News

Case Updates

News Releases

Speeches

Statements

For news, speeches or statements published before April 2012, please see our archived sites.

Current priorities and future directions

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Matthew Wagstaff, Joint Head of Bribery & Corruption, speaking at The Lawyer's Managing Risk and Litigation 2018 Conference

Thank you very much for the opportunity to speak this morning at the opening of your conference. From my perspective, conferences such as this give prosecutors like myself a valuable opportunity to engage directly with all of you. So thank you for that opportunity.

It's an exciting time at the Serious Fraud Office. As you will all be aware, Lisa Osofsky joined us as Director towards the end of Summer this year. Since then, we've announced an expansion of our senior management team with a particular focus on strengthening our intelligence and case development function as well as our corporate services. We have recently begun recruitment for a new General Counsel. And we've been joined by Peter Pope, a partner at Jenner & Block, who is on loan to us for a year and who will be bringing his experience to bear on a number of case-related issues, especially as they relate to our relationship with US law enforcement authorities – more on that in a moment.

In terms of casework, its been a busy time there as well. You will doubtless have read of at least some our recent casework activity. In the last few months alone, there has been ENRC's succesful appeal against the High Court's ruling on legal professional privilege; the Administrative Court's ruling in our favour on the extra-territorial effect of our s.2 notices; the decision of the High Court not to grant us a voluntary bill in the Barclays case; further charges brought in connection with our Euribor investigation; the announcement of an investigation into an individual connected with Patisseries Holdings; the conviction of six men in the solar panel installation fraud and the conviction and sentencing of two former senior executives of Afren Plc for offences of fraud and money laundering. And that's just the tip of the iceberg.

So you will appreciate there is a lot happening. What I want to focus on this morning is to give you something of an overview of our current priorities and where we are likely to be heading in the months ahead.

The first thing to reiterate is that our underlying role and remit remains unchanged. As you will all know, we are charged with investigating and prosecuting cases of serious or complex fraud, bribery and corruption and associated money laundering. That remains, very clearly, our focus. And we do so through means of the "Roskill" model; bringing together investigators, lawyers, accountants and others into combined case teams with the expertise and resilience required to deal with some of the most challenging cases to come before our courts.

As you'll be aware we are only designed, and resourced, to deal with a small proportion of fraud and bribery cases – those that are the most serious and complex. As I'll touch on in further detail later, that's why it's important that we work alongside other, similar, agencies, both here and abroad. You will know, as well, that we have published a Statement of Principle which provides some further guidance as to what cases the Director will accept for investigation. That focuses on matters such as whether the apparent criminality undermines the commercial or financial interests of the UK generally or the City of London in particular; whether the actual or potential financial loss is high; whether the actual or potential economic harm is significant; whether there is a significant public interest element and whether the conduct is suggestive of a new species of fraud.

With that background, then, what are we focusing on at present? At any one time, we tend to have around fifty to sixty active cases, including those which are still at the investigation stage, as well as those where we are preparing for trial. Obviously, we will continue to progress those cases as well as take on new work, where appropriate. In addition, however, there are three specific areas that I wanted to highlight in particular this morning. They are:

- progressing cases at pace
- working collaboratively with partners
- making full use of the tools available to us.

Let me deal with each of those in turn.

First, then, **progressing cases at pace**. You don't need me to tell you that our investigations take a long time – sometimes, a *very* long time. We hear the criticism and we understand the frustrations that lengthy investigations can cause. There are, of course, good reasons why complex fraud investigations can take a long time. As our economy has become increasingly global, so too our cases have become increasingly multinational, with all the challenges which that brings in terms of gathering evidence from a range of different countries. In addition, the last decade or so has seen an exponential increase in the volume of digital data that our case teams are acquiring during the course of their investigations. We should also acknowledge that there are some things, such as court listings, over which we have relatively little influence. Nevertheless, even accepting these points, we recognise the importance of progressing our cases as quickly as possible. Lisa has made clear her commitment to getting our cases moving more quickly, especially at the investigative or pre-charge stage. That will mean case teams being strategic as to what lines of enquiry they pursue; not over investigating cases; making good use of the investigative tools that Parliament has entrusted to us; selecting charges that are sufficient to reflect the criminality alleged but that do not go beyond what is necessary; presenting our cases in as simple and as jury friendly a manner as possible and making the best use of modern technology to assist us with both the investigation and presentation of cases.

