Global Investigations Review

The Practitioner's Guide to Global Investigations

Volume I: Global Investigations in the United Kingdom and the United States

Fourth Edition

Editors
Judith Seddon, Eleanor Davison, Christopher J Morvillo,
Michael Bowes QC, Luke Tolaini, Ama A Adams, Tara McGrath

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GIR

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Publisher's Note

The Practitioner's Guide to Global Investigations is published by Global Investigations Review (www.globalinvestigationsreview.com) – a news and analysis service for lawyers and related professionals who specialise in cross-border white-collar crime.

The Guide was suggested by the editors to fill a gap in the literature – namely, how does one conduct such an investigation, and what should one have in mind at various times?

It is published annually as a two-volume work and is also available online, as an e-book and in PDF format.

The volumes

This Guide is in two volumes.

Volume I takes the reader through the issues and risks faced at every stage in the life cycle of a serious corporate investigation, from the discovery of a potential problem through its exploration (either by the company itself, a law firm or government officials) all the way to final resolution – be that in a regulatory proceeding, a criminal hearing, civil litigation, an employment tribunal, a trial in the court of public opinion, or, just occasionally, inside the company's own four walls. As such it uses the position in the two most active jurisdictions for investigations of corporate misfeasance – the United States and the United Kingdom – to illustrate the approach and thought processes of those who are at the cutting edge of this work, on the basis that others can learn much from their approach, and there is a read-across to the position elsewhere.

Volume I is then complemented by Volume II's granular look at the detail of various jurisdictions, highlighting, among other things, where they vary from the norm.

Online

The Guide is available at www.globalinvestigationsreview.com. Containing the most up-to-date versions of the chapters in Volume I of the Guide, the website also allows visitors to quickly compare answers to questions in Volume II across all the jurisdictions covered.

The publisher would like to thank the editors for their exceptional energy, vision and intellectual rigour in devising and maintaining this work. Together we welcome any comments or suggestions from readers on how to improve it. Please write to us at:
insight@globalinvestigationsreview.com.

Preface

The history of the global investigation

Over the past decade, the number and profile of multi-agency, multi-jurisdictional regulatory and criminal investigations have risen exponentially. Naturally, this global phenomenon exposes companies and their employees to greater risk of potentially hostile encounters with foreign law enforcement authorities and regulators than ever before. This is partly owing to the continued globalisation of commerce, the increasing enthusiasm of some prosecutors to use expansive theories of corporate criminal liability to exact exorbitant penalties against corporations as a deterrent and public pressure to hold individuals accountable for the misconduct. The globalisation of corporate law enforcement, of course, has also spawned greater coordination between law enforcement agencies domestically and across borders. As a result, the pace and complexity of cross-border corporate investigations has markedly increased and created an environment in which the potential consequences, both direct and collateral, for individuals and businesses are of unprecedented magnitude.

The Guide

To aid practitioners faced with the myriad and often unexpected challenges of navigating a cross-border investigation, this book brings together for the first time the perspectives of leading experts from across the globe.

The chapters that follow in Volume I of the Guide cover in depth the broad spectrum of the law, practice and procedure applicable to cross-border investigations in both the United Kingdom and United States. Volume I tracks the development of a serious allegation (whether originating from an internal or external source) through its stages of development, considering the key risks and challenges as matters progress; it provides expert insight into the fact-gathering stage, document preservation and collection, witness interviews, and the complexities of cross-border privilege issues; and it discusses strategies to successfully resolve cross-border probes and manage corporate reputation throughout an investigation.

In Volume II, local experts from national jurisdictions respond to a common set of questions designed to identify the local nuances of law and practice that practitioners may encounter in responding to a cross-border investigation.

In the first edition, we signalled our intention to update and expand both parts of the book as the rules evolve and prosecutors' appetites change. The Guide continues to grow and extend its reach, in both substance and geographical scope. By its third edition, it had outgrown its original single-book format; the two parts of the Guide now have separate covers, although the hard copy of the Guide should still be viewed – and used – as a single reference work. All chapters are, of course, made available online and in other digital formats. Volume I also features tables of cases and legislation along with an index.

In this fourth edition, we have revised extant chapters to keep up with recent developments. To reflect an increased prosecutorial focus on individual accountability and on tone at the top, we have added US and UK chapters on the duties of directors to Volume I, outlining quite divergent corporate governance models. The questionnaire for Volume II authors has been extensively revised and reviewed by the editors and GIR staff. New questions zero in on the growing importance of technology in carrying out and investigating misconduct. There are also questions on economic sanctions, an area of heightened enforcement activity, which GIR has responded to this year with the launch of Just Sanctions (https://globalinvestigationsreview.com/just-sanctions). Volume II also carries regional overviews giving insight into cultural issues and regional coordination by authorities.

