

THE SFO'S APPROACH TO OVERSEAS CORRUPTION – CIVIL OR CRIMINAL?

After much criticism of the Serious Fraud Office's failure to bring any cases of overseas corruption, the last couple of months have seen its successful prosecution of Mabey & Johnson for overseas corruption in Jamaica and Ghana and its stated intention to seek the Attorney-General's consent to prosecute British Aerospace. Does this signal a new-found determination on the part of the SFO to prosecute these offences? It would appear so, but no doubt these cases will also be used by the SFO to demonstrate the full consequences of criminal investigation and prosecution in contrast to the civil outcome it states that it wishes to reach in cases where companies with an overseas corruption problem bring the matter voluntarily to the SFO's attention.

In July the SFO issued a guide to its "Approach to dealing with Overseas Corruption" in which it seeks to encourage companies (or "corporates" as the SFO refers to them) with an overseas corruption problem to self-report to the SFO. It states that "we want to settle self-referral cases...civilly wherever possible" and "the benefit to the corporate will be the prospect (in appropriate cases) of a civil rather than a criminal outcome". The possibility of a corporate apparently being able to avoid criminal proceedings by reaching a civil settlement with the SFO is controversial but is this, in fact, what the SFO are offering?

Where a corporate has corruptly obtained a contract, the corporate is liable to civil proceedings under the Proceeds of Crime Act 2002 to recover the proceeds of that unlawful conduct. The SFO has to date only dealt with one case of any type on this basis (Balfour Beatty, which related to payment irregularities in an overseas subsidiary), but the guide clearly evidences the intention of the SFO to deal with more cases in this way.

There are doubtless advantages to a corporate if it can deal with a corruption issue on a civil as opposed to a criminal basis. The guide identifies such advantages as avoiding the full

rigours of a criminal investigation, prosecution, conviction and confiscation and avoiding the mandatory debarment provisions under the EU Public Procurement Directive which would follow from conviction. However, whether the civil process is in fact an alternative to the criminal process will depend on whether the corporate ever ran the risk of prosecution in the first place.

It is well-established that, in these circumstances, a corporate will only have criminal liability if one or more of its “guiding minds” (normally a director) have personal criminal liability. Thus a corporate can only be convicted of corruption if the prosecutor is able to establish the guilt of somebody sufficiently senior within the organisation to be regarded as a guiding mind. Are the SFO offering the prospect of a civil outcome in these circumstances?

It would appear not. The SFO identify the situation where “board members of the corporate had engaged personally in the corrupt activities, particularly if they had derived personal benefit from this” as one of the exceptions to its desire to settle self-referral cases civilly. In such circumstances, it is not surprising that the SFO would choose to prosecute the corporate as well as the individual board members.

Even if a corporate self-reports and is dealt with on a civil basis, it does not follow that individuals will escape prosecution. The SFO state that “there are no guarantees here.” But, as explained, there is no inconsistency in this. Individuals involved in corruption will always be vulnerable to prosecution whereas the vulnerability of a corporate will depend on the seniority of the individual concerned. However, notwithstanding this analysis, there is always likely to be a sense that in deciding to self-report, the corporate is hanging the individuals out to dry.

The SFO is no doubt anxious to respond to the criticism which it has faced in recent years about its failure to enforce the UK’s anti-corruption regime and is keen to demonstrate that things will change. It has recently obtained guilty pleas in its first prosecution of a corporate for overseas corruption offences (Mabey & Johnson) and, according to the guide, “more will follow.” However it is clear from its guide that in relation to future enforcement the SFO will

not only be acting as prosecutor but also as regulator as it brings civil proceedings and seeks to help “produce a new corporate culture” and “bring about behavioural change”.

With one third of its staff employed in its anti-corruption unit, the SFO is preparing for increased activity in this area. Indeed, the guide states that the SFO “expect to conduct more criminal investigations and prosecutions in the future (particularly if the Bribery Bill becomes law).” This Bill was published in March 2009. It proposes the repeal of the existing patchwork of common law and statutory offences and their replacement with two general offences of bribing and being bribed, and a specific offence of bribing foreign public officials. It also proposes a new criminal offence for companies and partnerships that negligently fail to prevent bribery by persons performing services on their behalf.

Assuming the Bribery Bill becomes law, it will be interesting to see how this new criminal offence for corporates interacts with the SFO’s desire to encourage self-reporting. It is one thing to self-report corruption in circumstances where the corporate is confident that it can have no corporate criminal liability. It is a different matter if that self-report, by definition, raises the question as to whether the corporate has committed the criminal offence of negligently failing to prevent bribery. Will the SFO still be prepared to deal with the matter on a civil basis? The first cases will be awaited with interest.

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15 October 2009

