

COVID-19 Slows Pace Of Existing UK Investigations

By **Richard Crump**

Law360, London (April 17, 2020, 7:37 PM BST) -- The coronavirus has begun to infect the ongoing case work of U.K. enforcement agencies facing constraints imposed by the countrywide lockdown and social distancing measures that are hampering their ability to push forward substantive investigations already on their books.

The government and law enforcement agencies have been very vocal about their unwillingness to let coronavirus-related fraud slide. And there are already instances where pre-existing investigations have been halted and of other activities being suspended to better focus their efforts in response to the pandemic.

“In terms of those investigations that were active pre-COVID-19, the ability to push those forward has been hampered by the virus,” said Joanna Dimmock, a partner in White & Case LLP’s white collar team in London.



Shoppers wait in line at a supermarket in London on Friday. The ongoing coronavirus pandemic continues to impact the U.K., including the work of the country's enforcement agencies. (AP)

HM Revenue & Customs, Britain’s tax authority, has suspended inquiries into taxpayers and businesses because of capacity constraints caused by the coronavirus, instructing them not to ask for documents or to press for responses to existing requests.

The country’s antitrust watchdog, the Competitions and Markets Authority, also suspended two probes into pharmaceutical companies that it suspects of illegally colluding on the price of drugs, saying the cases are still open but resources have been reallocated to “urgent work.”

These moves are indicative of the pressure on resources that have been diverted in response to the COVID-19 outbreak, according to Neil Williams, legal director at Rahman Ravelli Solicitors.

“Enforcement agencies will likely have lost great numbers of their staff to illness and to the government’s ‘lockdown’ policies, the result being that there are far fewer staff to investigate reports,” Williams said.

HMRC has also been tasked with running the government’s furlough schemes, which allow the

government to foot up to 80% of individual wages — or up to £2,500 (\$3,149) — for employees temporarily laid off because of the coronavirus outbreak.

Jim Harra, head of HMRC, has said that the government's Coronavirus Job Retention Scheme and the parallel scheme for the self-employed, carry significant fraud risks with them and that HMRC is directing every resource available toward the scheme.

"Law enforcement agencies have had to react extremely quickly to changing circumstances caused by COVID-19," Caroline Day, a criminal litigation partner at Kingsley Napley, said.

She noted that the CMA launched a COVID-19 task force to monitor market developments, identify harmful sales and pricing practices and take enforcement action if necessary.

The government has relaxed competition regulations to allow retailers to work together more closely during the coronavirus outbreak, but the CMA warned in an open letter to the pharmaceutical and food and drink industries that they should not capitalize on the current situation through unfair tactics by charging unjustifiably high prices for essential goods or making misleading claims around their efficacy.

Attorneys have also noticed a slowdown in investigatory work by the Financial Conduct Authority, the U.K.'s financial watchdog, which has been focused on the operational resilience of the financial sector and the protective measures firms have in place.

There is a sense that the FCA is allowing companies "breathing space" during the crisis while there is "firefighting to be done" in response to the impact of the virus on financial institutions, according to Abdulali Jiwaji, a partner at boutique law firm Signature Litigation LLP.

"This has to be the focus, rather than demanding firms hand over a whole swathe of documents electronically," he said. "In the short term I think there is room for more flexibility."

"If a business is being investigated, the FCA isn't going to gain much more credit by putting it under more pressure through heavy document requests," Jiwaji added. "It is different from the position of parties in litigation. There is no strategic or tactical advantage to be gained by the FCA in a regulatory process."

According to Ian Hargreaves, a partner at Covington & Burling LLP, interviews with individuals connected to active FCA investigations "seem to have slowed down significantly" since social distancing and lockdown measures have been introduced.

"On one matter we had anticipated receiving contact from the FCA for the purposes of fixing up an interview or interviews, but this has not happened," Hargreaves said. "They seem to be struggling to progress matters, although with COVID-19 they are fighting many fires at present."

And attorneys that have dealings with the Serious Fraud Office say there has been a slackening of activity, even if the anti-fraud agency has not suspended any of its current investigations.

"It is inevitable that investigations slow down," said Timothy Bowden, a white-collar attorney at Dechert LLP in London. "There were a few cases where there had been mention of a charging decision and that has all gone quiet."

Limited court capacity has meant that prosecuting coronavirus-related criminal activity is now the top priority.

The Crown Prosecution Service, the principal public agency conducting criminal prosecutions in England and Wales, said in an interim charging protocol that those investigating COVID-19-related cases, such as fraud, can seek an immediate charging decision.

“This prioritization is in stark contrast to the CPS’ approach to other ‘less serious cases,’” Day said.

Day pointed to recent comments by Max Hill, the CPS director of public prosecutions, that “in less serious cases, it is right that we consider all options available when weighing up the right course of action ... offences relating to COVID-19 will remain an immediate priority.”

“Trial fixtures will undoubtedly be pushed back but there has been the suggestion of a ‘virtual specialist fraud court’ which would be set up to manage cases given the expected backlogs when many Crown Court trials resume,” Day said.

Lawyers expect the SFO and the FCA to face the biggest hurdles in trying to progress cases that require Section 2 interviews — which allow the SFO to compel an individual to answer questions deemed relevant to an investigation.

According to Bowden, it is possible to find a way to proceed with interviews, but in more contentious interviews there will be difficulties and issues for both sides.

“Investigators prefer to conduct interviews face-to-face, and many lawyers instinctively get nervous when their clients are not within arms-length,” he said. “On both sides, the natural response is to wait, unless the delay is going to be so long it has an unacceptable impact on moving forward.”

But where the interviews are pure fact-finding exercises, both sides will probably be eager to make some progress, according to Jiwaji.

“If it is uncontentious, fact finding can be done remotely,” said Jiwaji. “Where the process is more adversarial with possible dishonesty and they will need to challenge more, look people in the eye and test the evidence, the FCA may prefer to wait until things are more stable when face-to-face interviews can be arranged.”

But despite the restrictions imposed by the lockdown, the FCA and the SFO are well-adapted for remote working and attorneys expect both agencies to be focused on documentary evidence during any hiatus.

“Investigations by these authorities are by their nature likely to be document based and sizable. There will be much that investigators can work on remotely, including liaising with defense practitioners,” Day said.

--Editing by Alyssa Miller.