Volume II covers 25 jurisdictions, increasing the global coverage, particularly in South America, which continues to rake over recent corruption scandals. As corporate investigations and enforcer co-operation crosses more borders, we anticipate Volume II will become increasingly valuable to our readers: external and in-house counsel; compliance and accounting professionals; and prosecutors and regulators operating in this complex environment.

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Judith Seddon, Eleanor Davison, Christopher J Morvillo, Michael Bowes QC, Luke Tolaini, Ama A Adams, Tara McGrath
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37

Publicity: The UK Perspective

Edward Craven and Alex Bailin QC[1]

Overview 37.1

Publicity is an inevitable by-product of many investigations and criminal prosecutions, particularly in high-profile business crime cases. The potential adverse consequences of publicity for a corporation implicated in an investigation or prosecution – which include reputational damage, harm to relationships with customers, investors and employees, and the spurring of further investigations and interest by other investigating authorities – are self-evident and often significant.

Most individuals and corporations who find themselves caught up in an investigation or prosecution – whether as a suspect, defendant, witness or even victim – will therefore wish to limit the publication of information regarding their involvement. The extent to which English law will assist them in doing this will vary from case to case and will depend on a range of factors, including the nature of the information, the identity and status of the person seeking to restrict publicity, the nature and severity of harm that is likely to be caused if the information is published, the stage the investigation or proceeding has reached and the public interest in the underlying subject matter.

On the other hand, in some contexts a corporation may consider there is benefit in certain information about an ongoing investigation or prosecution being made public. In such cases, the corporation will need to be cognisant of the potential legal restrictions that govern the public disclosure of information regarding live investigations and criminal proceedings.

With these considerations in mind, this chapter examines the rules and mechanisms governing the publication of information about investigations and prosecutions.

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37.2 The common law principle of open justice

As a general starting point, anyone hoping to facilitate or restrict the publication of information regarding an investigation, prosecution or related civil or regulatory proceedings will need to be mindful of the central role that the common law 'open justice principle' plays in the UK legal system. This is the rule that, '[w]ith limited exceptions, the English courts administer judgment in public, at hearings which anyone may attend . . . and which the press may report.'[2] As well as the requirement that hearings should take place in public, the open justice principle also includes 'the placing into the public domain of judicial decisions . . . and the obligation to ensure that evidence or information communicated to a court is presumptively available to the public'.[3]

The English courts have described the principle of open justice as 'one of the most precious in our law'[4] and one that is founded on 'the value of public scrutiny as a guarantor of the quality of justice'.[5] It serves two principal purposes: first, 'to enable public scrutiny of the way in which courts decide cases – to hold the judges to account for the decisions they make and to enable the public to have confidence that they are doing their job properly'; secondly, 'to enable the public to understand how the justice system works and why decisions are taken'.[6] In particular, the courts have stressed that: 'it is impossible to over-emphasise the importance to be attached to the ability of the media to report criminal trials.'[7]

The requirement of open justice is not limited to proceedings that take place before criminal courts: it extends 'to all courts and tribunals exercising the judicial power of the state'.[8] It therefore applies equally to criminal and civil courts and other bodies such as the Financial Reporting Council and other regulatory and disciplinary tribunals. Nor is the open justice principle confined to proceedings that take place in public. It may in some circumstances require information about proceedings in private (i.e. proceedings which the public and press are properly excluded from) to be put into the public domain.[9] The position in relation to criminal investigations, prior to the commencement of any court proceedings, is nuanced and is considered further below.

Although it is a longstanding principle of the common law, the significance of the open justice principle 'has if anything increased in an age which attaches growing importance to the public accountability of public officers and institutions and to the availability of public officers and institutions and to the availability of information about the performance of their functions'.[10] The principle has particular

2 *Khuja v. Times Newspapers Limited* [2019] AC 161 at [12].
3 *R (DSD) v. The Parole Board of England and Wales* [2019] QB 285 at [170].
4 *R (C) v. Secretary of State for Justice* [2016] 1 WLR 444 at [1].
5 *A v. British Broadcasting Corporation* [2015] AC 588 at [26].
6 *Cape Intermediate Holdings Ltd v. Dring* [2019] 3 WLR 429 at [42], [43].
7 *R (Trinity Mirror Plc.) v. Croydon Crown Court* [2008] QB 770 at [32].
8 *Cape Intermediate Holdings Ltd v. Dring* [2019] 3 WLR 429 at [41].
9 *R (DSD) v. The Parole Board of England and Wales* [2019] QB 285 at [175].
10 *Khuja v. Times Newspapers Limited* [2019] AC 161 at [13].

implications for the ability of the media to report on court proceedings: 'Since the rationale of the principle is that justice should be open to public scrutiny, and the media are the conduit through which most members of the public receive information about court proceedings, it follows that the principle of open justice is inextricably linked to the freedom of the media to report on court proceedings.'[11]

