KEY POINTS

- Global settlement is a challenging goal, and corporates often find themselves entering into partial settlements on a staged basis.
- It is important for corporates to have an understanding of the problems and ensuing challenges that can arise after settlement with a sub-set of regulators, and that any such settlement is not the end of the story.
- Following settlement with a sub-set of regulators, other existing regulators' investigations may remain ongoing along those regulators' original timelines. In addition, the announcement of settlements may encourage new regulators to start their own investigations.
- Criminal investigations into individuals' conduct may remain ongoing, which require the corporate's continued cooperation and can generate ongoing media attention for the corporate.
- Additional internal reviews may be required for HR-related matters, in particular to identify individual employee failings and to ensure there is not a wider cultural issue that needs to be addressed.
- Settlement may encourage potential claimants to bring their own private actions, whether on an individual or class action basis.

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The next chapter: life after settlement

This article examines some of the problems and ensuing challenges facing corporates following settlement with only a sub-set of regulators.

INTRODUCTION

Regulatory enforcement activity continues to grow on a global basis across all major industries, including within both regulated and unregulated sectors. In turn, corporates find themselves having to deal with an ever increasing number of regulators – and thus investigations – where they are suspected of engaging in wrongdoing.

Faced with the prospect of multiple (potentially complex, large scale) investigations, corporates may seek to navigate a route through towards a global resolution. This route contains many pitfalls, however, which have already been explored in the article *Squaring the circle: the challenges of settling global investigations* [2015] 7 JIBFL 430.

Indeed, given the difficulties of achieving a global settlement across multiple regulatory regimes, corporates often find themselves reaching settlement with only a sub-set of regulators. They must then continue to manage other ongoing investigations, whilst also dealing with the novel issues which can result from those initial settlements. This article examines some of the attendant problems and ensuing challenges that a corporate may face in such circumstances.

IMPACT ON ONGOING AND NEW INVESTIGATIONS

Continuing enquiries from non-settling regulators

Perhaps the most obvious consequence of achieving settlement with only a sub-set of regulators is the continuation of other regulators' investigations along their normal timetables. While some regulators may seek to align the timing of their investigations (and any settlement discussions) with each other (such as the various US authorities), others often do not. In Europe, for example, the European Commission's (EC) settlement procedure operates largely independently to settlement procedures of other regulators and, generally speaking, the EC has demonstrated that it is unwilling to be influenced by the timing or content of other settlements. It is also possible that, within a global investigation, there are regional variations between the scope of products or conduct under investigation, which may lead to differing approaches being adopted by regulators.

Investigating other issues

There is also the risk of "mission creep", even after settlement. For example, if a regulator previously requested production of a selection of documents relating to one type of conduct, one possibility is that the regulator could discover evidence of other (unrelated) wrongdoing within the documents, which it subsequently decides to investigate as well. This could lead to a situation where settlement occurs with the regulator on the main grounds of the investigation, but the regulator continues its investigation into the other wrongdoing that is tangential to the original focus of its investigation.

In the case of anti-trust investigations where the corporate is a leniency applicant (and therefore subject to ongoing cooperation obligations to maintain its place in the leniency queue), it is possible that the corporate's initial scope of disclosure to the regulator may expand into other product or geographic areas as the corporate's internal review progresses. In doing so, the corporate's objective will be to secure equivalent leniency benefits in respect of those additional products or geographies if the regulator decides to expand its investigation into those areas. The risk of "mission creep" may be further heightened in circumstances where the regulator requests production of documents without first providing the corporate with the opportunity to review the material for relevance to the regulator's investigation.

New investigations: other global regulators

At least in theory, one would expect that the overall number of regulators examining a corporate's conduct would reduce as a result of a settlement – even if only with a sub-set of regulators – being reached. In practice, however, a settlement with some regulators can often result in an overall expansion of a global investigation. For example, regulators in other jurisdictions which had previously stayed silent may be encouraged by public settlement announcements to launch their own investigations, in turn creating further resource burden for the corporate and, ultimately, the risk of further penalties. This may particularly be the case where the initial settlements in question are in "major" jurisdictions, such as the US and UK, where they will likely attract considerable media attention.

New investigations: criminal investigations in the UK

Looking at the UK's regulatory landscape specifically, following settlement with the UK Financial Conduct Authority (FCA), there may still be continuing or new investigations by other UK regulators. In particular, the Serious Fraud Office (SFO) may conduct separate investigations into specific individuals' conduct (for example, where there is suspected fraudulent or cartel-related conduct). Such investigations by the SFO often last longer than the FCA's (or, in the case of cartel-related conduct, relevant competition authorities') investigation into the corporate's involvement.

Where the SFO launches its own investigation, even though it is targeted at individuals and not the corporate itself, the corporate will nevertheless have a duty to comply with any information requests (and failure to do so would constitute a criminal offence). Compliance with such requests, which can expand as the regulator's focus evolves, can be a time-consuming and expensive exercise.

The continued examination of individuals' conduct may also generate further ongoing media attention, which inevitably will also impact the corporate. For instance, in the criminal trial of Tom Hayes, a former trader at UBS who was implicated in the manipulation of LIBOR, the Court was informed that more senior managers at UBS were aware of Mr Hayes' actions. Clearly, public allegations of this nature attract a reputational risk for the institution against which they are being made. However, there is also an attendant danger that renewed publicity of the wrongdoing, combined with novel information which may arise during testimony, could result in a regulator raising additional concerns or, at the extreme, conducting a new investigation even after settlement has been reached.

