UK Economic Crime Group

UK Enforcement Update

Overview

The first quarter of 2012 has been a period of significant enforcement action by the Serious Fraud Office. They have obtained convictions in four separate criminal trials and have commenced criminal proceedings against a number of new defendants, including a senior mining industry executive who was extradited from Australia. More controversially, the SFO obtained a Civil Recovery Order against Mabey Engineering (Holdings) Limited requiring them to forfeit dividend payments received from a subsidiary. In the context of this, Richard Alderman, the Director of the SFO, made stark threats to institutional investors which some commentators consider to be ultra vires. Despite this flurry of activity, it has been reported in the press that an internal report for the Department for International Development gave a damning assessment of Britain's efforts to tackle corruption whilst the OECD savaged Ken Clarke for being soft on corporate bribery. It seems that influential forces have high expectations in relation to the criminal enforcement of overseas corruption and this may add real momentum to enforcement activity in this area. In the meantime, the Financial Services Authority has been rigorous in its enforcement activities; the FSA fined a former managing director in corporate broking at Merrill Lynch and the owner of a prominent US hedge fund for market abuse and, on the criminal side, is currently prosecuting 15 individuals for insider dealing. The consensus is that the prosecutorial agencies with responsibility for prosecuting white collar crime are seeking to ramp up their enforcement activities.

Update on 2012 Enforcement Activity

DfID attacks Government record on overseas corruption

In late February, The Times (22 February 2012) reported that an internal report by ministry officials for the Department for International Development (DfID) made "a damning assessment of British efforts to tackle corruption." Apparently the 21-page report stated that there were "fluctuating levels of appetite" within the Government for dealing with international corruption effectively. This criticism might come as a surprise given that the Bribery Act 2010 has been hailed as one of the toughest pieces of anti-corruption legislation in the world and, on any analysis, provides a robust statutory framework for prosecuting corruption

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and companies which fail to prevent corruption. However, there has been a legitimate debate in relation to whether the Bribery Act could damage UK Plc's ability to do business in certain jurisdictions and the spectrum of views on this subject will inevitably be reflected across Government. Business lobbying organisations such as the CBI have warned the SFO not be "over-zealous" in policing British companies and Richard Alderman, the director of the SFO, has sought to allay such concerns by indicating that the SFO will prosecute overseas companies which use corruption to put ethical UK companies at a disadvantage. The Times also said that the report criticizes the SFO for encouraging companies to report corruption in return for avoiding criminal prosecution. In this regard, the views of DfID align with those of the OECD who have also criticised the use of civil recovery in place of criminal enforcement in relation to overseas corruption. Given such criticism, it is likely that the SFO will carefully ensure that their portfolio of Bribery Act cases includes an appropriate balance between civil recovery against corporate defendants and criminal prosecution of officers.

OECD criticizes Clarke for being 'lenient' on corporate bribery

The Sunday Times (5 February 2012) reported that key parts of the government's approach to tackling corruption had been criticized as too "lenient" in a draft report by the OECD. In his foreword to the Ministry of Justice Guidance on the Bribery Act 2010, Ken Clarke, Lord Chancellor and Secretary of State for Justice, sought to provide assurance that the Act does not criminalize legitimate hospitality, stating that "no one wants to stop firms getting to know their clients by taking them to events like Wimbledon or the Grand Prix." The Guidance itself seeks to distinguish between legitimate hospitality and conduct potentially constituting a bribery offence through explanation and a number of examples. One such example involves a UK commercial organization paying for flights and accommodation to allow foreign public officials to meet with senior executives in New York "as a matter of genuine mutual convenience," and some reasonable hospitality for the individual and his or her partner, such as fine dining and attendance at a baseball match. The Guidance provides that these facts, in themselves, are unlikely to constitute an offence. Apparently, the OECD draft report takes issue with the Guidance, stating that such examples present "a high risk of corruption." Given that the OECD's views are extremely influential, it will be interesting to see how the Government responds when the final OECD report is published. The OECD draft report is also critical of, in particular, civil settlements between the SFO and corporate defendants as an alternative to criminal prosecution. Given that Edward Garnier QC, the Solicitor General, has recently stated that he intends to introduce deferred prosecution agreements (a US remedy) into this jurisdiction, the stage may be set for increasing polarization on the issue of civil recovery between the Government and the OECD.

