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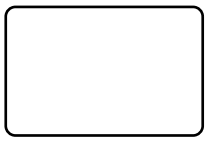

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Contents

Cross-border overviews

The Geopolitics of Data Transfer: What Do Companies Need to Consider When Managing Conflicts of Law in a Global Investigation? 1
Weng Yee Ng and Jimmy Ko
Forensic Risk Alliance

Money Laundering Compliance and Investigations Across EMEA 6
Matthew Getz, Neil Pigott and David Bufton
Boies Schiller Flexner

Securities Regulation and Investigations Across EMEA 11
Roger A Burlingame, Jason A Masimore and Nathaniel P Barber
Kobre & Kim

Enforcer overviews

Norway: Enforcer Overview 15
Lars Stoltenberg and Henrik Horn
ØKOKRIM

Country chapters

France 19
Ludovic Malgrain, Jean-Pierre Picca and Charlotte Gunka
White & Case LLP

Germany 24
Philipp von Holst and Friedrich Popp
Debevoise & Plimpton LLP

Italy 29
Raffaella Quintana, Antonio Carino and Ilaria Curti
DLA Piper

Nigeria 33
Babajide O Ogundipe
Sofunde, Osakwe, Ogundipe & Belgore

Switzerland 36
Thomas A Frick and Adrian W Kammerer
Niederer Kraft Frey Ltd

United Kingdom: Anti-corruption Enforcement and Investigations 40
Christopher David, Alison Geary, Lloyd Firth, Anna Gaudoin and Fred Saugman
WilmerHale

United Kingdom: Cooperation Since Rolls-Royce: Learning Points for Companies and Individuals 46
Caroline Black, Karen Coppens and Timothy Bowden
Dechert LLP

United Kingdom: Financial Services Enforcement and Investigation 52
Clare McMullen and Elly Proudlock
Linklaters

United Kingdom: Cooperation since Rolls-Royce: Learning Points for Companies and Individuals

Caroline Black, Karen Coppens and Timothy Bowden
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Last year we considered in detail the learning points on cooperation from the *Rolls-Royce* deferred prosecution agreement (DPA), which was finalised on 17 January 2017. Although the *Tesco Stores* DPA was approved in April 2017, it remains subject to reporting restrictions pending the retrial of three former Tesco executives. In the meantime, there has been no new judgment approving a DPA since the *Rolls-Royce* decision. However, further guidance is available in the form of commentary from the Serious Fraud Office (SFO) in relation to how it views the required standards of cooperation for companies wanting to be invited into a DPA process. Observations can also be drawn from recent case law in the form of:

- *R (on the application of AL) v Serious Fraud Office* where the court criticised the SFO for relying on oral summaries of interview accounts and failing to demand the written interview summaries from XYZ before offering the company a DPA; and
- *R v Skansen Interiors Limited* as to whether size is a factor when considering making any self-report.

Rolls-Royce

Readers will recall that, according to the *Rolls-Royce* DPA, the conduct concerned the 'most serious breaches of the criminal law in the areas of bribery and corruption', spanning three decades and seven jurisdictions.[1] Rolls-Royce did not self-report the wrongdoing to the SFO, but was able to remedy that failure with its 'extraordinary' subsequent cooperation, which included the SFO receiving pertinent information that may not otherwise have come to its attention.[2] Lord Justice Leveson highlighted the following factors to demonstrate the extent of Rolls-Royce's cooperation with the SFO:

- Rolls-Royce agreed to audio-record interviews where requested by the SFO and upon request deferred company interviews of relevant individuals until the SFO had completed its own interviews. Rolls-Royce also disclosed, on a limited waiver basis, all company lawyer interview memoranda of earlier employee interviews, despite Rolls-Royce's position that the material was privileged.
- Rolls-Royce voluntarily provided all material requested by the SFO, including significant amounts of data held overseas. This meant that the SFO was not required to use its compulsory powers or to make mutual legal assistance requests in order to access the material.
- Rolls-Royce removed implicated personnel, and no member of the board at the time of the DPA was involved in any of the conduct described in the Statement of Facts.[3]

Lord Justice Leveson acknowledged that his first reaction was that if Rolls-Royce were not to be prosecuted for such 'egregious criminality' then 'it was difficult to see when any company would be prosecuted'.[4] The approval of the *Rolls-Royce* DPA, in circumstances where the SFO investigation was not instigated by a voluntary self-report, confirmed that a failure to self-report could be remedied by later cooperative actions on the part of the company.

