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Waiting for a verdict

The jury is out on the SFO's new prosecution policy, says **David Corker**

The Serious Fraud Office (SFO) recently published its policy on dealing with UK companies suspected of having committed offences involving overseas corruption.

It is rare for a UK prosecutor to formulate—not to mention publish—such a crime-specific policy, let alone a policy directed at the treatment of only corporate entities. The Director of Public Prosecution's guidance on assisted suicide cases published last month was only issued as a result of the Crown Prosecution Service (CPS) being ordered to do so by the House of Lords in the *Purdy* case. Hitherto in determining whether to prosecute or not in relation to any offence, the SFO has only ever purported to apply the CPS Code for Crown Prosecutors and has not distinguished between corporate and individual suspects. Para 5.7 of the code states that where an offence is serious (and corruption is surely that) prosecution should ensue. This code, while not law, is considered by the courts as so authoritative that a prosecutor who departs from it must justify this and his decision is amenable to judicial review. See for example *R (Guest) v DPP* [2009] EWHC 594.

Policy

While it does not admit it, the SFO has decided to supplant the code and replace it with this policy insofar as companies and overseas corruption is concerned. It creates a presumption against prosecution of a delinquent company if it blows the whistle to the SFO about its knowing involvement in foreign corruption. Turning the logic of

criminal law in general and of the code in particular around, the policy announces that it is the non-prosecution of such serious crime that will best “bring about behavioural change within businesses themselves and will create new corporate cultures in which no form of corruption will be tolerated”. Many will find this assertion and the policy resting upon it difficult to accept.

Overseas corruption predominantly occurs in vulnerable and relatively poor countries and damages their development. Against this backdrop the SFO contemplates not prosecuting companies which deliberately engage in such immoral and criminal conduct, primarily because they admit this and offer to make reparation. Plainly this policy is likely to be controversial and the SFO will need to placate many who will claim that its policy

the SFO with their concerns about their company's past complicity in foreign corruption had no choice unless they wanted to risk a CPS prosecution of them for either a failure to report suspicion of money laundering or for actual laundering. This was irrespective of whether they had been involved in corruption or whether their suspicion was reasonable or not. Thus the SFO's belief about companies acting voluntarily here is a fallacy. Moreover, POCA 2002 requires such a report to be made as soon as reasonably practicable and not after a leisurely *tour d'horizon* by the board and its lawyers which the SFO suggests is acceptable.

Full investigation

After a self-report the policy contemplates that a full investigation will be undertaken. But who will conduct it? Not the SFO: “Wherever possible, this investigation

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is really little more than an opportunity for UK plc to buy its way out of criminal justice where the third world is concerned.

The basis for such a surprising assertion about the benign effects of non-prosecution from an erstwhile prosecutor is that a company which self-reports thereby demonstrates its contrition because “a decision to approach us [the SFO] is not easy for a corporate when it discovers a problem concerning overseas corruption... we appreciate that a corporate will not want to approach us unless it had decided, that there is a real issue and that remedial action is necessary”. Maybe so, but whatever the board's dilemma, if it seeks legal advice it will quickly learn that it has an extant obligation to self-report imposed by the Proceeds of Crime Act 2002 (POCA 2002). This obligation does not depend at all upon what the board considers are the issues and appropriate remedies as the SFO suggests.

The boards of Balfour Beatty and Mabey & Johnson (M&J) which approached

will be carried out by the corporate's professional advisers. This will be at the expense of the corporate.”

The fruits of the investigation including the advisers' report will, however, be supplied to the SFO; in the *M&J* case the SFO declared that if this did not happen then the SFO “would not regard the co-operation as a model of corporate transparency”. The unspoken corollary is that asserting legal privilege over the adviser's work-product could be regarded as akin to obstruction.

Privatisation

A number of other tricky issues arise from this privatisation. One can presume that the company and the fortunate lawyers and accountants who are hired by it to act as bloodhounds will be zealous in leaving no stone unturned. To that extent the SFO's and the public interest in having corruption exposed are served. But the SFO also has a wider responsibility within the criminal justice system.

This includes being concerned to ensure that privatised quasi-criminal investigations performed at its behest must be fair to suspects and that there are some proper procedural safeguards. But the policy says nothing about this; the emphasis is all on results. Such disregard is dangerous; the company might for example conclude that permitting, let alone paying for a director or employee under suspicion to have their own lawyer would be seen by the SFO as an act inimical to achieving transparency.

