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Bribery – a UK guide to self-reporting in the light of DPAs and the new SFO policy

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Introduction

Until very recently, the Serious Fraud Office had been keen to publicise the upside of companies self-reporting incidents or suspected incidents of bribery and co-operating with any investigation launched as a result, namely more lenient treatment in the decision to prosecute and in sentencing following conviction, and the possibility of a civil rather than a criminal penalty.

A key advantage of civil recovery over a criminal fine, aside from potentially less damaging financial and public relations fallout, is the potential for avoiding a mandatory public procurement ban. A company convicted of an offence of bribery, corruption, fraud or money laundering will be subject to an automatic public procurement ban, under European law. Debarment is mandatory if a company is convicted of one of the core primary offences under the Bribery Act of offering or paying a bribe (s.1 of the Act), or bribing a foreign public official (s.6 of the Act), but it is discretionary for the corporate offence of failing to prevent bribery (s.7 of the Act).

This approach of encouraging companies to self-report, which was endorsed by the SFO's July 2009 guidance on self-reporting, "Approach of the Serious Fraud Office to dealing with Overseas Corruption" ("the 2009 Guidance"), was intended to improve the detection rates for bribery and enable the SFO to demonstrate that it was serious about bribery and corruption.

However, a report by the OECD published in March this year on the UK's progress with implementation of the OECD Anti-Bribery Convention was highly critical of the SFO's stated policy of settling self-reported cases of bribery "*civilly wherever possible*". The OECD's view was that anything less than criminal sanctions for bribery or corruption undermines the seriousness of the offence. The OECD recommended that if a company self-reports, "*it should be rewarded with a reduced penalty, not the absence of a criminal penalty*".

Against that background, there have been two very recent developments which are relevant to a decision whether or not to self-report an incident or suspected incident of bribery to the SFO, and if so, when.

- First, last month, the SFO, citing the OECD's concerns, abruptly withdrew its 2009 Guidance, replacing it with a brief statement of policy warning that "*[s]elf-reporting is no guarantee a prosecution will not follow*". The accompanying Q&A issued by the SFO at the same time said that the revised policies make it clear that "*there will be no presumption in favour of civil settlements in any circumstances*" and that the decision to prosecute in any given bribery case will be governed by the normal principles applicable to all corporate prosecutions.
- Second, the UK Ministry of Justice has now announced its commitment to press ahead with its proposals to introduce Deferred Prosecution Agreements ("DPAs") in the UK by 2014, which may go some way towards redressing the balance in favour of self-reporting and co-operation with the prosecuting authorities.

In this note, we consider the practical implications of these developments for companies considering whether or not to self-report.

Dilemma

In some respects nothing has changed for a business facing an incident or suspected incident of bribery. Should it self-report, or stay quiet in the hope that the whistle isn't blown? In seeking to resolve this dilemma, the business will want to understand the benefits and risks of self-reporting and weigh those up against the risks of saying nothing and subsequently being found out by the SFO.

Key questions that senior management will therefore want answers to are:

- whether or not the SFO, with knowledge of the misconduct, would pursue a criminal prosecution against the business?
- will self-reporting make a prosecution less likely?
- are there any other benefits of self-reporting?

Factors tending for/against prosecution

Under the SFO's revised statement of policy on corporate self-reporting ("the Revised Statement of Policy"), its decision to prosecute or not will continue to be based on the Code for Crown Prosecutors and the Guidance on Corporate Prosecutions. Assuming, on the evidence, there is a realistic prospect of conviction, the SFO says it will prosecute if it is in the public interest to do so.

The Guidance on Corporate Prosecutions states that the more serious the offence, the more likely it is for it to be in the public interest to prosecute. Indicators of seriousness include not just the value of any gain or loss, but also the risk of harm to the public, to unidentified victims, shareholders, employees and creditors and to the stability and integrity of financial markets and international trade. The impact of the offending in other countries, and not just the consequences in the UK, will also be taken into account.

The Guidance on Corporate Prosecutions lists various other factors tending for and against prosecution. The key ones are:

Factors tending in favour of a prosecution

- a history of similar conduct (including previous enforcement action) or failure to heed previous warnings, or learn from previous sanctions or charges;
- the alleged conduct being endemic in the business practices of the company;
- an ineffective compliance programme;
- failure to report the wrongdoing within a reasonable time or to reveal its full extent.

