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Learning from the Past: What Anti-Corruption Compliance Can Teach Companies About Human Rights and Corporate Responsibility

Corporate risk continues to evolve, particularly in the field of human rights and corporate responsibility. Increasingly, human rights obligations are viewed as corporate obligations. Drivers of this shift include the UN Guiding Principles on Business and Human Rights, transnational civil litigation, investor disclosure expectations, and an array of domestic regulations.

These changes in the corporate risk landscape are not unprecedented. Over the last decade, corporate anti-corruption laws have multiplied, along with increasingly vigorous enforcement, even sometimes in unexpected places. This has promoted the creation of robust anti-corruption compliance programs requiring businesses to set clear statements of policy, establish due diligence processes, monitor and test for compliance, and provide mechanisms for remediation.

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Substantively, there is much overlap: heat maps of countries with high corruption risk often mirror those of countries with high human rights risk. Corruption can fuel or at least facilitate human rights abuses, such as human trafficking, and vice versa. Building a human rights compliance program by leveraging an existing anti-corruption compliance program provides a powerful, practical, and efficient approach for companies seeking to address evolving human rights risks.

I. Companies Can Meet Human Rights Responsibilities By Adopting Processes for Addressing Adverse Human Rights Impacts

As a matter of international human rights law, the responsibility to address human rights abuses has largely been seen as a matter of state competence. This legal obligation rests on individual states to comply, which in turn can act domestically through criminal and administrative law provisions.

The UN Guiding Principles on Business and Human Rights, which were unanimously endorsed by the UN Human Rights Council in 2011, are an innovation to that basic approach.[1] They seek to address—on an international level—the individual responsibility of companies, advancing a voluntary, systems-based approach to corporate human rights obligations. The Guiding Principles largely have been lauded in policy and academic circles, as well as by civil society organizations, and have taken a central role in shaping transnational civil liability, investor disclosure expectations, and relevant domestic regulations.

The Guiding Principles distinguish between public- and private-sector human rights responsibilities. States must *protect* human rights.[2] Businesses must *respect* human rights.[3] Respect is systems-focused. That is, businesses respect human rights by adopting policies and implementing processes to address adverse human rights impacts with which they are involved.[4]

II. Compliance Programs Can Be Built on Existing Models

Before legal corporate human rights emerged as a more formalized risk, businesses witnessed a similar evolution in anti-corruption laws. In response to a growing number of scandals and concerns regarding corporate bribery, the U.S. Congress enacted the Foreign Corrupt Practices Act ("FCPA") in 1977, outlawing the bribery of foreign officials.[5] But anti-corruption enforcement in the United States remained

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1. United Nations Guiding Principles on Business and Human Rights (2011), https://business-humanrights.org/en/un-guiding-principles/text-of-the-un-guiding-principles (hereinafter "Guiding Principles").
2. *Id.* Part I.A.1.
3. *Id.* Part II.A.11.
4. *Id.* Part II.A.15.
5. Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-1, et seq.

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relatively limited for decades: for 1977 to 1997, the websites of the U.S. Department of Justice ("DOJ") and the Securities and Exchange Commission ("SEC") reflect only 39 FCPA-related enforcement actions.[6]

Outside the United States, efforts to combat transnational corruption progressed more slowly. Until the late 1990s, the German, French, and Swedish governments, among others, still deemed bribes paid to foreign officials by local companies to be tax-deductible. The attitude shifted markedly with the adoption of the OECD Anti-Bribery Convention in 1997.[7] The Convention requires signatory countries to criminalize offering or giving bribes to foreign public officials under their domestic laws.[8] One by one, the OECD signatory nations have implemented national legislation proscribing the bribery of foreign officials.[9]

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Meanwhile, the enforcement of anti-corruption legislation has ballooned. Over the last decade, DOJ's and SEC's websites recount more than 350 FCPA-related enforcement actions, roughly nine times as many as in the first twenty years the statute was in force.[10] And anti-corruption enforcement is no longer the exclusive province of U.S. regulators. Recent years have witnessed a growing intensity of anti-corruption enforcement throughout the world, including in South America, Europe, and Asia.