Open justice and the European Convention on Human Rights 37.3

Although it is a creation of the common law, the open justice principle is reflected in Article 6 of the European Convention on Human Rights (ECHR), which entitles everyone to 'a fair and public hearing' of any determination of a criminal charge or civil rights and obligations. It is also reflected in the right to freedom of expression under Article 10, since 'the right to receive and impart information, which is guaranteed by article 10(1), may be engaged where measures are taken in relation to court proceedings to prevent information from becoming publicly available.'[12]

At the same time, the ECHR also contains other rights that may require the publication of information concerning individuals implicated in investigations or prosecutions to be restricted. In particular, Article 8 protects the right to respect for private and family life. Article 8 may also extend to business and company premises.[13] This right is engaged whenever anyone proposes to publish information about a person in respect of which that person has a 'reasonable expectation of privacy'. In such cases, the private information may only lawfully be published if this is a necessary and proportionate means of achieving a legitimate aim.

In addition, Article 6 provides that the press and public may be excluded from trials 'in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.'

Derogations from open justice 37.4

While the open justice principle is a jealously guarded 'constitutional principle',[14] it is not absolute. First, Parliament has enacted various statutory restrictions on the open justice principle which limit what may be reported about certain court proceedings. Second, since the open justice principle is a development of the common law, the courts have an inherent jurisdiction to determine its scope and requirements.[15] Over the years the courts have recognised a number of circumstances where derogations from the open justice principle are permitted or required. For present purposes, the most pertinent exceptions are those required to give effect to the rights under Articles 2, 3 and 8 of the ECHR.

11 *A v. British Broadcasting Corporation* [2015] AC 588 at [26].

12 *A v. British Broadcasting Corporation* [2015] AC 588 at [47].

13 *Niemietz v. Germany* (1992) 16 EHRR 97; *Société Colas Est v. France* (2002) App no 37971/91, 16 April.

14 *Cape Intermediate Holdings Ltd v. Dring* [2019] 3 WLR 429 at [41].

15 *A v. British Broadcasting Corporation* [2015] AC 588 at [27].

37.4.1 Restrictions on publicity where absolute rights are engaged

Articles 2 and 3 of the ECHR enshrine the right to life and protection from serious physical harm. The 'absolute' character of those rights means that they cannot be balanced against other 'qualified' rights such as the right to freedom of expression. Nor can they be balanced against countervailing public interests such as the importance of media reporting on court proceedings. Consequently, if the publication of certain information about an investigation or prosecution would expose an individual to a real risk of physical harm or death, then a court is required by Articles 2 and 3 of the ECHR to take effective steps to prevent that risk from materialising. (A court may, for example, make an anonymity order and take other associated procedural steps to protect the identity of a witness or party from a threat of violence arising from the proceedings.)[16] The court must, however, ensure that the extent of the interference with the media's rights is no greater than is necessary to protect against the risk of harm.[17] In civil proceedings, a variety of measures can be utilised to address such risks, including 'ring-fenced' testimony, which is heard in private and accessible only by a limited 'confidentiality club'. But such measures are necessarily more limited in criminal proceedings where the open justice principle is particularly strong and where the power to hear any part of the trial in private is very limited indeed.[18]

37.4.2 Restrictions on publicity where qualified rights are engaged

Where there is a conflict between the media's right to report on an investigation or prosecution and the Article 8 privacy rights of a person implicated in it (e.g. a defendant, suspect, witness or victim) then 'a balance must be struck, so as to ensure that any restriction upon the rights of the media, on the one hand, or of the litigants or third parties, on the other hand, is proportionate in the circumstances.'[19] In applying that balance, neither the right of the media nor the right of the individual affected by publicity has automatic precedence over the other. Instead, the court must apply 'an intense focus on the comparative rights claimed in the individual case'. The respective justifications for interfering with each right must be considered, and the proportionality of the respective interferences must be assessed.[20]

In carrying out that fact-sensitive evaluation, the court must pay close attention to the purpose of the open justice principle, the potential value of the information in question in advancing that purpose and, conversely, any risk of harm its disclosure may cause to the maintenance of an effective judicial process or to the legitimate interests of others.[21] In applying the open justice principle, the courts will generally proceed on the basis that the press 'should be trusted to fulfil

16 *In re Guardian News and Media* [2010] 2 AC 697 at [26], [27].

17 *A v. British Broadcasting Corporation* [2015] AC 588 at [49].

18 *Criminal Procedure Rules, rule 6.6; Guardian News & Media Ltd v. Incedal* [2016] EMLR 14 at [49].

19 *A v. British Broadcasting Corporation* [2015] AC 588 at [48].

20 *In re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593 at [17].

