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United Kingdom Introduces New Laws and Enforcement Strategies to Prosecute and Prevent Overseas Corruption

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Following international criticism of the United Kingdom's record on prosecuting corporate corruption offences, particularly in the wake of the collapse of the criminal investigation into the British Aerospace Al-Yamamah arms deal with Saudi Arabia, the U.K. government and enforcement agencies have been taking action to increase both the detection and prosecution level in respect of this type of corporate wrongdoing.

The United Kingdom has international obligations as a signatory to the Organisation for Economic Co-operation and Development's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the "OECD Anti-Bribery Convention"), which is modelled on the United States' Foreign Corrupt Practices Act 1977 ("FCPA"), 15 U.S.C. §§ 78dd-1, et seq.. Whilst the existing anti-corruption legislation in England and Wales, which dates back over a century, was given extra-territorial effect from February 2002[1] in order to comply with the United Kingdom's obligations under the OECD Anti-Bribery Convention, the OECD has called for the United Kingdom to enact new modern anti-bribery legislation, in particular with the aim of tackling corporate offenders. New legislation is at the moment working its way through the parliamentary process and should be enacted in the near future. Meanwhile, enforcement agencies have been publicizing a new approach to tackling corruption offences.

Enforcement Agencies

In the United Kingdom, cases of large scale or systemic corruption are generally handled by the Serious Fraud Office ("SFO"), an independent government department that investigates and prosecutes serious and complex fraud and overseas corruption. The SFO has prioritized overseas corruption, and has moved significant resources into this area over the last twelve to eighteen months under a dedicated domain area. The SFO said in November 2008 that it ultimately intends to have 100 staff working in this area, almost double the number it had two years ago.[2]

The U.K. government also signalled its intention to do more to tackle corruption offences committed overseas by British companies by establishing the City of London Police Overseas Anti-Corruption Unit in 2007. This specialist unit tends to focus on smaller cases and on individual wrongdoers.

In addition, firms which are regulated by the Financial Services Authority ("FSA") may face regulatory sanctions in respect of any failures to implement adequate systems and controls to prevent bribery being used by employees to win business. In late 2008 the FSA began a review of anti-bribery and corruption systems and controls in commercial insurance broker firms. The FSA concluded in its interim findings published in September 2009 that due diligence and monitoring of third-party relationships and payments were generally very weak in the sector. In January 2009, the FSA fined a large firm £5.25 million for failing to take reasonable care to establish and maintain effective systems and controls to counter the risks of bribery and corruption associated with making payments to overseas firms and individuals.

A New Approach: Self-Reporting

Richard Alderman, who was appointed the Director of the SFO from April 2008, has during the last year initiated a high-profile publicity campaign to publicise the SFO's anti-corruption remit, in particular reaching out to those who advise corporates, such as accountants and lawyers. The SFO has also been learning from the methods used by U.S. investigators and prosecutors in this area. The U.S. Department of Justice ("DOJ") encourages corporates to disclose voluntarily suspected violations within their own organisations in return for more lenient treatment. As a result a culture of self-reporting has developed in the United States in recent years.

In July 2009 the SFO issued a guide to self-reporting for corporates.[3] The SFO is clearly aware that many suspected offences which it may have jurisdiction to investigate and prosecute under English law will also come within the scope of other enforcement agencies, notably in the United States, which has operated a robust enforcement regime against overseas corruption for many years. The SFO has said that where relevant it would expect a notification to be made to it at the same time as to the DOJ.

Other investigative agencies in the United Kingdom have required or encouraged self-reporting by corporate wrongdoers for some time. For example, the Office of Fair Trading ("OFT"), which investigates anti-trust offences such as cartels, operates an explicit leniency policy for companies who volunteer information about possible violations. A self-reporter could be granted immunity from criminal prosecution or a reduction in any fine that could be imposed. The OFT also operates a rewards policy under which it will pay financial incentives of up to £100,000 in return for information which helps it to identify and take action against illegal cartels.

The SFO is not offering this type of explicit guidance on what leniency measures will be applied, and certainly not immunity from prosecution. One difference of course is that the OFT is looking to informers to give it evidence to use against others, whereas in many cases companies self-reporting corruption issues to the SFO will be handing over evidence against only themselves and their employees.

The SFO has said it will be looking to agree on the scope of any investigation with a self-reporting organisation in advance and that, wherever possible, such an

investigation would be carried out by the corporate's external professional advisers (lawyers and accountants) at the corporate's own expense.

The incentive for a corporate to self-report issues is a combination of potentially more lenient treatment plus an opportunity to better manage resulting publicity. Conversely, there is the threat of criminal sanctions for those who fail to cooperate, including for company executives who uncover a problem within their organisation but decide not to report it. It is worth noting, in particular, that the SFO is likely to bring criminal proceedings against any individual directors or senior management whom it believes were complicit in using bribery to obtain business contracts, whether or not it brings a prosecution against the company itself. The SFO has said it may also seek Directors Disqualification Orders as a sanction against non-compliant executives.

