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No Need to Overreact: Protecting Privilege in the U.S. and U.K. After the ENRC Decision

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Companies around the world conduct internal investigations to detect and remediate potential wrongdoing. Lawyers typically lead these investigations under the cover of legal privilege, meaning that companies cannot be forced to produce their findings to third parties, including the government.

The recent United Kingdom case of *Serious Fraud Office v Eurasian Natural Resources Corporation Limited*[1] limits the scope of legal privilege in internal investigations. More specifically, in this case, the Court ordered ENRC to produce witness-interview summaries, forensic audit findings and draft investigative reports to the SFO to be used in the SFO's investigation and potential prosecution of ENRC for corruption charges.

Companies and their counsel are understandably nervous about the potential implications from the *ENRC* decision – they are worried that documents properly subject to privilege in the United States could be deemed not privileged in the U.K. Making matters worse, the production of any privileged documents to the U.K. government would likely be deemed as a waiver under U.S. law, thus eliminating the privilege entirely.

There remains some uncertainty in the scope of the *ENRC* decision, and it may yet be appealed, so drastic changes in the ways companies undertake internal investigations are likely premature. However, there are a few prudent steps companies and their counsel should take to increase the likelihood their documents are protected both in the U.S. and the U.K.

SFO v ENRC – Background

ENRC launched an internal investigation in early 2011 following receipt of whistleblower allegations. ENRC and its lawyers first liaised with the SFO in August 2011 and continued to do so on many occasions over the next two years. Indeed, there were over 30 meetings and discussions between ENRC or its law firm, Dechert, and the SFO between September 2011 and March 2013. These meetings were under the guise of what the SFO, rather than ENRC, deemed to be self-reporting in line with the SFO's 2009 Guidelines. Those Guidelines, which incentivized cooperation with the possibility of a civil settlement, were replaced in 2012 by those which reasserted the SFO's role as a prosecutor.

The SFO launched its own investigation in April 2013. As part of this investigation, the SFO used s2(3) Criminal Justice Act 1987 notices to compel ENRC to produce certain documents generated by accountants and lawyers during ENRC's internal investigations, including interview summaries, forensic audit reports and investigation summary materials. ENRC asserted litigation privilege and/or legal advice privilege over these documents, and the SFO took the matter to the High Court.

In reviewing the issue, the Court noted that it was a matter of first impression where criminal proceedings, as opposed to civil, represented the potential "adversarial litigation reasonably in contemplation" by the party to support a claim for litigation privilege. And, it was the parameters of litigation privilege that the Court substantially limited.

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Severe Limitation on Litigation Privilege

As set forth below, the Court denied ENRC's claim for litigation privilege with respect to each category of documents (interview summaries, third-party forensic audit materials, and investigation reports and summaries). The Court concluded that a criminal investigation is just a "preliminary step" and therefore not sufficient to qualify as "adversarial litigation." Thus, the Court found that anticipation of a criminal investigation, even an imminent one, was not enough to support a claim for litigation privilege.

From an investigation timeline perspective, this holding suggests that litigation privilege only attaches *after* criminal conduct warranting prosecution is uncovered and negotiations have broken down such that litigation is the only alternative. The Court noted that the documents at issue were created in this case *to avoid prosecution*, not for the dominant purpose of conducting or preparing to conduct litigation. The logic here seems perverse given the trend towards cooperation with regulators in the U.K., as companies can only potentially assert privilege in the U.K. where they adopt an adversarial approach with regulators from the outset. Further, now litigation privilege in criminal matters offers less protection than its civil counterpart in the U.K. This will have particular knock-on effects for relationships between companies and bodies that have a regulatory and prosecutorial function (such as the Financial Conduct Authority) where it may be even harder to determine the line between an investigation and a prosecution and at what point litigation can be properly foreseen.

