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"Self-Reporting" Where are we now?

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A. INTRODUCTION

1. The Serious Fraud Office ("SFO") has, according to its Director, David Green QC, "*got its mojo back*" and is actively investigating and prosecuting a large number of complex and serious cases involving fraud, bribery and corruption. In recent years the SFO has convicted at trial a number of individuals and one entity for overseas corruption under pre-Bribery Act 2010 corruption law and has convicted a number of individuals under the Bribery Act 2010[1]. The prosecution of the alleged Libor manipulators has commenced, and a number of corporate entities have been charged with corruption offences. In May 2015 the SFO stated that in the previous calendar year it had convicted 18 defendants, comprising of corporates and individuals.

2. The message now emanating from the SFO is that it is first and foremost a prosecutor of complex fraud; although it remains to be seen how many complex and lengthy investigations the SFO has the resources to handle. One option the SFO now has, to deal with cases in a speedier, less resource intense way, is to enter into a Deferred Prosecution Agreement ("DPA") with the corporate entity. The SFO has the statutory criminal prosecution. However, prior to DPAs coming into force on 24 February 2014, the SFO made clear that it did not view DPAs as an easy fix. David Green QC, stated on 14 February 2014 that although DPAs provide a "*welcome addition to the prosecutor's tool kit for use in appropriate circumstances..DPAs are not a panacea, nor are they a mechanism for a corporate offender to buy itself out of trouble*".[2] Similar sentiments have been expressed since, with Ben Morgan

[1] https://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2014/city-directors-convicted-in-23m-green-biofuel-trial.aspx

[2] http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2014/deferred-prosecution-agreements-new-guidance-for-prosecutors.aspx

the Joint Head of Bribery and Corruption at the SFO, recently stating there are no "*cosy deals, short-cuts or easy targets' to be had*".[3]

3. The process to be followed by the SFO and corporates entering into DPA negotiations is set out in Schedule 17 of the Crime and Courts Act 2013 and the accompanying DPA Code of Practice. The SFO has emphasized that it views the most important features of the DPA regime as judicial oversight and "*unequivocal cooperation from the corporate*", with prosecution remaining "*the preferred option for corporate criminality*".[4] What therefore can corporates wishing to be considered for a DPA expect from the SFO, and what is meant by "*unequivocal cooperation*"?

B. PREVIOUS APPROACHES TO CORPORATE AGREEMENTS

1. During the last seven years, the SFO has adopted different approaches to corporates wishing to cooperate with it in the hope of obtaining a favourable outcome. The SFO, whilst actively investigating and prosecuting cases, would consider entering into plea agreements with corporates, for example in the case of Mabey and Johnson[5], a case in which the author was involved. The company would plead to a lesser offence or agree with the SFO a narrow set of facts to put before the court. The reasons the SFO considered entering into these agreements were varied, and certainly any corporate wishing to be considered for a limited basis of plea would need to demonstrate cooperation with the SFO. At the time, what constituted self-reporting and cooperation was case specific and not set out in any legal guidance, but was rather left to the discretion of the SFO Case Controller, who was bound to follow the Code for Crown Prosecutors when it came to deciding whether or not to accept a limited basis of plea, and the Attorney General's Guidelines on Plea Discussion.

2. In several cases, companies offered limited pleas in England as part of a global settlement with a number of enforcement authorities. In order to encourage corporates to plead, as part of a global settlement, the SFO sought to provide corporates with some certainty as to the financial penalty that would be imposed by the English court, by presenting the court with an agreed range of financial penalties. Unfortunately, the SFO did not have the legal architecture in place on which to base these agreements and the courts expressed their displeasure at the SFO's attempt to fetter its discretion.

