SELADORE LEGAL

Investigations into Corporate Wrongdoing: the Case for Independence

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The Serious Fraud Office has announced (SFO charges five former Glencore employees - Serious Fraud Office) various criminal charges of conspiracy to make corrupt payments against five former employees of Glencore and, in respect of two of them, also charges relating to falsification of invoices. All the charges are connected with the award of a range of oil contracts in Cameroon, Nigeria and the Ivory Coast from 2007 to 2014. Glencore Energy UK Ltd itself revealed the allegations it faced as long ago as 2018, and pleaded guilty two years ago to seven counts of bribery.[1] This followed an SFO investigation that exposed the payment of $29 million in bribes to gain preferential access to oil in five African countries.

Prosecution of Glencore Employees

With a new leader at the helm at the SFO, and a former head prosecutor now in charge at No.10 Downing Street, it will be interesting to follow the progress of the prosecution of the Glencore employees. While prosecutions of individuals following a corporation agreeing a resolution of a criminal investigation have not been frequent in the UK, the prosecution of the Glencore employees signals an important trend in relation to corporate misconduct.

In this article, we re-evaluate the changing corporate criminal landscape and the increasing need for true independence when it comes to corporates investigating internal conduct/scandals, noting:

- important legislative changes to corporate criminal liability;
- how corporates and their management react to receiving information about potential criminality;
- the incentives for and methods by which corporates investigate criminal conduct internally;
- the importance of independence in this process; and
- managing the impact on whether and how external investigations (and prosecutions) are pursued, as against corporates and individuals.

The successful prosecution of corporations for financial crime in the UK has historically been quite rare, and guilty pleas, like those entered by Glencore, even more so. One of the most significant challenges faced by the SFO has been presenting the evidence required to meet the criminal standard of proof and, in particular, evidencing that, broadly, someone at director level was involved in the relevant criminality so as to be able to attribute that director's knowledge to the company.

[1] Serious Fraud Office v Glencore [2022] EWCR 1

Measures Introduced

The 'Failure to Prevent' model of corporate offences (including the much-heralded Failure to Prevent Bribery offence that came into force in 2011) and the introduction of the Deferred Prosecution Agreement (DPA) regime in 2014 initially saw an increase in enforcement activity relating to corporate financial crime as well as a significant uptick in "internal investigations" by corporates to meet what was perceived to be expected by prosecuting bodies, investors and other stakeholders.

DPAs (which follow an SFO investigation into criminal allegations into corporate conduct) involve a corporate acknowledging that certain criminal conduct has taken place and agreeing:

(1) to co-operate with the authorities; and
(2) to accept the imposition of penalties and other financial orders (e.g. fines, confiscation/disgorgement of profits and costs).

These developments have though not, yet, led to the expected increase in prosecutions of individuals.

So, why have not more individuals been successfully prosecuted? The prosecution and conviction of individuals guilty of serious fraud and other financial crime must be a priority, not an afterthought.

Why should shareholders and investors suffer a loss in value and companies accrue criminal and civil liability, whilst the culpable individuals escape justice? Pursuing individuals connected to corporate offending has arguably not been as fruitful for the SFO in the past because:

- the SFO has been all too satisfied with securing a DPA or other corporate disposal, and
- the relevant individuals tend to fight hard and exploit gaps in the evidence needed to secure a conviction.

But has a lack of corporate co-operation also contributed? The answer is probably, but this is likely to change, as explained further here.

Generally, the wheels of justice continued to turn (albeit more slowly) during the Covid pandemic, but the progress of new investigations into corporate crime reduced dramatically. The SFO's new Director, Nick Ephgrave, has however hit the reset button since his appointment towards the end of last year and vowed to make SFO investigations speedier and more effective.

Significantly, the previous Conservative government also passed legislation that:

- extends corporate criminal liability automatically for specified misconduct of any senior managers of those corporates (not just their directors); and
- will introduce a new corporate offence of failure to prevent fraud.

Both of these developments have extra-territorial reach and significantly increase the armoury of prosecutors.

Criminal Investigations

As a result of these developments, there is an expectation that corporate (mis)conduct is more likely to be criminally investigated by law enforcement and that the risk of punitive/adverse consequences for corporates has increased.

Corporations will therefore be primed to seek to avoid or reduce the adverse consequences of criminal investigations and convictions – particularly when corporate convictions can now more easily be secured without the burden of having to prove that directors themselves have been culpable. More than ever Directors and GCs in particular need to be live to the steps that should be taken proactively to mitigate the corporates prospects of such liability.

Putting the company in the best position to achieve a consensual resolution (whether a DPA or guilty plea) with any agency in relation to any legitimate allegations will be high on a GC's list of priorities in such a scenario.

