

Money talks

Should the SFO be content to be a deal maker? **David Corker** reports



The Serious Fraud Office (SFO) announced its “ground breaking global agreement” with British Aerospace (BAe) earlier this month. Under its terms, the company will pay £30m in return for the SFO terminating its prolonged investigation of it for overseas corruption. Simultaneously the SFO’s counterpart in the US, the Department of Justice (DoJ) announced that the company had agreed to pay a settlement totalling £257m.

What is striking about both announcements is that there is no mention, let alone any finding, of BAe ever being involved in corruption. A gullible reader could be led to believe that BAe’s misdemeanour in the US amounted to nothing more than a number of misrepresentations to various parts of the US government in order to win contracts and, in the UK, to a relatively trivial Companies Act offence (s 221) of possibly misleading shareholders by failing to compile accurate accounts. Such a reader might even have cause to think highly of BAe because the SFO parades the company’s corporate social responsibility credentials—the announcement says that “*ex gratia*”, ie as a favour, the company will donate most of the £30m “for the benefit of the people of Tanzania”.

To what extent does this fudge of a deal reflect badly on the SFO? Recalling that in a press statement last October, Mr Alderman the SFO’s director, committed himself to prosecuting BAe for corruption, this outcome seems disappointing for the SFO. Mr Alderman described the deal as a pragmatic solution, which underscores this. Comparing the SFO deal with the DoJ one, the latter at least extracted greater admissions of corporate criminality and compelled BAe to pay a much bigger fine.

Counting the cost

Nonetheless, the SFO can justifiably point to a number of redeeming features.

- First the quantum of BAe’s “fine”, £30m swamps what any UK regulator has hitherto prised from a multinational in relation to its complicity in overseas corruption. In 2008 Balfour Beatty paid £2.25m. In 2009 AON, Mabey &

Johnson (M&J) and AMEC paid £5m, £6m and £5m respectively. In relation to the M&J fine this was imposed by a court. This suggests that there is as yet no judicial appetite for fining companies similar sums to those which the courts have recently awarded in relation to corporate manslaughter.

- Second the SFO can take credit for its dogged perseverance. Its investigation was always deeply unpopular in Whitehall, and BAe assembled a formidable legal and PR team to defend its interests. Evidence disclosed as a result of the judicial review hearings in 2008, after the SFO dropped its investigation of BAe in relation to Saudi

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Arabia, demonstrated its determination to investigate the company despite the odds. The challenge of getting BAe to settle even for £30m should not be underestimated.

- Third, and most importantly, the legal architecture concerning overseas corporate corruption is hostile terrain for a UK prosecutor. Proving beyond doubt that the board of a company the size of BAe (as opposed to a private company like M&J) agreed to particular acts of corruption, where incriminating documents or admissions are absent and the case relies on inference, is notoriously problematic. This is why, in the Bribery Bill, the government wants to enact a new corporate offence of failure to prevent complicity in bribery to which the only defence is proof that there were “adequate procedures” to prevent it.

Impact

The important question prompted by this latest corporate-SFO deal is whether the Bill will make any significant difference. Will it provide the SFO with the necessary teeth to prosecute a multinational and eliminate

the fudges and absurdities that bedevil the presentation of these deals? The prognosis is not good. First, this new offence will not apply to individuals. The inability to prosecute a reckless director means that the deterrent is lessened. Statements in the past from the DoJ about, for example, its willingness to extradite white collar suspects from the UK in relation to Foreign Corrupt Practices Act offences had a huge salutary effect here.

Second, a lack of controls and systems offence has been tried before and did not attract interest from law enforcement agencies. Failure to comply with money laundering regulations, for example, has been an offence since 1993. No one has ever been convicted of it and there have been no more than a handful

of prosecutions. Contrast this with the FSA’s regulatory approach where plenty of firms have been fined for equivalent breaches. Will the SFO show any interest in investigating the finer points of whether or not a company had adequate controls when for whatever reason it could not prosecute it for bribery?

Failure

More fundamentally this Bill fails to create a means whereby the SFO’s discretion to settle with errant companies is subject to any form of accountability. This is desperately needed. Using the Companies Act, s 221 to get the BAe deal into court and thereby create an illusion that somehow the deal has been approved by a judge makes a mockery of our criminal justice system. BAe’s plea of guilt to this offence is pure theatre. The SFO needs a safe harbour as a bulwark against widespread disquiet that it is condoning two-tier justice, one rule for big companies, another for individuals. The public needs to know that behind SFO announcements about ground-breaking deals justice really has been done.

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