One potential disincentive to self-reporting, which has been publicly noted by the SFO itself and by the government, is that under European Union law a company will be automatically debarred from competing for public contracts where it is convicted of a corruption offence. Whilst the SFO has said that a negotiated settlement rather than a criminal prosecution means that these mandatory debarment provisions will not apply, there is no guarantee when a company makes a voluntary disclosure that a negotiated settlement will be achievable.

The SFO has warned that in conjunction with self-reporting, it intends to be more pro-active going forward in trying to identify fraud and corruption offences, and will utilize the full range of powers available to it, including surveillance, telephone tapping and mail interception.

But how will the SFO become alerted to potential offences? In addition to general monitoring of business activities within high risk industries and regions and tip-offs from employee whistleblowers, the SFO may be alerted by a company's professional advisers. Under the Proceeds of Crime Act 2002 ("POCA") certain types of professional service providers (such as lawyers, accountants, tax advisers and bankers) have obligations to make disclosures to the relevant criminal authorities (the Serious Organised Crime Agency) of any suspicions they have of money laundering. A company which was in possession of profits made on the back of contracts obtained through bribery may well be engaged in money laundering for the purposes of this legislation.

The SFO can also use statutory powers to obtain information from third parties such as accountants and other professional advisers. Under section 2 Criminal Justice Act 1987, the SFO can require any person (whether an individual or a corporate) to provide it with any relevant documents, including confidential documents, except documents to which legal professional privilege attaches. The SFO can also require any person to answer any relevant questions, including questions about confidential matters. In certain circumstances the SFO can also apply to the court for a warrant to search residential or business premises and seize relevant documents.

A further issue to consider is that where a company has been involved in suspected corruption overseas, it may end up under investigation by enforcement agencies in multiple jurisdictions. An agreement with either the SFO or the DOJ will not protect an organisation from criminal prosecution by the other agency or by the authorities in any other jurisdiction (including, for example, the country in which the relevant activity took place). The SFO has said, however, that it will offer corporates who self-report its assistance in a settlement with other authorities where appropriate.

Civil Recovery Orders

POCA created a power for the court to grant civil recovery orders. The SFO can seek an order that specified property is recoverable (that is, liable to forfeit) on the basis that it is or represents the proceeds of criminal conduct. It would have to prove that the property itself was or represents the proceeds of unlawful conduct, but only on the balance of probabilities (the standard of proof in civil cases), rather than to the normal criminal standard of proof of beyond reasonable doubt. Thus the SFO is potentially able to apply for financial sanctions against a company or individual without first having to obtain a conviction.

The SFO has used civil recovery orders in combination with determinations of failure to comply with accounting requirements. For example, in October 2008 the SFO announced that it had agreed to a settlement payment of £2.25 million with the construction company Balfour Beatty in respect of inaccurate accounting records relating to irregular payments made by a subsidiary involved in a construction project in Egypt. Balfour Beatty self-reported the issue and co-operated fully with the investigation.

More recently, in October 2009 the SFO announced that it had agreed a civil recovery order in the amount of £4,943,648 plus costs with AMEC plc. The engineering company made a referral to the SFO in March 2008 following an internal investigation into the receipt of irregular payments made between November 2005 and March 2007 associated with a project in which AMEC was a shareholder. The SFO determined that unlawful conduct occurred in connection with the description entered into AMEC's books and records of the payments in question which amounted to failure to comply with the relevant company law requirements.[4]

Serious Crime Prevention Orders

New powers for the court to impose serious crime prevention orders on either individuals or corporate entities were introduced by the Serious Crime Act 2007 ("SCA"). The SFO has the power to apply to the court for such an order to be made. These are civil orders with the civil burden of proof (the balance of probabilities) intended for use against those involved in serious crime. Breach of the terms of a serious crime prevention order is a criminal offence. The SCA also contains a power for the SFO to petition the court for a winding-up order against a company if it breaches a serious crime prevention order imposed on it.

The potential scope of such orders is wide ranging and can include amongst other things prohibitions or restrictions on, or requirements in relation to, financial, property or business dealings or holdings, including the types of agreements to which the relevant person or entity may be a party, and the provision of goods or services and the employment of staff by the relevant person or entity.

External Monitors

As part of its settlement with the SFO, Balfour Beatty voluntarily agreed to introduce certain compliance systems, and to submit these systems to a form of external monitoring for an agreed period. AMEC also agreed to appoint an independent consultant to review improvements made to its ethics, compliance and accounting standards and report their findings to the SFO.

The imposition of an independent monitor is in itself a significant sanction, as such external monitoring may be both intrusive and expensive.

