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Insights

THE SFO, THE GOOSE AND THE GOLDEN EGGS: WHAT THE SFO'S NEW GUIDANCE ON DPAS TELLS US ABOUT THE PROSECUTOR'S APPROACH TO CO-OPERATION

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SUMMARY

On 23 October 2020, the SFO published a chapter from its Operational Handbook, including an expanded section on corporate co-operation, so as to give "comprehensive guidance" on the organisation's approach to the use of deferred prosecution agreements. In this article, we explain how co-operation features in the DPA process, what it means to be "co-operative", and why the SFO appears to be trying to strongly encourage organisations to lay golden eggs for it in the form of privileged documents.

On 23 October 2020, the SFO published a chapter from its Operational Handbook so as to give *"**comprehensive guidance**"* on the organisation's approach to the use of deferred prosecution agreements ("**DPAs**").[1] In her statement to accompany the new guidance, the Director of the SFO, Lisa Osofsky, explained that the publication of this chapter was intended to *"**provide further transparency on what we expect from companies looking to co-operate with us**."*[2]

Whilst this guidance reiterates much of the previous DPA Code of Practice (the **"DPA Code**"), which was published jointly by the CPS and SFO in February 2014, it expressly encourages co-operation between overseas and/or other UK agencies conducting parallel investigations. It also expands further on what the SFO will consider as evidence of a commercial organisation co-operating with it. Such co-operation can be an important contributing factor in evidencing that an organisation has taken a *"**genuinely proactive approach**"* upon learning of any offending[3]; one that can help tip the scales away from prosecution. However, the SFO has not used the publication of this guidance to suggest, expressly or otherwise, that companies will receive co-operation credit for identifying individuals involved in the misconduct. Given that the SFO has yet successfully to bring a case against individuals following any of the DPAs entered into to date, it is surprising that it has not set out its stance in this respect.

In this article, we explain how co-operation features in the DPA process, what it means to be "co-operative", and why the SFO appears to be trying strongly to encourage organisations to lay golden eggs for it in the form of privileged documents.

How does co-operation feature within the DPA process?

The new guidance highlights that co-operation is a consideration in the DPA process in two key areas: (i) as between the SFO and other authorities; and (ii) when the SFO considers if the public interest test has been satisfied.

Co-operation between the SFO and other authorities

The guidance sets out that the SFO must give due consideration to any parallel investigations into an organisation by overseas and/or other UK agencies and sets out a non-exhaustive list of relevant factors.

Relevant factors include: encouraging early communications and *"**de-confliction**"* in respect of investigative activity, such as interviews and the use of statutory powers; early communication and *"**de-confliction**"* in respect of interaction with the organisation and its position with respect to the authorities on matters such as privilege; ensuring that the terms of the negotiations allow for communication and sharing of information provided by the organisation with other relevant agencies; and ensuring liaising between respective press offices.

In short, the SFO could not be clearer in making the point, once again, that it will be co-operating and co-ordinating its efforts with other investigating authorities in the UK and internationally, as applicable.

The public interest test

In addition to satisfying the evidential test, the prosecutor has to satisfy the public interest test in order to enter into a DPA.

To pass the public interest test, it must be shown that the public interest would properly be met by entering into a DPA with the organisation instead of proceeding to prosecution. It is this public interest test that provides the stage on which co-operation can take a leading role.

In considering whether a DPA, as opposed to a prosecution, is in the public interest, the prosecutor must have regard to the non-exhaustive list of public interest factors as set out in the Code for Crown Prosecutors and the DPA Code. One of these factors is co-operation. The Code for Crown Prosecutors states that "**considerable weight may be given to a genuinely proactive approach adopted by [an organisation's] management team when offending is brought to its notice**." When looking at whether an organisation has been proactive in this respect, the prosecutor will consider whether it has been co-operative.

When will an organisation be considered to be "co-operative"?

It is abundantly clear from the guidance that co-operation remains a critical consideration for the SFO when considering whether to enter into a DPA with an organisation. In fact, the newly published SFO chapter states that it is a "**key factor to consider when deciding whether to enter into a DPA**."