Reminder of the Boundaries of Legal Advice Privilege

The only privilege claim the Court upheld was for legal advice privilege attaching to the investigative summaries and reports that lawyers presented to ENRC's Special Committee and Board. And, the Court warned that the materials in the reports would not otherwise be privileged. While the decision did not redefine legal advice privilege, it did offer reminders about the parameters of the privilege.

Specifically, the Court warned companies to carefully consider the roles of the lawyers giving the advice and drew a sharp distinction between advisors and fact finders. During the relevant period ENRC engaged a number of external law firms, and the Court distinguished Dechert's role as "information gatherers" from the advisory role of the Addleshaw Goddard solicitor who sat on ENRC's Special Investigation Committee.

Further, in addition to external counsel, the Court also revisited the role of lawyers within companies. ENRC claimed that documents created by Beat Ehrensberger, who was head of mergers and acquisitions in 2010 and became the general counsel in 2011, and sent to another colleague in 2010 could be properly withheld because they contained legal advice and Ehrensberger spent "virtually all" of his time acting as a lawyer. The Court was quick to shoot that point down, quoting ENRC's own internal documents that made clear that Ehrensberger's job description as head of mergers and acquisitions made no reference to a legal function. The Judge said even though Mr. Ehrensberger may have felt that he was acting as a lawyer, his role pre-2011 was one of a "man of business" and, as such, privilege did not attach.

The Court also suggested that companies should consider the roles of those receiving legal advice to ensure those individuals are authorized to seek and receive legal advice on behalf of the company.

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Nature of documents	Nature of ENRC's privilege claim	Ruling and reasoning
Interview Notes:Notes taken by ENRC's lawyers of investigative interviews with employees and third parties	Litigation privilege	Denied because ENRC was not "aware of circumstances which rendered litigation between itself and the SFO a real likelihood rather than a mere possibility." Even if a prosecution had been reasonably in contemplation, the documents were not created with the dominant purpose of conducting litigation. Rather, the dominant purpose was to avoid prosecution.
	Legal advice privilege	Denied because there was no evidence that any of the persons interviewed were authorized to seek and receive legal advice on behalf of ENRC, or that those communications conveyed instructions or advice. Additionally, the interview notes formed part of the preparatory work of compiling information for the purpose of enabling the corporate client to seek and receive legal advice and therefore are not privileged.
Third-Party Forensic Documents: Documents created by accountants as part of a "books-and-records" review	Litigation privilege	Denied because the dominant purpose of the documents was to meet compliance requirements or obtain accountancy advice, not to prepare to defend a prosecution.
	ENRC retains the right to claim legal advice privilege in respect of any individual document which falls within this category.	These proceedings did not determine this issue.
Investigation Summaries and Reports: Documents presented by lawyers to ENRC's Committee and Board	Litigation privilege	Denied because ENRC did not establish that at the time it was "aware of circumstances which rendered litigation between itself and the SFO a real likelihood rather than a mere possibility." Even if a prosecution had been reasonably in contemplation, the documents were not created with the dominant purpose of being used in the conduct of such litigation. Rather, the dominant purpose was to avoid prosecution.
	Legal advice privilege	Allowed because the lawyers' presentation contained legal advice even though it made reference to the investigation's factual information and findings which would not otherwise be privileged.
Third Party Forensic Documents:- Documents comprising the forensic accountants' reports referred to in letter sent to the SFO by ENRC's lawyers	Litigation privilege	Denied because the dominant purpose of the documents was to meet compliance requirements or obtain accountancy advice, not to prepare to defend a prosecution.
In-house Legal Communications: Communications between Ehrensberger and a senior ENRC executive, also referred to in the letter sent to the SFO by ENRC's lawyers	Legal advice privilege.	Denied because ENRC's own documents did not provide any evidence that Ehrens-berger's role was a legal one, and therefore legal advice privilege did not attach even if the documents contained legal advice.

See "*Rolls Settlement Illuminates SFO Expectations for Cooperation and Compliance*" (Mar. 15, 2017).