21 *A v. British Broadcasting Corporation* [2015] AC 588 at [41] (adopting the test laid down in *Kennedy v. Charity Commission* [2015] AC 455 at [113]).

their responsibilities accurately to inform the public of court proceedings, and to exercise sensible judgment about the publication of comment which may interfere with the administration of justice.'[22]

Suspects in criminal investigations: before charge 37.4.3

In recent years the English courts have recognised that suspects in criminal investigations who have not yet been charged with any offence have a legitimate interest in limiting publication about their status as suspects. Whether or not there is a reasonable expectation of privacy in a criminal investigation is 'a fact-sensitive question and is not capable of universal answer one way or the other'.[23] However, 'as a matter of general principle, a suspect has a reasonable expectation of privacy in relation to a police investigation'.[24] This is because:

> *As a general rule it is understandable and justifiable (and reasonable) that a suspect would not wish others to know of the investigation because of the stigma attached. . . . If the presumption of innocence were perfectly understood and given effect to, and if the general public was universally capable of adopting a completely open- and broad-minded view of the fact of an investigation so that there was no risk of taint either during the investigation or afterwards (assuming no charge) then the position might be different. But neither of those things is true. The fact of an investigation, as a general rule, will of itself carry some stigma, no matter how often one says it should not.*[25]

There is therefore a 'clear public policy . . . that suspects in criminal investigations should not be identified prior to charge'.[26] Similarly, the courts have held that the fact that investigators have conducted a search of a suspect's property does not, without more, deprive the suspect of their legitimate expectation of privacy:

> *The circumstances of the execution of the warrant may, as a matter of practice, involve a certain compromise of the privacy of the investigation . . . but it does not follow from that that privacy rights should be automatically and totally lost. If there is a legitimate expectation of privacy before the search then the search itself would have to be carried out with a due regard to it (which is doubtless why, in practice, the police do not now identify who the subject of the search was, even if neighbours might know).*[27]

It is important to note, however, that although the 'starting point' is that a suspect has a reasonable expectation of privacy unless and until they are charged, there

22 *R v. B* [2006] EWCA Crim 2692 at [25].
23 *Sir Cliff Richard v. British Broadcasting Corporation* [2019] Ch 169 at [237].
24 Ibid., at [248].
25 Ibid.
26 *ZXC v. Bloomberg L.P.* [2019] EWHC 970 (QB) at [125].
27 *Sir Cliff Richard v. British Broadcasting Corporation* [2019] Ch 169 at [255].

may be 'all sorts of reasons why, in a given case, there is no reasonable expectation of privacy, or why an original reasonable expectation is displaced' even though a suspect has not yet been charged (for example, because there is a risk of harm to the public or because the identity of the suspect is already widely known to the public).[28] Also, the existence of a reasonable expectation of privacy is merely the starting point, and not the endpoint, of the analysis. Once a reasonable expectation of privacy has been established, the lawfulness of publishing that information will depend on whether publication is a necessary and proportionate means of pursuing some legitimate objective in the public interest.

These principles are reflected by the guidance on media relations issued by the College of Policing, which stresses that: 'The police service has a duty to safeguard the confidentiality and integrity of the information it holds and the rights of individuals to privacy.' The guidance explains:

> *Suspects should not be identified to the media (by disclosing names or other identifying information) prior to the point of charge except where justified by clear circumstances e.g. a threat to life, the prevention or detection of crime or a matter of public interest and confidence.*
>
> . . . . .
>
> *Police will not name those arrested, or suspected of a crime, save in exceptional circumstances where there is a legitimate policing purpose to do so.*[29]

The basic guidance of the Financial Conduct Authority (FCA) on publicity in criminal investigations is set out in the FCA Enforcement Guide 6.6:

> *EG 6.6 Publicity during, or upon the conclusion of criminal action*
> *EG 6.6.1 The FCA will normally publicise the outcome of public hearings in criminal prosecutions.*
> *EG 6.6.2 When conducting a criminal investigation the FCA will generally consider making a public announcement when suspects are arrested, when search warrants are executed and when charges are laid. A public announcement may also be made at other stages of the investigation when this is considered appropriate.*
> *EG 6.6.3 The FCA will always be very careful to ensure that any FCA publicity does not prejudice the fairness of any subsequent trial.*

The SFO's general guidance on the issue is as follows:

> *We try to provide as much information as we can without compromising law enforcement work, prejudicing the right of defendants to a fair trial, or causing avoidable reputational damage or harm to individuals or businesses under*

28 Ibid., at [251].

29 College of Policing guidance on media relations (May 2017), quoted in *ZXC v. Bloomberg L.P.* [2019] EWHC 970 (QB) at [122].

investigation. In practice the amount of information we can provide, particularly about cases which are in the investigation stage, is usually very limited.

Before the Director decides whether to open an investigation, the SFO does not normally confirm or deny interest in allegations made against either companies or individuals. If asked, we would normally say no more than that we are aware of the situation and that we are monitoring it.