3. By way of example, when dealing with Innospec Ltd, the SFO entered into an agreement with a number of US authorities that were also investigating the company. As part of that agreement the SFO asked the court to approve an agreed range of penalties for the company. Lord Justice Thomas remarked when sentencing the company on 26 March 2010: *"It is clear therefore that the SFO cannot enter into an agreement under the laws of England and Wales with an offender as to the penalty in respect of the offence charged*".[6] In April 2010, the case of Dougall followed with the court specifically rejecting the SFO's recommendation that Dougall, who had cooperated with the SFO, be given a suspended sentence. The Court of Appeal remarked: *"In this jurisdiction a plea agreement or bargain between the prosecution and the defence in which they agree what the sentence*

[3] http://www.sfo.gov.uk/about-us/our-views/other-speeches/speeches-2015/ben-morgan-compliance-and-cooperation.aspx

[4] http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2014/deferred-prosecution-agreements-new-guidance-for-prosecutors.aspx

[5] http://www.sfo.gov.uk/press-room/press-release-archive/press-releases-2009/mabey--johnson-ltd-sentencing-.aspx

[6] R.v Innospec [*2010] EW Misc 7 EWCC.*

should be, or present what is in effect an agreed package for the court's acquiescence is contrary to principle.. No such agreement is envisaged in the "Guidelines on Plea Discussions" issued by the Attorney General".[7]

4. The SFO then tried a different approach, in an attempt to maintain control over the agreements it was seeking to enter into, by selecting the charges that were brought before the court. Notably, the SFO charged BAE Systems PLC ("BAE") with an offence contrary to Section 221 of the Companies Act 1985 for the company's use of an arms agent in Tanzania. BAE had already entered into a DPA with the US Department of Justice ("DOJ") and had agreed to pay a penalty of USD $400 million. The charge put in front of the English court could not trigger any European debarment provision and attracted a limited maximum financial penalty. It was clear that the plea in England was part of a settlement agreement that BAE had entered into with the SFO and the DOJ. However, this did not prevent Justice Bean from criticizing the SFO for bringing a Companies Act offence and for being "*naive in the extreme*" in describing the agent as a "*well paid lobbyist*" and for agreeing not to pursue any further investigation into any member of BAE for any conduct prior to the court hearing.

5. By 2011, the guidance that Richard Alderman published when he became the Director of the SFO, for corporates who wished to self-report, started to see results. The guidance was called "*The Approach of the Serious Fraud Office to dealing with Overseas Corruption*" and was a markedly different approach.

6. The guidance set out the procedure that the SFO would follow where a corporate self-reported incidents of corruption overseas and was issued following the publication of the De Grazia review. That review compared the SFO unfavourably with the US Attorney's Office for the Southern District of New York and the Manhattan District Attorney's Office, a local prosecutor's office[8]; and made a number of comments and recommendations about the SFO's productivity and low conviction rate.

7. The guidance stated that the SFO would seek to settle cases using its civil powers of recovery under the Proceeds of Crime Act 2002, provided certain criteria were met. In order to qualify for civil recovery, the SFO required that the wrong-doing be promptly brought to its attention, and that if the incident also came under the jurisdiction of the DOJ, then a report to the SFO should be made at the same time. The SFO also required the company to demonstrate a general commitment to resolving any issues associated with the corrupt act and to act in a transparent and open way, cooperating in any further investigation. Notably, there was no requirement for corporates to provide the SFO with the product of their internal investigations.

8. Macmillan Publishers Ltd, a case in which the author was involved, was one of the first companies to receive a civil recovery order and on 22 July 2011 was ordered to pay £11 million, in recognition of the sums it received through unlawful conduct related to its education division in East and West Africa[9]. Another company, AMEC, made a referral to the SFO in March 2008 following an internal investigation into the receipt of irregular payments and paid just under £5 million in civil recovery proceedings. The SFO acknowledged on its website that AMEC had acted promptly and responsibly in referring the case and had cooperated with the SFO's investigation into corporate irregularities.

[7] R. v. Dougall [2010] EWCA Crim 1048.