Of course, we recognise it's not always in everyone's interests for cases to be resolved quickly. There are those who are more than happy to see our cases drift and meander without resolution for years. There is, in some cases, a clear tactic of seeking to delay and distract us. My message this morning is that we will not be distracted; we will deal with delaying tactics as the merits of the case demand and we will continue to do all that we can to progress cases as quickly as we can.

Let me turn next to working **collaboratively with partners**. The key point here is that we recognise, increasingly, that working with our fellow law enforcement partners, both domestically and internationally, is a vital component of building strong and effective cases. As I've already alluded to, the nature of the crimes we investigate are such that they rarely, if ever, touch upon just a single jurisdiction. More often that not, we are investigating conduct that spans numerous jurisdictions and which requires co-operation with multiple law enforcement agencies. To be clear, this is a good thing. It is absolutely right, for example, that those suspected of criminal wrongdoing, be they corporates or individuals, are dissuaded from thinking that they can play one law enforcement authority off against another. Similarly, it is often easier and quicker to obtain evidence from overseas where the jurisdiction in question is itself investigating similar or overlapping conduct. Of course, working closely with others can also bring challenges. There is the fact that, often, we are working alongside those who may be operating in an environment with a very different legal system from our own. And there is often a need to have grown up discussions as to which jurisdiction will have primacy in relation to particular conduct or particular individuals.

Given the nature of these overlapping interests, we recognise the advantages that come from achieving global settlements with other jurisdictions wherever possible. We will look to do this in a co-ordinated and equitable way. A good example of how powerful an outcome this can be was the Rolls-Royce DPA, which involved a three way settlement between authorities in the US, Brazil and the UK. Certainly, we will look to co-ordinate enforcement action with our international partners and reach joint resolutions wherever that is possible and where it makes good sense to do so.

A key partner for us in this is the US Department of Justice. We have always worked collaboratively with the DOJ on our cases and we have recently committed to even closer working together in the months ahead. Indeed, as some of you may be aware, we currently have a DOJ secondee embedded within one of our case teams working on SFO cases.

But it's not just the DOJ that we will be working closely with. We go wherever our evidence takes us and that will mean working collobaratively with a range of international partners. On that, I ought to briefly mention Brexit. The UK is seeking a relationship with our European partners that provides for the maximum practical co-operation possible on operational issues, building on the close relations we already have with a number of relevant EU agencies. We hope and expect that this will be achieved; whatever the final outcome in terms of any deal, ongoing co-operation on operational matters will clearly be in both of our best interests.

Our domestic law enforcement relationships are also important of course. You will know that the new National Economic Crime Centre launched just earlier this month. The NECC is tasked with planning and co-ordinating operational responses across UK agencies in order to tackle economic crime more effectively and will clearly be a key partner for us in the months and years ahead. We have seconded a number of staff into the NECC so will

be able to contribute directly to its success. More generally, we continue to work closely with colleagues in the NCA and in local police forces, especially the City of London police, who are the lead force for fraud, upon whom we are heavily reliant to assist us with important operational activity such as searches of premises and arrests of suspects.

Next, I want to touch upon making best use of **the tools that are available to us**. I've said something about this already in the context of moving our cases along at pace but the point I want to make here is that we are committed to using the right tools for the right case.

