A NEW ACT, A NEW DIRECTOR, WHAT NEXT FOR THE SFO?

On 23 April 2012, David Green CB QC, started his role as the new Director of the UK's Serious Fraud Office ("SFO"), taking over from Richard Alderman. He takes over almost a year after the UK's Bribery Act came into force and at a time when there have not been any corporate prosecutions brought under it. The UK has also undergone a Phase 3 evaluation on its implementation of the OECD Convention Combating Bribery of Foreign Public Officials in International Business Transactions. As discussed below, that review makes a number of recommendations.

Mr Green inherits an organisation at an important point in the UK's fight against international corruption and at a time when the future role and direction of the SFO is still being considered. The UK's National Crime Agency ("NCA"), a new FBI-style government body, is due to be formed in 2013 and is intended to, *inter alia*, improve the UK's response to serious and organised crime. One of the commands will be the Economic Crime Command, which will have its own operational ability to conduct investigations, including cases with an international dimension. There is therefore clearly the risk of overlap with activities of the SFO in the fight against international corruption. There has even been consideration that the SFO could be subsumed within the NCA, but for now its independent status as the principal agency for investigating and prosecuting international corruption remains.

The key question is whether a change of director will mean a difference of approach at the SFO and whether the SFO will continue to take a pragmatic view about some of the difficulties created by the Bribery Act.

When Mr Alderman arrived at the SFO, the UK's track record of combating international corruption was poor and was subject to criticism by the OECD. Since then, a number of companies have been prosecuted and the SFO has reached civil settlements with a number of others. Individuals have also been subject to prosecution and conviction. Over that period, the SFO has also developed guidance on self-reporting and a number of its current cases flow out of self-reports. In its latest evaluation of the UK, the OECD was more complimentary of the steps which had been taken. However, concerns were expressed about the SFO's publicly stated policy that where a company self-reports, it will look to resolve those cases civilly wherever possible.

The new Director has already gone on public record that he wishes to re-balance the relationship between prosecution and civil settlements. He has said that the SFO is primarily a crime-fighting agency and that if a company self-reports it might well be prosecuted.

One of the reasons why civil settlements have been preferred has been because of the consequences of a corporate conviction for corruption under EU procurement rules. This leads to mandatory debarment. A civil settlement does not carry that risk, although it could lead to debarment under the discretionary rules in place under those same procurement rules. Unsurprisingly, the new Director is in favour of the proposals for US-style deferred prosecution agreements, which would avoid a mandatory ban imposed on any company and would therefore make reaching a resolution on a criminal basis much easier. Combined with the increased ease of prosecuting companies under the new "adequate procedures" offence under the Bribery Act, it appears that going forward, companies can expect a tougher stance from the SFO with increased risk of a criminal resolution, even if they self-report.

The OECD Working Group made a number of other recommendations in its Phase 3 report which if implemented by the SFO could have a negative impact on companies and may reverse some of the more pragmatic approaches taken to the Bribery Act. They could also have an impact on how the SFO deals with cases going forward.

Test for prosecution

Before a prosecution can be brought, a prosecutor has to consider the case against the criteria contained in the Code for Crown Prosecutors. That means that even if there is sufficient evidence to justify a prosecution, a prosecutor has to consider whether it is in the public interest for a prosecution to be brought. One of the current factors which a prosecutor can take into account is the risk of mandatory exclusion under the EU procurement regime. The regime states that any company convicted of corruption must be barred from EU public procurement contracts for an unlimited period. The OECD Working Group considered that having regard to this risk in deciding whether to prosecute was not compatible with the OECD Convention and should be removed as part of the test.

Given the new Director's stated stance to bring more prosecutions, it will be interesting to see whether the Code is amended or whether less weight is given to this factor.

Self-reporting and civil resolution

The previous Director had publicly stated that where a company came forward and made a voluntary disclosure, it would then seek to resolve the case without a prosecution wherever possible.

The OECD Working Group had concerns that such an approach meant that the UK was not ensuring that companies guilty of corruption faced sanctions which were sufficiently effective, proportionate and dissuasive, in accordance with Article 3 of the Convention. As a result, they have recommended that the SFO re-consider that approach.

The OECD Working Group also had concerns that "credit" was being given for self-reporting, even in cases where the SFO or the police were already investigating.

Again, the comments by the new Director suggest that a civil resolution, even for a company which self-reports will not be the default option. We expect, with the advent of deferred prosecution agreements, that such agreements may become the preferred resolution in such cases.

Clearly the new Director's hand is strengthened by the Bribery Act and the new section 7 offence, which makes prosecuting a company easier.

Publicity - Civil Settlements

Of equal concern to companies may be the prospect that there may be much more disclosure of the underlying facts when reaching a civil resolution with the SFO. The SFO has come under criticism ever since the first civil recovery case involving Balfour Beatty. Comments were made that this was not public justice but private justice. The OECD Working Group commented that more information should be made public when a civil settlement is agreed. Of course, that will increase the risk of civil litigants using the disclosure in those proceedings as a basis for further claims against the company.

Disgorgement of dividends

When the Bribery Bill was passing through Parliament and before the Guidance was published, a number of persons felt that the new "adequate procedures" offence would mean that UK companies and those doing business in the UK would have to roll out their compliance policies across all subsidiaries or otherwise face the risk of prosecution under section 7 of the Bribery Act if an overseas subsidiary paid a bribe. The Guidance, correctly, clarified that not all subsidiaries will fall within the definition of an "Associated Person" for the purposes of the section 7 offence, as the mere payment of a dividend was not a "service."

This potentially left a significant lacuna under the Act, a fact which has not been lost on the SFO or the OECD Working Group. However, a recent case in which the author was involved went some way to filling that lacuna. An innocent parent company which had not committed any wrongful act was pursued by the SFO with respect to the tainted dividends it had received from a subsidiary which had engaged in corruption. The SFO's argument was that the parent company had received criminal property and that whilst it was an innocent recipient of those funds such that it could not be prosecuted, nevertheless it was liable under the UK's civil recovery regime to disgorge that element of the dividends which was tainted by corruption. It settled the case with the SFO paying over a proportion of the dividends received.

Going forward, this means that private equity funds, parent companies and others with equity stakes in overseas companies need to be concerned about the risk of disgorgement proceedings in the UK.

Joint Ventures

In addition to the debate about the extent to which subsidiaries are "associated persons" of their parent companies, a similar point arises as regards joint ventures. However, joint ventures pose other problems because the UK party may not have control such that they can insist on the joint venture implementing "adequate procedures." As a result, the SFO has commented that where companies are locked into detailed contractual arrangements which prevent them from taking all the necessary compliance steps, prosecution may be less likely. On the other hand, new joint ventures are expected to reflect the anti-corruption culture the SFO is expecting to see. The OECD Working Group was critical of this approach and has recommended that the Act should apply equally to pre-existing and new joint ventures. However, this overlooks the issue of whether a joint venture is an "associated person" in any event.

Facilitation payments

These were illegal under the previous legislation and remain unlawful under the Bribery Act. The SFO has said that although facilitation payments were unlawful under the previous legislation, given the scale of the problem and the broader corporate criminal liability under the Act, a period of adjustment is required. It has indicated that it is unlikely to prosecute a true facilitation payment if the company is working towards a zero tolerance policy in a reasonable time. However, it has been unclear what constitutes a "reasonable time" and what "working towards" means. The OECD Working Group has recommended that criteria should be developed.

Of course, what should be remembered is that the SFO's approach is not consistent with what the Bribery Act says, and is more akin to a comment about how prosecutorial discretion will be exercised. There therefore remains a risk that the SFO's approach will harden under its new Director.

Gifts and hospitality

Prior to publication of the Ministry of Justice's Guidance on the Bribery Act, a number of concerns were expressed about the impact the Act would have on hospitality. It came as a surprise and, with the Olympics around the corner and the corporate hospitality associated with the Olympics, a relief, that the Guidance went so far as to suggest that paying for flights to allow foreign public officials to meet with executives of a UK company in New York as a matter of mutual convenience and some reasonable hospitality for the individual and their partner such as fine dining and tickets to a sporting event, were unlikely to give rise to an inference they were bribes. The OECD Working Group expressed concern about these examples and thought it should be made clear that they were examples where there was a high risk of bribery.

What perhaps is more important to note is that the Guidance is not a safe harbour. The OECD evaluation refers to comments from the judiciary that they would make limited use of the Guidance when interpreting the Act. UK officials went further and said a company could be convicted even if it acted in accordance with the Guidance. Of course, prosecutors will take it

into account in deciding whether to launch a prosecution, but again, with a new Director promising a tougher stance, there is perhaps more uncertainty in this area as well. With the new Director promising more prosecutions, care will therefore need to be taken before blindly following the Guidance.

The SFO's advisory role

The SFO has indicated that it will provide guidance to companies involved in mergers and acquisitions and who discover bribery and corruption during the due diligence process. That guidance will include comments about what action it will take in the future. The SFO has also been prepared to give guidance on prospective future transactions outside of mergers and acquisitions. The SFO has also invited companies to discuss its approach to the adequate procedures offence.

The OECD Working Group were concerned about these practices, partly because it blurred the line between the SFO's advisory and prosecutorial role and partly due to the lack of transparency around the advice it was giving, unlike the more transparent opinion procedure operated by the US Department of Justice.

The Working Group recommended the SFO should make its advice public and it should establish transparent procedures for communicating with companies over its approach to past or future conduct. Again, it remains to be seen whether the new Director will be as willing to engage in these sorts of discussions.

Future of the SFO

The SFO's position at the centre of law enforcement's fight against corruption may also have been strengthened since this was one of the recommendations of the OECD Working Group. Concerns have been expressed in the past about the ever-shrinking budget of the SFO and whether it will have the resources to investigate and prosecute complex international corruption cases. Comments by the new Director reflect the limited budget and resources as he proposes that the SFO will have to take a "strategic" and "surgical" approach. Of course, it should not be forgotten that, unlike the US Department of Justice, the SFO has the opportunity to increase its own budget. Under existing rules, for example, it is entitled to a significant percentage of any amount "confiscated" following a successful prosecution. The UK confiscation regime considers that the benefit from corruption is the gross revenues received on tainted contracts and not the net profits. This therefore gives the SFO a real opportunity to increase its resources in the event of a successful prosecution.

Conclusions

With a new Director who is keen to return to the SFO's role of Prosecutor, it will be interesting to see whether some of the pragmatism which the SFO has adopted in the recent past will be lost. From a corporate perspective, we consider the SFO's approach in recent years to have been much better. Having handled the prosecutions of Severn Trent Plc and Mabey and Johnson,

which took place when there were different Directors at the SFO, and having dealt with the civil recovery claim against Mabey Engineering Holdings, a number of the recent initiatives gave flexibility to a process which in the past had been rigid. When Mabey and Johnson self-disclosed, it was not clear what the SFO's approach would be, unlike, by contrast, our experience when Virgin Atlantic made a disclosure to the Office of Fair Trading. It appears that there will be more uncertainty as to how the SFO will react to a corporate self-disclosure and the other issues discussed above for a while to come.

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