INTERNAL INVESTIGATIONS
THE CASE FOR INDEPENDENCE

Simon Bushell, Dan Hudson and Kevin Kilgour of Seladore Legal examine the changing corporate criminal liability landscape and the need for independence when businesses investigate internal misconduct.

The Serious Fraud Office's (SFO) recent prosecution of six former employees of Glencore Energy (UK) Ltd signals an important trend in relation to corporate misconduct (*see box "Prosecution of Glencore and former employees"*).

Prosecutions of individuals following a business resolving criminal investigations and allegations by way of a guilty plea or an entry into a deferred prosecution agreement (DPA) have not been frequent in the UK. The prosecution of businesses for financial crime in the UK has, historically, also been quite rare and guilty pleas, like those entered by Glencore, are even rarer.

However, with the SFO having a new Director, Nick Ephgrave, at the helm, and with the new Prime Minister, Sir Keir Starmer, being a former Director of Public Prosecutions, it will be interesting to follow the progress of the prosecution of the Glencore employees.

This article examines the changing corporate criminal landscape and the increasing need for true independence when it comes to businesses investigating internal misconduct or scandals. It looks at:

- Important legislative changes to corporate criminal liability.
- How businesses and their management should react to receiving information about potential criminality.
- The incentives for businesses to investigate criminal conduct internally.
- The importance of both co-operation and independence in the investigation process.
- Managing the impact on both businesses and individuals of external investigations and prosecutions, and of the way in which they are pursued.

MEASURES INTRODUCED

Two measures that were introduced a number of years ago resulted in an initial increase in enforcement activity relating to corporate financial crime, as well as a significant increase in internal investigations by businesses as they strove to meet what they perceived was expected of them by prosecuting bodies, investors and other stakeholders. These measures are:

- The "failure to prevent" model of corporate offences, including the much-heralded failure to prevent bribery offence that came into force in 2011 (*see box "The failure to prevent offences" and feature*

article "Bribery Act 2010: ten years on", www.practicallaw.com/w-026-9809).

- The introduction of the DPA regime in 2014 (*see box "Deferred prosecution agreements" and feature article "Deferred prosecution agreements: moving into the unknown", www.practicallaw.com/6-525-6101*).

However, these developments have not, as yet, led to the expected increase in prosecutions of individuals.

Low number of prosecutions

Many commentators wonder why more individuals have not been successfully prosecuted, arguing that the prosecution and conviction of individuals who are guilty of serious fraud and other financial crime must be a priority, not an afterthought. Furthermore, they assert that shareholders and investors should not suffer a loss in value, and that companies should not accrue criminal and civil liability, while 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 a corporate guilty plea.

- The relevant individuals tend to fight hard and exploit gaps in the evidence needed to secure a conviction. For example, in September 2016, the SFO charged three former senior directors of Tesco with offences of fraud and false accounting following Tesco's entry into a DPA, but the individuals were eventually acquitted of all charges (*see News brief "Tesco investigation: SFO probes fraud and false accounting allegations", www.practicallaw.com/8-633-7695 and Opinion "Deferred prosecution agreements after Tesco: whither are we bound?", www.practicallaw.com/w-019-1564*).

One of the most significant challenges faced by the SFO has been collecting the evidence required to meet the criminal standard of proof and, in particular, providing the evidence 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 business.

Prosecution of Glencore and former employees

On 1 August 2024, the Serious Fraud Office (SFO) announced that it was bringing various criminal charges of conspiracy to make corrupt payments against five former employees of Glencore Energy (UK) Ltd and, in respect of two of them, additional charges relating to the falsification of invoices (*www.sfo.gov.uk/2024/08/01/sfo-charges-five-former-glencore-employees/*). On 10 September 2024, those individuals appeared at Westminster Magistrates' Court, along with a sixth former employee, whom the SFO had not previously announced that it was charging (*www.sfo.gov.uk/2024/09/10/six-former-glencore-employees-appear-in-court-charged-with-bribery-offences/*). Three of the individuals indicated that they will be entering not guilty pleas, while the other three did not provide any indication of how they will plead. They were all granted unconditional bail, with a hearing set at Southwark Crown Court for 8 October 2024. All of 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 revealed the allegations that it faced as long ago as 2018 and pleaded guilty in June 2022 to seven counts of bribery (*Serious Fraud Office v Glencore Energy (UK) Ltd [2022] EWCR 1*). The conviction included the first ever finding of the substantive bribery offences for a company, meaning that senior individuals at Glencore authorised the bribery instead of simply failing to prevent it.