More dangerously, the board and its advisers may conclude that achieving maximum credit pursuant to this policy requires the delivery up of individuals to the SFO as candidates for prosecution. This can be done for example by a display of trumped-up disciplinary proceedings against employees which demarcates them

endorses discussion concerning “settlement” between the SFO and corporate criminal wrongdoer it says nothing about giving a voice in this process to the victims. Probably this is implicit. In an appendix to its Opening Note in the *M&J* case, the SFO described itself as “committed to the interests of the victims of overseas corporate corruption”. However, in common with the CPS policy in relation to when to offer a conditional caution, it would be better if the SFO committed itself in writing to consulting them. This would help offset any international concern that the policy offered preferential access to lobbyists representing UK business interests.

Possible sanctions

Bearing in mind that the policy is a corporate leniency programme and

as inevitably allegations of secret deals leading to trifling penalties will be levelled at it both domestically and internationally whenever a settlement agreement with a company is announced.

A satisfactory result?

As the *M&J* case is the first example of the policy in action—albeit that a prosecution ensued—it is worth considering whether the result was satisfactory. First, did M&J self-report, the essential condition for leniency? Only sort of; it went to the SFO in February 2008, but only after the directors realised that some of them plus the company were about to be exposed in High Court litigation by a senior ex-employee who had provided them with an advance copy of his detailed and incriminatory pleading.

Second, were the sanctions imposed effective or proportionate? According to SFO figures, the value of contracts obtained by the company through its serial corruption of civil servants in six countries is £62m. A company owned and controlled by one family who the SFO say are worth £200m. What was the financial penalty? £2.6m or 1.6% of £62m. Small wonder that the director said that this result should motivate other companies “to come and talk to us”. Surely there are plenty of bank robbers and drug traffickers who would if they could also be happy to come in to discuss paying a tax at a similar rate on their gains if they could keep the rest. No individual defendant, no matter how co-operative or remorseful could ever hope for such favourable terms to be afforded to them.

The SFO is right to be adopting a new approach to corporate crime falling within its remit. Its past performance on prosecuting companies from the Blue Arrow case in 1991 to the NHS cartel last year is dismal. But whether offering such leniency is the right course without a clearer policy on where individual suspects stand or whether it will have the outcomes the SFO predicts is debatable.

The jury is still out on whether the SFO any longer has the appetite to prosecute in the biggest cases to enable it to show that the ultimate deterrent is still a real threat. NLJ

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as the prime suspects and has the effect of compelling them to answer the “charges” at an early stage.

Alliance?

A lack of interest in individuals pervades the policy except when it deals with factors encouraging their prosecution. Remarkably the policy contemplates the SFO and the company working together as allies: “The interaction between the corporate investigation and any investigation of individuals gives rise to many issues...We can discuss these issues with the corporate and its advisers so far as it is appropriate for us to do so.” Offering the possibility of such privileged access is likely to dissuade any company from seeking advantage for itself in assisting an individual suspect prepare for his SFO interview, pursuant, for example, to a joint defence agreement. Further underlining the potential for conflict between the company and an individual, the policy in the section entitled “Settlement Discussions” envisages “discussion, where necessary, and to the extent appropriate, about individuals” between the SFO and the company when deciding what sanction should be imposed on the company.

It is striking that, while the policy

not an immunity one, what sanctions short of prosecution does the policy envisage the SFO imposing?: “The benefit to the corporate will be the prospect (in appropriate cases) of a civil rather than a criminal outcome as well as the opportunity to manage, with us, the issues and any publicity proactively.” Such civil outcomes will “have the effect of crafting effective and proportionate sanctions for this type of case”.

The policy (para 14) only provides two examples of such outcomes; civil recovery and monitoring. Whichever of these is used, there is no reference to a court, which is effectively bypassed. Thus, responsibility for determining what the public interest requires—both in terms of diversion away from a court and the appropriate sanction—rests solely with the director of the SFO. This will be a heavy responsibility in a politically charged arena as last year’s decision by the then director to halt the corruption investigation into British Aerospace and Saudi Arabia demonstrates.

Of course, the current director recognises this which explains his decision to promulgate this policy. However, the problem is that there is no opportunity for public scrutiny of his future decisions in these two regards short of a judicial review. This lack of accountability is likely to harm rather than help the reputation of the SFO