In seeking to enhance anti-corruption compliance, regulators around the world increasingly have articulated standards for what constitutes an effective compliance program. The broad strokes are often largely the same. For example,

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6. *See* U.S. Department of Justice, FCPA Related Enforcement Actions Chronological List, https://www.justice.gov/criminal-fraud/related-enforcement-actions (last updated Jan. 25, 2017); U.S. Securities and Exchange Commission, SEC Enforcement Actions: FCPA Cases, https://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml (last updated Feb. 9, 2017).
7. OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Nov. 21, 1997), https://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf.
8. *Id.* Art. I.
9. *See, e.g.*, French Act No. 2000-595 (June 30, 2000); Swedish Penal Code, Ch. 17, Section 7 (July 1, 1999); German Act on Combating Bribery of Foreign Public Officials in International Business Transactions (Sept. 10, 1998).
10. *See* FCPA Related Enforcement Actions Chronological List, *supra* note 6; SEC Enforcement Actions: FCPA Cases, *supra* note 6.

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the UK Ministry of Justice has underscored the importance of proportionate procedures, committed management, risk assessment, communications (including training), due diligence, and monitoring.[11] The Decree implementing the so-called Brazilian Clean Company Act sets out similar parameters for assessing the effectiveness of a compliance program.[12]

Likewise, the "Resource Guide to the U.S. Foreign Corrupt Practices Act," issued by the DOJ and SEC in 2012, as well as the DOJ's April 2016 guidance unveiling its FCPA pilot program, have emphasized: (1) an established culture of compliance; (2) effective policies and procedures, including a code of conduct; (3) sufficient oversight, autonomy, and resources for the compliance program, including qualified and experienced personnel; (4) risk assessment; (5) adequate training and continuing advice; (6) positive incentives and disciplinary measures; (7) the mitigation of third-party risks through due diligence; (8) a confidential reporting mechanism and an efficient and reliable internal investigation process; (9) continuous improvement through periodic testing and review; and (10) adequate due diligence on acquisition targets.[13] More recently, in February 2017, the DOJ provided added clarity on its approach to evaluating corporate compliance programs, highlighting the importance of management's role and the board's compliance expertise, the autonomy and resources devoted to compliance, and the business's involvement in compliance policies and procedures.[14]

As a further incentive to adopt compliance programs, regulators may consider such programs in determining whether to charge a corporate violation or at least in deciding what penalty to impose (or seek). Indeed, the sole defense against the corporate offense of failing to prevent bribery under the UK Bribery Act is that the company had "adequate procedures" in place designed to prevent bribery by associated persons.[15] In the United States, although not a formal defense, both the DOJ and the SEC routinely consider a company's compliance program as part of their investigations. In November 2015, the DOJ hired a compliance consultant to

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11. Ministry of Justice, The Bribery Act 2010 Guidance (2012), https://www.gov.uk/government/publications/bribery-act-2010-guidance.
12. Decree No. 8.420/2015 (Mar. 18, 2015), http://www.planalto.gov.br/ccivil_03/_Ato2015-2018/2015/Decreto/D8420.htm (implementing Federal Law No. 12.846/2013 (Aug. 1, 2013), http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2013/lei/l12846.htm).
13. U.S. Department of Justice, The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance (Apr. 5, 2016), https://www.justice.gov/criminal-fraud/file/838416/download; U.S. Department of Justice, A Resource Guide to the U.S. Foreign Corrupt Practices Act (2012), http://www.justice.gov/criminal/fraud/fcpa/guidance/.
14. U.S. Department of Justice, Evaluation of Corporate Compliance Programs (Feb. 8, 2017), https://www.justice.gov/criminal-fraud/page/file/937501/download. *See also* Sean Hecker, Andrew M. Levine, and Philip Rohlik, "DOJ Issues Guidance on Evaluating Corporate Compliance Programs," FCPA Update, Vol. 8, No. 7 (Feb. 2017), http://www.debevoise.com/insights/publications/2017/02/fcpa-update-february-2017.
15. UK Bribery Act 2010, Ch. 23, Section 7(2).

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help with this important task.[16] And the DOJ's 2017 guidance presents a series of "Sample Topics and Questions" the government commonly asks in deciding whether to charge a business organization.[17] As reflected in the U.S. Sentencing Guidelines, a company's failure to prevent a particular violation does not necessarily mean that the entity's compliance program is ineffective.[18] Regulators therefore focus on a compliance program's good faith design, implementation, and enforcement.[19]

Of course, there are no "one-size-fits-all" effective compliance programs. Each program should be fashioned to meet an organization's specific needs and risks. In general, regulators' measures of an effective anti-corruption compliance program, as laid out above, are instructive for fashioning programs that are likewise effective for demonstrating respect for human rights. The Guiding Principles add to this mix an expectation of public reporting.[20] The cornerstone of each of these expectations is for the business to prioritize risks from the perspective of those whose rights might be negatively impacted.

