SFO and Administrative Investigations

Safeguards under the EIO

By Anthony Wilson[1]

Introduction

The views I will express are personal and do not necessarily reflect those of the Serious Fraud Office as an organisation. I am conscious that the organisers want this series of lectures to inform the debate about safeguards in the European Investigation Order ("EIO"). This aims to replace mutual legal assistance within the EU with a single measure which enables evidence to be furnished to another Member State within 90 days. Joint Investigation Teams and most interception of telecommunications are excluded. Grounds for refusal are limited to just four:

- Immunity or privilege under national law
- National security
- Impossibility
- None availability of the necessary investigative measure in a domestic case[2]

That the material might be required for a domestic case is a reason for delay but not for refusal of execution. There are Parliamentary concerns over loss of sovereignty, effective scrutiny and proportionality[3].It has been suggested that dual criminality should be a condition of execution; that there is judicial scrutiny at the issuing stage and execution stage; and that there be the possibility of judicial challenge in the executing state as well as the issuing state. This would imply disclosure and access to files.

---

[1] The author reserves the authorship rights herein.

[2] See Art 10

[3] Hansard debate 27/7/10

In essence the Debate is focused on the issues of efficiency verses safeguards. As an enforcement authority we often find that evidence transfer is all too often delayed by unsuccessful and resource wasteful judicial reviews and the possibility of increasing the speed by which exculpatory as well as incriminating evidence can be transferred between Member States is particularly attractive.

I was taught that hard cases make bad law. But hard cases also inform discussion on the law. Therefore we have chosen to examine the subject of the SFO and administrative investigations trusting that it will inform debate on the appropriate safeguards for defence in criminal and civil investigations too.

SFO Investigations

S1 Investigations

I would suggest that there are 5 distinct investigations which the SFO can engage in. First, there is a section 1 investigation where on reasonable grounds the Director believes that offences involving serious and complex fraud have occurred in England, Wales or Northern Ireland and he considers it appropriate to investigate them: a domestic criminal investigation.

Proceeds of Crime Investigations

Secondly, there are investigations into the whereabouts of criminal proceeds under the Proceeds of Crime Act 2002. These are classed as civil by the United Kingdom legislature and the UK courts[4]but the confiscation regime is regarded as "criminal" by the ECHRC.

Assistance in Overseas Investigations

Since 1994 the Director has been able to use his powers on behalf of an overseas investigation. These are predominantly criminal investigations but on the replacement of the Criminal (International Cooperation) Act 1990 with the 2003 Act assistance with certain administrative investigations can be given too. The specific provision of the Crime (International Cooperation) Act 2003 states as follows:

> "The [UK] may arrange for evidence to be obtained… if the request for assistance in obtaining the evidence is made in connection with-

[4] Per Collins J in *R. (Director of the Assets Recovery Agency) v He and Chen* [2004]EWHC 3021 (Admin)

(a) Criminal proceedings or a criminal investigation, being carried on outside the United Kingdom,

(b) Administrative proceedings, or an investigation into an act punishable in such proceedings being carried on there,…

(2) In a case within subsection (1) (a) or (b) , the authority may arrange for the evidence to be so obtained only if the authority is satisfied-

(a) that an offence under the law of the country in question has been committed or that there are reasonable grounds for suspecting that such an offence has been committed, and

(b) that proceedings in respect of the offence have been instituted in that country or that an investigation into the offence is being carried on there.

An offence includes an act punishable in administrative proceedings[5]"

Pre investigation investigations

There are two further types of investigation I should mention. An amendment to section 2 of the Criminal Justice Act 1987 which established the SFO permits the Director to use section 2 powers in order to obtain material which would enable him to decide whether or not to launch a section 1 investigation into bribery. As the result does not definitively affect the rights of the suspects but could result in a criminal investigation being opened what safeguards are required here?

Intelligence Gathering Operations

Lastly, there is the gathering of intelligence. As you will have heard from the media there is a greater emphasis on intelligence led operations on the part of all law enforcement. This raises the some interesting questions. What are the appropriate safeguards for intel investigations and should we consider them to be "administrative", "criminal" or "civil"? Should data subjects be informed that intelligence has been gathered and have access to the file? These issues are part of a wider debate and I do not propose to address them here.

