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The Practitioner's Guide to Global Investigations

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Since the third edition of the Practitioner's Guide was published in January, notable legislative proposals, prosecutor guidance and court judgments, in both the United States and United Kingdom, have caught our editors' eyes. To update readers, they have identified some of the most significant recent developments in the investigations space and asked authors of the chapters most directly affected by the changes to summarise and analyse their implications.

The newsletter opens with a piece by one of the Guide's editors, Eleanor Davison of Fountain Court Chambers, updating readers on UK legislators' continued interest in extending corporate criminal liability for economic crime. The second article is written by lawyers at Gibson Dunn, including storied white-collar crime counsel – and Practitioner's Guide author – F Joseph Warin, and focuses on enforcement in the United States. The authors take a close look at business-friendly revisions to the US Department of Justice's Corporate Enforcement Policy, which have softened some requirements for companies seeking credit for assisting it in its investigations of wrongdoing and rectifying the harm they uncover. Our third update, written by another Practitioner's Guide editor, Judith Seddon of Ropes & Gray, returns our focus to the United Kingdom, and the issue of self-reporting. She takes a look back at guidance issued by the UK tax authorities on the benefits of corporates self-reporting when they have failed to prevent tax evasion. And she asks whether the Serious Fraud Office – now headed by an American – will mirror US rules for compliance programmes, and what value the SFO will place on privilege waiver in its much-anticipated guidance on self-reporting. In our fourth article, co-authors Nicholas Purnell QC (Cloth Fair Chambers) and Rod Fletcher (Herbert Smith Freehills) look at the UK's fourth deferred prosecution agreement between UK prosecutors and retailer Tesco, which was judicially approved in 2017 but only published this year, following the acquittal of former

employees in parallel criminal proceedings. If co-operating companies have agreed with prosecutors on the facts, which are later contested in criminal court – but can still be published unredacted – is that fair to the individuals a jury has acquitted? In our final article, lawyers at Dechert, the firm that contributes the chapter on production of information to the authorities in the Practitioner's Guide, analyse a recent English judgment holding that the tax authority's information powers under a UK statute could extend extraterritorially – and that mutual legal assistance arrangements did not act as a bar to their application – even though the law was silent on its reach.

We hope readers enjoy this newsletter, which should be read alongside the third edition. The developments described below are far-reaching and have a bearing on many other chapters in the Practitioner's Guide, links to which are included below. Future newsletters will focus on other areas and jurisdictions.

The fourth edition is currently being fully revised and expanded to include new substantive topics for Volume I on UK and US investigations, and to provide comprehensive primers on the law of internal and government investigations in several jurisdictions not featured in the current edition of Volume II.

The publisher invites readers to send in their comments on this newsletter and the third edition of The Practitioner's Guide to Global Investigations at david.samuels@lbresearch.com.

Corporate liability and deferred prosecution agreements in the United Kingdom: a post-Bribery Act 2010 analysis

Eleanor Davison

Fountain Court Chambers

Corporate liability and the failure-to-prevent model have been the subject of further parliamentary discussion in the United Kingdom with the publication on 14 March 2019 of the House of Lords Committee Report into the Bribery Act 2010 (the Bribery Act). The Committee commented that at a time when corruption is on a global scale, the offence of corporate failure to prevent bribery was regarded as a particularly effective tool because it enables those in a position to influence how a company conducts business to ensure that it is ethical, and to take steps to remedy matters where it is not.

The Committee's considerations were wide-ranging and extended to models of corporate liability and concerns regarding deferred prosecution agreements (DPAs) as well as post-legislative scrutiny of the Bribery Act.

Corporate liability

In relation to corporate criminal liability, the Committee examined whether English law should adopt the vicarious liability model of corporate criminal liability used in the United States, whereby a corporate can be vicariously liable for criminal offences committed by its employees and agents rather than liability attaching through the principle of identification.

The Committee did not receive a unanimously positive response from witnesses on this subject but the evidence of the current director of the SFO, Lisa Osofsky, was in favour of moving to a vicarious liability route, commenting:

> *[W]e might find ourselves less hamstrung by the identification principles. We might make better progress against some of the larger, fair-fight opponents of the SFO. I am willing to take them on. I wish the law was completely in my court, because I would like to be able to show just how much that is a challenge I welcome. But for now it is harder.*[1]

If vicarious liability were not to be adopted, Osofsky would be in favour of extending the failure-to-prevent model.

The Committee concluded that although there were arguments in favour of amending the law to a vicarious liability model, this was a matter that went beyond its remit, and it made no formal recommendations.

The UK government's response to the Committee's Report was published in May 2019 and in respect of the Committee's discussion on corporate liability the government referred to its Call for Evidence on Corporate Criminal Liability for Economic Crime published in January 2017. The government's position was that the issue of corporate liability and the extent to which the identification doctrine is deficient as a tool for effective enforcement of the criminal law against large modern companies was covered in detail in the Call for Evidence. The government stated it had been carefully considering the evidence submitted since the Call for Evidence closed in March 2017 and that a response to the exercise would be issued shortly.

Readers may recall that the Call for Evidence canvassed views on whether the failure-to-prevent model of offences found in section 7 of the Bribery Act ought to encompass other economic offences, such as fraud and money laundering. Whether the position under section 7 is extended, or the more recent failure-to-prevent model

1 Lisa Osofsky, Director of the Serious Fraud Office, Corrected oral evidence: Bribery Act 2010, House of Lords Bribery Act 2010 Committee, 13 November 2018, Q157.

under the sections 45 and 46 of the Criminal Finances Act 2017 will be advanced as the basis for extending corporate criminal liability, remains to be seen.

The distinction between the failure-to-prevent models is that under section 7 of the Bribery Act corporate liability requires the employee who committed the substantive bribery offence to do so with the intention of obtaining or retaining business or some other advantage for the corporate. The Criminal Finances Act model does not require the prosecution to prove that the employee or agent committed the tax evasion facilitation offence with that intention. The latter model could be used where offences are committed with the aim of benefiting the corporate, those committed by employees purely for self-enrichment or with both aims in mind, whereas the former is limited to offences that are intended to enrich the corporate.

Deferred prosecution agreements

Although DPAs are not derived from the Bribery Act, they were introduced soon after the advent of the Act and its shift in approach to corporate liability. As the DPA regime has permitted some of the largest recent cases of corporate corruption to be settled without the companies involved being convicted of offences, the Committee included it within its remit. The Committee stated that concerns that DPAs were an 'easy way out' for companies were not borne out but that a DPA is not, and cannot be, a substitute for the prosecution of any individuals involved in corrupt conduct. The government's response concurred with the Committee. DPAs were intended to ensure that companies are held to account and incentivise self-reporting and co-operation with investigations, they are not an alternative to the prosecution of individual wrongdoers. The government restated that prosecution decisions are a matter for the agencies that retain the authority and expertise in any individual prosecution. Neither the Committee's discussion nor the government response addresses the scenario that arose in the Tesco DPA (and is addressed in Nicholas Purnell QC and Rod Fletcher's article beginning on page 11 of the newsletter), where the corporate entered a DPA with an agreed set of facts, and individuals subsequently charged with offences on the same facts were acquitted.

FURTHER READING

Read the 'Introduction', by Judith Seddon, Eleanor Davison, Christopher J Morvillo, Michael Bowes QC, Luke Tolaini, Ama A Adams and Tara McGrath in GIR's *The Practitioner's Guide to Global Investigations*.

See also, in the Practitioner's Guide, the chapters on:

- 'Self-Reporting to the Authorities and Other Disclosure Obligations: The UK Perspective', by Judith Seddon, Amanda Raad, Sarah Lambert-Porter, Chris Stott and Matthew Burn
- 'Witness Interviews in Internal Investigations: The UK Perspective', by Caroline Day and Louise Hodges
- 'Co-operating with the Authorities: The UK Perspective', by Ali Sallaway, Matthew Bruce, Ben Morgan, Nicholas Williams and Ruby Hamid
- 'Co-operating with the Authorities: The US Perspective', by F Joseph Warin, Winston Y Chan, Pedro G Soto and Kevin Yeh
- 'Negotiating Global Settlements: The UK Perspective', by Nicholas Purnell QC and Rod Fletcher
- 'Global Settlements: The In-House Perspective', by Stephanie Pagni
- 'Extraterritoriality: The UK Perspective', by Tom Epps, Mark Beardsworth and Anupreet Amole

Dropping the Pilot – DOJ's toned-down Corporate Enforcement Policy reduces the burden on business and could improve information sharing

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In April 2016, the US Department of Justice (DOJ) announced a new one-year 'Pilot Program' to provide greater transparency on expectations for mitigation credit for voluntary self-disclosure, co-operation and remediation in Foreign Corrupt Practice Act (FCPA) investigations. Under the Pilot Program, if a company voluntarily self-disclosed FCPA-related misconduct, co-operated fully in the ensuing investigation and appropriately remediated the misconduct, it was eligible for up to a 50 per cent reduction off the bottom of the applicable US Sentencing Guidelines fine range, and the DOJ also would consider declining prosecution altogether. The Pilot Program reflected an increasing emphasis in DOJ policy on co-operation, where previous guidance had emphasised both co-operation and the effectiveness of the company's pre-existing compliance programme. The Pilot Program followed a September 2015 memorandum authored by former Deputy Attorney General Sally Yates (the Yates Memorandum),[1] which sent waves through the defence bar by affirmatively requiring prosecutors to pursue individuals from the inception of a corporate investigation.

The DOJ extended the Pilot Program beyond its initial one-year duration and, in November 2017, adopted it and codified it into the US Attorneys' Manual (now called the Justice Manual) as the FCPA Corporate Enforcement Policy. This introduces a presumption that the DOJ will decline prosecution of a company that voluntarily discloses FCPA-related misconduct, co-operates fully in the ensuing investigation and appropriately remediates the misconduct. To qualify for a declination, companies must disgorge any allegedly improper profits from the conduct. The presumption of declination that accompanies a voluntary disclosure is just that – a presumption – which may be overcome by aggravating circumstances, such as the involvement of executive management in the misconduct, significant profits from the misconduct, misconduct that was pervasive and criminal recidivism. The DOJ has since announced that it will consider the Corporate Enforcement Policy in all corporate criminal cases. [2]

In March 2019, the DOJ revised the Corporate Enforcement Policy. While the general structure of the policy remains the same, the DOJ made four key changes: (1) revisions to the policy on disclosures regarding responsible individuals, (2) application of the policy to the M&A context, (3) revised guidance on de-confliction requests and (4) a change in the DOJ's policy with respect to ephemeral communications tools.

Disclosures regarding responsible individuals

The revised Corporate Enforcement Policy implements changes announced on 29 November 2018 by then US Deputy Attorney General Rod J Rosenstein relating to the identification of culpable individuals in corporate investigations.[3] Under the Yates Memorandum, as a prerequisite for any co-operation credit, corporations had to

1 Memorandum from Sally Q. Yates, Deputy Attorney General, U.S. Dep't of Justice, to Assistant Attorney General, Antitrust Division, et al., Individual Accountability for Corporate Wrongdoing (9 September 2015), https://www.justice.gov/archives/dag/file/769036/download.

2 See Matthew S. Miner, Deputy Assistant Attorney General, U.S. Dep't of Justice, Remarks at the 5th Annual GIR New York Live Event (27 September 2018), https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-matthew-s-miner-justice-department-s-criminal-division.

3 See Rod J. Rosenstein, Deputy Attorney General, U.S. Dep't of Justice, Remarks at the American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act (29 November 2018), https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institute-0.

identify all individuals responsible for, or involved in, the underlying misconduct and provide all facts pertaining to such misconduct. Under the revised policy, corporations must identify 'every individual who was substantially involved in or responsible for the criminal conduct.'[4] Although, to receive co-operation credit, corporations must still identify those who were substantially involved in wrongdoing, the former Deputy Attorney General emphasised that the DOJ will not delay resolution of an investigation to gather information on those 'whose involvement was not substantial, and who are not likely to be prosecuted.'[5]

The revised policy better harmonises the Yates Memorandum with directives in the Justice Manual concerning joint-defence agreements. Under the Justice Manual, prosecutors cannot ask corporations to refrain from entering into a joint-defence agreement.[6] Parties to a joint-defence agreement are often prevented from sharing information derived from internal investigations. The Justice Manual states that corporations in joint-defence agreements may nevertheless wish to tailor their agreements to allow them to provide some relevant facts to the government to remain eligible for co-operation credit. But merely providing some relevant facts falls short of the 'all relevant facts' threshold under the Yates Memorandum. By emphasising that corporations need only identify individuals who were substantially involved in or responsible for wrongdoing, the revised policy is congruent with the 'some relevant facts' standard for co-operation credit in the Justice Manual.

The DOJ's revised policy defining corporate co-operation will have practical implications on corporate investigations that are likely to enhance information-sharing with the DOJ. The Justice Manual prohibits prosecutors from affirmatively seeking waiver of attorney–client privilege and protected work-product. Nevertheless, because companies often conduct investigations with the assistance and advice of counsel, they have not always been able to furnish all relevant facts to the DOJ, absent some form of waiver. The revised policy, by more narrowly focusing on those with substantial involvement in wrongdoing, will probably reduce the number of instances companies will face duelling priorities of protecting privilege versus co-operating with the DOJ.

Credit in M&A due diligence

The revised FCPA Corporate Enforcement Policy states that:

> *[W]here a company undertakes a merger or acquisition and uncovers misconduct through thorough and timely due diligence or, in appropriate instances, through post-acquisition audits or compliance integration efforts, and voluntarily self-discloses the misconduct and otherwise takes action consistent with this Policy including . . . the timely implementation of an effective compliance program at the merged or acquired entity, there will be a presumption of declination. . . .*[7]

This change reflects the policy, announced in a July 2018 speech by Deputy Assistant Attorney General Matthew S Miner, that the DOJ wishes to encourage M&A activity by companies with strong compliance programmes and not to have 'the specter of enforcement . . . be a risk factor that impedes such activity by good actors.'[8] One month later, at a GIR Live event, Miner expanded his comments to make clear that they apply to 'other types of potential

4 ibid.

5 ibid.

6 U.S. Dep't of Justice, Justice Manual, § 9-28 Principles of Federal Prosecution of Business Organizations, https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations.

7 U.S. Dep't of Justice, Justice Manual, § 9-47.120 – FCPA Corporate Enforcement Policy, https://www.justice.gov/jm/jm-9-47000-foreign-corrupt-practices-act-1977.

8 Matthew S. Miner, Deputy Assistant Attorney General, U.S. Dep't of Justice, Remarks at the American Conference Institute 9th Global Forum on Anti-Corruption Compliance in High Risk Markets (25 July 2018), https://www.justice.gov/opa/pr/deputy-assistant-attorney-general-matthew-s-miner-remarks-american-conference-institute-9th.

wrongdoing, not just FCPA violations', unearthed in connection with an acquisition and disclosed to the DOJ.[9] Although not an explicit amendment of the Halliburton FCPA Opinion Procedure Release (No. 08-02), the new policy does not heed the timelines the Release articulated.

De-confliction guidance

De-confliction requests, in which the DOJ asks the corporation not to take certain steps, such as employee interviews, can be challenging for corporate operations. The revised Corporate Enforcement Policy softens (but does not eliminate) the requirement that companies abide by de-confliction requests, stating that full co-operation requires de-confliction of witness interviews and other investigative steps '[w]here requested and appropriate'. In a footnote, the policy states that although the DOJ may ask the company to 'refrain from taking a specific action for a limited period of time for de-confliction purposes,' it 'will not take any steps to affirmatively direct a company's internal investigation efforts.' The comment to the new policy states that where the DOJ makes a de-confliction request, the request:

> *will be made for a limited period of time and be narrowly tailored to a legitimate investigative purpose (e.g., to prevent the impeding of a specified aspect of the Department's investigation). Once the justification dissipates, the Department will notify the company that the Department is lifting its request.*

The de-confliction process[10] fails to address the fundamental desire of a corporation to ferret out the misconduct and any wrongdoers.

The revised Corporate Enforcement Policy attempts to strike a better balance between the company's operational needs and the law enforcement desires of the government. It remains to be seen how the subjective standards, such as 'where . . . appropriate' and 'for a limited period of time' are applied in practice.

Business records

The Corporate Enforcement Policy continues to require that to receive remediation credit, a company must appropriately maintain business records. But where the original policy required companies to prohibit employees from using software that generates but does not appropriately retain business records, the revised policy allows companies to permit the use of such tools, while:

> *implementing appropriate guidance and controls on the use of personal communications and ephemeral messaging platforms that undermine the company's ability to appropriately retain business records or communications or otherwise comply with the company's document retention policies or legal obligations.*[11]

The DOJ did not provide any concrete guidance on what 'appropriate guidance and controls' on the use of ephemeral messaging tools might be. The revised Corporate Enforcement Policy no longer requires an outright ban on the use of such communications. The DOJ clearly continues to perceive them as risky from a compliance perspective. Companies should consider what ephemeral messaging tools their employees use and why, whether those business justifications outweigh the risks, and, if so, how best to restrict the use of the tools to appropriate areas and

9 Matthew S. Miner, Deputy Assistant Attorney General, U.S. Dep't of Justice, Remarks at the 5th Annual GIR New York Live Event (27 September 2018), https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-matthew-s-miner-justice-department-s-criminal-division.

10 U.S. Dep't of Justice, Justice Manual, § 9-47.120 – FCPA Corporate Enforcement Policy, https://www.justice.gov/jm/jm-9-47000-foreign-corrupt-practices-act-1977.

11 ibid.

to ensure that the company's recordkeeping obligations (including retention obligations unrelated to the DOJ's policy) are met.

Conclusion

Although the DOJ's revised Corporate Enforcement Policy is not a dramatic departure from the earlier iterations, the changes described above will have a significant impact on day-to-day practice for outside counsel defending corporations in FCPA investigations and for in-house legal and compliance personnel responsible for enhancing compliance programmes in response to the updated policy.

FURTHER READING

Read the Gibson, Dunn & Crutcher chapter 'Co-operating with the Authorities: The US Perspective', by F Joseph Warin, Winston Y Chan, Pedro G Soto and Kevin Yeh in GIR's *The Practitioner's Guide to Global Investigations*.

See also, in the Practitioner's Guide, the chapters on:

- 'Self-Reporting to the Authorities and Other Disclosure Obligations: The US Perspective', by Amanda Raad, Sean Seelinger, Arefa Shakeel, Jaime Orloff Feeney and Zaneta Wykowska
- 'Witness Interviews in Internal Investigations: The US Perspective', by Keith Krakaur and Ryan Junck
- 'Production of Information to the Authorities', by Hector Gonzalez, Rebecca Kahan Waldman, Caroline Black and William Fotherby
- 'Representing Individuals in Interviews: The US Perspective', by William Burck, Ben O'Neil and Daniel Koffmann
- 'Negotiating Global Settlements: The US Perspective', by Nicolas Bourtin and Kate Doniger
- 'Fines, Disgorgement, Injunctions, Debarment: The US Perspective', by Rita D Mitchell
- 'Privilege: The US Perspective', by Richard M Strassberg and Meghan K Spillane

HMRC outlines benefits of self-reporting tax offences, while SFO fraud guidance expected to reward privilege waiver and compliance programmes

Judith Seddon

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Just over six months into her tenure as Director of the Serious Fraud Office (SFO), Lisa Osofsky announced that she would soon be issuing guidance for corporates and their legal advisers to provide them with added transparency about what they might expect if they decide to self-report fraud or corruption to the SFO.[1]

At present – and despite numerous speeches concerning the advantages of privilege waiver[2] – the DPA Code of Practice simply states, 'The Act [the Crown and Courts Act 2013] does not, and this DPA Code cannot, alter the law on legal professional privilege.'

The guidance is expected soon. One key issue that the guidance will cover is the benefits that can accrue from waiving privilege in certain circumstances (in particular involving documents produced during internal investigations, to which privilege may attach). As Ms Osofsky said:

> *I fully support and value the right of privilege. Indeed, I grew up in a system in the USA where privilege is in some ways stronger, than in my adopted home here. It is [a] fundamental right in our legal system.*
> *But companies can waive that privilege if they wish to cooperate with the Serious Fraud Office.*[3]

She went on to say that:

> *[W]aiving privilege over that initial investigative material will be a strong indicator of cooperation and an important factor that I will take into account when considering whether to invite a company to enter into DPA negotiations; it also highlights whether a DPA is in the public interest in that case.*[4]

On 30 April 2019, the US Department of Justice, Criminal Division, published an updated version of its Guidance on 'Evaluation of Corporate Compliance Programs'[5] to provide prosecutors – and indirectly, corporates – with details of what is required of corporate compliance programmes for the purposes of DOJ investigations, charging decisions and potential resolution options. The DOJ referred to the Guidance (which comprises narrative and targeted questions) as a helpful checklist for corporates presenting the programme to the DOJ (as mitigation in the context of investigations or in settlement negotiations) or designing new and improved programmes.

It is understood that the current draft of the SFO's proposed guidance on self-reporting includes similar directions on corporate compliance programmes, but it remains unclear whether this will make it into the final guidance. However, including it would be consistent with the messaging coming from the SFO regarding the importance of corporate compliance.[6]

1 https://www.sfo.gov.uk/2019/04/03/fighting-fraud-and-corruption-in-a-shrinking-world/.

2 For instance, https://www.sfo.gov.uk/2014/03/26/corporate-criminal-liability-deferred-prosecution-agreements/.

3 Lisa Osofsky, SFO Director, speaking at the Royal United Services Institute in London on 3 April 2019, available at: https://www.sfo.gov.uk/2019/04/03/fighting-fraud-and-corruption-in-a-shrinking-world/.

4 ibid.

5 https://www.justice.gov/criminal-fraud/page/file/937501/download.

6 See, for example, https://www.sfo.gov.uk/2018/12/04/keynote-address-fcpa-conference-washington-dc/.

Separately, on 21 February 2019, the UK tax authority, HMRC, issued guidance on self-reporting in relation to the offence of failure to prevent the facilitation of tax evasion[7] and launched an online form to submit reports. The benefits of self-reporting are set out succinctly on the government's website and include the following:

- a self-report may assist a company that has failed to prevent the facilitation of tax evasion in providing evidence of its reasonable procedures to prevent the criminal facilitation of tax evasion (namely the defence to the corporate offence);
- it may be taken into account by prosecutors when they make a decision about prosecutions (and DPAs); and
- it may be reflected in any penalties that may be imposed.

The guidance arguably does no more than reiterate what was said in the government guidance, 'Tackling tax evasion: Government guidance for the corporate offences of failure to prevent the criminal facilitation of tax evasion'.[8] In the context of discussing the availability of DPAs for the corporate offence of failing to prevent the facilitation of tax evasion, the guidance stated: 'In order to encourage relevant bodies to disclose wrongdoing, timely self-reporting will be viewed as an indicator that a relevant body has reasonable procedures in place.'[9]

Less than a month following the latest guidance being issued, HMRC confirmed that it had opened fewer than five investigations into the corporate offence of failure to prevent the facilitation of tax evasion since the legislation came into force, while the SFO declined to state whether it had opened any.[10] It is unclear whether any of the HMRC investigations results from a self-report.

FURTHER READING

Read the Ropes & Gray chapter 'Self-Reporting to the Authorities and Other Disclosure Obligations: The UK Perspective', by Judith Seddon, Amanda Raad, Sarah Lambert-Porter, Chris Stott and Matthew Burn in GIR's *The Practitioner's Guide to Global Investigations*.

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- 'Negotiating Global Settlements: The UK Perspective', by Nicholas Purnell QC and Rod Fletcher
- 'Privilege: The UK Perspective', by Bankim Thanki QC, Tamara Oppenheimer and Rebecca Loveridge

7 https://www.gov.uk/guidance/tell-hmrc-your-organisation-failed-to-prevent-the-facilitation-of-tax-evasion#content.

8 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/672231/Tackling-tax-evasion-corporate-offences.pdf.

9 ibid. at p.13.

10 https://www.accountancydaily.co/hmrcs-first-probes-corporate-tax-evasion-facilitation.

Publication of embargoed Tesco and Sarclad (XYZ) DPAs leads to calls for anonymisation

Nicholas Purnell QC, Cloth Court Chambers, and **Rod Fletcher**, Herbert Smith Freehills

This article considers the UK's fourth deferred prosecution agreement (DPA) and highlights some implications it has for the negotiation of global settlements and for individuals facing related prosecutions.

On 10 April 2017, Sir Brian Leveson, at the time the President of the Queen's Bench Division, approved a DPA – the UK's fourth following their introduction in 2014[1] – between Tesco Stores Limited (TSL) and the Serious Fraud Office (SFO). The DPA concerned allegations that TSL had committed the offence of false accounting under section 17 of the Theft Act 1968 by allegedly falsifying the digital accounting records of TSL and Tesco Plc and draft statutory interim accounts for Tesco Plc.

Prior to the DPA being approved, the SFO had, on 9 September 2016, charged three former Tesco executives with offences of fraud and false accounting in relation to these accounting records. The DPA was finalised before the three former employees were tried and was based on TSL and the SFO having agreed, among other things, that: the three former employees were aware of, and dishonestly perpetuated, a misstatement leading up to a Tesco Plc trading update; the trading update overstated the profits for the Tesco group by £257 million; and the three former employees had therefore falsified, or concurred in the falsification of, accounts or records made for an accounting purpose.

The DPA judgment was handed down on 10 April 2017 but was embargoed pending the conclusion of the prosecution of the three former employees, owing to the risk of the details of the DPA undermining or prejudicing those proceedings. The first trial of the three former employees was abandoned after the former UK financial director suffered a heart attack. The former UK managing director and former UK food commercial director were re-tried and, on 6 December 2018, they were acquitted of all charges, after the trial judge ruled that they had no case to answer. Separately, the former UK financial director, who had been severed from the re-trial, was acquitted of all charges on 23 January 2019 after the SFO offered no evidence. The embargo on the DPA was lifted on the same day.

A DPA can only be entered into with a body corporate, not natural persons, which can raise various issues where the company and individual employees or directors are being investigated. A company may wish to enter an early settlement of UK proceedings, particularly as this may increase its prospects of concluding a global settlement. A DPA is likely to take less time than a contested trial, so the basis of the DPA will normally be determined before any trial of individuals, which creates a risk that the findings of fact will differ between the two. This risk arises whenever different people are the arbiters of fact, but it is heightened in these circumstances, as the DPA process requires close cooperation between the prosecutors and company to agree on the facts, whereas a trial is a judicially overseen adversarial process in which the jury decides any issues in dispute. Additionally, the company may not have access to the evidence of the natural persons under investigation at the time of a DPA negotiation (e.g., the enforcement agency may have requested the company not to interview the individuals or the individuals may have

1 The approved judgments relating to the DPAs are: *Serious Fraud Office v. Standard Bank PLC*, 30 November 2015, Case No. U20150854; *Serious Fraud Office v. XYZ Limited*, 11 July 2016, Case No. U20150856, *Serious Fraud Office v. Rolls-Royce plc and Rolls-Royce Energy Systems Inc*, 17 January 2017, Case No. U20170036; *Serious Fraud Office v. Tesco Stores PLC*, 10 April 2017, Case No. U20170287. The SFO concluded its fifth DPA, with Serco Geografix Limited, on 2 July 2019, which was approved by Mr Justice William Davis on 4 July 2019, Case No. U20190413.

refused to answer questions at interview, for fear of self-incrimination) and may only come to understand their position if they enter the witness box.

The Tesco and Sarclad Limited (originally anonymised as 'XYZ') cases are the only to date where the SFO has pursued charges against individuals following entry into a DPA. (The relevant individuals were outside of the jurisdiction in the Standard Bank investigation and the SFO ultimately decided not to charge any individuals in the Rolls-Royce investigation. In relation to the recent Serco DPA, a decision on whether to charge individuals is due by 18 December.[2])

As Tesco plc had publicly announced entering into the DPA, and its quantum, pursuant to its regulatory obligations as a publicly listed company, no attempt was made to anonymise its identity. The Tesco DPA was not referred to at the trials concerning the three employees, and it is difficult to see any prejudice having been caused to individuals during the trial from the fact of the DPA having been published.

Counsel for the three former employees had made representations to Leveson P, both before the DPA was approved in April 2017 and also before it was published in January 2019, that the statement of facts should be published in a form that did not identify the three former employees. Counsel argued that it would be unfair for the individuals' names and the conduct ascribed to them in the DPA to be publicly available in perpetuity when they had not been found to have committed any offence. On each occasion the request was declined, on the basis that the statement of facts had been ratified by that stage and the legislation does not address anonymity of individuals (cf. the protections afforded in US DPAs, in FCA investigations by the statutory third-party rights provisions, and in public inquiries by the 'Maxwellisation' process). Leveson P did, however, issue a short judgment at the time the DPA was published emphasising that the three former employees had been acquitted on all charges.

In the case of Sarclad, a judgment was published in July 2016 which anonymised the identity of the company as 'XYZ' to avoid prejudicing criminal proceedings against individuals arising out of the same facts. Leveson P also ordered that the judgment providing full details of the parties, the DPA and the statement of facts only be published once the proceedings against the individuals had concluded. On 16 July 2019 all three defendants were acquitted of all counts and the aforementioned documents were published.[3] As with the Tesco DPA, this has resulted in the individuals being identified in the publicly available DPA judgment (by role) and the statement of facts (by name) and said to have committed criminal offences, despite having been acquitted of all counts.

The Tesco case has led to strong calls from a wide range of practitioners and commentators that consideration be given to introducing mechanisms to protect the interests of individuals in the DPA process. The Sarclad judgment is likely to intensify these calls, and it remains to be seen how these issues will play out in the Serco matter. As this issue is likely to recur in future DPAs, it is important that an appropriate solution is found, rather than relying on ad hoc arrangements for each DPA. This is important not only to protect individuals who may be referred to in a DPA but also to uphold the integrity of the process.

2 The final DPA judgment, the DPA and undertaking in relation to Serco were published on 4 July 2019. However, the statement of facts, which is said to 'provide material by which individuals could be identified', has been embargoed until 18 December 2019 or further order, as publishing now would create 'a substantial risk of prejudice to the administration of justice in relation to any proceedings hereafter'.

3 The inherent tension between the position of the individuals and the company has already resulted in an interesting application by the individuals for judicial review of the SFO's refusal to compel the production of first account material, over which Sarclad claimed privilege, from Sarclad by pursuing breach proceedings under the DPA (*R (on the application of AL) v. Serious Fraud Office* [2018] EWHC 856). The court found that the SFO's approach to disclosure had been flawed, although the individuals' application was unsuccessful for other reasons. The judgment is likely to be relevant to whether the SFO would, in the future, accept witness proffers rather than full interview notes from a self-reporting/co-operating company, bearing in mind its need to discharge its disclosure obligations in any future prosecution of individuals.

FURTHER READING

Read the authors' chapter on 'Negotiating Global Settlements: The UK Perspective' in GIR's *The Practitioner's Guide to Global Investigations*.

See also, in the Practitioner's Guide, the chapters on:

- 'Self-Reporting to the Authorities and Other Disclosure Obligations: The UK Perspective', by Judith Seddon, Amanda Raad, Sarah Lambert-Porter, Chris Stott and Matthew Burn
- 'Co-operating with the Authorities: The UK Perspective', by Ali Sallaway, Matthew Bruce, Ben Morgan, Nicholas Williams and Ruby Hamid
- 'Individual Penalties and Third-Party Rights: The UK Perspective', by Elizabeth Robertson
- 'Publicity: The UK Perspective', by Stephen Gentle

Court of Appeal *Jimenez* decision strengthens UK taxman's long arm

Tim Bowden, Thomas Stroud and Clare Barnard

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The recent Court of Appeal case of *Jimenez v HMRC*[1] has furthered the powers of UK authorities to obtain information located outside the jurisdiction for the purposes of an investigation. The decision confirms that the United Kingdom's tax authority, HMRC, is authorised to serve a 'taxpayer notice' on a UK taxpayer resident overseas to obtain information about that individual's tax position.

Mr Jimenez, a UK national resident in Dubai, challenged the service of a notice under paragraph 1 of Schedule 36 to the Finance Act 2008 at his address in Dubai. Schedule 36 empowers HMRC to obtain information to check a person's tax position. HMRC served the notice as part of its investigation into Mr Jimenez's past and present tax position. The principal issue in the investigation is Mr Jimenez's residency, and the duration for which he was or is a UK taxpayer.

In 2017, the High Court quashed the notice sent to Mr Jimenez on the basis that Schedule 36 was silent as to its extraterritorial effect. It is a long-established general principle of English law that UK legislation is territorially limited, unless the law in question expressly provides for extraterritoriality.[2]

The Court of Appeal overturned the High Court's decision. In his leading judgment, Lord Justice Patten stated that in determining whether the powers conferred by a statute could be extraterritorial, the Court had to undertake a close examination of the interaction between (1) the relevant international law against extraterritoriality and (2) public interest considerations in favour of allowing the legislation to operate on persons outside the jurisdiction.

In weighing up these considerations, Patten LJ concluded that HMRC was authorised by paragraph 1 to serve a notice on a person outside the UK. Patten LJ noted that the purpose of Schedule 36 was to prevent tax evasion, which will often have a cross-border aspect to it, and that the subject matter of the legislation identifies a sufficient connection between the recipient of the notice (a UK taxpayer) and the jurisdiction. Patten LJ also reasoned that the strong public policy reasons for conferring effective investigatory powers on HMRC, taken together with the absence of any overt or express restriction on the geographical operation of paragraph 1, strongly suggested that Parliament intended the power to be available to investigate the UK tax position of persons resident abroad.

Patten LJ did not view the existence of mutual legal assistance arrangements that could be used by HMRC to obtain information from persons resident abroad as a bar to extraterritorial application, as mutual legal assistance agreements are more likely to have been intended to give HMRC additional powers, rather than limit the scope of its existing ones.

The Court's decision aligns with the 2018 Court of Appeal decision in *KBR*, which found that notices served pursuant to section 2(3) of the Criminal Justice Act 1987 could have extraterritorial effect provided there is a 'sufficient connection' between the overseas company and the United Kingdom.[3] In *Jimenez*, Patten LJ noted that Gross LJ's comments in KBR on public policy considerations were the 'background' against which the Court was to decide the position in *Jimenez*. Whether this will remain the relevant background for questions of extraterritoriality of public law remains to be seen; KBR has been granted leave to appeal the decision.

1 *R (on the application of Tony Michael Jimenez) v. (1) First Tier Tax Tribunal and (2) Her Majesty's Commissioners for Revenue and Customs* [2019] Civ 51.

2 *Clark v. Oceanic Contractors Inc [1983] 2 AC 130; Masri v. Consolidated Contractors International (UK) Ltd (No.4)* [2009] UKHL 43.

3 *R (on the Application of KBR Inc) v. The Director of the Serious Fraud Office* [2018] EWHC 2368 (Admin).

As in *KBR*, *Jimenez* concerned an authority seeking information from a (legal or natural) person resident abroad. It did not involve the questioning of individuals abroad, entering premises abroad or seizing foreign property, nor did it require the undertaking of any official act abroad. A failure to comply with the taxpayer notice did not lead to any criminal penalty, and did not therefore infringe the sovereignty of the state where the recipient was situated. The Court viewed the line of recent authorities, including the *KBR* case, as confirming that granting jurisdiction in such circumstances 'will not raise eyebrows' where it serves to protect a 'sufficient national interest'. The courts may be less likely to extend the jurisdictional reach of an authority's powers if they would prove more intrusive to the sovereignty of a foreign state.

The Court of Appeal decisions in both *KBR* and *Jimenez* are consistent with the recent focus of the UK government on bolstering its authorities' powers to address ever more complex multi-jurisdictional economic crime.[4] The apparent synergy between the Court's recent consistent approach of granting extraterritorial powers to UK authorities and Parliament's intention to grant enforcers' further economic crime powers will be tested if and when the KBR appeal is heard by the UK Supreme Court.

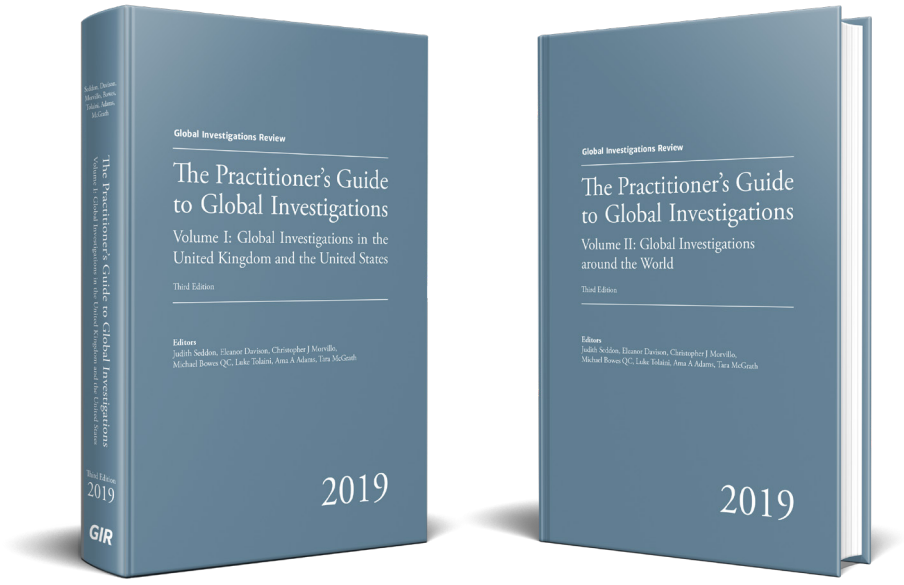
FURTHER READING

Read the Dechert chapter on 'Production of Information to the Authorities' by Hector Gonzalez, Rebecca Kahan Waldman, Caroline Black and William Fotherby in GIR's *The Practitioner's Guide to Global Investigations*.

See also in the Practitioner's Guide the chapters on:

- 'Co-operating with the Authorities: The UK Perspective', by Ali Sallaway, Matthew Bruce, Ben Morgan, Nicholas Williams and Ruby Hamid
- 'Individuals in Cross-Border Investigations or Proceedings: The UK Perspective', by Richard Sallybanks, Ami Amin and Jonathan Flynn
- 'Extraterritoriality: The UK Perspective', by Tom Epps, Mark Beardsworth and Anupreet Amole

4 The enactment of the Criminal Finances Act 2017 is one example of the UK Parliament's recent responses to international economic crime, and the UK government continues to consider further new legislation and reforms. In March 2019, the Treasury Committee published its report: Economic Crime – Anti-money laundering supervision and sanctions implementation, which made a number of recommendations to update and broaden UK legislation on economic crime. https://publications.parliament.uk/pa/cm201719/cmselect/cmtreasy/2010/2010.pdf.



The Practitioner's Guide to Global Investigations

Editors

Judith Seddon, Eleanor Davison, Christopher J Morvillo, Michael Bowes QC, Luke Tolaini, Ama A Adams, Tara McGrath

Access the full text of the third edition, volumes I and II, here
globalinvestigationsreview.com/insight/guides

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Volume I contains 40 comprehensive, authoritative chapters on investigations in the United Kingdom and the United States, allowing the reader to delve deeply into the full range of issues engaged by internal and government-led investigations. Read papers written by world-beating investigations professionals running the whole gamut of topics including risk management, beginning an internal investigation, employee rights, witness interviews, whistle-blowers, forensic accounting skills, individual penalties, data protection, monitorships, protecting corporate reputation and parallel civil litigation as well as the chapters identified in this newsletter.

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