After Rolls-Royce: the SFO's approach to cooperation

Alun Milford, SFO general counsel, has made clear that only cooperative companies will be offered the chance to enter into a DPA and that *Rolls-Royce* did not signify that 'the ground had shifted and [that] it was now possible to get a DPA offer by doing nothing, waiting for a phone call from the SFO and then going through the motions'. *Rolls-Royce* was not a case where the SFO had a significant amount of information on the wrongdoing to start with and Milford has emphasised that the SFO obtained information that was 'far more extensive and of a different order to what may have been exposed without the cooperation that the company provided'. Milford reiterated that:

> *Lawyers advising corporates should not expect to go down the DPA route if, by the time we come knocking, we already have a good idea of what happened. No amount of protestations of a desire to cooperate at that stage will make up the deficit. Nor will the deficit be made up by a Damascene conversion to the merits of cooperation as we approach a charging decision.*[5]

Camilla de Silva, joint head of bribery and corruption at the SFO, summarised the SFO's present position on cooperation in a 15 March 2018 speech at the ABC Minds Financial Services conference,[6] as follows.

Timing of a company's first contact with the SFO

De Silva explained that DPAs are a 'reward for openness' and that 'the sooner you come in, self-report and the more you are open with us, the more you have to be rewarded for'.

Internal investigation

What has a company already done to investigate and what access to that information is it willing to provide to the SFO?

The SFO want interview accounts of employees and third parties. Regardless of how these are provided, De Silva said that the 'key point is that we need to be able to feel confident that we are getting all the information we need in order to be able to meet our statutory duties as investigators and prosecutors'. Alun Milford has also stressed that what will be sufficient as regards interview accounts will be determined on a case-by-case basis. Milford sees the SFO as having the same expectations of companies wanting a DPA invitation as for Rolls-Royce in cases going forward.[7] Taking into account the court's criticism in *R (on the application of AL) v Serious Fraud Office* of the SFO's acceptance of oral summaries of interview accounts when XYZ was under investigation, it is likely that the SFO will require interviews to be fully recorded or transcribed going forward.

How has the company handled the evidence?
The company must ensure that information is identified, collected, preserved and analysed in a way that 'does not tip off potential suspects'. The SFO needs to understand the methodology behind the handling of evidence, to be able to do its own 'independent' work and test the internal investigation.

How thorough was the internal investigation?
De Silva makes plain that the SFO needs to be confident that the internal investigation is complete and follows the evidence as 'high up the corporate food chain as possible'.

What is the company's approach going forward?
The SFO expects to be involved in the discussion about the scope of the internal investigation. The SFO wants to be notified of conduct uncovered by the company ('even if we don't ask') and to be informed about the 'sequencing of interviews and media contact'.

The SFO expects a company to help it advance its investigation and in doing so to 'make it easier for the [SFO] to investigate and, if appropriate, prosecute other suspects, such as individuals'. Such ongoing cooperation with relevant prosecution agencies will inevitably form part of the terms of any DPA. The *Rolls-Royce* DPA contained a requirement for the company to use its best efforts to make available for interview, as requested by the SFO, present or former officers, directors, employees, agents and consultants of the company.[8] Rolls-Royce also agreed as part of the DPA, at the reasonable request of the SFO and consistent with local law and practice, to cooperate with foreign law enforcement and regulatory authorities and agencies.[9]

While the fact that Rolls-Royce was able to enter into a DPA despite the absence of a self-report reflects an element of flexibility in the approach of the SFO and the court, it is clear that a failure to self-report is viewed as a significant deficit, which must be addressed by extraordinary ongoing cooperation.