Once the Director has formally opened a criminal investigation, the position will change in the following circumstances:

(a) the company under investigation itself makes the information public. This normally happens when a publicly listed company is informed of our investigation and considers this fact to be market-sensitive information of which it must inform the market. In such cases the SFO will (usually in co-ordination with the company's lawyers) confirm the fact and focus of the investigation after the market has been informed, or

(b) there are operational reasons for announcing the investigation (such as a call for witnesses). Or,

(c) there is some other substantial reason why the announcement of the investigation would be in the public interest.

. . . . .

Once an investigation results in a decision to prosecute and a company or an individual is charged with an offence, we announce the relevant name and charges. This may happen at the time the individual or company appears in court in answer to a requisition.[30]

Suspects in criminal investigations: after charge 37.4.4

While a suspect is likely to have a reasonable expectation of privacy prior to a charging decision, the position changes if and when they are charged: 'a person cannot ordinarily have an expectation of privacy once s/he has been charged with a criminal offence.'[31] The College of Policing's media relations guidance explains:

Those charged with an offence should be named unless there is an exceptional and legitimate policing purpose for not doing so or reporting restrictions apply. This information can be given at the point of charge.

. . . . .

If charges are withdrawn before someone first appears in court, forces should proactively release this information as soon as possible in order to be fair to the person involved, especially if a case has previously been publicised.

In practice, in the absence of any applicable statutory reporting restrictions or a real risk of death or serious injury, a person who has been charged with an

30 Serious Fraud Office, 'Our policy on making information about our cases public', https://www.sfo.gov.uk/our-cases/.

31 *ZXC v. Bloomberg L.P.* [2019] EWHC 970 (QB) at [132].

offence will be unable to prevent that information from being publicly reported by the media.

37.4.5 Persons who are named in open court

While a suspect who has not been charged with any offence is likely to have a reasonable expectation of privacy, the position is different if that person is named as a suspect or alleged perpetrator in open court. This is because the Supreme Court has held that 'there is no reasonable expectation of privacy in relation to proceedings in open court.'[32] Nonetheless, the Court also specifically contemplated that third parties (such as an arrested person who has not been charged) may apply for anonymity during the trial of another if they fear being named in open court – under common law powers, backed up with statutory reporting restrictions.[33]

Similarly, if information about a witness or victim of an offence is discussed in open court, in the absence of statutory reporting restrictions or a real risk of death or serious injury, the witness or victim is unlikely to be able to prevent the publication of that information, unless that person has obtained, in advance, anonymity from the criminal court to prevent their naming in open court during those proceedings. In this regard, the courts have acknowledged that although criminal proceedings may have a significant 'collateral impact' on non-parties, this is 'part of the price to be paid for open justice and the freedom of the press to report fairly and accurately on judicial proceedings held in public'.[34]

37.4.6 Uncharged suspects who are named in charges laid against others

There is no statutory or common law rule that requires a charge or indictment to include the names of uncharged persons accused or suspected by a prosecutor of being party to the alleged criminal activity. Such names can be supplied to the defendants without appearing on the face of the indictment. As noted above, however, once a person has been named as a suspect in open court, they lose any reasonable expectation of privacy they may otherwise have had. Accordingly, if an uncharged suspect learns that a prosecuting authority intends to name them in charges laid against another person (e.g. by naming them as an unindicted co-conspirator), they should consider taking urgent steps (including, if necessary, by seeking third-party anonymity, injunctive relief or appropriate reporting restrictions) to prevent their name being included in a publicly accessible charge sheet[35] or indictment or being read out in open court.

32 *Khuja v. Times Newspapers Limited* [2019] AC 161 at [34].

33 Ibid., at [18], [35].

34 Ibid., at [34].

35 The inclusion of information (e.g., a person's name) in a publicly accessible charge sheet or indictment is likely to be treated in the same way as if that information had been read aloud in open court.

Criminal proceedings: statutory reporting restrictions 37.5

Under English law, a number of statutory provisions automatically restrict the publication of reports on certain types of hearings or information relating to ongoing court proceedings. In addition, various other statutory provisions confer discretionary powers on the courts to impose reporting restrictions in certain situations.

Contempt of court and the 'strict liability' rule 37.5.1

Section 1 of the Contempt of Court Act 1981 (CCA 1981) establishes the 'strict liability rule', namely that 'conduct may be treated as a contempt of court as tending to interfere with the course of justice regardless of intent to do so.' The strict liability rule applies to any 'publication' that is 'addressed to the public at large or any section of the public'[36] and that 'creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced'.[37] The rule only applies to publications made when proceedings are 'active' – which is the case if a summons has been issued or a defendant has been arrested without warrant.[38]

The upshot of these provisions is that once a suspect has been arrested or charged, no one may publish any statement to the public (or a section of the public) that creates a substantial risk of seriously prejudicing or impeding the course of justice in those proceedings. Such a risk may be created in a number of ways: for example by vilifying a suspect, by publishing prejudicial and inadmissible material (e.g. by revealing the defendant's prior criminal record) or by deterring witnesses from coming forward. No actual prejudice need be shown, merely the risk.