III. The Regulatory Landscape Is Evolving

The Guiding Principles are reshaping corporate risk in a way similar to that of the OECD Anti-Bribery Convention. First, they provide a benchmark against which consumers, investors, courts, and activists can assess corporate respect for human rights. Second, just as the OECD Convention led to national regulation of extraterritorial corruption, the Guiding Principles have inspired legislation to enforce business respect for human rights.

The trend is most apparent in the context of human trafficking (or modern slavery), which corruption can facilitate. Recent anti-trafficking legislation includes the California Transparency in Supply Chains Act,[21] the UK Modern Slavery Act,[22] and the U.S. Federal Acquisition Regulation on Ending Trafficking in Persons.[23] The risks created by each of these regulations differ.

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16. U.S. Department of Justice, New Compliance Counsel Expert Retained by the DOJ Fraud Section (Nov. 3, 2015), https://www.justice.gov/criminal-fraud/file/790236/download.
17. Evaluation of Corporate Compliance Programs, supra note 14.
18. U.S. Sentencing Guidelines § 8B2.1 (2011).
19. *Id.*
20. Guiding Principles, *supra* note 1.
21. California Civil Code Section 1714.43 (Sept. 30, 2010); California Revenue and Taxation Code Section 19547.5 (Sept. 30, 2010).
22. UK Modern Slavery Act 2015, Ch. 30 (Mar. 26, 2015), http://www.legislation.gov.uk/ukpga/2015/30/contents/enacted.
23. Combating Trafficking in Persons, 48 CFR 52.222-50 (Mar. 2015).

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The California and UK Acts, for instance, focus on disclosure. Thus, the California Transparency in Supply Chains Act requires that businesses disclose any measures they take relating to verification, audits, certification, internal accountability, and training; it does not mandate that businesses adopt particular processes regarding their supply chains.[24] Similarly, the UK Modern Slavery Act focuses on disclosure, though it broadens the set of relevant business activities.[25] Companies can comply with both regulations by reporting that they have done nothing to prevent human trafficking. When a company reports that it has taken measures to address human trafficking, those representations must of course be true, and litigation risk may ensue if they are not.

The U.S. Federal Acquisition Regulation on Ending Trafficking in Persons goes further. Issued in March 2015, the regulation significantly expands the responsibility of federal contractors sourcing over $500,000 in overseas goods or services to adopt measures to prevent human trafficking and forced labor.[26] In particular, contractors must now develop, and annually certify, detailed Human Trafficking Compliance Plans evidencing: (1) policies and procedures related to recruitment, wages, and housing; (2) employee training and awareness-raising; (3) due diligence measures to monitor, detect, and terminate subcontractors; and (4) confidential grievance mechanisms to report violations.[27]

Modern slavery legislation is just one aspect of emerging corporate human rights risk. The trend, however, is clear. As with anti-corruption two decades ago, corporate human rights risks are quickly multiplying. At the same time, the expectations of businesses are becoming more certain and practical.

Even as the breadth of these risks evolves, we can clearly discern regulatory focus on compliance program design. Against this backdrop, lessons internalized from anti-corruption efforts—regarding codes of conduct, due diligence, internal investigations, etc.—are invaluable for businesses seeking to navigate modern human rights risk.

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24. California Civil Code Section 1714.43(c), *supra* note 21.
25. Modern Slavery Act 2015, *supra* note 22.
26. 48 CFR 52.222-50(h), *supra* note 23.
27. *Id.*

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IV. Integrated Risk Management Can Bring Substantial Benefits in Efficiency and Effectiveness

The evolution of anti-corruption compliance not only helps one understand trend lines for human rights compliance, but also provides a practical model that companies can leverage to meet the expectations of regulators, courts, and investors. The fundamental compliance structure is the same: businesses must set clear statements of policy, establish due diligence processes, monitor and test for compliance, and provide mechanisms for remediation. In addition, compliance functions require sufficient resources and autonomy. The foundation of both anti-corruption and human rights compliance is risk- and context-sensitive, including obligations that extend to agents and subcontractors.