The reasons include that the advantages for a corporate of securing a DPA, for example, are that:

- a DPA allows the corporate greater certainty and a speedier resolution of allegations (freeing up management and other time and expense as a result);
- entering a DPA will enable a corporate to present itself, publicly, as being co-operative;
- the corporate will not face trial;
- a DPA enables the corporate to avoid the possibility of conviction (provided it complies with the terms of the DPA) – the fact of a conviction can have significant consequences for a corporate in terms of, for example, the covenants it may have provided to governments, financiers, stakeholders and counterparties and conviction may hinder or prevent the corporate from tendering for certain, particularly public, work; and
- a DPA opens the door to a greater discount to penalties than would ordinarily be appropriate for a guilty plea.

The DPAs that have been entered into so far have largely followed significant co-operation from the relevant corporates. Most notably, the co-operation that prosecutors typically tend to expect to receive from a corporate (before agreeing a DPA), includes:

- provision of information and evidence relating to the offending conduct which has been gathered by the corporate by way of internal investigations; and
- evidence in connection to related conduct by the corporate's personnel (which exposed the corporate to criminal liability) and agreement that the corporate will assist the prosecutor to bring proceedings against such individuals, where the prosecutor deems such appropriate.

Agencies, like the SFO, which have limited governmental budgets, obviously also benefit from the consequential reduction in time and expense they incur where corporate cooperation extends, effectively, to providing the prosecutor with the results/product of the internal investigation which has been carried out.

As such, it is in the interests of the prosecutors for corporations to be encouraged not only to self-report (suspected) instances of criminality, but for the corporates to carry the financial and administrative responsibility of investigating such matters. Of course, credibility with the prosecutor is crucial, here, and it is, therefore, important for all concerned that the results of any such investigation are not questioned or criticised.

Consequently, as well as such investigations being thorough and careful to secure and examine the evidence relevant to the suspected conduct (in order to be able to make such available to external investigators and prosecutors) they must be capable of being presented as being (and must in fact be) independent - such independence avoids unwanted criticism that the investigations might lack impartiality (for example where investigating advisors are seen to be too close, commercially, to the organisations and personnel under investigation).

However, independent investigations are not only needed in order to assist a related external agency investigation to be properly and comprehensively conducted and to come to accurate conclusions. Accuracy will also be key for corporates to be able to take legal and other advice in order to evaluate properly the existence, nature and extent of any liability (criminal and civil) as well as other non-legal impacts and to advise it how to protect its interests in connection with the conduct of the investigation.

Criminal Liability

By extending the law to make corporations liable for the criminal conduct of a wider range of employees (not just directors), the investigations landscape has changed dramatically. Companies will be far more concerned to avoid the heightened risks of criminal liability. The best route will be to weed out the wrongdoers, and to co-operate with the authorities. Investigations will need to be thorough, and seen to be independent in order to enhance the prospects of a successful negotiation with the SFO.

Interviews with employees conducted independently will now far more often include the Police and Criminal Evidence Act 1984 cautions or so-called "Miranda" warnings to ensure that what interviews reveal can be used in evidence in criminal proceedings against them.

Employees wishing to remain silent will risk breaching their duties to co-operate; at the same time their cards will be marked as the investigation deepens and the company prepares to co-operate in the hope of leniency. Employees who are genuinely in two-minds over whether to disclose information to the investigation will themselves need independent legal advice, and this will become far more commonplace than hitherto.

In a corporation's understandable desire to resolve investigations and pursue other priorities in a timely fashion, taking independent advice ought to ensure that the process of any investigation doesn't compromise accuracy (thereby missing or, worse, misidentifying culprits or wrongdoing) in the name of speed. Having independent lawyers conduct investigations and provide attendant advice also puts a corporate in a position to be able to

consider its ability to assert (and consider waiving in appropriate circumstances) legal professional privilege over the investigations/advice.

Guidance

The SFO's published guidance[2] makes clear that corporates wishing to rely on privilege "*will be expected to provide certification by independent counsel that the material in question is privileged*". If non-lawyers run the investigation, those possibilities are not available.

Agencies, such as the SFO, are obviously required to be able to present their own investigations as thorough and independent and will only want to be relying on the fruits of a corporate's internal investigation if it doesn't compromise those requirements.

Conclusion

Corporations, therefore, need to consider carefully the composition of the investigative team to ensure they can avoid accusations of actual or perceived lack of independence, which could prejudice its ability to satisfy law enforcement agencies, any potential court and its own stakeholders as to the appropriateness, accuracy and thoroughness of its investigation.

The same is equally true, if not more so, where a senior employee or director has been wrongfully accused – if there is an exoneration as a result of an "internal" investigation, it may not lift the cloud of suspicion if not carried out independently.

Conducting an independent investigation is a pre-requisite whichever way the issue of corporate misconduct is viewed. In particular, where criminal or regulatory agencies are likely to be interested, the era of the "internal" investigation is over.

[2] *Serious Fraud Office Corporate Co-operation Guidance, ID163 Version OGW 1*