The strict liability rule is subject to an important exception in section 4(1) of the CCA 1981. Subject to the provisions set out below, anything said in open court in any civil or criminal proceedings (e.g. the testimony of a witness or allegations made by a defendant or prosecutor) may be published to the world at large, provided that the publication is a fair and accurate contemporaneous report of those proceedings and is published in good faith.

Section 4(2) of the CCA 1981 allows a court to order that any reporting on civil or criminal proceedings shall be 'postponed for such period as the court thinks necessary'. The power temporarily to postpone reporting only arises where this is necessary to avoid 'a substantial risk of prejudice to the administration of justice' either in those proceedings 'or in any other proceedings pending or imminent'. The power cannot be used to obtain a permanent injunction – if a person seeks permanently to prevent publication of a matter arising during trial, they will need to apply in advance under common law powers to prevent that matter from being aired in open court.

36 Contempt of Court Act 1981, section 2(2).

37 Ibid., at section 2(1).

38 Ibid., at Schedule 1.

37.5.2 Automatic reporting restrictions which the court may vary or remove

37.5.2.1 Preparatory hearings

In certain cases involving serious or complex fraud or other complex cases, the Crown Court may hold a preparatory hearing for the purpose of identifying relevant issues, assisting in the management of the trial and considering legal questions such as joinder or severance of charges.[39] Automatic reporting restrictions prohibit the publication of reports of these hearings (or related appeals) until the conclusion of the trial. A judge may, however, disapply or limit the application of those automatic reporting restrictions.[40]

37.5.2.2 Pretrial rulings in the Crown Court

Section 40 of the Criminal Procedure and Investigations Act 1996 (CPIA 1996) empowers the Crown Court to make binding rulings at pretrial hearings on 'any question as to the admissibility of evidence' and 'any other question of law relating to the case concerned.' Section 41 imposes automatic reporting restrictions that prohibit any report of a ruling made under section 40 (or proceedings on such an application) or any related varying or discharging order. The judge dealing with the application may, however, remove or limit those reporting restrictions.[41]

37.5.2.3 Applications for dismissal in the Crown Court

A defendant in an indictable-only case sent to the Crown Court may apply for the charge or charges to be dismissed on the basis that the evidence is insufficient for him or her to be properly convicted.[42] Automatic reporting restrictions prohibit any report of the existence of an unsuccessful dismissal application until the conclusion of the trial of the last defendant.[43]

37.5.2.4 Prosecution appeals

Part 9 of the Criminal Justice Act 2003 grants the prosecution various rights of appeal to the Court of Appeal in relation to a trial on indictment. This includes

39 See section 7 of the Criminal Justice Act 1987 (in relation to cases concerning serious or complex fraud) and section 29 of the Criminal Procedure and Investigations Act 1996 (in relation to other serious, complex or lengthy cases).

40 See section 11 of the Criminal Justice Act 1987 and section 37 of the Criminal Procedure and Investigations Act 1996. If the accused objects to the disapplication or limitation of those restrictions, the judge must hear representations from the accused and must only make such an order if satisfied that it is in interests of justice to do so. If an order is made, the accused's objections or representations must not be reported.

41 See section 40(3) of the Criminal Procedure and Investigations Act 1996. As with preparatory hearings, if the accused objects to the disapplication or limitation of the automatic reporting restrictions that apply to pretrial rulings, the judge must hear representations from the accused and must only permit the reporting of such a pretrial ruling if satisfied that it is in the interests of justice to do so. If an order is made, the accused's objections or representations must not be reported.

42 See paragraph 2 of Schedule 3 to the Crime and Disorder Act 1998.

43 Paragraph 3 of Schedule 3 to the Crime and Disorder Act 1998.

appeals against rulings that terminate the proceedings and evidentiary rulings that significantly weaken the prosecution case. Automatic reporting restrictions prohibit any reporting of such appeals, although once again the Court of Appeal and trial judge have a discretion to disapply this.[44]

Discretionary restrictions regarding deferred prosecution agreements 37.5.3

Under paragraph 12 of Schedule 17 to the Crime and Courts Act 2013, a court may order that the publication of information by the prosecutor shall be postponed 'for such period as the court considers necessary if it appears to the court that postponement is necessary for avoiding a substantial risk of prejudice to the administration of justice in any legal proceedings.' In *SFO v. Serco* the court exercised that power on the basis that the SFO was continuing to consider charging individuals with offences arising out of the matters that were the subject of the deferred prosecution agreement (DPA). Since the agreed statements of facts contained material by which such individuals could be identified, the court ordered that publication of the statement be postponed until a charging decision had been taken (whereupon the matter would be revisited by the court seized of those proceedings).[45] The court exercised the power for a similar reason in *SFO v. Tesco Stores Limited*.[46] Subsequently, however, all the individual defendants were acquitted, and were aggrieved that the DPA, when eventually made public, effectively identified them and accused them of conduct of which they had been found not guilty. In *SFO v. Rolls-Royce plc*[47] the DPA statement of facts was made public before the SFO had made charging decisions in respect of individuals in the investigation. The issue of third-party reputational rights in relation to DPAs is likely to be revisited in subsequent DPAs.