As corporate risks evolve, companies need not start afresh in designing and implementing compliance strategies. To navigate effectively the changing human rights landscape, companies should mine their anti-corruption experiences, deploying lessons learned and considering the possible benefits of integrated risk management.

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Privilege in Internal Investigations: Recent Developments in English Law

The differing scope of protection provided by legal professional privilege ("LPP") across different jurisdictions has long been a factor requiring careful consideration in cross-border investigations. With the broad extra-territorial reach of U.S. and English anti-bribery laws and the resulting likelihood of concurrent jurisdiction, coupled with the more aggressive and expansive approach to anti-bribery enforcement now adopted by authorities in other jurisdictions, the case is even stronger for such LPP considerations to form part of any investigative plan.

Two recent English court decisions[1] have very significant implications for companies and lawyers conducting or involved in internal investigations with a U.K. element, in particular in relation to interview memoranda prepared by external lawyers. In this article, we reflect on the practical significance of these two judgments, the current status of certain types of documents under English law, and what this might mean for the future conduct of investigations involving U.K. authorities, in particular where there is also a U.S. element.

English Legal Professional Privilege

The importance of LPP is deeply enshrined in English law, with the courts describing it as "a fundamental human right."[2] The two categories of LPP most relevant to internal investigations are:

1. Legal advice privilege, which protects confidential communications between a client and its legal advisers which were created for the purpose of giving or receiving legal advice. Unlike litigation privilege, legal advice privilege does not extend to communications between a client or its legal advisers and third parties, although in recent years attempts have been made to test this principle, with some senior judges indicating that the character of the advice should take precedence over the status of the adviser.[3]
2. Litigation privilege, which protects communications between a client or its legal advisers (on one hand) and third parties (on the other) for the sole or dominant purpose of obtaining information or advice in connection with, or of conducting, litigation that is existing or 'reasonably in prospect.' The litigation must be adversarial, not investigative or inquisitorial.

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1. *Re The RBS Rights Issue Litigation* [2016] EWHC 311 (Ch) and *Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Ltd* [2017] EWHC 1017 (QB).
2. *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2003] 1 AC 563 per Lord Hoffmann at 606.
3. *R (Prudential plc) v Special Commissioner of Income Tax* [2013] 2 AC 185 per Lord Sumption (dissenting).

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It might be assumed that, in the context of an internal investigation, these categories of privilege would cover much, if not all, work product produced by external lawyers retained by a company to investigate allegations or suspicions of improper and potentially criminal activity within the company. In particular, it might be thought that interview memoranda prepared by a company's external lawyers and for the purposes of advising the company (or a subset of the company's employees) as to the facts underlying the issues under investigation would be covered. Such assumptions must be re-evaluated in the light of the recent decisions.

English Legal Advice Privilege

In *Re The RBS Rights Issue Litigation*, the Royal Bank of Scotland ("RBS") sought to argue before the English High Court that two categories of transcripts, notes and other records of interviews of current and former RBS employees (collectively referred to as "interview notes") were covered by legal advice privilege and were therefore not disclosable to the bank's opponents in civil litigation brought in England. RBS was the defendant in civil litigation concerning claims by RBS shareholders alleging that they were misled into subscribing for shares in a 2008 rights issue through an inaccurate or incomplete prospectus. RBS's share price subsequently collapsed, resulting in the shareholders incurring losses. Notably, a significant proportion of the interview notes in question related to interviews which were conducted by U.S. lawyers with U.S. employees in the U.S. as part of RBS's response to two subpoenas from the U.S. Securities and Exchange Commission.

RBS submitted that, assuming English law applied, the interview notes were covered by legal advice privilege and were therefore not documents that could be reviewed by the shareholder claimants. In support of this assertion that legal advice privilege applied to the interview notes, RBS argued that each recorded a communication between a lawyer (or agent of its lawyers) and a person authorised by RBS to communicate with its lawyers, who constituted the 'client.' RBS further submitted that, in any case, the interview notes constituted lawyers' working papers, the disclosure of which would indicate to the claimants the trend of legal advice RBS had received from its lawyers. The Court rejected both arguments.