Factors tending against a prosecution

- a genuinely proactive approach adopted by management, including self-reporting, remedial action and compensation of victims. In applying this factor, the prosecutor will need to establish whether sufficient information about the operation of the company in its entirety has been supplied in order to assess whether the company has been proactively compliant. This will include making witnesses available and disclosure of the details of any internal investigation;
- lack of any previous history of similar conduct involving prior criminal, civil and regulatory enforcement actions against the company;
- a genuinely proactive and effective compliance programme, indicating that the conduct complained of is an isolated event or action by a "rogue" individual;
- availability of civil or regulatory remedies that are likely to be effective and more proportionate;
- mandatory debarment would have a disproportionately adverse consequence on the company, given the seriousness of the offence (although the OECD has recommended that this factor should be removed as it detracts from the purpose of the mandatory debarment rules which are intended to be "draconian").

The big change is in the message delivered by the SFO in the Revised Statement of Policy in relation to self-reporting.

Consequences of self-reporting under the new "regime"

The Revised Statement of Policy stresses that "*Self-reporting is no guarantee that a prosecution will not follow"* and the Q&A state that *"there will be no presumption in favour of civil settlements in any circumstances .... each case will turn on its facts"*.

It is in this respect that the SFO's stance has shifted markedly. Although there was never a guarantee in the 2009 Guidance that prosecution would not follow where a company had self-reported, the guidance explicitly referred to the SFO's intention, where possible, to settle such cases by way of civil recovery. In the Introduction to the 2009 Guidance, the SFO said *"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"*. It went on to say *"Without knowing the facts, no prosecutor can ever give an unconditional guarantee that there will not be a prosecution of the corporate. Nevertheless, we want to settle self-referral cases ...... civilly wherever possible"*. The contrast in approach and tone as compared with the Revised Statement of Policy is clear.

Delays in self-reporting will continue to count against a company: the Revised Statement of Policy specifically warns against failures to report the wrongdoing within a reasonable time of the offending coming to light, which is, as above, a public interest factor in favour of a prosecution: *"It should be borne in mind that the SFO may have information about the wrongdoing from sources other than the corporate body's own self-report. The timing of any self-report is therefore very important."*

Furthermore, under the new regime, self-reporting in and of itself will not be enough. Referring to the Guidance on Corporate Prosecutions, the SFO states that: *"for a self-report to be taken into consideration as a public interest factor tending against prosecution, it must form part of a "genuinely proactive approach adopted by the corporate management team .... including making witnesses available and disclosing the details of any internal investigation... A failure to report properly and fully the true extent of the wrongdoing [will be] a further public interest factor in favour of a prosecution."*

Indeed the new policy outlines the process to be adopted by corporate bodies and/or their advisers when self-reporting to the SFO:

1. Initial contact, and all subsequent communication, must be made through the SFO's Intelligence Unit.
2. Hard copy reports setting out the nature and scope of any internal investigation must be provided to the Intelligence Unit as part of the self-reporting process.
3. All supporting evidence including, but not limited to emails, banking evidence and witness accounts, must be provided to the SFO's Intelligence Unit as part of the self-reporting process.
4. Further supporting evidence may be provided during the course of any ongoing internal investigation.

If the company wants to have any chance of avoiding a prosecution then it will have to hand over pretty much everything in its possession (barring legally-privileged documents) that is of relevance to the matter in question.

On the other hand, it is clear from the Revised Statement of Policy that whether or not the company has self-reported still remains a factor in determining whether or not the SFO will press ahead with a criminal prosecution: "*The fact that a corporate body has reported itself will be a relevant consideration to the extent set out in the Guidance on Corporate Prosecutions.*"

However, it will be no more than just that - a relevant consideration. A company considering self-reporting needs to understand that the SFO's starting point will be that if there is, on the evidence, a realistic prospect of conviction, and if it is in the public interest, then prosecution will follow, regardless of whether the matter in question was self-reported, with little prospect of a civil settlement. This will inevitably reduce any incentive to self-report, particularly where the threat of mandatory debarment is an issue for the company in question.

