

Slush push

Executive summary

- A proposed new criminal offence of bribing foreign public officials appears to conflict with the Serious Fraud Office's desire to encourage corporate self-reporting of overseas corruption problems.

In July the Serious Fraud Office (SFO) issued a guide for corporates to its approach to dealing with overseas corruption, which seeks to encourage companies with an overseas corruption problem to self-report to the government department. "We want to settle self-referral cases... civilly wherever possible," explains the guide, which adds: "The benefit to the corporate will be the prospect (in appropriate cases) of a civil rather than a criminal outcome."

While the possibility of a company apparently being able to avoid criminal proceedings by reaching a civil settlement with the SFO is a controversial issue, the real question is whether this is, in fact, what the SFO is offering.

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

There are undoubted advantages to a company if it can deal with a corruption issue on a civil as opposed to a criminal basis. The guide identifies these advantages as avoiding the full rigours of a criminal investigation, prosecution, conviction and confiscation, and avoiding the mandatory debarment provisions under the EU Public

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".



Procurement Directive that would follow on from conviction. However, whether the civil process is in fact an alternative to the criminal process will depend on whether the company ever ran the risk of prosecution in the first place.

It is well established that, in these circumstances, a company is criminally liable only if one or more of its "guiding minds" (normally, a director) has personal criminal liability. In other words, a company 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.

So is the SFO offering the prospect of a civil outcome in these circumstances? It would appear not.

The SFO identifies 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 company as well as the individual board members.

Even if a company self-reports to the SFO and is dealt with on a civil basis, it does not follow that individuals in the company will escape prosecution. The SFO states: "There are no guarantees here."

There is no inconsistency in this. Individuals involved in corruption will always be vulnerable to prosecution, whereas the vulnerability of a company will depend on the seniority of the individual concerned. Even so, there is always likely to be a sense that in deciding to self-report, a company is hanging out to dry the individuals it incriminates.

The SFO is probably keen to respond to the criticism it has faced in recent years about its failure to enforce the UK's anti-corruption regime and eager to demonstrate that things will change. It has recently obtained guilty pleas in its first prosecution of a company 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

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THE SERIOUS FRAUD OFFICE IS DANGLING THE PROSPECT OF CIVIL RATHER THAN CRIMINAL PROSECUTION FOR BUSINESSES THAT THEMSELVES REPORT INSTANCES OF OVERSEAS CORRUPTION.



IF THE BRIBERY BILL DOES BECOME LAW, IT WILL BE INTERESTING TO SEE HOW THE NEW CRIMINAL OFFENCE FOR COMPANIES INTERACTS WITH THE SFO'S DESIRE TO ENCOURAGE SELF-REPORTING.

a new corporate culture" and "bring about behavioural change".

With a 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)".

Published in March 2009, this bill proposes to repeal the existing patchwork of common law and statutory offences and replace them with two general offences of bribing and being bribed, along with 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.

If the bribery bill does become law, it will be interesting to see how the new criminal offence for companies interacts with the SFO's desire to encourage self-reporting. It is one thing to self-report corruption in circumstances where the company 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 company 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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