In relation to the first of RBS's arguments, the Court held that what constitutes the corporate 'client' for the purposes of legal advice privilege is to be narrowly interpreted and consists only of those employees of the company who are authorised to seek and receive legal advice from the company's lawyers. This narrow view is

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consistent with the leading authority on legal advice privilege previously outlined by the English Court of Appeal in *Three Rivers (No 5)*.[4] The decision was also consistent with the approach taken by the English courts in a judgment that was handed down shortly before the *RBS* decision.[5]

In reaching its conclusion, the Court noted that it was common ground that none of the interviewees had authority to obtain advice on behalf of RBS. The Court held that the interviewees had provided information to RBS's lawyers in their capacity as RBS employees, not as the 'client,' and were consequently considered third parties. The Court rejected RBS's arguments that, since the employees being interviewed were authorised by the bank to impart factual information to the bank's lawyers so as to enable the bank to obtain legal advice, they should be treated as being part of the client.

"It might be assumed that, in the context of an internal investigation, these categories of privilege would cover much, if not all, work product produced by external lawyers retained by a company to investigate allegations or suspicions of improper and potentially criminal activity within a company. . . . Such assumptions must be re-evaluated in light of the recent [court] decisions."

In addition, RBS failed to persuade the Court with its argument that the interview notes were lawyers' working papers betraying the trend of legal advice given to the bank. RBS had submitted that the interview notes were privileged on a number of grounds, namely that: they were not simply transcripts of the interviews but included 'mental impressions' of the lawyers who had produced them; they reflected the lawyers' train of inquiry in preparing for the interviews; they recorded the lawyers' selection of the points covered in the interviews; and interviewees received *Upjohn* warnings, thus being told at the start of the interview (and often acknowledging) that the interviews were subject to attorney-client privilege. The Court determined that these factors alone were not enough to establish privilege, since RBS had failed to provide examples of how the interview notes contained any analysis or legal input, or revealed the trend of legal advice provided to RBS.

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4. *Three Rivers District Council v Governor and Company of the Bank of England (No 5)* [2003] QB 1556.
5. *Astex Therapeutics Limited v Astrazeneca AB* [2016] EWHC 2759 (Ch) (8 November 2016).

This narrow approach to legal advice privilege was confirmed in the more recent *ENRC* privilege case.[6] There, Eurasian Natural Resources Company Ltd ("ENRC") had tried to assert that legal advice privilege attached to memoranda of interviews not only of company employees but also with persons who had no position within the company, such as employees of subsidiaries, suppliers and customers. The Court held that, contrary to ENRC's submissions, there was even less justification than in the *RBS* case for treating interviews with such non-employees as communications with part of the corporate 'client.' Further, the Court endorsed the reasoning in the *RBS* case in relation to lawyers' work product privilege, determining that the evidence indicated that the interview notes simply recorded what ENRC's lawyers were told by witnesses without giving a clue as to the legal advice provided to the company.

English Litigation Privilege

ENRC concerned LPP issues arising in the context of an ongoing investigation by the SFO into certain activities of ENRC. In late 2010, following a whistleblower allegation, ENRC commenced an internal investigation into allegations of wrongdoing within its Kazakh subsidiary. In March 2011, on the advice of its lawyers at the time, ENRC also began contemplating preparations for a dawn raid by the U.K. authorities. Following an approach by the Serious Fraud Office ("SFO") in August 2011, ENRC notified the SFO of its internal investigation and started engaging in dialogue with the SFO, including at a meeting in November 2011.

The SFO opened a formal criminal investigation into ENRC in April 2013. Using its powers under section 2 of the Criminal Justice Act 1987 ("CJA"), the SFO issued 'Section 2 notices' compelling ENRC and related third parties to produce certain documents created between August 2011 and April 2013, including interview notes taken by ENRC's former lawyers and materials generated by ENRC's forensic accountants. In responding to the Section 2 notices, ENRC withheld production of some of these documents on the basis that they were privileged. The SFO rejected ENRC's position and brought a claim in the civil courts for a declaration that the documents being withheld were not privileged.

ENRC's position was that it reasonably contemplated litigation by, at the latest, 19 August 2011, when it replied to the SFO's first letter and agreed to a meeting to discuss the corruption allegations which had been reported in the

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6. *Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Ltd* [2017] EWHC 1017 (QB).

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press. Citing *Three Rivers (No 6)*,[7] a House of Lords authority addressing litigation privilege, the Court noted that in England's adversarial system of litigation, the rationale behind litigation privilege was to allow each party to prepare its case without the risk that its opponent will be able to access any preparatory material.

