A question of compulsion: US requests for compelled FCA interviews

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Compelled interviews are a long-standing feature of the criminal and regulatory landscape in the UK. The Serious Fraud Office (SFO) has the power to compel persons to answer questions under section 2 of the Criminal Justice Act 1987. The Financial Conduct Authority (FCA) has a similar power under section 171 of the Financial Services and Markets Act 2000 (FSMA). Answers given in such interviews are not generally admissible as evidence against the interviewee in criminal proceedings. That reflects the primacy of the privilege against self-incrimination in criminal proceedings – a principle encapsulated by the European Court of Human Rights in UK v Saunders: "the prosecution in a criminal case [must] seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused." However, answers given in compelled interviews are admissible against the interviewee in most types of non-criminal proceedings, e.g. non-market abuse proceedings brought by the FCA before the Regulatory Decisions Committee or Upper Tribunal.

The privilege against self-incrimination is more far-reaching under US law. Under the US Constitution's Fifth Amendment, the idea of a compelled interview is anathema. A person cannot be compelled to answer questions, regardless of whether the interviewee is being questioned in a criminal or civil investigation. Whilst this distinction between the UK and US treatment of self-incrimination is a clear one, the line is sometimes blurred when the US authorities request the product of compelled interviews conducted by their UK counterparts.

These requests generally take one of two forms. The US authority may seek the product of compelled interviews which have already been conducted in the UK. Alternatively the US authority may request the UK authority to conduct a compelled interview at its behest (as envisaged by section 169 FSMA). In both scenarios the UK authorities are being asked to hand over information which the US authorities would have been unable to obtain using their domestic powers. The US authorities can thus obtain potentially incriminating material by exploiting this legal anomaly.

In the cross-border criminal context (e.g. a request from the Department of Justice (DOJ) to the SFO), the SFO will be careful to guard against prejudice to the interviewee (and any claim that it is acting incompatibly with the interviewee's Article 6 rights) by requesting an undertaking from the DOJ which upholds the privilege against self-incrimination, i.e. an undertaking that the interview transcripts cannot be used as evidence against the interviewee in any US criminal proceedings. However, an undertaking of this nature only solves part of the problem. The transcripts may be inadmissible as evidence in the US, but they can still provide valuable leads in an evolving investigation, and thus indirectly assist the US authorities in locating admissible evidence which can be used to prove their case. Whether it is wise for US investigators

to use compelled evidence in this way, and whether the suspects can claim that the investigation has become abusive or tainted as a result, are matters for US legal advice. From a UK perspective, however, the SFO will rarely hesitate in handing over compelled material to the DOJ provided the Saunders-style undertaking is in place.

The potential prejudice to a suspect may be greater in the cross-border regulatory context (e.g. a request from the Securities and Exchange Commission (SEC) to the FCA). The FCA does not need to request an undertaking from the SEC because Saunders extends the privilege against self-incrimination only as far as criminal proceedings, which is not a type of proceeding which the SEC can initiate. Thus the FCA can legitimately claim that for it to require an undertaking which upholds the privilege against self-incrimination is inapposite. In this regard it is sufficient for the FCA to presume that US law provides adequate safeguards regarding the admission as evidence in the US of material obtained compulsorily in the UK.

In this firm's experience the FCA is increasingly minded to assist the SEC in seeking to circumvent the admissibility problems created by the Fifth Amendment. The FCA will write to the relevant persons, inviting them to attend interviews voluntarily, but threatening the use of a compelled interview under section 171 FSMA if they refuse. The recipient of the letter may believe that, if ultimately he can be compelled to attend an interview, there is little point in waiting. And therein lurks the danger. By being subtly encouraged by the FCA to answer questions voluntarily, the SEC will be on stronger ground in arguing that an interviewee waived his Fifth Amendment rights, and accordingly that his answers are admissible in any US proceedings against him.

The lesson is that, on receiving such a letter from the FCA, the recipient should seek UK and US advice in order to evaluate whether he should insist on a formal statutory request for a compelled interview, which would make it more difficult for the SEC to admit the answers as evidence in US regulatory proceedings. Subject to US law advice, it may also be worth stressing at the outset of the FCA's compelled interview that the interviewee is only answering questions in light of the sanctions for refusing to do so (a potential contempt of court); that his testimony is therefore involuntary; and that it does not constitute a waiver of his Fifth Amendment rights. Taking steps such as these may serve to protect the interviewee, not only in any US regulatory proceedings, but also in the event that, further down the line, a criminal law enforcement body such as the DOJ makes a legally enforceable request for the interviewee transcripts.

Similar steps may also need to be considered in interviews conducted in the course of an internal investigation by a bank or company's lawyers. Bank or company employees are often warned, explicitly or otherwise, that to refuse to answer questions in such interviews would be in breach of their employment contracts and would lead to disciplinary consequences (including potentially dismissal). In these circumstances it would be necessary to determine whether the product of the interview, if released by the employer to the UK and US authorities in the context of a corporate self-report, would have the same legal status as a compelled interview conducted by those authorities in the exercise of their statutory powers, and accordingly whether the transcript would be admissible as evidence against the interviewee in UK or US criminal or regulatory proceedings.

On one view, an internal investigation interview is not equivalent to a compelled interview: it is simply a fact-finding exercise incorporating none of the statutory protections of SFO or FCA compelled interviews. On the other hand, it seems overly simplistic to argue that an interview is only truly "compelled" if criminal sanctions can be imposed in consequence of an interviewee's failure to comply; an internal investigation interview is hardly voluntary given the serious disciplinary consequences that may result from a refusal to attend. The status of such interviews, and their admissibility against the interviewee in criminal and regulatory proceedings, may well become the subject of judicial scrutiny in the future, particularly given the introduction of Deferred Prosecution Agreements (DPAs), which are likely to spur ever greater numbers of companies to consider the benefits of internal investigations and self-reporting.

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