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The Findings of an Internal Investigation Should Be Privileged

Managing international risks such as bribery and corruption, money laundering and economic sanctions violations is difficult for both companies and prosecutors. These matters often involve conduct occurring on the other side of the world, and the only way to remedy wrongdoing is to find it. As such, regulators around the world emphasize the importance of internal controls, including ongoing monitoring and investigative functions. Regulators also encourage self-reporting and cooperation to incentivize companies to find and bring forward potential wrongs.

Until now, the one benefit companies received for shouldering the substantial investigative costs associated with finding and fixing potential misconduct has been that they can control if and how that information is ultimately disclosed to anyone. Companies should retain the right to make their own decisions about whether to disclose the findings of their investigations, particularly where the investigations were carefully designed by counsel for the purpose of advising their clients. While prosecutors have every right to conduct their own investigations, they should not be entitled to the work product of a company's counsel. The public policy danger is that companies will question the prudence of conducting these reviews and leave it to the prosecutors to identify the wrongdoing in the first instance.

See "*Supreme Court's Refusal to Review Crime-Fraud Case Could Have Chilling Effect on Attorney-Client Relationship*" (Nov. 19, 2014).

A Further Divide Between the U.K. and U.S. Approach to Internal Investigations and Cooperation

Prior to the ENRC decision, the privilege discussion comparing U.K. and U.S. practices focused on the impact of waiver on cooperation, not the underlying definition of privilege. Specifically, SFO representatives clearly articulated their belief that companies should waive privilege to show cooperation. They demanded access to interview summaries and witness first accounts as a means of showing cooperation, not as a matter of right. In comparison, the U.S. Attorneys' Manual expressly prohibits conditioning cooperation credit on a company's decision to waive privilege. Instead of demanding interview summaries or other privileged investigative materials, U.S. regulators leave it to counsel to determine how best to share the underlying facts, some of which may come from otherwise privileged interview summaries. For example, the U.S. Attorneys' Manual states:

> By way of example, corporate personnel are usually interviewed during an internal investigation. If the interviews are conducted by counsel for the corporation, certain notes and memoranda generated from the interviews may be subject, at least in part, to the protections of attorney-client privilege and/or attorney work product. To receive cooperation credit for providing factual information, the corporation need not produce, and prosecutors may not request, protected notes or memoranda generated by the interviews conducted by counsel for the corporation. To earn such credit, however, the corporation does need to produce, and prosecutors may request, relevant factual information – including relevant factual information acquired through those interviews, unless the identical information has otherwise been provided – as well as relevant non-privileged evidence such as accounting and business records and emails between non-attorney employees or agents. See Section 9-28.720 – Cooperation: Disclosing the Relevant Facts

This flexibility in approach and appreciation for the role of privilege in internal investigations from U.S. prosecutors has likely resulted in increased disclosure and cooperation in the U.S. as compared to the U.K.

The *ENRC* decision altered the underlying definition of privilege in the internal-investigations context. Now, in addition to considering whether a company should disclose otherwise privileged material for cooperation credit in the U.K.,

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companies must first meet a heightened burden to demonstrate the underlying privilege. At least in this case, interview summaries, third-party audit findings used in the investigation and investigation summaries are not privileged unless delivered in a presentation to the client and subject to legal advice privilege. All of these materials are not only likely subject to privilege in the U.S., but regulators are prohibited from even asking that these materials be disclosed as part of evaluating cooperation. This sharp distinction makes it challenging for companies to navigate regulator expectations in cross-border investigations.

See The FCPA Report's three-part series on protecting attorney-client privilege and work product while cooperating with the government: "*Establishing Privilege and Work Product in an Investigation*" (Feb. 1, 2017); "*Cooperation Benefits and Risks*" (Feb. 15, 2017); and "I*mplications for Collateral Litigation*" (Mar. 1, 2017).