Rejecting ENRC's primary argument in support of its claim for litigation privilege, the Court held that an SFO criminal investigation is not adversarial litigation for the purposes of establishing whether litigation privilege applies and that only the bringing of a criminal prosecution can amount to 'litigation.' Consequently, documents created during an internal investigation will not be protected by litigation privilege unless it can be shown that the company reasonably contemplated that it would be prosecuted; the commencement, or real likelihood, of a formal criminal investigation alone is not sufficient. The Court characterised an SFO investigation as a preliminary step, following which the findings of the investigation are considered and a decision as to whether to prosecute is made.

The Court also rejected ENRC's alternative submission that, once an SFO investigation is reasonably contemplated, then so too is a criminal prosecution. In reaching this conclusion, the Court drew a distinction between civil proceedings, which can be brought by any person even when there is no proper foundation for them, with criminal proceedings, which can only be brought once a prosecutor is satisfied that there is sufficient evidence to provide a realistic prospect of conviction and it is in the public interest to prosecute. The Court held that a real risk of prosecution only arises if and when the company discovers "*that there is some truth in the accusations, or at the very least that there is some material to support*" the criminal allegations, which makes prosecution likely (rather than merely possible). Only then can the company appreciate that a prosecutor may be satisfied that it has enough evidence to provide a realistic prospect of conviction. Alternatively, the Court stated that in some circumstances, it might be that the company already knows that it has committed a criminal offence and that prosecution is likely, regardless of what the internal investigation might uncover.

In any event, the Court found that none of the documents in question was created for the dominant purpose of deployment in, or obtaining legal advice relating to the conduct of, anticipated criminal proceedings. The Court determined that the primary purpose of the internal investigation was to uncover facts in connection with the corruption allegations. Once discussions with the SFO began

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7. *Three Rivers District Council v Governor and Company of the Bank of England (No 6)* [2005] 1 AC 610.

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in August 2011, even if one purpose of the internal investigation had been to provide a basis for legal advice regarding how to avoid an SFO criminal investigation, the Court held that this did not equate to defending a future criminal prosecution.

Should English Law Adopt the U.S. Approach to Privilege?

The decisions in *RBS* and *ENRC* serve as a reminder of the limits to the protection afforded under English law to legal advice arising within the lawyer-client relationship. Whilst the legal advice itself that is provided by external counsel based on the contents of information assembled in investigative interviews is clearly privileged, it is likely that the bulk of the materials created by and relied upon by the external lawyers in providing that advice will not be deemed privileged. While this is consistent with the approach of the Court of Appeal in *Three Rivers (No 5)*, that decision was deeply contentious and has been much criticised for its narrow definition of the qualifying 'client' for these purposes. Such approach is also in stark contrast with the much wider protection provided under U.S. law.

Indeed, a significant (and somewhat overlooked) aspect of the *RBS* decision is that RBS argued that, since a number of the interviews in question were conducted by U.S. lawyers with U.S. employees and were conducted in the US as part of RBS's response to two subpoenas from the U.S. Securities and Exchange Commission, U.S. law should apply.

Under U.S. law, the position is that attorney-client privilege generally protects confidential communications between lawyers and their clients. In the leading case of *Upjohn,*[8] the U.S. Supreme Court rejected the control group test and held that attorney-client privilege can apply to any communication between corporate counsel and any employee of the client company if the employee divulges information that he or she gained while performing their employment duties. The rationale for this broad approach to attorney-client privilege was to "encourage full and frank communication between attorneys and their clients."

Further, the U.S. attorney work product doctrine generally protects from disclosure any documents, memoranda or tangible things prepared by lawyers (or those working under the direction of lawyers) in anticipation of litigation or trial, unless withholding that material would result in undue hardship to the other party which could not be alleviated through reasonable means.[9] This much broader approach to confidentiality means that the bulk of material produced in the course

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8. *Upjohn Co. v. United States*, 449 U.S. 383 (1981).
9. U.S. Fed. R. Civ. P. 26(b)(3); *Hickman v. Taylor,* 329 U.S. 495 (1947).

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of an internal investigation undertaken in the U.S. is considered to be protected. Indeed, in the *RBS* case, the English Court accepted that, if U.S. privilege law was applied to the facts in question, the interview notes would be privileged under the U.S. attorney-client privilege and/or attorney work product doctrine.