As a guide to the SFO and relevant organisations, the chapter provides a non-exhaustive list of seven factors that would be considered as evidence of co-operation.

1. Within a reasonable time of wrongdoing coming to light, reporting the company's offending otherwise unknown to the prosecutor.

2. Taking remedial actions including, where appropriate, compensating victims.

3. Preserving available evidence and providing it promptly in an evidentially sound format.

4. Identifying relevant witnesses and disclosing their accounts and the documents shown to them.

5. Where practicable, making witnesses available for interview when requested.

6. Providing a report in respect of any internal investigation including source documents.

7. Waiving privilege over any materials protected by Legal Professional Privilege, though the organisation can neither be compelled to waive privilege, nor penalised for not waiving privilege.

It is this final factor that has sounded alarm bells among commercial organisations as the SFO has expressly set out here that waiver of privilege will support a finding of co-operation. Although qualified, the obvious conclusion to be drawn from its inclusion in this list is that the SFO is strongly encouraging organisations to consider waiving privilege. This is audacious to the say the least.

The catalyst for the SFO's position is likely to be found in its third DPA, which was entered into with Rolls-Royce. In his final judgment,[4] the Rt. Hon. Sir Brian Leveson QC, then President of the Queen's Bench Division, repeated the high praise showered by the SFO on Rolls-Royce for its "**extraordinary co-operation**", which included providing:

- all interview memoranda from its internal investigation to the SFO "**having waived any claim for legal professional privilege on a limited basis**" and "**despite Rolls-Royce's belief that the material was capable of resisting an order for disclosure, on the basis that it was privileged**"; and

- "**complete digital repositories or email containers where available of in excess of 100 key employees or former employees [were obtained by the SFO], without [Rolls-Royce] filtering the material for potential privilege, but, instead, permitting issues of privilege to be resolved by independent counsel**".

In this respect, the Rolls-Royce DPA marked a stark gear change from the first DPA entered into between the SFO and Standard Bank PLC (now ICBC Standard Bank) and became the first corporate goose to start laying golden eggs for the SFO.

Our view

Whilst co-operation is the focus for the SFO in the UK, the focus in the US is very much on individual accountability; co-operation is only a mitigating factor for which a company can receive credit. For an organisation to receive any consideration for co-operation in the US, it must identify all individuals substantially involved in, or responsible for, the corporate misconduct at issue, regardless of their position status or seniority, and disclose all relevant facts relating to that misconduct.[5] If an organisation declines to do so, as opposed to being unable to do so, its co-operation will not be considered a mitigating factor; nor will the DoJ support a co-operation related reduction at sentencing if the organisation is prosecuted. Given that the SFO has received substantial criticism for its failure successfully to prosecute individuals following DPAs (on which, see also our post on corporate criminal liability), it is perhaps surprising that it has not taken more steps towards promoting individual accountability akin to the position in the US. That being said, a number of SFO cases are awaiting trial so we, in turn, are waiting to see if this pattern continues.

For organisations seeking to co-operate with the SFO, the crucial point is that privilege remains a fundamental right central to the proper administration of justice. The Courts continue to protect privilege and the judgment of Mrs Justice May DBE in the latest DPA with Airline Services Limited supports this: Airline Services Limited did not provide material requested by the SFO that was protected by legal professional privilege but was still found to have "**actively cooperated**" with it.[6] To the extent that the SFO is trying to turn the tide on disclosure of privileged documents and encourage a trend towards organisations replicating the position taken by Rolls-Royce, we consider it is looking for golden eggs that organisations should think very carefully about before laying. For its part, we suggest that the SFO should be wary of pushing waiver of privilege any further than it already has; else it and the DPA process may lose credibility.

Endnotes

[1] SFO Statement, **Serious Fraud Office releases guidance on Deferred Prosecution Agreements**, 23 October 2020

[2] Ibid

[3] Corporate Co-operation Guidance

[4] **Serious Fraud Office v Rolls-Royce PLC and Rolls-Royce Energy Systems Inc**, Case No. U20170036

[5] Department of Justice, Justice Manual, Title 9: Criminal, Section 28.700 – The Value of Co-operation

[6] **Director of the Serious Fraud Office v Airline Services Limited**, Case No. U20201913

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