[8] http://www.sfo.gov.uk/about-us/our-policies-and-publications/operational-handbook/topics-f---j/jessica-de-grazia-final-review.aspx

[9] http://www.sfo.gov.uk/press-room/press-release-archive/press-releases-2011/action-on-macmillan-publishers-limited.aspx

9. However, this new approach by the SFO was also criticized as one that lacked transparency, and when the SFO was inspected by the HM Crown Prosecution Service Inspectorate, one of the recommendations was that the SFO needed to design and document a transparent process for deciding to pursue civil recovery, and negotiating and agreeing any consent order. It was perhaps partly a response to the criticism about the lack of transparency that had dogged the SFO, that led David Green QC, when he became director of the SFO in April 2012, to state that the SFO did not do deals and that it was first and foremost a prosecutor of serious and complex fraud, bribery and corruption.

C. THE CURRENT POSITION

1. David Green QC, six months after taking office, retracted Richard Alderman's policy on self-reporting and replaced it with two short policies, entitled '*corporate self-reporting*'10 and the '*self-reporting process'.*[11] The guidance explains that for a self-report to be taken into consideration as a public interest factor tending against prosecution, it had to form part of a "*genuinely proactive approach adopted by the corporate management team when the offending is brought to their notice*". The SFO made clear that self-reporting was no guarantee that a prosecution would not follow.[12] In addition, the SFO stated that if it used its powers under the Proceeds of Crime Act 2002, it would publish its reasons, the details of the illegal conduct and the details of the disposal.

2. It was in the context of the SFO's restated role as a prosecutor of serious and complex fraud that DPAs became available for prosecutors to use from 24 February 2014. However, the SFO has made it clear that even though it has the legal authority to enter into agreements with companies, it will only consider doing so in limited circumstances. The SFO has also reminded corporates that there is no guarantee that a self-report will prevent a criminal prosecution. The SFO Guidance on self-reporting states: "*The fact that a corporate body has reported itself will be a relevant consideration to the extent set out in the Guidance on Corporate Prosecutions*".[13]

3. The SFO has stated that there are now a range of possible outcomes for a corporate entity that discovers wrongdoing but that it is "*overwhelmingly in your best interests to engage with us early and to do so fully, honestly and with integrity*". The reasons for this, the SFO explains, are that a) it will be unimpressed if it finds out about the problem from someone else, b) if it does discover the problem from another party, prosecution is likely to follow, and c) for those who do engage with the SFO there is an opportunity to deal with a problem in something other than a traditionally adversarial way, namely through a DPA. The SFO claims that DPAs provide a structure for those wanting to resolve their criminal liability quickly and with a degree of control and certainty that would not be present in a normal criminal prosecution. It appears that civil recovery orders of the type offered to AMEC will be even harder to obtain and probably will be available only where the corporate cannot be prosecuted but has benefitted from the crime. Given the increased ease of prosecuting companies under Section 7 of the Bribery Act 2010, civil recovery orders will be rarer, for example where a parent company has received tainted dividends, as in the case of Mabey Engineering[14], a case in which the authors acted for the company.

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[10] http://www.sfo.gov.uk/bribery--corruption/corporate-self-reporting.aspx

[11] id

[12] id

[13] id

[14] http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2012/shareholder-agrees-civil-recovery-by-sfo-in-mabey--johnson.aspx

D. WHAT DOES IT MEAN TO SELF-REPORT?

1. A company that has decided that it is in its best interests to self-report must now make contact with the SFO's Intelligence Unit, which will then handle all communication going forward. The SFO guidance makes clear that this is the only point of contact for corporates. It is no longer acceptable to make contact with a Case Controller or any other senior SFO officials. Once initial contact has been made, the SFO will require a hard copy report setting out the nature and scope of any internal investigation. In addition, the SFO will require all supporting evidence "*including, but not limited to emails, banking evidence and witness accounts*".[15] It is important to note that in order to qualify as a 'self-report' the report will need to be adverse to the company making it. A report into wrong-doing by others, for example employees of the company is likely not to qualify as a self-report and the company could not therefore be considered for a DPA.[16] Therefore, the practice in the past of alerting the SFO to issues concerning employees but preserving the right to argue that, under English law, they are not sufficiently senior to trigger corporate criminal liability or that the third party was not an "Associated Party" for the purposes of the Bribery Act 2010 and that therefore there is no corporate liability under Section 7, may not be possible if full credit is to be obtained. We consider this to be a retrograde step, particularly where the SFO is expecting "early contact", perhaps before all these issues have been fully investigated and considered.