Appeals against derogations from open justice 37.5.4

Section 159 of the Criminal Justice Act 1988 gives a right to appeal to the Court of Appeal to any 'person aggrieved' by any order under section 4 or 11 of the CCA made in relation to a trial on indictment, any order restricting the access of the public to the whole or any part of a trial on indictment, and any order restricting the publication of any report of the whole or any part of a trial on indictment. Note, however, that a person who is aggrieved by the refusal of the court to make

See Chapter 23 on negotiating global settlements

44 See sections 62 and 63 of the Criminal Justice Act 2003.

45 *Serious Fraud Office v. Serco Geografix Limited* (Case No. U20190413) judgment of William Davis J dated 4 July 2019 at [44].

46 *Serious Fraud Office v. Tesco Stores Limited* (Case No. U20170287) [2019] EW Misc 1 (CrownC), at [110] to [114]. In addition, the court has power under section 4(2) of the CCA 1981 to postpone reporting of any hearing concerning a DPA for a period it considers necessary to avoid a substantial risk of prejudice to the administration of justice in those or in other pending or imminent proceedings.

47 *SFO v. Rolls-Royce plc* (Case No. U20170036) [2017] Lloyd's Rep FC 249.

any reporting restrictions order has no statutory appeal right: the only remedy is to seek judicial review.[48]

37.6 Public access to information and documents from criminal courts

In addition to the right to attend and report on hearings held in open court (subject to any applicable reporting restrictions) the Criminal Procedure Rules and Consolidated Criminal Practice Directions recognise the right of the public (including journalists) to obtain access to certain information or documents from court records or case materials.

Any member of the public (including a reporter) may under the Criminal Procedure Rules apply for and obtain the following information from a criminal court: (1) the date of any hearing in public; (2) each alleged offence and any plea entered; (3) any decision by the court at any hearing in public; (4) whether the case is under appeal; (5) the outcome of the case; and (6) the identity of the prosecutor, the defendants, the parties' representatives (including their addresses) and the judge or magistrate by whom a decision at a hearing in public was made.[49] In addition, upon an application by a member of the public the court may direct the provision of 'other information about the case'.[50]

Members of the public and the media may apply for access to copies of other documents referred to during court proceedings. Access will normally be granted in respect of any document that is read aloud in its entirety (or which is treated as having been read aloud in its entirety) in open court. This includes opening notes, expert reports, skeleton arguments and written decisions by the court.[51] Other documents, such as materials from the jury bundles and exhibits, may also be made available to the public and media.[52] Those principles were recently reaffirmed by the Supreme Court, which held that the default position was that the public should be allowed access not only to the parties' written submissions and arguments but also to the documents that had been placed before the court and referred to during the hearing. But a non-party would have to explain why he or she sought access and how granting access would advance the open justice principle; the court would then have to carry out a fact-specific balancing exercise by weighing the potential value of the information sought in advancing the purpose of the open justice principle against any risk of harm its disclosure might cause to the maintenance of an effective judicial process or to the legitimate interests of others.[53]

The Criminal Practice Directions provide that where an application for access is made by legal representatives instructed by the media or by an accredited

48 *R v. Marine A* [2014] 1 WLR 3326 at [31], [48].

49 Criminal Procedure Rules, rule 5.8(4),(6).

50 Ibid., at rule 5.8(7).

51 See the Consolidated Criminal Practice Directions 2015 [2015] EWCA Crim 1567 at paragraphs 5B.10 to 5B.13.

52 Ibid., at paragraph 5B.17.

53 *Cape Intermediate Holdings Ltd v. Dring* [2019] 3 WLR 429.

member of the media 'there is a greater presumption in favour of providing the requested material' and '[t]he general principle . . . is that the court should supply documents and information unless there is a good reason not to in order to protect the rights or legitimate interests of others and the request will not place an undue burden on the court.'[54] The Practice Directions add that: 'the rights of a defendant, witnesses and victims under Article 6 and 8 of the European Convention on Human Rights may also restrict the power to release material to third parties.'[55]

In addition to the right of the media and public to obtain information and court documents, a criminal court is also under a duty proactively to publish information about hearings due to be heard in public, including (1) the date, time and place of the hearing; (2) the identity of the defendant; and (3) 'such other information as it may be practicable to publish' concerning the type of the hearing, the identity of the prosecutor, the identity of the court, the offence or offences alleged and the existence of any reporting restrictions.[56]