However, the Court in *RBS* rejected the proposition that any law other than English law ought to be applied to a privilege determination in an English civil litigation. In coming to this conclusion, the Court held that, applying English conflict of law rules, English law (as the *lex fori* of the litigation proceedings) governs whether documents were privileged. The Court rejected RBS's formulation of a choice of law rule pursuant to which the applicable law for the privilege determination should be that of the jurisdiction with which the engagement or instructions underlying the internal investigation was most closely connected.

"Both decisions show that any assumptions about the application of some form of English law privilege concept merely by virtue of the involvement of internal or external counsel in internal investigations must be tested on the specific facts of the case."

Although the Court described this '*lex fori* rule' as being "well settled" by a line of cases dating back to the mid-19th century and therefore a "well-established convention or practice of the English Court in proceedings in England," the matter is not, it seems to us, without some doubt. The applicable authorities are not numerous and do not address facts directly on point with those in *RBS*. In each of the authorities considered by the Court, the application of foreign privilege law was being argued by the litigant seeking to require disclosure in circumstances where English law would have provided protection. The *RBS* case concerned the opposite scenario where the broader scope of U.S. attorney-client privilege would have protected the interview notes from disclosure in the English civil proceedings. In spite of this, and despite acknowledging that some academic commentary suggesting that basis for the *lex fori* rule has never been properly explained or analysed by the courts, and that there are potentially strong grounds for reconsidering the law, the Court's reasoning could be considered slightly cursory.

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The earliest of the five cases considered by the Court was *Lawrence v Campbell*,[10] in which it was held that, in relation to a Scottish law firm practising in London, English privilege rules applied (preventing disclosure) rather than Scottish law (which would have allowed disclosure), since the dispute was being decided by an English court. The Court noted that while two of the subsequent cases relied upon by the claimants contained some relevant general statements regarding principles of privilege law, they did not address the question of whether foreign law or English law was applicable in English litigation. The most recent case considered by the Court, a 2014 decision,[11] concerned 'without prejudice privilege', which is more limited than LPP and does not engage fundamental rights in the same way. The Court appeared to be swayed by arguments that the *lex fori* rule reflected English public policy by striking a balance between disclosure and privilege to best serve justice between the parties, and that there were substantial practical difficulties in identifying and applying the relevant foreign law in multi-jurisdictional cases involving several parties.

The Court also rejected a submission by RBS that it should nevertheless exercise its overriding discretion to refuse disclosure of the interview notes. In doing so, the Court acknowledged that *Upjohn* warnings were given at the start of the U.S. interviews, stating that the interviews were privileged and even that RBS may reasonably have expected that the interview notes would be privileged. In spite of this, however, the Court was not minded to conclude that this amounted to a "special case" preventing or restricting disclosure of the interview notes on the basis of 'legitimate expectations.'

Legal Advice Privilege: Future Considerations

Both decisions show that any assumptions about the application of some form of English law privilege concept merely by virtue of the involvement of internal or external counsel in internal investigations must be tested on the specific facts of the case. Specifically, where no adversarial proceedings can be shown to have been reasonably contemplated at the time of an internal investigation interview of a client employee, notes of such interview may very well not be protected from disclosure through the application of legal advice privilege. The mere fact of delivering an *Upjohn* warning will not by itself be determinative of the subsequent treatment of the interview note; nor will including language in the note clarifying that it is a summary, not a transcript, and that it reflecting counsel's mental impressions and judgment.

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10. *Lawrence v Campbell* [1859] 4 Drew 485.
11. *Rochester Resources Limited v Lebedev* [2014] EWHC 2185 (Comm).

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While all companies should of course be careful to specify which employees form the client team and to attempt to control communications involving employees outside of that team, the *RBS* decision has thrown the scope of 'client' concept into further doubt. The Court made a passing *obiter* statement that only the 'directing mind and will' of a company – i.e., a person at or close to board level (a director, senior officer or other person who exercises autonomous control over the company's management functions) – should constitute the client for the purposes of legal advice privilege. Were this *obiter* statement to become an established principle of English law, it would have a considerable impact on not just the conduct of internal investigations, but of any matter requiring legal advice. Imposing such a high threshold would lead to the extraordinary situation in which in-house lawyers and senior compliance personnel (for example) would not be able to seek and receive legal advice on behalf of the company under cover of legal advice privilege. In this regard, it is perhaps significant that the Court in *ENRC* expressly declined to comment on the suggestion although some uncertainty remains. It is difficult to see how a relevant 'client team' could realistically only consist of the most senior executives and board members; the day-to-day conduct of any internal investigation would become extremely difficult and it would also place an unnecessary burden on the company in terms of senior management time. In our view, there is no justification for replacing the established (though narrow) test of a corporate client for the purposes of legal advice privilege as comprising 'employees authorised to obtain legal advice' with the completely different (and even narrower) 'directing mind and will' test which is used as the primary test of corporate criminal attribution. To do so would, in our view, amount to conflating differing principles devised for a different purpose and further reduce the fundamental right to legitimate privilege protections enjoyed by legal persons.