SFO Threat to Institutional Investors

On 13 January 2012, the SFO announced that it had obtained a Civil Recovery Order against Mabey Engineering (Holdings) Limited which required them to forfeit the sum of £131,201 reflecting dividend payments received from Mabey and Johnson Limited, a subsidiary, which had previously admitted offences of overseas corruption/ breaching UN Sanctions, with two of its former directors being convicted of making illegal payments in breach of UN sanctions. SFO Director Richard Alderman stated that:

Shareholders who receive the proceeds of crime can expect civil action against them to recover the money ... shareholders and investors in companies are obliged to satisfy themselves with the business practices of the companies they invest in ... It is particularly so for institutional investors who have the knowledge and expertise to do it. The SFO intends to use the civil recovery process to pursue investors who have benefited

from illegal activity. Where issues arise, we will be much less sympathetic to institutional investors whose due diligence has clearly been lax in this respect.

On 18 January 2012, Richard Alderman revealed the policy reasons behind this aggressive new approach:

Institutional shareholders are not just passive recipients of dividends; they also have regular discussions with the management of the businesses in which they hold shares ... I am going to ask them whether any of them have asked management if they are satisfied that their companies have adequate procedures under the Bribery Act.

The SFO clearly is seeking to leverage the influence that institutional investors have in the management of corporations in order to ensure that they have adequate procedures for preventing bribery. Seeking to impose such obligations on institutional investors is clearly uncharted territory; however, until such time as these matters are litigated, the prudent approach for institutional investors is to supplement their due diligence on financial performance with proportionate due diligence to establish whether adequate procedures for preventing bribery are in place. It will be interesting to see if the SFO's approach continues in the same expansive vein under the incoming director, David Green QC.

Economic Crime Command/National Crime Agency

With the creation of the National Crime Agency underway, there is a large scale restructuring of law enforcement taking place. In a November 2011 speech to the British Bankers Association, Richard Alderman explained how this new agency will interface with other prosecutorial agencies. His speech provides a succinct and helpful road map for the new world of law enforcement and is repeated below:

The government has made it clear that it wants to see a very big improvement in the way in which financial crime is investigated and prosecuted. The National Fraud Authority has published its estimate of the amount of money lost to victims each year as a result of fraud. This amounts to £38 billion each year. This is an extraordinary amount. The government has pledged to set up a new National Crime Agency. This will cover a very wide range of activity including economic crime. It is proposed that there will be an Economic Crime Command (ECC) within the National Crime Agency. Ministers are looking at this Economic Crime Command to spearhead a major new push in relation to economic crime. Let me just explain a little about what this means although you will understand that this is work in progress and that there is a lot more to be done before the National Crime Agency is set up in 2013. Indeed there will need to be complex legislation about this. The Economic Crime Command will not be undertaking the type of work that the SFO does, namely the most complex cases of economic crime. There was a debate about this earlier this year but at the end of that debate it was agreed that the joint investigation and prosecution model for these very complex cases needed to remain and that the SFO should continue to deal with those cases. Similarly it was agreed that insider trading would remain the responsibility of the FSA and the soon to be Financial Conduct Authority and that cartel activity would remain with the OFT. The ECC's role will be in respect of the very great range of other cases I have talked about where so much damage is done to victims as a result of economic crime. Police forces such as the City of London Police and the Metropolitan Police as well as SOCA do a great deal of excellent work here but more is going to be needed. This will be the responsibility of the ECC.