Small company, different rules?

In February 2018, a British interior design company, Skansen Interior Limited (SIL), was found guilty of failing to prevent bribery in the UK's first-ever contested prosecution under section 7 of the Bribery Act 2010. The decision to prosecute (by the Crown Prosecution Service (CPS) rather than the SFO) has been criticised. The company had self-reported misconduct, fired executives, cooperated with the police and implemented a new specific anti-bribery policy. So why a prosecution rather than a DPA? SIL had become dormant in May 2014 and had no assets; no jobs would have been lost and SIL would have been unable to comply with any terms a DPA might have imposed.[10] However, that fact also meant that there would be no financial punishment after trial. The CPS decision to prosecute therefore appears to have been driven by a desire to seek to test the section 7 adequate procedures defence in front of a jury.

Viewed alongside *Rolls-Royce*, the different contexts to self-reporting and cooperation for a smaller company as opposed to a large one are apparent. Cooperation will be viewed in the context of the consequences that a prosecution would have for the company in question. In *Rolls-Royce*, Lord Justice Leveson clearly took into account the potential damage (financial and human) that would result from a conviction and subsequent debarment from public contracts.[11] While it is unclear whether the SFO would have decided to prosecute in the same circumstances, the CPS decision in *Skansen* risks undermining the emphasis placed by the SFO on cooperative conduct, and suggests that it may be more difficult for a smaller company to secure a DPA.

UK DPAs: a model for other countries?

The rise in multi-jurisdictional criminal and regulatory investigations over the last few years has led to improvements in cross-border cooperation with overseas enforcement authorities in corporate investigations and resulted in numerous enforcement proceedings and global settlements.

Since DPAs were introduced in the United Kingdom in 2014, a number of other countries, including Canada, Australia and Singapore have followed suit and are in the process of introducing DPAs.

- In December 2017, the Australian Minister for Justice, Michael Keenan MP, announced that the Australian coalition government would introduce new laws to establish DPAs as part of a raft of new reforms to Australia's anti-bribery and corruption regime.
- On 22 February 2018, the Canadian government, Ministry of Public Services and Procurement announced that it will draft legislation to introduce DPAs in the country and that the agreements will be implemented through judicial remediation orders. At this stage, it is unclear whether the Canadian DPAs will follow the UK or US model.
- On 19 March 2018, the Singapore Parliament passed the Criminal Justice Reform Act, which enacts a framework for DPAs into the current Criminal Procedure Code. The new law largely copies the UK model but there are also key differences.
- In France, Sapin II[12] entered into force on 11 December 2016 and brought French anti-corruption laws into closer alignment with the corresponding legislation in the United Kingdom and the United States, introducing the concept of French DPAs (CJIPs). At the initiative of the public prosecutor or the investigating judge (depending on where the criminal procedure stands), an agreement can be offered to any legal person suspected of having committed bribery, influence peddling and laundering of the proceeds of tax fraud. The CJIP will have to be validated after a public hearing but will not have the effect of a sentencing judgment. Sapin II appears to have had an almost immediate effect and, on 14 November 2017, the Parquet National Financier (PNF) entered into the first French DPA with HSBC Private Bank (Suisse) SA,[13] which agreed to pay €300 million to settle allegations that the bank assisted its clients to evade tax. This landmark settlement marked a distinct break from the past and suggests a future in which the French authorities become active enforcers in complex international fraud and bribery cases. However, what is less clear in France is the degree of cooperation expected of a company prior to a CJIP being offered by the authorities. There is no statutory or judicial guidance on this point, so accepted procedure is likely to develop on a case-by-case basis.

With increased coordination and cooperation between authorities in the United Kingdom and overseas, it is likely that further multi-jurisdictional investigations will lead to coordinated global resolutions via DPAs.