---

[5] See http://www.parliament.uk/documents/commons/lib/research/rp2003/rp03-030.pdf for the meaning of "administrative". See also J R Spencer QC and Antje du Bois-Pedain, "Approaches to strict and Constructive liability in Continental Criminal Law"

SFO and Administrative Investigations

Just before Christmas the SFO received a request for assistance from the Commission for Human Rights and Justice of Ghana ("CHRAJ") who had been tasked to enquire into allegations of bribery by a British company of Ghanaian public officials. CHRAJ did not appear to be a court or a prosecutor nor was it an international police organisation or one of the other bodies which either the Crime (International Cooperation) Act 2003 or other legislation appeared to suggest that we could assist. Again as a student I had been taught that it was improper to use a power which had been conferred for one purpose for a completely different purpose. Criminal powers were not to be used to assist civil recoveries nor should public officials use their powers partially. As CHRAJ[6] were essentially an administrative body fulfilling an administrative function could the SFO assist them in their investigation? What scrutiny should be applied in examining the grounds of their request. What interests of third parties victims and witnesses needed to be taken into account. If the request was not from CHRAJ but from a national competition authority, which might result in a substantial fine against a corporation and criminal penalties against individuals or from a Securities Regulator pursuing market abuse would the SFO being able to assist? Does s14 Crime (International Cooperation) Act 2003, coupled with s2 Criminal Justice Act 1987, provide a yes answer?[7].

Safeguards in Administrative Cases

When we come to consider defence safeguards our starting point must be Article 6 of the European Convention of Human Rights – the right to a fair trial. The standards applicable to "criminal" cases are clear. So, too, with "civil" cases. Administrative cases are somewhat different. Firstly, there is a tendency of the ECHRC to interpret "criminal" to include certain administrative cases, such as traffic violations which are classified as administrative under German law. Secondly, the ECHR concept of fair trial safeguards is informed by the French notion of administrative law and administrative courts. Professor John Bell in his textbook on French Law[8] explains in some detail their development of a separate system of courts to deal with the acts and affairs of public officials acting in a public capacity. In England the civil

---

[6] See http://www.graphicghana.com/news/page.php?news=7642

[7] The insertion of this provision derives from Art 49 of the Schengen Convention and the First Additional Protocol to the Council of Europe Convention on Criminal Matters. In the debate the example was given of traffic violations which are classified as "administrative" for example in Germany.

[8] Bell J., Boyron S., Whittaker S., Principles of French Law (Oxford University Press, 1978)

service and civil servants have historically been treated differently too but the Administrative Courts and public laws has been more concerned with acts of public bodies rather than the internal organisation and decisions of individual public servants. The English system of administrative law has never been as distinct and separate as it has been in France. The Commission is heavily influenced by the French model right down to having its own system of tribunals to deal with acts, omissions and disciplinary matters. Indeed there is a corpus of EU public law which has a tendency to incorporate the defence safeguards generally extended to criminal defendants in judicial proceedings to civil servants in administrative cases.

A good illustration of how these principles are applied and the potential difficulties and tensions created can be seen in recent decisions concerning OLAF investigations. When these cases, which are administrative, have come before the European Court, there has been a tendency to apply some of the standards applicable in cases which would be considered "criminal" by the ECHRC. A good example of this is in relation to the presumption of innocence. One aspect of this concerns publicity pre trial. In *Allenet de Ribemont v France* the applicant whilst in police custody was described by Police officers at a press conference as being the instigator of a murder. This publicity contravened the presumption of innocence. The Court rejected the argument that the presumption of innocence only applied to the judicial authority in the context of criminal proceedings and said that it applied to other public authorities where an applicant was "charged with a criminal offence". In Albert Le Compte v Belgium (1983) 5 E.H.R.R. 533 this aspect of the presumption of innocence was held to apply to disciplinary cases against doctors whether the charge was civil or criminal. In the context of Commission Staff cases the non- publication of suspicions aspect of Art 6.2 can be seen in several cases which concerned investigations by OLAF. In *Franchet and Byk v Commission* [2008] ECR II-1585 the applicants lodged a complaint seeking damages against the Commission on account of the leaking of information concerning the Eurostat investigation. The Court (not the ECHRC) regarded the leaking of the information by OLAF to be an infringement of the general principles of presumption of innocence, confidentiality and sound administration[9].

[9] The principle of the presumption of innocence requires that a person charged with an offence be presumed innocent so long as his guilt has not been proved beyond all reasonable doubt in legal proceedings. However, an institution cannot be prevented from informing the public about investigations in progress opened by the European Anti-Fraud Office (OLAF) in relation to irregularities committed within that institution. It must, however, do so with all the necessary discretion and reserve, while striking a proper balance between the interests of the officials concerned and those of the institution.

