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Co-operation or Capitulation? – What the SFO Corporate Co-operation Guidance really means

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Is there a point at which co-operation becomes capitulation? Is there a danger inherent in co-operating without the guarantee of a favourable outcome for doing so?

The Serious Fraud Office ("**SFO**") has published its Corporate Co-operation Guidance (the "**Guidance**"), which outlines the level of co-operation required of an entity if it is hoping to avoid a criminal prosecution or to enter into a Deferred Prosecution Agreement ("**DPA**"). This includes identifying suspected wrongdoing, self-reporting, and preserving and providing evidence in a suitable format. There is, however, a caveat under the Guidance: even "full, robust co-operation" is no guarantee of a favourable resolution.

This is the first time the SFO has provided detailed written guidance on its attitude to co-operation, and it is made clear that this "means providing assistance to the SFO that goes above and beyond what the law requires". The Guidance places a significant burden on corporates to gather evidence and make their records available to the SFO. However, without any guarantee of an agreeable outcome, is there sufficient incentive for corporates to self-report when the cost of co-operation is so high?

The investigative burden

The SFO emphasises that it will retain "*full and independent control of its investigation process*", but what is clear from the Guidance is that the corporate will be expected to do most of the evidence-gathering, and to provide it in a format requested by the SFO so that it is ready to digest and potentially use in a trial. This includes providing schedules of relevant documents, creating and maintaining a schedule of continuity, and assisting in identifying disclosable material – that is, material which might assist an accused or undermine the prosecution case.

Prior to the Guidance, those seeking to understand the SFO's approach to co-operation relied principally on the SFO's and Crown Prosecution Service's DPA Code of Practice.[1] This refers more generally to efforts such as supplying "*sufficient information about the operation and conduct*" of the corporate, and "*providing a report in respect of any internal investigation including source documents*", without the granularity featured in the Guidance.

According to the Guidance, under the heading of preserving and providing material, the type of conduct which constitutes "*genuine co-operation"* and indicates good practice includes:

- creating and maintaining a comprehensive audit trail of the acquisition and handling of hard copy and digital material, and financial records;
- providing a list of relevant document custodians and the location, physical or digital, of documents;
- preparing compilations of material requested and sorting material, for example by issue or individual;
- providing material in a structured format that is, where digital, "*ready for ingestion*" by the SFO on its own document review platforms;
- identifying third party material, and facilitating its production to the SFO; and
- providing background information on the industry in question, including common practices, potential defences particular to that industry, and information on other actors in the market.

The SFO and the battle over privilege

The SFO has previously taken a tough line on claims of legal professional privilege in the course of its investigations, as demonstrated in its court battles with Eurasian Natural Resources Corporation ("**ENRC**") over the status of documents produced in the course of internal investigations.[2] The Court of Appeal found in ENRC's favour and held that working papers and notes produced by ENRC during the course of an internal investigation were privileged. The SFO did not appeal the decision but declared in response to it that it "*remains prepared to challenge those [privilege claims] it considers to be ill-founded".*

Any notion that the SFO's approach might soften in the wake of the departure of former director Sir David Green has been dispelled by the stance apparently taken by his replacement Lisa Osofsky. In a speech to the Royal United Services Institute in April, Osofsky recognised legal privilege as a "*fundamental right in our legal system*", but re-emphasised that "*companies can waive that privilege if they wish to co-operate with the Serious Fraud Office*". This statement expresses a strange and conflicting sentiment which implies a fundamental right must be waived in order to co-operate with the SFO.

Lisa Osofsky has gone so far as to say that "*waiving privilege over that initial investigative material will be a strong indicator of co-operation and an important factor that I will take into account when considering whether to invite a company to enter into DPA negotiations."*[3] However, this statement is at odds with the SFO's treatment of Rolls-Royce, Tesco and Serco, who each provided only a limited waiver of privilege but still received a substantial discount. Both Standard Bank and Sarclad were considered to have provided sufficient co-operation to enter into a DPA, despite not waiving privilege, with Standard Bank receiving a discount on its financial penalty of one-third, and Sarclad receiving a 50% discount which was further reduced due to Sarclad's limited financial means.

Waivers of privilege under the new Guidance

The Guidance reveals the SFO's frustration with claims of legal professional privilege by corporates, and emphasises that, "*if an organisation decides to assert legal privilege over relevant material (such as first accounts, internal investigation interviews and other documents), the SFO may challenge that assertion where it considers it necessary or appropriate to do so*."

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1 https://www.cps.gov.uk/sites/default/files/documents/publications/dpa_cop.pdf

2 *Director of the Serious Fraud Office v Eurasian Natural Resources Corp Ltd* [2017] EWHC 1017 (QB); *Director of the Serious Fraud Office v Eurasian Natural Resources Corp Ltd* [2018] EWCA Civ 2006

3 Speech to the Royal United Services Institute, 3 April 2019

The SFO, which has been the subject of scrutiny in its handling of prosecutions of individuals, has found itself in a difficult position in previous investigations where a corporate may claim privilege over first accounts but the SFO's disclosure obligations to an individual require them to be disclosed. The emphasis in the Guidance on providing witness accounts is undoubtedly designed to address this. In *R v (on the application of AL) v SFO*[4], an application for judicial review, the claimant, who was being prosecuted by the SFO, sought disclosure of the full records and notes of interviews conducted by his former employer, Sarclad (then referred to as XYZ Ltd). Sarclad had entered into a DPA and the SFO did not seek to compel the disclosure of the material. The SFO was criticised for failing to challenge assertions by Sarclad, and its legal representatives that its notes of interviews with witnesses were subject to legal advice privilege and/or litigation privilege and for not pursuing the disclosure of the material. The SFO's approach jeopardised the claimant's right to a fair trial.

