UK Economic Crime Group

UK Enforcement Update

Overview

The second quarter of 2012 has brought mixed blessings for the Serious Fraud Office and its new Director David Green QC. On the one hand, the UK was commended by the OECD for stepping up its enforcement of foreign bribery laws, on the other hand, the conduct of the Tchenguiz matter has been an unmitigated disaster. The Financial Services Authority (FSA) has had successes both in a regulatory and criminal enforcement context. It fined Barclays Bank Plc £59.5 million, its largest fine ever, for misconduct relating to the London Interbank Offered Rate (LIBOR) and the Euro Interbank Offered Rate (EURIBOR). This was a significant cross-border investigation, reiterating the developing trend of parallel UK and US enforcement action, in which the FSA cooperated with the U.S. Commodity Futures Trading Commission (CFTC) and the U.S. Department of Justice (DOJ) who imposed combined penalties of US$360 million on Barclays. On the criminal side, the FSA secured the conviction of 3 individuals for insider dealing contrary to section 52 of the Criminal Justice Act 1993. This case also involved parallel investigations by the FSA, the US Securities and Exchange Commission and the DOJ. In the meantime, the FSA is currently prosecuting 11 other individuals for insider dealing. Finally, the Ministry of Justice has begun a Consultation on the introduction of Deferred Prosecution Agreements, a remedy used to great effect in the US criminal justice system, as a new enforcement tool to deal with economic crime committed by commercial organisations in the UK. It is clear that there has never been a greater need for commercial organisations to approach enforcement from a trans-Atlantic perspective.

The Future of Economic Crime Enforcement

David Green CB QC commenced his appointment as the new Director of the Serious Fraud Office (SFO) on 23 April 2012. He replaces Richard Alderman who was appointed as Director of the SFO in April 2008 and recently completed his four year tenure. It was an extremely challenging environment for Richard Alderman at the outset and the consensus is that he has done an impressive job in restoring the SFO's reputation. Prison sentences are up, the number of cases on the books is up and the amount of time taken to charge is down; all of which point towards a more effective and efficient SFO than 4 years ago. On any analysis, Richard Alderman has been a creative and progressive Director and, under his leadership, the SFO has increasingly utilized self-reporting, plea negotiations and civil settlements as

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alternatives to prosecution, particularly in relation to corporate corruption cases. David Green's opening words as Director were, "*The SFO is here to stay. It is and will remain a key crime fighting agency targeting top-end fraud, bribery and corruption.*" This is, of course, a reference to the fact that the SFO will not be subsumed into the National Crime Agency (for now, at least) and will continue to exist as the specialist investigator/prosecutor for the most complex cases. Much of the legal commentary in relation to the new era under David Green speculates that he will seek to draw the SFO back from pragmatic settled remedies and pursue more conventional criminal prosecutions. Our view is that this would be the right approach to some offences investigated by the SFO. However the inherent risks of complex criminal litigation are well-known and the smart approach would be for the SFO to take advantage of the developing range of enforcement tools at its disposal as circumstances dictate.

Consultation on Deferred Prosecution Agreements - What Does This Mean For Business?

On 17 May 2012, the Ministry of Justice began a Consultation on a new enforcement tool to deal with economic crime committed by commercial organisations, namely Deferred Prosecution Agreements (*DPAs*). Whilst DPAs are a new concept in this jurisdiction, they are already used to great effect by the Department of Justice across the Atlantic. Like the US model, the Consultation proposes that DPAs would involve the prosecutor laying criminal charges against a commercial organisation but deferring proceedings while it has the opportunity to satisfy agreed terms and conditions, which might include paying financial penalties, compensating victims, handing over the profits of wrongdoing and/or taking measures to prevent future offending. The introduction of DPAs is being hailed as something of a silver bullet for prosecutorial agencies due to their effective use in the US and our view is that they may work well in conjunction with the failure to prevent bribery offence under section 7 of the Bribery Act 2010 where there are very real risks of criminal liability for commercial organisations. However, there are profound differences between the legal systems of the UK and US which may make DPAs less effective as a remedy for other forms of corporate criminality in this jurisdiction. In essence, DPAs are a means of settling potential criminal liability and, as such, in order to be really appealing to a well-advised commercial organisation, there must be a realistic prospect of a successful prosecution in the first place. Unlike the US, the law of corporate criminal liability in the UK (known as "*the identification doctrine*") usually requires a prosecutor to show that the directors and managers who represent the "*directing mind and will*" of the commercial organisation had the necessary fault element or "*mens rea*" for the offence (notably, this is not the case in relation to the failure to prevent bribery offence hence the distinction with other forms of corporate criminality). Where the offence was committed by more junior staff or it is difficult to evidence board-level culpability, the prospect of a criminal conviction against a corporate defendant may be remote. Moreover, the Consultation proposes that the financial penalty payable pursuant to a DPA should be subject to a maximum reduction of approximately one third of what would have been imposed on conviction in a contested case. Our view is that, given the difficulties with establishing corporate liability under the identification doctrine, civil recovery orders under the Proceeds of Crime Act 2002 will frequently offer a more attractive route for commercial organisations seeking to settle potential liability with the SFO than the model of DPAs set out in the Consultation. The consultation ends on 9 August 2012.

OECD Report on Implementing the OECD Anti-Bribery Convention in the UK

The OECD Working Group on Bribery has published a Report which evaluates and makes recommendations on the UK's implementation of the OECD Anti-Bribery Convention. It is important to note that the OECD is extremely influential and it is difficult for the Government to ignore its recommendations - in this regard, the Government is expected to make an oral report on its implementation of recommendations within one year and will submit a written report on the implementation of all recommendations within two years. The Report

is wide-ranging and multi-faceted therefore we have focused upon issues of particular interest to corporate clients and in-house counsel. In terms of enforcement, the Report compliments the UK for stepping up its enforcement activity in recent years and refers to the fact that the SFO had 11 active bribery cases and a further 18 cases under consideration as of 31 January 2012. Significantly, it also recommends that the UK ensure that SFO and police resources for foreign bribery-related cases are adequate. In terms of compliance, the Report is critical of hypothetical examples in the Ministry of Justice's Guidance to Commercial Organisations (GCO) that seek to illustrate reasonable and proportionate payments. In particular, the Report states in paragraph 31, page 13, that "*Flights and accommodation to allow foreign public officials to meet with senior executives of a UK commercial organisation 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 are facts that are, in themselves, unlikely to raise the necessary inferences*." The Report contends that there is a consensus that this presents an unadvisable, high-risk activity under almost all circumstances. Case Study 4, page 36 states that "*a firm of engineers ('F') maintains a program of annual events providing entertainment, quality dining and attendance at various sporting occasions, as an expression of appreciation of its long association with its business partners. Private bodies and individuals are happy to meet their own travel and accommodation costs associated with attending these events. The cost of the travel and accommodation of any foreign public officials attending are, however, met by F.*" The Report states that this presents a high risk of corruption. Given that, firstly, the GCO does not have the force of law and is not binding on prosecutors or courts and, secondly, the OECD recommends that the UK amend the GCO to note that certain examples represent a high risk of bribery, the prudent approach may be to construe hospitality compliance more narrowly than the examples given in paragraph 31 and Case Study 4.

Kaupthing Investigation: Vincent Tchenguiz no longer a suspect

Following the recent judicial review hearing, the SFO has announced (18 June 2012) that it no longer has reasonable grounds to consider Vincent Tchenguiz as a suspect in its investigation into the collapse of Kaupthing Bank. Although the SFO had previously stated there would be an urgent review of Mr. Tchenguiz's status, this raises further questions about the SFO's ongoing Kaupthing investigation. The case is one of the most complex investigated by the agency and Mr. Tchenguiz and his brother, Robert Tchenguiz, both high profile property investors, were arrested in March 2011. In the judicial review proceedings brought by the brothers in May 2012, Mr. Tchenguiz's counsel described the SFO's errors in the case, particularly relating to search and arrest warrants, as indicative of *"institutional failure".* Counsel for Robert Tchenguiz suggested that there had been *"material non-disclosure"* by the SFO when seeking the warrants, particularly noting that the judge had not been made aware of offers of cooperation. Recent reports have indicated that SFO lawyers warned against pursuing a case as early as January 2011 (prior to the brothers' arrests) and there appear to have been substantial divisions at the SFO regarding the approach to be taken. To add to the embarrassment felt by the agency, there have also been reports that investigators pushed for undercover operatives to work in nightclubs frequented by Mr. Tchenguiz and his brother. Mr. Tchenguiz has indicated that he will be seeking damages from the SFO for damage to his business interests and reputation - with aggravated and exemplary damages included, reports have indicated that the total figure claimed could be as high as £100 million, a substantial amount for an agency with an annual budget of £32 million. The SFO has said that it is continuing its investigation into Robert Tchenguiz and Kaupthing but it is likely to come under further pressure when the judgment in the judicial review proceedings is released in the next few weeks. The criticisms of the Kaupthing investigation appear to have already had an impact on the approach of the SFO. A recent freedom of information request indicates that the agency carried out no similar raids for the next 12 months, ending 31 March 2012.