On 3 November 2022, Glencore was fined £280 million, following an SFO investigation that exposed the payment of $29 million in bribes to gain preferential access to oil in five African countries (*www.sfo.gov.uk/2022/11/03/glencore-energy-uk-ltd-will-pay-280965092-95-million-over-400-million-usd-after-an-sfo-investigation-revealed-it-paid-us-29-million-in-bribes-to-gain-preferential-access-to-oil-in-africa/*). The penalty was the largest ever for an SFO case following a conviction.

During the COVID-19 pandemic, although the wheels of justice continued to turn, albeit more slowly than usual, the progress of new investigations into corporate crime reduced dramatically. However, the SFO's Director, Mr Ephgrave, has hit the reset button since his appointment in September 2023 and vowed to make SFO investigations speedier and more effective (*www.sfo.gov.uk/2024/02/13/director-ephgrave-speech-at-rusi-13-february-2024/*).

In the view of some commentators, a historic lack of corporate co-operation has probably also contributed to the dearth of successful prosecutions of individuals. However, this may well change, as this article explains.

New measures

Significantly, the previous government passed legislation that:

- Extended corporate criminal liability for specified misconduct of any senior managers of organisations, not just their directors (*section 196, Economic Crime and Corporate Transparency Act 2023*) (ECCTA). This is known as the senior manager test (*see feature article "The fight against economic crime: ECCTA takes effect", www.practicallaw.com/w-043-0383*).

- Will introduce a new corporate offence of failure to prevent fraud (*section 199, ECCTA*). This provision will be brought into force after the mandatory guidance has been published. The expectation is that this will happen at some point in 2025.

Both of these developments have extraterritorial reach and significantly increase the armoury of prosecutors.

BUSINESS RESPONSE

As a result of the developments outlined above, there is an expectation that corporate misconduct is more likely to be criminally investigated by law enforcement agencies and that the risk of punitive or adverse consequences for businesses has increased.

Businesses should therefore be primed to seek to avoid or reduce the adverse consequences of criminal investigations and convictions, particularly when corporate convictions can now be secured more easily without the burden of having to prove that directors have been culpable, due to the senior manager test in ECCTA. More than ever, directors, and general counsel in particular, need to be aware of the steps that should be taken proactively to mitigate the business's prospects of criminal liability.

Putting the company in the best position to achieve a consensual resolution, whether through a DPA or a guilty plea, with any law enforcement agency in relation to a legitimate allegations of misconduct will be high on a general counsel's list of priorities.

INCENTIVES

There are several advantages for a business of securing a DPA, including that:

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

CO-OPERATION

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

- The provision of information and evidence relating to the offending conduct that has been gathered by the business by way of internal investigations (*see feature article "Corporate investigations: key issues for boards and in-house lawyers", www.practicallaw.com/0-619-0485*).
- Evidence in connection with related conduct by the business's personnel that exposed the business to criminal liability, and agreement that the business will assist the prosecutor to bring proceedings against the relevant individuals, where the prosecutor deems it to be appropriate.

Agencies such as the SFO, which have limited governmental budgets, obviously also benefit from the consequential reduction in time and expense that they incur where corporate co-operation extends, effectively, to providing the prosecutor with the results or product of the internal investigation that has been carried out.

It is therefore in the interests of the prosecutors for businesses to be encouraged not only to self-report suspected instances of criminality, but for businesses to carry the financial and administrative responsibility of investigating these matters (*see feature article "Self-reporting bribery: the ongoing dilemma", www.practicallaw.com/w-015-6714*).

INDEPENDENCE

Credibility with the prosecutor is crucial and it is therefore important for all concerned that the results of any internal investigation are not questioned or criticised. Consequently, as well as the investigations being thorough and careful to secure and examine the evidence that is relevant to the suspected conduct, in order to be able to make the evidence available to external investigators and prosecutors, they must be capable of being presented as being, and must in fact be, independent.

This independence avoids unwanted criticism that the investigations might lack impartiality; for example, where investigating advisers 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's investigation to be properly and comprehensively conducted and to come to accurate conclusions. Accuracy will also be key for a business to be able to take legal advice in order to evaluate properly the existence, nature and extent of any liability, whether criminal or civil, as well as other advice as to any non-legal consequences, and on how to protect its interests in connection with the conduct of the investigation.