Libel and data protection 37.7

Libel 37.7.1

An individual or corporation that is the subject of false and damaging reporting in connection with an investigation or criminal prosecution may have a claim in libel against the publisher. To establish liability for libel, a person must demonstrate that they have suffered, or are likely to suffer, 'serious reputational harm' as a result of the defamatory publication. In the case of a body that trades for profit, this requirement is only met if the publication 'has caused or is likely to cause the body serious financial loss'.[57] Under the so-called 'repetition rule', a person who reports a defamatory allegation made by another is treated as though they had made the allegation themselves.[58]

A publisher of a defamatory statement will have a complete defence if the statement is true, or if it meets the requirements of the defence of honest opinion[59] or publication on a matter of public interest.[60] In addition, a fair and accu-

54 See the Consolidated Criminal Practice Directions 2015 [2015] EWCA Crim 1567 at paragraph 5B.26, citing the judgment of the Court of Appeal in *R (Guardian News and Media) v. City of Westminster Magistrates' Court* [2013] QB 618 at [87].

55 Ibid., at paragraph 5B.24.

56 Criminal Procedure Rules, rule 5.8(10).

57 Defamation Act 2013, section 1.

58 As Lord Devlin explained in *Lewis v. Daily Telegraph Ltd* [1964] AC 234 at [284]: 'For the purpose of the law of libel a hearsay statement is the same as a direct statement, and that is all there is to it.'

59 See section 3 of the Defamation Act 2013. The requirements for this defence are, in summary, that: (1) the statement was a statement of opinion; (2) the statement indicated, whether in general or specific terms, the basis of the opinion; and (3) an honest person could have held the opinion expressed on the basis of any fact that existed at the time the statement was published or anything claimed to be a fact that was published in a privileged statement published before the statement complained of.

60 See section 4 of the Defamation Act 2013. The requirements for this defence are, in summary, that: (1) the statement complained of was, or formed part of, a statement on a matter of public interest; and (2) the defendant reasonably believed that publishing the statement complained

rate contemporaneous report of any proceedings before any court in the United Kingdom is protected by the defence of absolute privilege.[61]

It is generally difficult to obtain an interim injunction preventing a person from publishing a defamatory statement.[62] Given the potential size of a damages award for a serious libel, however, a well-founded threat to pursue libel proceedings may give a prospective publisher pause for thought before publishing potentially defamatory information.

37.7.2 Data protection

The publication of information about an identifiable living individual will constitute 'processing' of 'personal data' under the Data Protection Act 2018. Part 3 contains specific rules governing the processing of personal data by law enforcement authorities such as the police, SFO, National Crime Agency, Financial Conduct Authority and Her Majesty's Revenue and Customs. All processing of personal data for law enforcement purposes must be lawful and fair. Processing will only be lawful 'if and to the extent that it is based on law' and either the data subject has consented or the processing is 'necessary for the performance of a task carried out' by that authority. Accordingly, any decision by a lawful enforcement authority to publicise particular information about an individual's involvement in an investigation or prosecution will need to comply with these requirements.

See Chapter 40 on data protection

37.8 Public relations

Most corporations involved in a serious investigation or prosecution would be well advised to seek professional communications advice from specialist corporate communications consultants with specific expertise of managing the PR implications of criminal investigations or proceedings. Before doing so, however, it is important to be mindful that communications with such consultants are unlikely to be protected by legal professional privilege and could be the subject of compulsory production by law enforcement authorities or disclosure in related civil litigation.

See Chapters 35 on privilege and 39 on protecting corporate reputation

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of was in the public interest. For these purposes, if the statement was part of an accurate and impartial account of a dispute that the claimant was a party to, a court determining whether it was reasonable for the defendant to believe that publishing the statement was in the public interest must disregard any omission of the defendant to take steps to verify the truth of the allegation conveyed by the statement.

61 See section 14(1) of the Defamation Act 1996. Similarly, a fair and accurate non-contemporaneous report of court proceedings in public is protected by the defence of qualified privilege at common law: see *Reynolds v. Times Newspapers Ltd* [2001] 2 AC 127 at [196] and *Kimber v. Press Association* [1893] 1 QB 65 at [68], [69].

62 As *Duncan and Neill on Defamation* (Fourth Edition) explains at paragraph 26.02, 'the general rule is that an interim injunction will not be granted in a claim for libel or slander if there is any doubt as to whether the statement is defamatory. Nor will an injunction be granted where the defendant provides a statement asserting that he will be able to prove that the statement complained of is true or that he intends to rely on another recognised defence, such as qualified privilege or honest opinion, unless it is clear that any such defence will fail at trial'.

Appendix 1

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