In an important article; “What’s wrong with OLAF? Accountability, Due Process and Criminal Justice in European Anti Fraud Policy” Xavier Groussot and Ziva Popov review the principles in Commission Staff Cases[10]. Strong arguments are put forward in support of the proposition that in OLAF investigations, staff the subject of those investigations should have the minimum rights to be informed of the charge against them, to have disclosure of relevant materials (access to the file), an opportunity to comment on the allegations against them and a presumption of innocence which entails confidentiality of the investigation. These are characteristic of the fair trial rights applied to criminal cases under Article 6 ECHR.

Fair Trial Rights

Article 6 reads as follows:

> 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a **fair and public hearing *within a reasonable time*** by an **independent and impartial tribunal** established by law. **Judgement shall be pronounced publicly** but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

An institution’s communication to the public of a press release, giving the public, or at least a part of the public, the impression that an official was involved in irregularities committed within that institution, whereas the culpability of the latter has not yet been proven, is not within the limits of what is justified in the interests of the service and constitutes a sufficiently serious breaches of the presumption of innocence, as the institution has no margin of discretion with respect to compliance with the obligation to respect that presumption.

Similarly, OLAF infringes the principle of the presumption of innocence where, during an investigation procedure against an official, it leaks to the press information reflecting the view that the official is guilty and encourages the public to believe in his guilt before a court has ruled in that respect. By such a leak, OLAF also breaches the obligation to maintain the confidentiality of investigations and, by provoking the disclosure in the press of sensitive elements of the investigations, acts against the interests of sound administration in so far as it enables the public at large to have access, during the investigation procedure, to confidential information of the administration. Those are sufficiently serious breaches of those rules of law, in so far as it is for OLAF to ensure that such leaks, which breach the fundamental rights of the persons concerned, such as the presumption of innocence, do not take place, as the administration has no margin of discretion with respect to compliance with that obligation.

(see paras 216-217, 219, 309-311, 314)

10

http://www.kluwerlawonline.com/toc.php?area=Journals&mode=bypub&level=6&values=Journals~~Common+Market+Law+Review~Volume+47+%282010%29~Issue+3

2. Everyone charged with a criminal offence shall be **presumed innocent** until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

(a) **to be informed promptly**, in a language which he understands **and in detail**, of the nature and cause of the accusation against him;

(b) to have **adequate time and the facilities for** the preparation of his **defence**;

(c) to **defend himself in person or through legal assistance of his own choosing** or, if he has not sufficient means to pay for legal assistance, to be given it **free when the interests of justice so require;**

(d) to **examine or have examined witnesses** against him and to obtain the attendance and examination of witnesses on his behalf **under the same conditions as witnesses against him;**

(e) to have **the free assistance of an interpreter** if he cannot understand or speak the language used in court

In the second edition of Emmerson and Ashworth on Human Rights and Criminal Justice the authors observe "Since the first edition of this book, a major characteristic of English Law reform has been the tendency to adopt legislative techniques which seek to resolve perceived procedural impediments in the criminal law by exporting its subject matter into civil proceedings." To some extent, the ECHRC have counteracted this tendency (which is not purely English) by pointing out that for the purposes of Article 6 "criminal" has an autonomous convention meaning[11] thus preventing the due process rights of the Convention from being subverted.

EIO Safeguards

I want to address now some of the suggested safeguards proposed in respect of the EIO. Some commentators have suggested that some of the safeguards from the European Evidence Warrant should be introduced such as:

[11] *Ozturk v Germany* (1984) 6 E.H.R.R. 409

Judicial Scrutiny

> " Since the instrument is intended to cover wide ranging evidence requests on a mutual recognition basis, judicial scrutiny at both the issuing and executing stage is imperative"[12]

Legal representation and rights of redress

> "Legal remedies cannot be effective unless a structure is provided in which representations can be made"[13]

Such rights might entail the possibility of damages against the executing authority, access to the investigation order in the executing State and, through judicial proceedings, to the investigation file in the requesting State.

Whilst I appreciate Justice's arguments, such rights are much more what one might expect to see in the proceedings stage of an English case rather than in the investigation stage. Of course, in Europe the investigation stage often is a judicial one - controlled by Investigating Magistrates or Prosecutors and directed by them.

Such arguments are likely to appeal to our European colleagues because of the fundamental difference in the structure and roll of judicial and police authorities. Traditionally the International Assistance Unit at the SFO has worked very successfully with its European colleagues because of the Prosecutor led nature of its investigative processes.

I would suggest that there is a case for saying that the EIO is called an **investigation order** for the very reason that the furnishing of such material is provisional only and is not determinative of the rights of the suspects. It is the requesting state that has to make a determination as to whether and what charges to prosecute. The position therefore is more analogous to the position of OLAF with respect to external investigations[14]. In addressing the

---

[12] Justice: Briefing for the UK on the European Investigation Order (http://www.justice.org.uk/images/pdfs/Briefing%20on%20the%20European%20Investigation%20Order.pdf)

[13] Justice: Briefing for the UK on the European Investigation Order (http://www.justice.org.uk/images/pdfs/Briefing%20on%20the%20European%20Investigation%20Order.pdf

[14] "(OLAF) is under no obligation to grant a Community official who is alleged to be concerned by an internal investigation – before his appointing authority adopts a final decision adversely affecting him – access to the documents forming the subject-matter of such an investigation or to those drawn up by OLAF itself on that occasion; otherwise, the effectiveness and confidentiality of the mission entrusted to OLAF and OLAF's independence could be undermined. In particular, the mere fact that part of a confidential investigation file appears to have been unlawfully communicated to the press does not in itself justify any derogation, in favour of the official alleged to be referred to, from the confidentiality of that file and of the investigation conducted by OLAF. Respect for the defence rights of the official in question is sufficiently ensured by Article 4 of Decision 1999/396, which does not require OLAF to grant access to those documents.

question of defence rights we also need to consider the needs of others involved in the investigative process such as victims and witnesses. They need an effective investigation process. One in which their confidentiality and security can be protected, particularly, during the evidence collecting stage. The case of *Franchet and Byk II*[15] is a good example of the tensions and competing interests where attempts are made to confer all the defence rights of Art 6 when the investigation is still on foot.

The General Court accepted that the applicants were entitled to be informed of and heard prior to OLAF forwarding information concerning them for investigation by the national authorities[16] but accepted that there can be exceptional cases where those defence rights can be deferred when there is a need to maintain absolute secrecy for the purpose of the investigation[17].

That approach is not inconsistent with respect for the right to good administration, provided for in Article 41 of the Charter of Fundamental Rights of the European Union, which states that that right includes the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy. Thus, access to OLAF's investigation file before the adoption of its final report may be refused, according to that principle, where respect for confidentiality so requires."

Nor is OLAF required to grant access to the final report of the investigation. None of the obligations resulting from Article 4 of Decision 1999/396 is material to that question, and, moreover, regarding the principle of *audi alteram partem*, the existence of an illegality with regard to OLAF can be established only where the final report is published or in so far as it is followed by the adoption of an act adversely affecting the person concerned. If that report has been sent to the institution and the national judicial authorities concerned, it is for that institution and those authorities, where appropriate, to give the official concerned access to that report in accordance with their own procedural rules in so far as they intend to adopt a measure adversely affecting the official on the basis of the final report.

(see paras 255-260)

[15] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005A0048:EN:HTML

[16] This was on account of the regulations applicable rather than upon any general principle of human rights

[17]" It is clear from the provisions of the first paragraph of Article 4 of Decision 1999/369 concerning the terms and conditions for internal investigations in relation to the prevention of fraud, corruption and any illegal activity detrimental to the Communities' interests that the official concerned must be informed rapidly that he may be personally implicated, as long as this would not be harmful to the investigation, and that, in any event, conclusions referring by name to an official of the Commission may not be drawn once the investigation has been completed without the interested party's having been enabled to express his views on all the facts which concern him. Failure to apply those provisions, which lay down the conditions under which observance of the rights of defence of the official concerned may be reconciled with the requirements of confidentiality inherent in any investigation of that kind, constitutes an infringement of the essential procedural requirements applicable to the investigation procedure.

It is true that Article 4 of Decision 1999/396 does not expressly concern the forwarding of information which, by virtue of Article 10(2) and (3) of Regulation No 1073/1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF), OLAF may or must, in respect of external and internal investigations respectively, forward to the national judicial authorities and therefore does not impose any obligation to

Two other safeguards are worth mentioning – territoriality and ne bis in idem. The first is a ground for refusing to execute an EIO where the requested state has already investigated a case and decided there is no criminality. The second prevents an investigation where a person has already been convicted for some offence, for example, an investigation for conspiracy to supply heroin in the UK when a person has been tried for receiving heroin in Holland.

Territoriality[18]

As to territoriality[19], our legislation was amended as a result of the Law Commission's review on double jeopardy to reflect the fact that sometimes an acquittal or, similarly, the ending of an investigation, may result because at the relevant time important evidence was not

---

inform the official concerned before such information is forwarded. However, if such information contains 'conclusions referring by name' to the official concerned, the latter must, in principle, be informed and heard with respect to the facts concerning them.

However, that article provides for an exception in cases necessitating the maintenance of absolute secrecy for the purposes of the investigation and requiring the use of investigative procedures falling within the remit of a national judicial authority. In such cases, the obligation to invite the official concerned to give his views may be deferred in agreement with the Secretary-General of the Commission. Thus, in order to defer informing the official concerned, the twofold condition consisting of the need to maintain absolute secrecy for the purpose of the investigation and the requirement to use investigative procedures falling within the remit of a national judicial authority must be satisfied. In addition, it is necessary to obtain the prior agreement of the Secretary-General of the Commission. The obligation to seek and obtain the agreement of the Secretary-General of the Commission is not a mere formality that might, in an appropriate case, be complied with at a later stage. The requirement to obtain such agreement would lose its rationale, which is to ensure that the rights of defence of the officials concerned are respected, that OLAF can defer informing them only in truly exceptional cases and that the assessment of that exceptional nature is not a matter solely for OLAF but also requires the assessment of the Secretary-General of the Commission. "

(see paras 128-130, 133, 144-146, 151)

[18] Territoriality in relation to the EIO has a wider meaning than one would normally attribute to it. For example in the EEW it relates to criminal offences which, under the law of the executing State, are regarded as having been committed wholly or for a major or essential part within its territory, or in a place equivalent to its territory; or where the criminal offences were committed outside the territory of the issuing State, and the law of the executing State does not permit legal proceedings to be taken in respect of such offences where they are committed outside that State's territory

[19] The argument is that such a provision is necessary to stop "forum shopping" i.e. a request is sent to a country where covert surveillance is easily granted when such an investigative technique would not be available in the territory in which the crime was committed and where the crime should be prosecuted.

available. This is more likely to be the case in serious cross border cases involving organised crime.

Ne Bis in Idem

As to ne bis in idem there does not yet appear to be sufficient agreement between Member States on when and in what circumstances this concept applies. Whilst all Member States agree that defendants should not face the prospect of multiple prosecutions and sentences for the same crime at national level there is insufficient agreement upon the detail of how one identifies such cases[20].

Concluding remarks

In investigating cross border cases the best safeguard for suspects, victims and witnesses alike is

- A fair and impartial investigation
- conducted with accuracy and sincerity[21],
- swiftly and with an eye to ensuring that exculpatory material is collected as well as material indicating guilt.

We all have an interest in ensuring that this is the result of the SFO's investigatory reforms.

---

[20] In England the lead cases are Connelly v D.P.P. (1964) 48 Cr. App. R. 183 and R v Lavercombe and Murray (and another). In the latter case the Court of Appeal permitted a prosecution in England for conspiracy to import cannabis following a conspiracy to possess conviction in Thailand arising out of the same incident. The Court of Appeal held that for the plea of autrefois convict to apply there had to be shown that the later charge was substantially the same in law and fact and that the "acts constituting the later charge would have been sufficient to convict on the earlier charge". There being no identity in both fact and law of the two charges autrefois convict did not apply. It was assumed, but not argued, that a foreign conviction could form the basis of the plea. As signatories to the Schengen Convention Art 54 and 57 have to be considered as to which see judgment of the Court of Justice of the EC of 11 February 2003 in the joined cases of Huseyin Gozutok and Klaus Brugge, C-187/01 and C-385/01 which prevent a conviction on the same charge in two EU Member States. See also Gardner, I. "CONCURRENT NATIONAL AND INTERNATIONAL CRIMINAL JURISDICTION AND THE PRINCIPLE "NE BIS IN IDEM**"** *International Review of Penal Law (Vol. 73)*

[21] The two "virtues" of truth according to Bernard Williams in "Truth and Truthfulness, an essay in Genealogy" (Princetown Press, 2002).