2. This is particularly harsh when one considers that there is no body of case law under the Bribery Act 2010 and therefore different interpretations may be reasonably held. Just because in due course the SFO reaches a contrary view on an untested legal point and persuades the company of its position, should not, in our view, prevent the company from being considered for a DPA because it did not volunteer that position from the outset.

E. COOPERATION

1. What does the SFO expect from a corporate body that has made the decision to self-report and wishes to inform the SFO about a problem in the hope of avoiding criminal prosecution? The SFO has stated that first and foremost it expects cooperation. Ben Morgan of the SFO has stated that it does not want to be kept in the dark while corporates carry out extensive private investigations only to present the SFO with the outcome of the internal investigation many months later.

F. INTERVIEWS

1. The SFO views investigation as its job, and has become concerned that some internal investigations "*trample over the crime scene*". The SFO expects to be engaged early and to work with the corporate in conducting the investigation. What this means in practice remains to be seen but we suspect that at a minimum the SFO would expect to be notified prior to any interviews being conducted with key witnesses. The SFO also views cooperation as extending to companies waiving privilege over "*first account witness statement as a further sign of a company's* cooperation"[17]. We are aware from previous interactions with the SFO that it is also concerned to ensure that any records of an interview are full and not a high-level summary of what was said. We therefore would expect the SFO to agree to those interviews taking place only if (a) comprehensive notes are taken; and (b) privilege in those notes is waived. Will the SFO require interviews to be tape recorded, as the FCA has done when financial

[15] http://www.sfo.gov.uk/bribery--corruption/corporate-self-reporting/self-reporting-process.aspx

[16] http://www.sfo.gov.uk/about-us/our-views/other-speeches/speeches-2014/alun-milford's-speech-to-the-global-investigations-summit.aspx

[17] David Green QC 9 June 2015, Corporate Crime and Investigations Conference, London.

institutions are conducting their own internal investigations into insider trading? Will the SFO require warnings to be given, as the FCA has done, e.g., if you mislead the company's lawyers you may be seen as attempting to mislead the FCA or now the SFO. In the past the authors have been asked to make clear to the interviewee in advance of the interview that the notes will be made available to the SFO, but managed to resist the notion of having to issue a full police caution (US Miranda equivalent).

G. CO-OPERATING WITH POSSIBLE "CO-DEFENDANTS"

1. Given the SFO's stated concerns about internal investigations that "*trample over the crime scene*", companies ought to carefully consider any substantive contact they make with individuals or entities that may become witnesses or co-defendants after a self-report has been made, as in our experience the SFO may view this contact as interfering with its SFO investigation.

H. DOCUMENT GATHERING

1. Whilst the SFO has been concerned to control the interview process so as not to prejudice its ability to investigate, we would expect the SFO to be more willing to allow the corporate to gather in its own documents, particularly if the documents are overseas as that will enhance the SFO's ability to see the full picture. Absent the company so doing, the alternative for the SFO is to use letters of request and mutual assistance agreements, which can be a slow and cumbersome process.

2. Of course, if the company is to do this, then it will likely need to ensure a proper audit trail and chain of control, in the event the documents subsequently need to be produced at a criminal trial.

I. ATTENDING SFO INTERVIEWS

1. Once a self-report has been made to the SFO in the manner set out in the guidance, it is likely that the SFO will wish to conduct interviews of key witnesses. The SFO can conduct these interviews under Section 2 of the Criminal Justice Act 1987 or under the Police and Criminal Evidence Act 1984.