Litigation Privilege: Catch-22 for Companies?

The key finding in the *ENRC* decision – that litigation privilege does not necessarily protect materials generated during an internal investigation from its commencement up to (at least) the point when the SFO opens a formal criminal investigation – has significant ramifications for companies conducting internal investigations where there is U.K. criminal exposure.

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In *ENRC*, the Court did not need to consider whether any documents created after the SFO opened its investigation were privileged, since the documents in dispute were all created before that point. While that is obviously a criticially important (and perhaps distinguishing) feature of the case, the Court's reasoning indicates that the opening of an SFO criminal investigation would not in any event be the automatic turning point at which litigation privilege starts to apply. Where legal advice privilege does not apply, interview notes, reports and other documents will not be privileged simply because the company has commenced an internal investigation to assess its criminal exposure or even because an SFO investigation is expected or, indeed, has commenced.

"[I]f a company that discovers a potentially serious criminal issue cannot fully investigate it (and subsequently obtain legal advice based on an appropriate understanding of the facts) without the risk of having to turn over any documents created during such investigation to the authorities, the law may in fact be disincentivising companies from investigating and self-reporting such issues to the authorities."

What is more, assertions of litigation privilege will now put companies in a difficult position, as they will need to demonstrate that there was sufficiently strong evidence available to them to lead to a reasonable contemplation of criminal prosecution. In practice, this might mean that, in order to substantiate a claim to litigation privilege in the face of demands for production by the investigation agency, a company will be required to indicate that strong evidence of culpability has been detected and to provide some evidence of the company's concerns about the prospect of prosecution. It is conceptually difficult to see how this can be done without necessarily also alerting the requesting authority to the existence of potentially incriminating materials.

These conceptual concerns are exacerbated by practical ones. Internal investigations produce an incremental accumulation and assessment of evidence (of varying degrees of concern) which can make it difficult to pinpoint precisely when sufficient criminal wrongdoing is identified for litigation privilege to

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be triggered. To rely on litigation privilege, the company will need to document the progress of the investigation, record the point at which it considers there is a real likelihood of prosecution, and have witnesses who can subsequently give evidence of this (should the privilege claim be contested, as happened in *ENRC*). The best evidence may be contemporaneous memoranda amongst senior company personnel indicating that they held a real fear that the company would be prosecuted, something that the Court found to be missing in *ENRC*.

Further, any reliable objective determination of the likelihood of prosecution by the company itself is often fraught with difficulties, given that it depends on prosecutorial assessments of evidential and public interest tests. Second-guessing a prosecutor – who will likely have access to evidence and witnesses the company does not – can be an almost impossible undertaking. Companies are frequently in a position where they have only identified circumstantial evidence, but hold a genuine and very real fear of potential prosecution following an investigation by the authorities. It could be considered unfair to deprive companies of the protections of litigation privilege in such circumstances.

Moreover, if a company that discovers a potentially serious criminal issue cannot fully investigate it (and subsequently obtain legal advice based on an appropriate understanding of the facts) without the risk of having to turn over any documents created during such investigation to the authorities, the law may in fact be disincentivising companies from investigating and self-reporting such issues to the authorities. That would be a somewhat perverse outcome when one considers the general importance attached to corporate self-reporting and cooperation with the criminal enforcement authorities.

Conclusion

While every case needs to be decided on its particular facts – and in both *RBS* and *ENRC* the facts were heavily scrutinised by the Court – the current status of English privilege law is certainly problematic for companies undertaking cross-border investigations. At the time of writing, it remains to be seen whether the *ENRC* decision will be appealed. White-collar lawyers and clients alike will be hoping for much-needed clarifications of some of the more concerning and restrictive features of the privilege principles set out in the decision at first instance.

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