In situations where an employee is under investigation by the SFO, the corporate will need to decide whether it is happy to pay the employee's independent legal fees. Assuming that the employee is continuing to cooperate with the corporate's own internal process, it may be advisable for the corporate to do so (and, indeed, there may be situations where the corporate is obliged to do so under the individual's terms of employment). It may also be in the corporate's interest to ensure that its senior employees, in particular, are well-represented, since any criminal exposure for the company must be founded on the actions and knowledge of its senior employees. In a similar vein, if the FCA has commenced disciplinary proceedings against a corporate's employee, the corporate should also consider paying the employee's fees in connection with those proceedings.

THE NEED FOR REMEDIAL ACTION

Ongoing supervision

In certain circumstances, the risk of criminal prosecution at the corporate level, as opposed to at the individual employee level, may exist with certain regulators. To mitigate this risk, corporates can explore the possible use of Deferred Prosecution Agreements (DPAs) during an investigation; that said, a DPA would, of course, only need to be negotiated if the corporate is subject to a criminal investigation and faces the risk of a criminal sanction being imposed on it. DPAs are court-approved agreements which allow a corporate, if invited by the regulator, to accept a charge against it in relation to a criminal offence, with the regulator's agreement that it will "defer" any criminal proceedings in exchange for the corporate agreeing to other remedial measures (eg financial penalties).

DPAs are a relatively new concept in the UK, having been introduced in February 2014. In May of this year, the SFO announced that it is working on agreeing the first DPAs with corporates that have pleaded guilty to corporate wrongdoing, but no agreement has yet been reached. Corporates should nevertheless expect to see their usage increase in the UK, with the result that common issues that corporates face in the context of negotiating DPAs with US regulators will also become relevant in the UK. One such issue is the appointment of an independent monitor who, depending on the terms of the DPA, will work with the corporate to gather certain further information.

Depending on the monitor's activity levels, this process can create a further drain on a corporate's resources, particularly if they need to maintain a team to respond to the monitor's ongoing queries and information requests. In addition, where the information provided to the monitor is suggestive of further wrongdoing, this process can lead to further subsequent investigations or potentially an extension of the DPA and/or additional penalties.

Corporates should also be aware of the risk of the independent monitor's report subsequently entering the public domain, for instance through court filings. To the extent the report contains unhelpful statements in respect of the corporate (such as criticism of its handling of the auditing process), this risks creating further reputational damage, particularly at a time when the corporate's external messaging is likely to be focused on the improvements it is making to its compliance and governance culture. However, such risks can be difficult to gauge at the time, given the long delay that could potentially exist between completion of the monitor's report and it subsequently entering the public domain.

Further internal review

As noted above, it is often assumed that once global settlement is reached, a corporate can cease its internal fact-finding exercise. However, in practice there will likely be other HR-focussed issues that the corporate will need to address, such as whether reporting procedures were properly followed, or whether particular employees failed to carry out their duties. Indeed, such HR issues are often deferred until after settlement has been reached with at least some regulators so that the corporate has the "full facts" before taking any further internal action.

Wider cultural issues

Within the global regulatory environment, regulators are increasingly interested in exploring whether the wrongdoing they have identified is an isolated occurrence, or indicative of a wider cultural issue. This is particularly the case where the corporate in question is subject to ongoing regulatory supervision by the regulator (eg financial

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Following settlement, regulators may therefore require corporates to demonstrate that they have identified wider cultural issues (if any) and applied the key lessons of the investigation to other business areas in an effective way to address such issues. Otherwise, it is possible that in future investigations, the corporate is viewed as a recidivist when determining the appropriate level of any future penalty. Indeed, a number of regulators, including the EC, include specific reference to the aggravating nature of "repeat offenders" in their fining guidelines.

EXPOSURE TO PRIVATE LITIGATION

Civil claims

Where the conduct under investigation has had a potential effect on third parties (eg customers), corporates face the risk of civil claims being brought against them for redress. Where settlement is reached, the ensuing publicity that it receives often encourages potential claimants to commence their own actions either on an individual or class basis (depending on the jurisdiction). In this regard, settlement with a sub-set of regulators is often sufficient encouragement for potential claimants to come forward, rather than them waiting for the other remaining investigations to reach a conclusion.

In the UK, such claims can be brought either on a stand-alone basis or, in the case of anti-trust infringements, as a follow-on action based on a decision of a relevant competition authority, such as the EC or UK Competition and Markets Authority. In this regard, corporates should be aware that one requirement of the EC's cartel settlement procedure is that the corporate acknowledges its participation in the cartel and admits liability. In follow-on claims under English law, the English courts would then treat liability as having been established by the settlement decision. Potential claimants would, however, still have to prove causation and loss.

Possibility of collective settlement

Depending on the precise circumstances of the case, following settlement corporates may therefore be faced with the potential threat of multiple civil claims from a variety of different claimants across a number of jurisdictions.

In the UK, new collective action proceedings in respect of competition law related claims are due to be implemented in October 2015 under the Consumer Rights Act 2015. At the time of writing, the final procedural rules have not yet been published. The provisions of this Act permit large groups of claimants to bring actions together in respect of EU/UK competition law breaches before the UK courts. At the same time, however, the new UK regime provides for a collective settlement procedure in respect of breaches of EU/UK competition law. It is important to bear in mind, however, that the UK collective settlement procedure will only apply to UK domiciled claimants on an opt-out basis, with non-UK domiciled claimants having to pro-actively opt-in to any such procedure if the corporate wishes them to be covered too. It remains to be seen what the effect of these changes will be. ■

Further Reading:

- Squaring the circle: the challenge of global settlement investigations [2015] 7 JIBFL 430.
- Self-reporting and internal investigations: speak now or forever hold your peace [2014] 10 JIBFL 643.
- LexisPSL: Financial Services: Investigations, enforcement and discipline – overview.