One tool available to us, obviously, is *the Bribery Act* and, in particular, *the s.7 offence of failing to have adequate measures in place to prevent bribery*. Our message here is that this legislation has been highly effective. Whilst the number of prosecutions brought for this offence have been relatively few so far, it has nonetheless proven to be a powerful tool in terms of in encouraging corporates who have identifed a problem to come forward and talk to us. Unlike in non-bribery cases – where the so-called identification principle often means that those at the very top of an organisation can escape any liability for the conduct of their employees and agents – the s.7 offence bites equally on <u>all</u> corporates, large or small. This, it seems to us, is absolutely vital if we are to avoid creating perverse incentives for company directors and other senior executives to distance themselves as far as possible from the day to day operations for which they are responsible. Indeed, we have made no secret of the fact that we would like to see this model of corporate criminal liability, or something closely akin to it, apply across the economic crime lansdcape more generally.

Another important and still relatively new tool for us is the *deferred prosecution agreement.* They have long been a familiar feature in other jurisdictions, notably the US, but have only been available to prosecutors here since 2014. To date, the SFO have entered into four such agreements: three of those involved allegations of foreign bribery and one, the Tesco case, involved an allegation of fraud. The main features of the UK regime are by now pretty well known and can be stated quite briefly: they only apply to corporates as opposed to individuals; they can be begun by the prosecutor inviting the company to enter into DPA negotiations where satisfied that to do so is in the public interest; they are governed by a Code of Practice which sets out the circumstances in which a DPA will be appropriate and – unlike, say, their US counterparts – they involve a very close degree of judicial supervision. Indeed, that last point is critical. No agreement can take effect until is is endorsed by a judge and a judge will only agree to a DPA where he or she is satisfied both that it is in the interests of justice to do so and that the terms of the DPA, including any financial penalty, are fair, reasonable and proportionate. Save in exceptional circumstances, the final hearing at which the judge approves the DPA will be held in public and both the agreement and the supporting Statement of Facts are then published.

I mentioned a moment ago that a prosecutor will only invite a company into DPA negotiations if satisfied that it is in the interests of justice to do so. There are a number of factors which a prosecutor will take into account in making this determination. These include the seriousness of the predicate offending; the effectiveness of any internal compliance programme; whether or not there is a history of any similar conduct in the past; the extent to which the company has genuinely changed its corporate culture since the conduct came to light; the impact of a prosecution on innocent employees or shareholders and the extent to which the company has co-operated with our investigation. This last factor, especially, is important. Our message – endorsed by the courts – has been very clear: no co-operation means no agreement. Conversely, as the DPA Code of Conduct acknowledges,

“considerable weight” may be given to a genuinely proactive approach by a corporate’s management team when offending is brought to their attention. A good example of this, once again, is the Rolls-Royce DPA agreed in January 2017. On any view, the offending in that case was egregious in the extreme. The judge’s initial view, on reading the papers, was that if any company ought to be prosecuted, it was Rolls-Royce. What changed his mind, ultimately, was what he termed the “truly exceptional” level of co-operation that the company demonstrated, both in their initial reports to the SFO and their subsequent co-operation with our investigation.

Just before I leave this topic, I want to acknowledge that our Director has recently indicated that we are thinking whether there might be a little more that we can give to corporates and others who may be interested in terms of guidance around what co-operation looks like in the context of our assessment as to whether to invite a company into DPA negotiations. There is nothing more that I can say on that at present other than we recognise that this is a topic of interest and we are continuing to think through what that might involve.

A final tool I wanted to just briefly touch upon are *unexplained wealth orders*. These are part of a parcel of measures introduced by the Criminal Finances Act 2017. They are intended as investigative orders made to progress a civil recovery investigation and enable us to apply to the High Court for an order that requires a respondent to explain how they came to acquire identifiable assets. If there is no response, there is a rebuttable presumption that the property is recoverable property; i.e. that is in fact the proceeds of crime. As you may have read, just last month the High Court dismissed the first challenge to an unexplained wealth order, rejecting an application to overturn an order that required the applicant to explain how she could afford £22 million of property in the UK. The SFO has not yet obtained a UWO but we continue to monitor our casework and will certainly look to obtain such an order in an appropriate case.

Hopefully, that has given you something of a sense of our current priorities and our likely future direction. Thank you again for your time this morning.