Liability of individuals

As we explained last year, UK DPAs are not available to individuals. Notwithstanding any DPA entered into by an employer company, employees and others responsible for the relevant misconduct are likely to be prosecuted.

There are likely to be increased numbers of prosecutions of individuals stemming from evidence provided by cooperating companies seeking to elicit a DPA invitation.

As investigation and settlement with a cooperating company is always likely to be completed substantially quicker than a contested prosecution of the individuals, a key issue for the SFO and individuals and their counsel is how to ensure that disclosures made in DPA documents do not prejudice ongoing investigations or the rights of individuals to a fair trial. Although individuals were named in the first DPA,[14] information about the current or former employees involved in wrongdoing has not been disclosed in subsequent DPAs.

- In July 2016, Leveson LJ approved a DPA concerning bribery and corruption offences alleged to have been committed by a company (referred to only as XYZ) in relation to contracts to supply products to its customers overseas. In the DPA, and as of today, the company's identity remains anonymous so as not to prejudice ongoing related criminal proceedings concerning former XYZ employees.
- On 10 April 2017, the court approved a DPA between Tesco Stores Limited and the SFO relating to allegations of false accounting between February and September 2014. In order not to prejudice proceedings against three individuals, reporting restrictions were imposed and only a few details of the DPA were released to the public. The SFO press release in April 2017 made it clear that the DPA only related to 'the potential criminal liability of Tesco Stores Limited and does not address whether liability of any sort attaches to Tesco Plc or any current or former employee or agent of Tesco Plc or Tesco Stores Ltd'.[15] The reporting restrictions remain until the trials of the individuals conclude.
- In January 2017, Leveson LJ approved a DPA between the SFO and Rolls-Royce. No individuals were named and the investigation into the conduct of individuals is ongoing. Leveson LJ explained that 'the identities and positions of employees within Rolls-Royce referred to in the Statement of Facts' were 'made known to him', to enable him to 'assess their comparative seniority, and thus, the responsibility of Rolls-Royce', but were not disclosed in order not to prejudice the ongoing criminal investigation into the individuals.[16] Leveson LJ also explained that naming the recipients of corrupt payments or bribes, in relation to certain countries, could lead to action or the imposition of a penalty that would be regarded in the United Kingdom as contravening article 3 of the European Convention on Human Rights (the prohibition against torture, inhuman or degrading treatment or punishment).[17]

Defence lawyers acting for individuals potentially implicated in a possible DPA will need to be proactive to ensure that appropriate care is exercised over the drafting of the agreed Statement of Facts, to protect their client's rights to a fair trial and to safeguard their reputation. It may be in a self-reporting company's interests to focus blame on individuals rather than corporate culpability. The challenge is that both the company negotiating the DPA and the prosecutor may be embargoed from disclosing the timescale and progress of DPA negotiations to third parties, including those directly involved. Consideration should therefore be given to making representations to the SFO as soon as it is realised that the client has a potentially significant role or their interview account is in SFO hands.

Interviews

In the past, an employee participating in an internal investigation interview with their employer's lawyers might, when told that the conversation was legally privileged, have a reasonable degree of confidence that what was said would remain confidential to the employer and the lawyers. Now, there can be little confidence.

Due to developments in the law, and in the attitude and expectations of the SFO, companies and their lawyers are now less able to safeguard the privilege of interview records in England and Wales, and instead are likely to be challenged on any claim to legal professional privilege, or find themselves being incentivised to voluntarily concede or waive any possible privilege claim as part of the company's cooperation.

In April 2018, the High Court[18] criticised the SFO's acceptance of oral summaries of witness accounts in the *XYZ* DPA. A former employee of XYZ Ltd (referred to as 'AL' in the judgment to preserve anonymity) brought a judicial review application against the SFO. XYZ had conducted interviews, including with AL, prior to self-reporting to the SFO and the interviewing lawyers had taken detailed notes of the interviews. XYZ claimed privilege over the interviews, but agreed to give an 'oral proffer' of the interviews to the SFO, who then transcribed these oral summaries. AL was charged in February 2016, and the SFO subsequently disclosed the transcribed oral summaries to him. AL sought the full interview notes from the SFO (AL considered that the full notes contained material relevant to his defence that was not included in the summaries), which in turn requested them from XYZ. Met with a refusal by XYZ to provide them, the SFO declined to take further steps to obtain the full interview notes.

While the court ultimately held that the claim had not been brought in the correct forum,[19] the court criticised the SFO for failing to demand the written internal interview summaries from XYZ before offering a DPA and held that the SFO had committed a series of 'public law errors' in deciding not to take any further steps to challenge XYZ's claim to privilege over the interview notes.[20]

The court observed that the process of accepting oral summaries of the interview accounts and the SFO then transcribing them was 'highly artificial'. The judges said that they did 'not know why the SFO did not simply demand, robustly, that the written summaries used by the lawyer . . . be handed over'.[21]

The interests of a company in successfully asserting privilege and thereby maintaining confidentiality are in opposition to the interests of a cooperating company in maximising the prospects of being offered a DPA:

- To assert that a company has made an early self-report, as soon as practicable after discovering a potentially criminal issue (and therefore deserves a DPA), is likely to undermine a claim that any interviews conducted prior to the self-report are covered by litigation privilege, for which it might be argued it is necessary to establish that a criminal prosecution was contemplated.
- Seeking to maintain records of interviews conducted prior to a self-report in the form of lawyer-drafted notes or summaries may face SFO criticism for failing to secure a reliable record of the first account of a witness. The clearer the note, however, the more difficult it may be to establish that there is the necessary lawyer input to assert privilege.
- After a self-report is made (by which point the argument that litigation privilege applies is stronger), it is likely that the SFO will require a cooperating company to conduct interviews in a way that provides an independently reliable record such as an audio recording, and that it is made available to the SFO.

In this context the need for lawyers to be made available to individual employees is heightened, as is the need for those lawyers

to proceed on the basis that the interview record is likely to find its way to one or more prosecutors, including those overseas as it is increasingly likely that a company may be cooperating with authorities in more than one jurisdiction.

In such circumstances, a formal process may be to the advantage of the interviewee: better to have confidence of an accurate record than for a lawyer's note to be produced that may be incomplete, mis-recorded or misunderstood.

In light of the increased likelihood of transmission of the interview content to a domestic or overseas authority, it is even more incumbent on an individual's counsel to consider and ensure that the rights of their client are sufficiently protected during the process. This should include ensuring that:

- independent legal advice and input is sought from all jurisdictions that may be relevant (dependent on where the corporate is cooperating);
- where the UK authorities are involved, that advance disclosure is sought from the company prior to interview;
- the individual and counsel can review and comment on any transcript (and obtain a copy if possible); and
- further clarification is sought, if required, as to which authorities may be provided with the materials.

Conclusion

Notwithstanding the sporadic nature of DPA case law, the SFO is continuing to develop its expectations as to standards of cooperation required by companies wishing to receive an invitation to enter a DPA. This is inevitably based on their experience in past and ongoing investigations.

Responding to these developing expectations requires strategic thinking, flexibility and foresight on the part of lawyers representing companies and counsel acting for individuals affected. Regular engagement and advocacy with the authorities is essential throughout the life of the self-report. This is particularly acute where a company may be cooperating with more than one authority, which may have competing or different interests or expectations in terms of cooperation or privilege. As multi-jurisdictional investigations and coordinated resolutions are likely to continue, dynamic management by counsel of the plethora of legal issues is essential.

The authors would like to acknowledge the assistance of their colleague Tom Stroud in the preparation of this chapter.

