

Fit for purpose?

Is civil recovery effective in settling overseas corruption investigations, asks **David Corker**

The Serious Fraud Office (SFO) is increasingly using civil recovery to settle corruption investigations. On 22 July it announced that it had terminated its criminal investigation into Macmillan Publishers Ltd in connection with suspected corruption of government officials in African countries in relation to the award of contracts. This is the third settlement concluded so far this year compared to a total of two during 2009 and 2010.

Macmillan did not self-report and decided to co-operate with the SFO long after it knew that it was the target of a bribery investigation. No papers or statement of the case were published. The SFO press release indicated that the outcome was justified because it had agreed to a civil recovery order whereby it paid £11m to the Treasury (with £4m of that being routed back to the SFO). Macmillan also admitted that "such public tender processes were susceptible to improper

SFO versus other regulators

In the US, Foreign Corrupt Practices Act (FCPA) settlements are used to develop guidelines and thus assist companies seeking to avoid enforcement and improve their compliance. Unfortunately, a lack of detail about settlements of this kind has been a hallmark of the SFO's approach since 2009. Moreover, it has refused subsequent requests made under the Freedom of Information Act 2000 for disclosure about any of the deals.

This policy contrasts with that of other regulators. For example, on 21 July 2011 the Financial Services Authority (FSA) announced that it had fined a major firm of insurers, Willis Ltd, £6.9m for inadequate anti-bribery controls. The FSA set out its findings in detail concerning the company's shortcomings. In the US, the Department of Justice (DoJ) always makes fulsome disclosure of the terms of its settlements. Like the FSA, the DoJ believes that it is in

not made public, the conduct admitted cannot be readily analysed or differentiated from other enforcement actions.

The SFO has pointed out that its settlements have been affected by the actions of other regulators or brought in tandem with them on a basis which does not unduly prejudice the company affected. The danger of this approach, however, is that it can lead to inadequate UK enforcement and can marginalise the SFO. Sanctioning UK companies should rest with the UK regulator, but too often it appears that the SFO is left with the remains. In the DePuy settlement, where all the conduct was by UK nationals operating substantially from the UK, the SFO recovered £5m whereas the DoJ and Securities and Exchange Commission combined got 10 times as much.

The UK used to be criticised for an absence of enforcement outcomes. Now the criticism is of insufficient information on which to advise on regulator response with any certainty. The degree to which Macmillan's conduct differed from that of Mabey & Johnson, a company prosecuted in 2010, is a mystery.

Are criminal prosecutions history?

Recent civil settlements suggest that the SFO perceives that the UK's criminal justice system is not responsive to adequate enforcement. Part of the problem is that in criminal proceedings the sentencer cannot be accessed until late in proceedings: there are no deferred prosecution agreements and no guarantees can be given as to sentence by the prosecutor.

SFO preference for civil recovery orders is despite misgivings about their legitimacy as expressed by Thomas LJ in the *Innospec* case in April 2010. *Innospec* marks the last corporate criminal case brought by the SFO. Thomas LJ said: "It would be inconsistent with basic principles of justice for the criminality of corporations to be glossed over by a civil as opposed to a criminal sanction." Consequently, as we enter the Bribery Act enforcement era with expanded corporate criminal liability and a new corporate offence of failing to prevent bribery, the trend to civil recovery is likely to be short lived and viewed as a pragmatic "stop gap" response to apparent deficiencies in the criminal justice architecture rather than as a long term enforcement trend in settling overseas corruption cases involving companies. **NLJ**

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relationships being formed" and that "it was impossible to be sure that the awards of tenders to the company in the three jurisdictions were not accompanied by a corrupt relationship".

The SFO states that this settlement is in accordance with its settlement policy, published in July 2009. This is a surprising assertion. That policy, in essence, indicated that if a company self-reports complicity in suspected corruption and agrees to make amends, a civil settlement is likely. However, under the heading of "What happens if there is no self-referral", it states that prosecution is the appropriate outcome. However, in *Macmillan* the SFO took the view that a non self-referral case could nonetheless qualify for self-referral benefits.

the public interest and in the interests of companies to be put in a position to know how the law will be enforced against them.

Not only has there been limited factual disclosure of civil recovery cases by the SFO, their legal basis remains unclear. Civil recovery requires only admission of "unlawful conduct" and, as the papers are



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