims that may be triggered by regulatory investigations, and some of the complex issues such claims raise, are considered below.

Private damages actions arising from regulatory enforcement action can take a number of different forms depending on the nature of the relevant conduct and the relationship between the claimant and the infringing company. This can be illustrated by the variety of civil actions brought against certain panel banks following findings by global regulators in 2012/13 that submitters and traders had sought

to manipulate one or more interest rate benchmarks (IRBs).

These actions included, for example, claims based on allegations of fraudulent misrepresentation (e.g., *Graiseley Properties Limited & Ors v Barclays Bank plc* and *Deutsche Bank AG & Ors v Unitech Global Limited & Ors*), the mis-selling of financial instruments referenced to an IRB (e.g., *Property Alliance Group Limited v The Royal Bank of Scotland plc (PAG v RBS)*), negligent misstatement and various breaches of contract (*PAG v RBS*), and infringements of competition law, deceit and conspiracy (*FDIC-R v Barclays Bank plc & Ors*).

Such claims can give rise to complex and overlapping factual, legal and procedural issues, particularly where – as has been the case for litigation arising from IRB-related regulatory action – claims have been brought by a wide spectrum of claimants in multiple jurisdictions and on multiple bases.

In addition to the right to bring individual damages actions, the UK has established various mechanisms

for groups of consumers or businesses to bring private actions on a collective basis. These include: (i) representative actions, where a named claimant brings an action on its own behalf and that of a class of individuals who have the 'same interest' in the claim and who have not 'opted out' (section II of part 19 of the Civil Procedure Rules (CPR)); (ii) claims subject to a group litigation order (GLO), where claims that give rise to 'common or related issues of fact or law' are brought together on an 'opt in' basis (section III of CPR part 19); and (iii) collective proceedings for damages in relation to competition law infringements, which can be brought on either an 'opt in' or 'opt out' basis (section 47B of the Competition Act 1998).

Importantly, in the context of enforcement action by competition authorities, collective proceedings can be brought on a 'follow on' basis (where claimants can rely on a prior infringement finding by a competition authority as evidence that anticompetitive behaviour has occurred), as well as on a 'standalone' basis (where the claimant faces the additional challenge of proving the infringement).

The UK collective proceedings regime is still developing, and the use of representative actions and GLOs has historically been sporadic. However, the emergence of claimant-focused law firms which, often with the assistance of litigation funders, scrutinise regulatory decisions and vigorously pursue claims that otherwise might not be brought, is likely to continue to fuel the growth in group actions.

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This may lead to companies facing the prospect of defending both individual and collective actions.

For example, findings by the European Commission in May 2019 concerning cartels in the spot foreign exchange market led to both class action and individual claims (brought by a large number of parties, including many investment funds) against various banks for losses allegedly caused by the relevant conduct (*Allianz Global Investors GmbH & Ors v Barclays Bank plc & Ors* and *O'Higgins/Evans v Barclays Bank plc & Ors*).

Companies may also face claims by securities holders (or groups) concerning false or misleading

statements and disclosures, particularly on the basis of issues highlighted in regulatory enforcement decisions. The 2000 Financial Services and Markets Act (FSMA) provides statutory regimes for such claims, which are a fast-developing area.

In particular, section 90 of FSMA provides a remedy for investors who acquire securities (or who contract to do so), and suffer losses consequent on false or misleading statements in, or the omission of required information from, a prospectus or listing particulars concerning those securities. Such claims can be brought against any person responsible for the relevant document, including the issuer itself and any others stated as having responsibility for its contents, potentially including the issuer's directors.

In addition, under section 90A (and schedule 10A) of FSMA, buyers, sellers or holders of securities may bring claims against an issuer where they have suffered losses resulting from untrue or misleading statements in, or omissions from, any company announcement by the issuer. Such claimants must establish that a 'person discharging managerial responsibilities' (principally any of the issuer's directors) knew that, or was reckless as to whether, the statement in question was untrue or misleading, or that the omission was a dishonest concealment of a material fact, and there is an express requirement to demonstrate reliance on the statement or omission in question.

The likelihood of investors bringing such claims is liable to increase following public announcements by regulators of adverse findings (or even that an investigation is underway) regarding issues which call into question a company's statements and disclosures (which can, in turn, lead to significant falls in the share price).

This was seen, for example, in the securities class action brought by investors against G4S plc following the announcement of the Serious Fraud Office's (SFO's) investigation (culminating in a 2020 deferred prosecution agreement (DPA)) concerning billing practices and alleged overcharging in connection with UK government contracts (*Various Claimants v G4S plc*). The litigation was settled shortly before trial was due to begin in January 2024.

Regulatory investigations can also create thorny employment law issues, with the potential for employees to bring claims against their employer relating to the alleged misconduct, or the manner in which the investigation was undertaken, and for companies to take action against employees implicated in the wrongdoing. The pursuit or defence of employee claims often involve a delicate balance between establishing any wrongdoing on the part of the employee, while at the same time vigorously defending civil claims that arise out of the same conduct.