No Need to Overreact

Those conducting internal investigations will no doubt find the ENRC decision frustrating. That said, it leaves enough room to successfully litigate future requests from the SFO for privileged documents.

Limiting the scope of internal investigations or the number of witness interviews for fear of those materials becoming subject to production demands would be an overreaction to this new development. Witness interviews are an essential part of any fact-finding exercise designed to detect and remediate wrongdoing. Employees must be afforded the opportunity to respond to evidence collected during an investigation, not only for employment law purposes, but also to ensure the investigation uncovers the true facts. In short, companies must continue to exercise their corporate duties, but they should carefully consider how to scope their investigations and interact with regulators in the U.K. and abroad.

Additionally, ENRC is appealing the decision and many are hoping the Court of Appeal takes a different approach. And in an unexpected twist adding to the confusion following the ENRC case, it has been reported (as of June 5, 2017) that the SFO itself has asserted legal privilege over its interviews with suspects in the Barclays Qatar investigation, in order to prevent third parties accessing the transcripts. This claim must be in respect of litigation privilege given that there is no legal advice being provided by an SFO investigator to a subject under investigation, which means that this assertion by the SFO appears to fly in the face of the SFO's submissions and the Court's findings in the ENRC case that the investigative stage is not adversarial. The SFO has yet to argue its case on this and will have additional claims, such as Public Interest Immunity, to try and keep these transcripts out of the hands of third parties. Whether the Court will see fit to allow the SFO to play by seemingly different rules than those it insists others play remains to be seen.

See "*Navigating Privilege and Data-Privacy Challenges in a Cross-Border Bribery and Corruption Investigation*" (May 10, 2017).

Three Ways to Protect Privilege

For now, while we wait for a decision from the U.K. Court of Appeal, companies must navigate seemingly competing and uncertain standards. There is no doubt that U.S. regulators expect and reward full and thorough investigations while respecting rightful claims to privilege in the internal investigations context. Meanwhile, companies will need to be careful to clearly articulate their claims to privilege in the U.K., while expecting pressure from regulators to waive any existing privilege. Here are a few practical tips:

1) Clearly Articulate the Bases for Privilege

One of the key criticisms of ENRC in this case is the lack of evidence submitted by ENRC to support its claim of privilege. As such, companies should clearly articulate the privilege claim and basis at the start of the investigation, including pursuant to U.S. law or other applicable jurisdictions.

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Specifically, engagement letters between external counsel and companies should clearly specify the grounds for privilege (both in the U.K. and other relevant jurisdictions). To assert litigation privilege in the U.K., companies should ensure that engagement letters clearly state that the dominant purpose of the investigation is to prepare to defend a prosecution. And, where there is no threat of prosecution at the beginning of an investigation, companies should consider how to best protect their investigation materials pursuant to legal advice privilege.

Documents produced during the investigation should similarly indicate the grounds for privilege (both in the U.K. and other relevant jurisdictions).

2) Focus on Legal Advice Privilege

Given there is more certainty in the U.K. around legal advice privilege, counsel should use interview summaries, third-party forensic audit findings, and investigation reports and summaries to provide legal advice to clients.

3) Clearly Define Roles

Companies should also be sure to clearly define at the outset who the counsel is and who the client is for purposes of reporting. The client must be a small and defined group of individuals who are able to give instructions and receive legal advice on behalf of the company.

Given that legal advice privilege does not as a general rule apply to third parties in the U.K. (such as forensic experts) the way that litigation privilege does, companies should carefully consider how these services are used and documented in the U.K. until the boundaries of litigation privilege in the criminal context are more clearly settled.

See "*Attorney-Consultant Privilege? Key Considerations for Using the Kovel Doctrine (Part One of Two)*" (Dec. 21, 2016); and *Part Two* (Jan. 18, 2017).

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[1] The Director of the Serious Fraud Office and Eurasian Natural Resources Corporation Limited [2017] EWHC 1017 (QB).

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