Under the Guidance, an organisation seeking credit for co-operation is expected to:

- provide witness accounts, including recordings, notes and/or transcripts of interview;
- recognise the SFO's disclosure obligations to prospective individual defendants; and
- submit claims of privilege to independent counsel for certification – presumably at the cost of the organisation.

As an apparent deterrent to claims of privilege, the Guidance states that "*an organisation that does not waive privilege and provide witness accounts does not attain the corresponding factor against prosecution that is found in the DPA Code… but will not be penalised by the SFO*." This is followed by an associated footnote which warns that the Court of Appeal has not ruled out a court's consideration of the effect of a corporate's refusal to waive privilege in determining whether a proposed DPA is in the interests of justice[5].

In addition, the Guidance notes that "*the existence of a valid privilege claim must be properly established*", although it stops short of clarifying what "properly established" will mean in practice. It is also unclear whether the SFO is expressing an intent and willingness to litigate privilege issues when it states it is "*prepared to challenge*" what it considers to be ill-founded claims.

Does the Guidance provide sufficient incentive to co-operate?

Regulated firms bound by the FCA's principles for businesses must under principle 11, deal with its regulators in an open and co-operative way and must disclose anything relating to the firm which that regulator would reasonably expect notice. As a result, in reality, any regulated firm is duty bound to self-report and thereafter co-operate with the FCA at the very least. Having made disclosures to the FCA, it follows that it is also in the interest of the firm to self-report to the SFO. The Guidance does not provide any greater or lesser incentive to firms already duty bound to self-report to a regulatory body. However, for those who do not operate in a regulated sector, the cost-benefit analysis of self-reporting may result in a different conclusion.

There are undoubtedly benefits to obtaining a DPA. The risk of criminal conviction is avoided with all of the consequences which may flow from that, including reputational damage, sanctions and debarment from certain contracts. By entering into a DPA, an organisation also avoids a potentially lengthy and costly trial. Despite the patchy success of cases brought by the SFO, the risk of conviction to a corporate is still a real one.

However, when deciding whether to self-report and co-operate in the way envisaged by the Guidance, a corporate must be aware of the financial burden that such a degree of co-operation will bring. It is not inconceivable that the cost of co-operation matches or exceeds the cost of a trial, and a corporate or its shareholders might wonder whether the uncertain prospect of a DPA provides sufficient incentive for self-reporting and complete capitulation.

On the other hand, it could be argued that the legal costs payable to the SFO under the terms of a DPA, which have thus far been in the range of £300,000 to £13 million[6], will be lower in future as a result of the extensive work undertaken by corporates, arguably on the SFO's behalf. A decision to co-operate with the SFO, with a

4 [2018] EWHC 856 (Admin)

5 *SFO v ENRC, supra note 2 above.*

6 In the case of the Rolls-Royce DPA.

resulting DPA may still mean negative publicity, a significant financial penalty, the prospect of a monitoring programme and possible industry purgatory. It may also be remembered that at the time a DPA is agreed, even if in principle, the admissions made are to the SFO's case at its highest. Almost invariably, by the time of trial, the SFO's case would have narrowed somewhat as a result of a number of factors including a review of the evidence, the disclosure exercise and issues raised in a defence case statement. Admissions made to the SFO's untested case at its highest may result in a greater financial burden and penalty on the company than a guilty plea to a narrower set of facts which the SFO is able to establish at trial, particularly when one considers that a corporate may still benefit from a discount of up to 30% on sentence.

The potential preferential outcomes awarded by a DPA will have to be balanced by each corporate against the financial cost of full co-operation. In the end, it will be for the SFO and the courts to decide whether the corporate's efforts have been sufficient to merit reward, and if so, at what level. This assessment comes late in the day and there is no certainty as to what position the corporate will be in at the end of the process.

It is of interest to consider the different approach taken in the US. The Principles of Federal Prosecution of Business Organisations in the US Department of Justice's Justice Manual[7] set out a different approach to the waiving of privilege and credit for co-operation. Attorney-client privilege is viewed as sacrosanct and waiver is not "*a pre-requisite under the Department's prosecution guidelines for a corporation to be viewed as cooperative…Eligibility of cooperation credit is not predicated upon waiver…*" The guidance issued by the DOJ on co-operation in FCA cases adopts the same approach. The DOJ emphasises that it is concerned with establishing the relevant facts not the waiver of privilege. However, a corporate might wish to consider how it conducts its internal investigations and whether the method used might hinder the ability to disclose the relevant facts. In short, a corporate which waives privilege in order to co-operate is eligible for no more credit than one who provided the relevant facts without the waiver of privilege.

While the SFO's Guidance still leaves questions hanging over much of the DPA decision-making process, it is clear on one thing: "…*co-operation – even full, robust co-operation – does not guarantee any particular outcome.*".

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7 https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations