Business operations can often involve a wide range of regulated activities, including financial activities, consumer-facing activities, health, safety and environment, data protection and sector-specific requirements. Engaging with regulators is increasingly an essential part of doing business and can be more complex for businesses operating across several sectors and jurisdictions, where there are different regulators. Taking steps to ensure a joined-up approach when engaging with regulators should mean that businesses can limit business interruption in responding to regulators, go beyond mere compliance and drive value from that engagement.

Dentons' cross-departmental trade and regulatory group has extensive experience of collaborating strategically when assisting clients with issues that involve a range of regulators, including sectoral economic and prudential regulators (such as the Office of Communications (Ofcom), the Gas and Electricity Markets Authority (Ofgem) and the Financial Conduct Authority (FCA)), the Information Commissioner's Office (ICO), the Environment Agency (EA) and Health and Safety Executive, the National Crime Agency (NCA) and competition authorities (for example, the Competition and Markets Authority (CMA), the European Commission (EC) and national competition authorities (NCAs) in other jurisdictions). Close working with all these regulators now is important, as Brexit is driving regulatory change and COVID-19 is disrupting normal operations and compliance. We set out below some key tips on how to handle your interaction with these various regulators, to meet your compliance obligations and avoid enforcement action.

Ensure your messaging is consistent

Regulators across different jurisdictions often cooperate and share information (for example, NCAs in merger and competition cases). Sectoral regulators may also participate in these cases. Where you are making submissions or disclosures in more than one jurisdiction or to more than one regulator, it is vital that any arguments and data submitted are consistent across all documents. Otherwise, you risk discrepancies coming to light which, at the very least, will undermine your credibility.

Ensure that your current and future communications with regulators are consistent with earlier communications (including informal contact, such as telephone calls and emails). Where there are differences, make sure you can objectively justify these (for example, by reference to changes in the way a product/services market has developed over time, or to movement in the number and size of market players). Statements to the regulator can come back to haunt you, so it is always important to consider how these may constrain the business in the future before you commit to them.

CASE STUDY

When a client is investigated by the Environment Agency in relation to offences under the waste regime relating to a landfill, HMRC and the Environment Agency operational teams will work closely together to tackle any landfill tax non-compliance more effectively. This collaboration may not be seen by the company and so it is important to remember when communicating with either regulator that the information will likely be shared between them.

Provide accurate (and timely) information

Companies which provide misleading information to regulators can face fines and reputational damage, which can affect their ongoing relationships with regulators and ultimately customers. NCAs and other regulators will often release press statements to "name and shame" parties who submit incorrect, or even tardy, information. In some cases, they have duties to publish the results of investigations and other processes.

CASE STUDY

The Prudential Regulation Authority (PRA) has issued letters to the CEOs of several major banks indicating that those firms failing to meet their reporting expectations may expect to come under a skilled persons review. This is a key area of focus since it impacts the regulator's ability to discharge its statutory functions. In 2019, the PRA also imposed a multi-million pound fine on the UK operations of a global banking group for regulatory reporting governance and controls failures, which led to them failing to submit complete and accurate regulatory returns to the PRA.

Be pro-active

Early engagement with regulators builds goodwill. In our experience, if you are unable to provide information requested by a regulator, or unable to provide it in the relevant timeframe, you are generally better off discussing this early on with the regulator, fully explaining the issue and proposing alternatives. The regulator is likely to appreciate such an approach and may be more willing to agree to an alternative solution. It is important that you are about to develop your "narrative" with the relevant regulator to demonstrate compliance culture in which the context of an inability to provide a specific document or specific piece of information should be assessed.

In addition to goodwill, companies may also benefit from greater leniency should dealings with a regulator progress to prosecution from either an early guilty plea or, in the example of an environmental crime, by offering an Enforcement Undertaking at the earliest opportunity. An Enforcement Undertaking is a civil sanction which is offered to the Environment Agency following an incident and sets out what activities the company intends to carry out to restore or remediate the environmental damage caused. Such an offer, which would avoid an investigation proceeding to prosecution and is generally a more favourable outcome for the company, is more likely to be accepted if made during the early stages of an investigation.

Be mindful of new and shifting regulatory priorities

Understanding a regulator's short-term and long-term priorities can help companies plan ahead to manage any potential regulatory intervention or response. Most regulators generally prioritise their work according to published prioritisation principles, which will take account of factors such as resources and strategic significance. You can also find guidance on potential new priority areas in a regulator's annual plan or policy. Keeping up to date with changes in the priorities and behaviour of regulators is vital, particularly where these may be introduced at fairly short notice to deal with exceptional circumstances, such as the outbreak of the COVID-19 pandemic. Account needs to be taken of political intervention in new areas of regulation, or areas of increased regulation, such as national security and foreign investment, which may have a significant impact on how you do business.

CASE STUDY

Following the outbreak of the COVID-19 pandemic, multiple countries have put in place new or tighter restrictions on foreign investment. These rules mainly relate to investments in key strategic sectors, such as defence and critical infrastructure (including transport, water and health). These new restrictions demonstrate increased protectionism over national industries of strategic importance, as well as the politicisation of regulators' powers – trends which companies operating in these sectors need to be aware of.

Do not work in regulatory siloes

The technical detail of various types of regulation is obviously very different, but there are a number of reasons why it helps to approach regulatory issues in each area with an understanding of other areas:

- issues which may at first glance appear to affect just one area can have knock-on consequences in other areas (e.g. disclosure, see Case Study);
- regulatory issues can often raise points of principle/public law that can be applicable to other areas (e.g. public law processes, such as decision-making processes, consultation processes);
- you need to be mindful of other regulatory duties (e.g. delivery up of information, including personal data to a regulator, may have data protection implications);
- your arguments will be more persuasive if you can cite precedent for them, including precedent from other areas of regulation; and
- the regulators themselves also collaborate and align strategies (e.g. through the UKRN, a network which brings together 13 regulators from the UK's utility, financial and transport sectors).

This makes it very important not to look at issues in isolation especially when first scoping an issue. It also means you want those people (e.g. your MLRO, DPO, legal, compliance, regulatory) who deal with regulatory issues to know each other so they can share information and collaborate; the same applies to your external advisers.

CASE STUDY

When a client in a regulated sector (e.g. financial services, telecoms) experiences a cyber attack, it is necessary to consider the potential obligations to engage with a sectoral regulator (e.g. FCA, Ofcom), the ICO, the NCA, as well as possibly the police, the SFO or the National Cyber Security Centre. It is also important to consider whether the obligation to notify a regulator means that, even though there may not be a strict obligation to notify another regulator, it might be considered preferable to have informed them rather than risk compromising the relationship of trust were they to be informed of the situation by the other regulator. An FCA-authorised firm experiencing a cyber attack was obliged to report the matter to the ICO and the NCA, but it was open to argument whether or not they should notify the FCA. Where there was no clear obligation to notify the FCA, the fact that the ICO and NCA were required to be notified tipped the balance in favour of also notifying the FCA.

Do your homework

Regulators all operate under their own statutory framework and publicly available regulatory approach, which both confers, but also constrains, their powers and the objectives they must try to meet in exercising them. They are all constrained by general public law and policy, such as the duty to treat like cases alike, to behave in a particular way in relation to certain matters (such as consultations) and numerous other general law requirements. Your arguments will be stronger if they are informed by knowledge of these things and, on occasion, rely on them.

Cite the evidence

The weakest arguments to a regulator are those not backed by evidence, i.e. just advocacy. Advocacy backed by evidence is far more powerful. This applies even if you are asking a regulator to do something you believe they want to do; part of the public law tightrope they must walk is to insulate themselves from challenges by people who do not want them to do things you want them to do and the process will always be safer for the regulator, and so more likely to be successful for you, if your arguments are supported by persuasive evidence. In addition, it is most important that the regulator has this evidence-based information when they are making their initial decision – generally they have scope to assess what are relevant factors for consideration and it is usually difficult to introduce different considerations if the decision is appealed.

Know when to challenge the regulator

Do not assume the regulator has full knowledge of the facts, technical terms, your methodology or your experience. Regulators get things wrong. Do not be afraid to check that they have properly understood the situation or ask them to explain their thinking – they generally have a public law duty to provide reasons for key decisions – so that you can check they are not proceeding on a mistaken basis. A defective process can be challenged, not just the substantive decision they have reached. If necessary, decisions can be challenged either on judicial review grounds (such as irrationality) or, in some cases, may be subject to a statutory appeal or full merits review (e.g. some CMA decisions in the Competition Appeal Tribunal). Where a decision or approach may have a particularly damaging effect on your business, it is always worth considering what your options are in this regard. However, you need to act quickly – public law challenges operate against very challenging deadlines.

Carefully consider what information will be made public by the regulator

In the event of a formal regulatory investigation, carefully consider if there is a need or expectation for the regulator to make certain facts available regarding the investigation and any enforcement action taken. This can spur subsequent civil claims and litigation where individuals have been impacted by the events. This may be a driver to seek to reach a different resolution with the regulator. In addition, bear in mind the scope of information you provide to regulators that could fall within the scope of Freedom of Information requests.

CASE STUDY

Following large data breaches, ICO enforcement notices may contain details of the security lapses and breaches that result in the relevant data loss. With developments group litigation order and representative actions, speculative law firms can use this detail as the basis of "particulars of claim" to seek to bring action on behalf of large numbers of affected individuals.

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