

## From bribes to sex scandals, lawyer investigations scrutinised over 'whitewash' claims

Internal probes in the spotlight following high-profile cases as legal regulator prepares new guidance



Corporate probes have been thrust into the spotlight this year following high-profile investigations, including into Post Office chief executive Nick Read and Formula One team boss Christian Horner © FT montage

**Michael O'Dwyer and Suzi Ring in London APRIL 28 2024**

Nigel Farage, the outspoken former Brexit campaigner, prides himself on saying what others dare not. But when he labelled a law firm's report into claims he was debanked by Coutts as a "whitewash", he was not the first to raise concerns about such investigations.

Corporate probes have been thrust into the spotlight after a recent slew of high-profile cases of alleged misconduct or company failings raised questions about the quality and independence of lawyer investigations, and how companies use them to rebut criticism.

Red Bull said this year that a barrister had cleared its Formula One team boss Christian Horner of claims of inappropriate behaviour towards a female employee, but refused to name the lawyer or publish their conclusions.

The Post Office this month exonerated its chief executive, Nick Read, from misconduct allegations following a barrister probe, without disclosing the report or its findings. Such cases have underlined the fraught nature of internal investigations, which must balance a corporate's imperative to show it has properly probed an allegation with its desire to avoid greater disruption or reputational damage than necessary.

Some companies want to use a high-profile lawyer or firm in order to gain an "air of respectability" but do not really want a robust probe, said Lord David Gold, former senior partner of City law firm Herbert Smith Freehills and founder of David Gold & Associates.

Increased scrutiny surrounding internal investigations comes as the solicitors' watchdog for England and Wales is due to update its guidance this summer on how best to conduct them, after lawyers expressed concerns.

In the wake of global scandals from Libor-rigging by banks to #MeToo, it has become standard practice for companies facing claims of corporate failings — which can range from suspected bribery to sexual misconduct — to call in external lawyers to investigate. That growing demand has spurred City law firms to build up investigations practices, creating a cottage industry for specialist advice.



Red Bull said a barrister had cleared Christian Horner of claims of inappropriate behaviour, but refused to name the lawyer or publish their conclusions © Pedro Pardo/AFP/Getty Images

More work is coming their way, with the Bank of England's Prudential Regulation Authority in January introducing a 50 per cent discount on fines for companies that make early admissions and show full candour on probes, including handing over reports and interview transcripts.

Allegations of a lack of independence and transparency have long dogged internal investigations, which deal with high-stakes accusations and are generally carried out behind closed doors. Lawyers' findings can carry immense power, potentially heading off regulatory or reputational damage by drawing a line under misconduct.

But such probes face myriad hurdles: lawyers' access to information and witnesses is sometimes impeded, according to people who have worked on investigations, and their findings are sometimes kept private, or made public only through selective summaries. The most common risks with these investigations are "whitewashing" of mistakes or "stonewalling" by the company, said Peter Swabey, a director at the Chartered Governance Institute.

Companies often turn to long-standing advisers who know the business. In those circumstances, a real or perceived lack of independence from a go-to firm can risk undermining the credibility of an investigation.

"If [an investigation] is about addressing external reputational concerns . . . independence becomes much more important," said Roger Barker, director of policy and corporate governance at the Institute of Directors. An investigator's findings will be "much more credible" if they are genuinely independent, he added.

Linklaters, the magic circle law firm, was criticised in January by employees at its client, Endeavour Mining, after the gold producer used it to investigate ousted chief executive Sébastien de Montessus. Critics argued

that the firm's relationship with Endeavour, which flourished under de Montessus, undermined its independence when it came to probing his behaviour — a claim that Linklaters denied.

"If you want an independent investigation, you should not go to your pet lawyer," said Gold, whose firm specialises in working for companies facing regulatory or governance problems. "It may be fine [in substance] but it's an own goal."

To avoid allegations of bias, companies under fire sometimes turn to barristers instead. Barristers, who are self-employed and usually do not advise on other areas of a company's business, can be seen as having an added level of independence.

The appointment of senior counsel on its own does not eliminate questions, however. Red Bull, which was unwilling to even name the investigating barrister, was urged by F1 partner Ford to be "transparent" in its probe into Horner. The woman who made the allegations, and was suspended last month, has launched an appeal. Red Bull declined to comment.

Shortly after the Post Office investigation was published this month, Marianne Tutin, the barrister who led that probe, defended the work as "fair, thorough and proportionate", saying it was for the Post Office to decide what was made public.

The cases are the latest to throw up questions around a lack of transparency concerning how company investigations are conducted and their findings used. The Financial Times reported in December that KPMG partners in Dubai had expressed concerns over the cost and transparency of a \$1.5mn review carried out in 2022 by Freshfields Bruckhaus Deringer, with board members concerned they were being kept in the dark.

Meanwhile Farage claimed Travers Smith was "trying to hide the truth" in its investigation of his debanking row with Coutts.

Companies sometimes opt against publishing the findings of a legal review, or even sharing them internally, because they want to assert legal privilege — a confidential protection that applies in relation to legal advice and potential litigation. Conclusions are sometimes given orally to a company board rather than in writing to guard against creating a document that may be disclosable in a future legal dispute.

Legal privilege is a long-established principle but relying on it carries reputational risks and can frustrate external parties such as politicians. Australian authorities accused accounting firm PwC in February of "deliberately hiding" a report by Linklaters about how leaked government information was used outside the country. PwC has insisted the information is "privileged and confidential", but later published a two-page summary.

Linklaters referred to previous statements regarding its investigations, saying it had complied with professional obligations. Freshfields and Travers Smith declined to comment on the criticisms they have faced. The Post Office said its report should remain confidential to protect its whistleblower policy and fulfil its 'duty of care' to the people involved.

While some companies try to keep investigation findings private, others deliberately seek to limit the scope of probes or secure a particular outcome, said some lawyers. Witnesses may also be reluctant to co-operate, either because they have left the company or fear implicating themselves in wrongdoing.

"[Sometimes] you get a company who says 'we'd like you to do this work and effectively we'd like you to come up with this answer and result for us'," said one law firm partner. "You've got to take it or leave it."

Lawyers said they sometimes used different teams to those which regularly advise a client in order to improve independence. And some said they had turned down requests to carry out corporate probes where they believed they would not be given the freedom to investigate properly and to access the documents and witnesses required.

In its draft guidance published last month, the Solicitors Regulation Authority said it was concerned that poorly conducted investigations could undermine their outcome "on grounds of actual or perceived unfairness or bias . . . damaging public trust and confidence".

“Best practice would be to use a law firm that has no prior business relations with the firm,” said Henri Servaes, a professor of corporate governance at London Business School. “What is important here is not just that any conflicts of interest are avoided, but that even the remote appearance of any conflicts of interest is avoided.”

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