Informal guidance

Also of concern is the change of approach by the SFO in the Revised Statement of Policy regarding its previous willingness to give an early indication of its likely approach in any given case and to offer informal guidance on future enforcement activity, i.e. the likelihood of a prosecution. For example, the 2009 Guidance invited companies to discuss with the SFO its approach to the adequacy of their corporate anti-bribery procedures and stated that the SFO would be prepared to give assurances in relation to the approach it would adopt where a group ("A") was proposing to take over another group ("B"), in circumstances where A had uncovered overseas bribery and corruption issues in B during the course of due diligence.

Bowing to the OECD's concerns that this informal guidance procedure could amount to a de-facto non-prosecution agreement and detract from the SFO's primary role as an enforcer, the SFO's position is now as follows: "*The SFO encourages corporate self-reporting, and will always listen to what a corporate body has to say about its past conduct; but the SFO offers no guarantee that a prosecution will not follow any such report. The SFO is primarily an investigator and prosecutor of serious and/or complex fraud, including corruption. It is not for the SFO to provide corporate bodies with advice on their future conduct*". This followed an earlier comment by the new Director of the SFO that "*corporates cannot be seen to be allowed some special kid glove treatment*".

Deferred Prosecution Agreements

The incentive for organisations to self-report, as things stand, is questionable. Even if the SFO is minded not to go down the criminal route, under current case law, as outlined by the judge in the *Innospec* case, companies entering into plea negotiations with the SFO have no guarantee that when the settlement is submitted to the court for approval, it will be upheld.

In *Innospec*, the SFO submitted a sentencing proposal to the court for approval whereby *Innospec* would be subject to a US$12.7m penalty payable in part by means of a civil recovery order and in part by means of a confiscation order. Ultimately, the court overruled the SFO and imposed a US$12.7m fine upon a criminal conviction following Innospec's guilty plea, and criticised the SFO for the suggestion that such a serious crime should be punishable by means of a civil recovery order and also for tying the court's hands in terms of the amount of the penalty to be imposed. The judge indicated that given a free rein, he would have imposed a much heftier fine, "*in the tens of millions*" and commented "*it will therefore rarely be appropriate for criminal conduct by a company to be dealt with by means of a civil recovery order; the criminal courts can take account of co-operation and provision of evidence against others by reducing the fine otherwise payable*".

Responding to the criticism of the judge in *Innospec* and, more generally to the need to encourage companies to own up to criminal conduct, the Ministry of Justice embarked on a consultation process in May 2012 in relation to Deferred Prosecution Agreements ("DPAs"). Last month, the MoJ published the Government's response to the consultation, which concluded that the Government would introduce DPAs into UK law in amendments to the Crime and Courts Bill which is currently going through Parliament.

The key features of DPAs, which the MoJ describes as the "*next instrument in the battle against economic crime*", are as follows:

- A DPA will be a voluntary agreement between a company and the prosecuting authority whereby, in return for complying with the requirements of the DPA, the criminal prosecution will be deferred. The criminal charge will be laid but not pursued, unless and until the company breaches the requirements of the DPA.
- Having made an in principle decision to pursue a DPA, proceedings would be commenced in the Crown Court with a preliminary hearing (in private) whereby the court would decide whether a DPA would be in the interests of justice and whether the conditions to be set out in the DPA are fair, reasonable and proportionate. Thus the court has the power to veto a DPA at an early stage, but equally, once the court has determined that the "interest of justice" test is satisfied, the company and the SFO or DPP would have a degree of certainty at an early stage that the DPA has the support of the court (although this is not an absolute guarantee that the court will approve the DPA at the final hearing).
- The final agreement will be approved in open court and the judge will be obliged to publish the DPA and any court rulings in relation to it, details of how the terms have been complied with at the end of the DPA process and of any breach, variation or termination of the DPA. This ensures that the DPA process is transparent, and the prosecuting authorities are fully accountable in respect of settlements agreed with individual organisations.
- Depending on the circumstances of the case, DPAs may encompass a "substantial" financial penalty, reparation to victims, repayment of profits and remedial measures such as a requirement to put in place anti-corruption or anti-fraud policies, procedural training, including in more serious cases appointing an independent monitor.
- As things stand, DPAs will only apply to economic crimes, in particular fraud, bribery and money laundering offences committed by a company (DPAs will not apply to individuals). Note, however, that in recent Parliamentary debates on the Crime and Courts Bill, Lord Goldsmith and others have proposed that the application of DPAs be extended to other crimes and to individuals.
- All DPAs will have to attach a statement of facts so as to ensure transparency, although importantly, an admission of guilt will not be required.
- The legislation will allow for a maximum reduction in the financial penalty element of a DPA of up to one third, which will mirror the recommended maximum reduction which would be available in a criminal prosecution for a guilty plea indicated at the first reasonable opportunity.
- The DPA will have a fixed term and if, on expiry, the terms and conditions of the DPA are complied with, the court will lift the criminal charges and the threat of prosecution will cease. There will be scope for a variation in a DPA to cater for an unforeseen change in circumstances. In the event of breach of the DPA, depending on its seriousness, it will either be referred to the prosecutor for a determination, or referred back to court. If the DPA is terminated for breach, a court would then assess whether or not to revive the criminal prosecution in accordance with the Code for Crown Prosecutors.