Criminal Prosecutions

At the end of 2009 the SFO achieved its first successful prosecution of a British company, Mabey & Johnson Ltd., a manufacturer of bridge equipment, which admitted using bribery to win business abroad. After pleading guilty to a series of corruption offences, on Friday 25 September 2009 the company was ordered by the court to pay £4.6 million in fines and disgorgement of profits, a figure which was previously agreed between the SFO and the company and which, after hearing evidence, the court agreed was appropriate in all the circumstances. In addition, the company undertook to pay reparations in an amount of just under £1.5 million to the affected countries. It must also pay legal costs and the costs of an external compliance monitor, estimated at around £250,000, to ensure it has appropriate systems and controls in place aimed at preventing such activities from taking place in future.

The court stressed that the fact that the company had self-reported the problem to the SFO and then cooperated as fully as possible in the investigation was the biggest mitigating factor in assessing the level of fine to be imposed. The SFO's Director, Richard Alderman, described the case as "a model for other companies who want to self report corruption and have it dealt with quickly and fairly by the SFO."[5] The court ruling does not preclude the SFO from bringing criminal charges against the company's former directors – indeed it has now been reported that in February 2010 the SFO plans to charge a former director with various criminal offences relating to false accounting and breaches of U.N. sanctions.

The City of London Police Overseas Anti-Corruption Unit had its first successful prosecution in August 2008 when the finance director of a British company pleaded guilty to bribing a Ugandan public official in relation to government contracts. In addition, the Ugandan official who accepted the bribes was arrested when he came to Britain for medical treatment and also pleaded guilty to a corruption offence.[6]

The SFO also has a remit to prosecute individuals, and in December 2009 launched its first criminal proceedings against a British executive, a former employee of a U.K.-based subsidiary of the U.S. healthcare company Johnson & Johnson, for allegedly conspiring to bribe foreign government officials to obtain business sales.

New Legislation

The U.K. government is currently pushing modern anti-bribery legislation through parliament which is designed to give the enforcement authorities further weapons with which to attack corporate misconduct. The legislation has passed through the major phase of the parliamentary scrutiny process and is expected to be enacted this year.

The proposed new legislation contains a specific offence of bribing a foreign public official in order to obtain business contracts which is closely modelled on the OECD Anti-Bribery Convention, in response to concerns that the current anti-corruption laws fail adequately to implement the Convention.

The draft legislation also contains a new corporate bribery offence of failing to prevent bribery by an employee or agent. This is to be a strict liability offence, although subject to an adequate procedures defence. The government is still considering whether a conviction for this proposed new offence would trigger the conditions for automatic debarment from public contracts under European legislation described above.

Further, under the proposed new legislation it would be possible to hold directors and senior managers individually liable if they consent to or connive at the commission of bribery offences by their organisations. Maximum penalties for individuals would be increased from a term of imprisonment of seven years to ten years, in line with other fraud offences.

There is no carve-out in the legislation for "facilitation" payments, so where payments are unlawful but small it will be a question of prosecutorial discretion as to whether a case should be brought. The government has said that businesses should be aware that the continued practice of making facilitation payments carries with it the risk of prosecution. The government has stated expressly, however, that it does not intend that the new legislation should be used to penalise the legitimate and proportionate use of corporate hospitality to establish or maintain good relations with prospective customers.[7]

Of course the new legislation would apply only to offences committed after it was enacted. Since there is often a significant time lag on investigating these types of offences, the SFO will in many cases still be forced to bring prosecutions under the law as it currently stands for some time going forward.

Conclusion

The move to target corporate wrongdoers in the proposed new anti-bribery legislation and increased, and increasingly well-publicized, enforcement activity is undoubtedly a response to international scrutiny, but it is also part of a wider trend to bring corporate wrongdoing within the criminal sphere which can be seen in a range of actions, from the recent introduction of corporate criminal liability for manslaughter to the stated objective of the FSA to bring more enforcement actions for regulatory breaches and prosecutions for criminal offences such as insider dealing.

Going forward corporates will need to prioritise anti-corruption compliance training, the introduction of effective controls to prevent this type of wrongdoing by employees, and appropriate due diligence of the background and business practices of agents, suppliers and business partners to mitigate the risk of serious civil and criminal penalties.

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[1] Sections 108-109 Anti-Terrorism, Crime and Security Act 2001.

[2] Speech by Richard Alderman, Director of the SFO, given on November 18 2008 at an anti-bribery conference in London. See also U.K. Serious Fraud Office, *Approach of the Serious Fraud Office to Dealing with Overseas Corruption*, July 21 2009, page 1.

[3] U.K. Serious Fraud Office, *Approach of the Serious Fraud Office to Dealing with Overseas Corruption*, July 21 2009.

[4] Section 221 Companies Act 1985.

[5] SFO Press Release, July 10, 2009.

[6] The defendants were prosecuted under the Prevention of Corruption Act 1906.

[7] Government Response to the conclusions and recommendations of the Joint Committee Report on the Draft Bribery Bill, November 2009.