2. It is now by no means certain that a corporate entity will be allowed to have its legal representative attend these interviews, even if the representative is acting for the individual and the company where there is no conflict. In May of this year a company unsuccessfully challenged the SFO's decision to exclude its lawyers from a Section 2 interview. The High Court noted that there was nothing in the relevant statutory wording that gave an interviewee the right to have legal representation in such an interview. The court further remarked that the SFO's Operational Handbook allowed the SFO to refuse an interviewee the presence of a legal adviser in an interview "with good reason"[18]. The SFO is currently in the process of revising its policy governing the interviews it conducts and it will be interesting to see, in light of this case, whether the SFO gives itself greater scope to refuse to permit the attendance of lawyers in both Section 2 and PACE interviews.

[18] R (Lord, Reynolds and Mayger [2015] EWHC 865 (Admin))

J. CONCLUSION

1. Where then does this leave a corporate that discovers wrong-doing and decides to self-report to the SFO in the hope of entering into a DPA with the SFO? In order to qualify as a genuine self-report, the approach to the SFO must be made early, and in any event before the SFO is informed of the matter from another party, such as a regulator or foreign enforcement authority. Following the self-report and any ensuing investigation, the SFO will need to be satisfied under the Joint Code of Practice issued on the use of DPAs[1] that the evidential and public interest test as set out in the Code have been met. Evidentially the SFO will need to be satisfied that "*there is a realistic prospect of conviction*" or that there would be such a prospect if the investigation continued. Therefore there must be evidence of a criminal offence having been committed or a likelihood of this evidence being gathered for a DPA to be considered.

2. If either of these tests is passed and the SFO decides that a DPA is in the public interest, the process will progress as set out in the statutory framework and the Code. In the event that terms are agreed, the DPA will be assessed by a Crown Court judge who, if satisfied will make public the terms of the DPA at a final hearing.

3. David Green QC recently stated that he is concerned that "*maybe it is not appreciated in all quarters just how high the bar is*" as far as the cooperation that is required from corporates is concerned. Although corporate entities will avoid a criminal sanction if a DPA is agreed, they must take the risk of self-reporting to the SFO and still be prosecuted, they face the risk of having to desist from conducting key interviews or waive privilege over the interviews they do conduct, they must agree to assist in the investigation and potential prosecution of employees within the company, and the court will make public the details of the improper conduct that underlies the DPA. It remains to be seen if the bar has in fact been set too high. Our experience suggests that self-reports are made less frequently now than they were before.

SUMMARY OF ISSUES

We have set out below a summary of the issues that ought to be considered by any company considering self-reporting to the SFO:

- The initial contact with the SFO will require a report setting out details of the Company's internal investigation, including supporting emails.
- The corporate making the self-report will likely have to point to evidence of its own wrong-doing to be considered as a self-report.
- The SFO will expect privilege to be waived over first account witness statements as a sign of the Company's cooperation.
- The SFO will expect to be consulted on any further interviews the corporate intends to conduct after making the self-report.
- The SFO may require interviews to be tape recorded and warnings to be given.
- The SFO may not allow a company's lawyers to attend interviews the SFO conducts after the self-report is made.
- The corporate making the self-report ought to carefully consider any substantive contact that it makes with individuals or entities that may become witnesses or co-defendants.
- Companies providing documents to the SFO ought to keep an audit trail of the document collection process.
- The SFO will require the corporate entity, as part of the DPA Agreement, to assist it in its investigating of individuals (possibly employees).
- The final DPA, as published by the court, will include details of the companies wrongdoing.

If you have any questions regarding this memorandum, please contact Peter Burrell in London (+44 20 3580 4702, pburrell@willkie.com), Paul Feldberg (+44 20 3580 4734, pfeldberg@willkie.com), or the Willkie attorney with whom you regularly work.

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