- There will be a DPA Code of Practice for Prosecutors containing important guidelines outlining the general principles to be applied in determining whether a DPA is likely to be appropriate in a given case. This will be consulted on separately.

Impact of DPAs on self-reporting

The DPA regime is intended to encourage self-reporting and to provide companies with a secure framework for plea bargains negotiated with the SFO or other prosecuting body which will be upheld by the court, and to avoid the expense and uncertainty of a protracted criminal trial. This is all well and good, but will the introduction of DPAs have the desired effect?

The answer is that they are likely to go some way towards reversing the negative effect of the SFO's recent pronouncements on self-reporting discussed above. In particular, the uncertainty relating to the validity of plea bargains has now been removed. Also, the Government's response to the consultation on DPAs suggests that a DPA will not trigger mandatory debarment under European law, but may be a factor in deciding whether a company should be excluded on a discretionary basis.

In any event, DPAs will not be available in every case. As the SFO made clear in its response: "*Often of course full criminal proceedings are the only just course of action, and prosecution will continue to be the priority where a DPA would not be in the public interest or an organisation's alleged wrongdoing is very serious*." So a company that self-reports because it wants to avoid a criminal conviction could end up handing over to the SFO on a plate all the incriminating evidence it needs to hang itself with. Similarly, if a DPA is ultimately not concluded, the response states that "*prosecutors should not be prevented from relying on evidence obtained from enquiries pursued as a result of anything said in any unsigned statement of facts/draft DPA*".

Other considerations should be borne in mind by those looking to self-report and cut a deal with the SFO. For example, the publicity surrounding a DPA has the potential to be just as damaging from a PR perspective as a criminal conviction. And the DPA (and the statement of facts, even where there's no admission of guilt) could be used against the company in "follow-on" civil proceedings.

Furthermore, a company will often find itself subject to prosecution in multiple jurisdictions. How will the DPA regime affect the global settlement process? The Government's response suggests that the inherent flexibility of DPAs will better enable UK prosecutors to negotiate with their overseas counterparts in multi-jurisdictional cases, although guidance on how this would work would be welcomed.

Conclusion

The SFO's dramatic restatement of its approach to self-reporting has been widely interpreted as a hardening of its position on bribery which may have dealt a major blow to its efforts to uncover and punish bribery. Whilst the introduction of DPAs (anticipated to come into effect in early 2014) may go some way towards redressing the balance in favour of self-reporting, there are a number of issues and unanswered questions that suggest that they may not be the panacea that some are expecting.

A final word of caution for those companies considering sitting on their hands when faced with a bribery issue. Increasingly, prosecuting authorities are tipping each other off. So any relevant Suspicious Activity Reports made to SOCA under the Proceeds of Crime Act may be referred to the SFO. HMRC and the FSA are similarly likely to share details of any suspicions or reports of conduct which may give rise to allegations of bribery, as are overseas regulators where, for example, they have concerns relating to an FSA-regulated entity. Perhaps even more likely in the current enforcement environment, prosecutors may be tipped off by a competitor alleging that a company is distorting the market by paying or soliciting bribes; and there is always the threat of a disgruntled employee blowing the whistle. Whilst there will always be risks associated with self-reporting, they will be nothing compared to the consequences of the SFO coming knocking at your door.

If you would like to talk through your options in relation to a particular bribery issue or would like guidance in developing a self-reporting policy, please contact a member of our Anti-Bribery Group (details below) or your usual contact at the firm.

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