This was evident in the fallout from the SFO's 2014 investigation (and resulting DPA in 2017) concerning

accounting practices at Tesco plc. In particular, the FTSE 100 company had to grapple with unfair dismissal claims brought by two former executives charged by the SFO in the course of its investigation (*Bush v Tesco plc; Rogberg v Tesco Stores Ltd*), as well as a substantial securities action brought by investors under section 90A of FSMA (*Manning & Napier Fund Inc & Anr v Tesco plc*).

Civil proceedings which are commenced in parallel with an investigation can be especially challenging to manage, often requiring a company to balance carefully the expectation of regulatory cooperation (potentially on a global basis), with the need robustly to defend the civil claims. The risk that a strategy pursued in one action could jeopardise the company's position in another needs to be constantly monitored and managed. In particular, the implications of any significant admissions of liability or broadly worded statements of fact, which may be required in a regulatory settlement agreement or DPA, must be very carefully assessed, given the scope for material impacts in parallel or subsequent civil claims.

Regulatory investigations may also raise difficult questions regarding the availability of legal professional privilege, such that claimants in related litigation may have a basis for arguing that highly sensitive documents are not privileged and should, therefore, be disclosed.

As a reminder, documents may be subject to either: (i) legal advice privilege (if the document is a confidential communication between client and lawyer created for the dominant purpose of obtaining or giving legal advice); or (ii) litigation privilege (if the document is a confidential communication between client and lawyer or a third party, the dominant purpose for which is to obtain information or advice in connection with existing or reasonably contemplated adversarial proceedings).

Both heads of privilege raise particular issues in the context of regulatory investigations and related litigation.

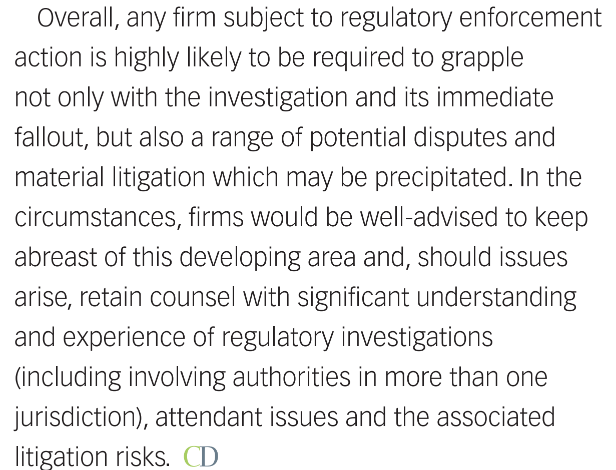
First, unless litigation privilege is available, there exists the possibility that certain records of investigatory interviews with certain employees may not be privileged (unless those employees can be classed as members of the 'client', which is currently defined narrowly under English law (see the Court of Appeal's 2018 decision in *SFO v ENRC*)). Second, the point at which litigation privilege becomes available may not always be clear, and investigations may start as non-adversarial proceedings (see, e.g., *Tesco Stores Ltd v OFT*).

Furthermore, where a company under investigation considers waiving privilege over certain documents (e.g., sensitive witness interview memoranda) with a view to obtaining credit for cooperation from the relevant authority, the potential impact in related litigation must be carefully judged.

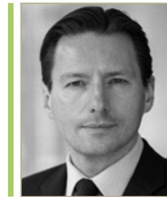
That is all the more the case where regulatory action engages multiple jurisdictions and, therefore, differences in the application of legal privilege. In particular, it is possible that a 'limited waiver' of privilege (permitted under English law) may impair the application of privilege, or even operate as a general waiver, under the laws of other relevant jurisdictions.

Finally, outside the scope of competition law claims (where a claimant is permitted to bring a 'follow on' action relying on a prior infringement decision), regulatory findings are generally inadmissible in civil proceedings to prove the facts in issue (*Hollington v Hewthorn (*1943)). Despite that rule, it is not uncommon for claimants to refer to such findings in their pleadings and the courts have held that the substance of any underlying evidence set out in prior decisions can be taken into account, with the court giving it such weight as is appropriate (*Rogers v Hoyle* (2014) and *JSC A Bank v Ablyazov & Anr* (2016)).

There may also be circumstances in which a defendant wishes to rely on regulatory findings (or, at least, the absence of particular findings) in defending claims brought against it. However, by advancing a positive case that no findings were made on a key issue (and where the authority's findings resulted from a settlement process), a defendant runs the risk of opening up communications made as part of that process (see *PAG v RBS* (2015)).



Overall, any firm subject to regulatory enforcement action is highly likely to be required to grapple not only with the investigation and its immediate fallout, but also a range of potential disputes and material litigation which may be precipitated. In the circumstances, firms would be well-advised to keep abreast of this developing area and, should issues arise, retain counsel with significant understanding and experience of regulatory investigations (including involving authorities in more than one jurisdiction), attendant issues and the associated litigation risks. CD



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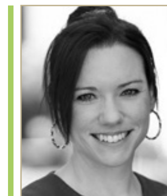

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