

## Privilege in Internal Investigations Practical Guidance in light of *Bilta*



Last year's High Court decision in *SFO v ENRC [2017] 1 WLR 4205* caused widespread concern in the legal community as to a corporate's ability to claim litigation privilege over the output of an internal investigation conducted in the shadow of a criminal investigation by the SFO. However, in *Bilta (UK) Ltd v Royal Bank Of Scotland Plc & Anor*, handed down on 7th February, the Chancellor of the High Court confirmed that, given the right set of facts, it remains open to parties to claim litigation privilege over documents created during an internal investigation.

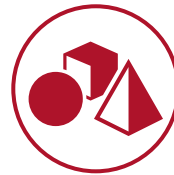
Taken together, these two first instance decisions leave considerable ambiguity over the application of litigation privilege to documents produced in an internal investigation, making life ever more challenging for in-house counsel engaged in conducting such investigations.

Our Compliance & Investigations team have identified six aspects of any investigation that you will need to consider carefully in light of *Bilta*:



### OUTPUT

What steps can you take to ensure that the output of an investigation is appropriately protected by legal privilege?



### STRUCTURE

What is the best way of structuring an investigation so as to minimise the risk of inadvertently waiving legal privilege over parts of the process that would otherwise be protected?



### LIABILITY

How can you best ensure that the company does not unnecessarily expose itself to criminal or civil liability as a result of the manner in which the investigation has been conducted?



### DATA PROTECTION

What steps do you need to take to ensure the investigation does not breach the new EU General Data Protection Regulation (or other relevant data protection legislation)?



### REGULATORY / PROSECUTORIAL ENGAGEMENT

How far should you be engaging with regulators and/or prosecutors during an investigation?



### GLOBAL CONSIDERATIONS

How do you balance the different rules of privilege across multiple jurisdictions, in particular, having regard to the differences in approach between the UK and US authorities?

None of these issues are straight forward, but we have developed our thinking in conjunction with our international network of offices and in many jurisdictions we have the benefit of having experienced what works and what doesn't work in practice.

We would be delighted to discuss our thinking and strategy with you. Should you wish to discuss this, please contact:



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So what should you be doing now to protect yourself, your team and your organisation while the landscape is unclear?