Notes

1 *SFO v Rolls-Royce PLC* U20170036, paragraph 20, https://www.judiciary.gov.uk/wp-content/uploads/2017/01/sfo-v-rolls-royce.pdf.
2 *SFO v Rolls-Royce PLC* U20170036, paragraphs 19 and 20, https://www.judiciary.gov.uk/wp-content/uploads/2017/01/sfo-v-rolls-royce.pdf.
3 *SFO v Rolls-Royce PLC* U20170036, paragraph 49, https://www.judiciary.gov.uk/wp-content/uploads/2017/01/sfo-v-rolls-royce.pdf.
4 *SFO v Rolls-Royce PLC* U20170036, paragraph 61, https://www.judiciary.gov.uk/wp-content/uploads/2017/01/sfo-v-rolls-royce.pdf.
5 Alun Milford, SFO General Counsel, speaking at the Cambridge Symposium on Economic Crime, 5 September 2017, Jesus College, Cambridge, www.sfo.gov.uk/2017/09/05/alun-milford-on-deferred-prosecution-agreements/.
6 Camilla de Silva, Joint head of bribery and corruption, speaking at ABC Minds Financial Services conference on 15 March 2018, www.sfo.gov.uk/2018/03/16/camilla-de-silva-at-abc-minds-financial-services/.
7 Alun Milford, SFO General Counsel, speaking at the Cambridge Symposium on Economic Crime, 5 September 2017, Jesus College, Cambridge, www.sfo.gov.uk/2017/09/05/alun-milford-on-deferred-prosecution-agreements/.
8 Clauses 10 and 12, Deferred Prosecution Agreement – *SFO v Rolls Royce PLC.*
9 Clause 11, Deferred Prosecution Agreement – *SFO v Rolls Royce PLC.*
10 https://globalinvestigationsreview.com/article/1166539/sil-prosecution-%E2%80%9Cmakes-mockery%E2%80%9D-of-uk-criminal-process.
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14 *SFO v Standard Bank* U20150854.
15 www.sfo.gov.uk/2017/04/10/sfo-agrees-deferred-prosecution-agreement-with-tesco/.
16 *SFO v Rolls-Royce PLC* U20170036, paragraph 32, https://www.judiciary.gov.uk/wp-content/uploads/2017/01/sfo-v-rolls-royce.pdf.
17 Ibid.
18 *R (on the application of AL) v Serious Fraud Office*, [2018] EWHC 856.
19 The court referred the case to the Crown Court, but stated that if it transpired that the Crown Court did not have sufficient powers to determine the matter fairly, then it was possible that the High Court may have to exercise its jurisdiction in order to fill a 'procedural lacuna'.
20 *R (on the application of AL) v Serious Fraud Office* [2018] EWHC 856, paragraph 125.
21 *R (on the application of AL) v Serious Fraud Office* [2018] EWHC 856, paragraph 26.

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Dechert LLP is a global specialist law firm with 27 offices in the United Kingdom, Europe, Asia, Middle East and across the United States. Our expert lawyers are focused on sectors with the greatest complexities, legal intricacies and highest regulatory demands. Dechert has an impressive track record of resolving difficult and sensitive investigations discreetly and favourably without prosecution. Our lawyers have represented organisations and their officers, boards and senior management in all phases of civil and criminal investigations, actions and prosecutions. We regularly assist clients in responding to government and regulatory investigations, and have extensive experience in dealing with the Serious Fraud Office, the Financial Conduct Authority, HM Revenue and Customs, HM Treasury, the Office of Foreign Assets Control, the Department of Justice and the Securities and Exchange Commission. Whether allegations of misconduct arise internally, as a result of a government investigation, whistleblower claims, an audit or from civil or criminal litigation, our lawyers act promptly, investigating the allegations and offering strategic solutions to resolve the situation and limit our clients' exposure. Our white-collar defence and securities teams include more than 100 lawyers globally. Dechert has leading white-collar crime practices in the United Kingdom, and the United States, which enables us to deal with simultaneous multi-jurisdictional investigations. We offer a coordinated mix of legal, strategic and public affairs advice to clients. The team includes former prosecutors and government lawyers who provide experienced guidance, determine the facts, assess legal exposure and recommend appropriate action, including the development of, or modifications to, compliance programmes.

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