Privilege

Having independent lawyers conduct investigations and provide relevant legal advice also puts a business in a position to be able to consider its ability to assert, and consider waiving in appropriate circumstances, legal professional privilege over the investigations and advice (*see feature articles "Privilege for in-house lawyers: navigating the challenges", www.practicallaw.com/w-043-2783 and "Privilege*

The failure to prevent offences

The key failure to prevent offences are:

- Failure to prevent bribery (*section 7, Bribery Act 2010*).
- Failure to prevent the facilitation of UK tax evasion (*section 45, Criminal Finances Act 2017*) (*see feature article "Facilitation of tax evasion: new offences of failure to prevent", www.practicallaw.com/w-010-4276*).
- Failure to prevent the facilitation of foreign tax evasion (*section 46, Criminal Finances Act 2017*).
- Failure to prevent fraud (*section 199, Economic Crime and Corporate Transparency Act 2023*).

in investigations: the journey continues", www.practicallaw.com/w-030-9877).

The SFO's guidance on corporate co-operation, which was published on 6 August 2019, makes it clear that businesses that want to rely on privilege will be expected to provide certification by independent counsel that the material in question is privileged (*www.sfo.gov.uk/publications/guidance-policy-and-protocols/guidance-for-corporates/corporate-co-operation-guidance; see News brief "SFO guidance on co-operation: more carrot than stick?", www.practicallaw.com/w-021-8255*). If non-lawyers run the investigation, those possibilities are not available.

IMPLICATIONS

By extending the law to make businesses liable for the criminal conduct of a wider range of employees, not just directors, the investigations landscape has changed dramatically.

Businesses 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 that are conducted independently will now far more often include the Police and Criminal Evidence Act 1984 cautions (so-called "Miranda" warnings in US parlance) to ensure that the information revealed in interviews can be used in evidence in criminal proceedings.

Employees who wish to remain silent during an investigation will risk breaching their duties to co-operate. At the same time, their cards will be marked as the investigation deepens and the business 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 need independent legal advice and this will become far more commonplace than has previously been the case.

In a business's understandable desire to resolve investigations and pursue its other commercial and business priorities in a timely fashion, taking independent advice ought to ensure that the process of any investigation does not compromise accuracy as this could risk missing or, worse, misidentifying culprits or wrongdoing in the name of speed.

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

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

The same is equally true, if not more so, where a senior employee or director has been wrongfully accused. If the individual is exonerated as a result of an internal investigation, it may not lift the cloud of suspicion if the investigation was not carried out independently (*see News brief "Investigating senior executives: what do in-house counsel need to know?", www.practicallaw.com/w-042-7726*).

Conducting an independent investigation is a prerequisite 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 that is not independent is over.

SRA guidance

On 1 March 2024, the Solicitors Regulation Authority published draft guidance on internal investigations (*www.sra.org.uk/solicitors/guidance/internal-investigations/*).

It is very common for lawyers with strong existing relationships with the entity concerned to conduct internal investigations. That can make good sense with highly sensitive issues, but a little distance often helps. The fact and the perception of independence are both critical in the conduct of an investigation. The appearance of close existing ties between investigators and those that are subject to investigation can all too easily undermine the value of the exercise.

The person or persons who are leading the investigation obviously need to be

Deferred prosecution agreements

Deferred prosecution agreements (DPAs) are court-approved agreements that follow a Serious Fraud Office (SFO) or other law enforcement agency investigation into criminal allegations of corporate misconduct. They involve a business acknowledging that certain criminal conduct has taken place and agreeing to:

- Co-operate with the authorities.
- Accept the imposition of penalties and other financial orders, such as fines, confiscation and the disgorgement of profits and costs.

If a DPA is entered into, the business will still be charged but all proceedings will be suspended automatically and it will not receive a conviction.

The SFO published guidance on DPAs on 23 October 2020, which follows and complements the guidance on corporate co-operation that it issued on 6 August 2019 (*see "Privilege" in the main text*) (*www.sfo.gov.uk/publications/guidance-policy-and-protocols/guidance-for-corporates/deferred-prosecution-agreements/; www.practicallaw.com/w-028-4481*).

DPAs have regularly been used in investigations into corporate organisations and the failure to prevent bribery offence (*see News brief "Airbus: the flight path for future DPAs?", www.practicallaw.com/w-024-1612*). The most recent DPA was concluded between the Crown Prosecution Service and Entain plc on 5 December 2023 following an investigation by HM Revenue & Customs (*www.cps.gov.uk/cps/news/first-ever-cps-deferred-prosecution-agreement-ps615-million*).

Related information

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independent of the issue under investigation. If the lawyer concerned is not sufficiently independent, they risk:

- Being in breach of their SRA obligations to act with independence and to avoid acting with a conflict of interest.
- Undermining the outcome of the investigation on the grounds of actual or perceived unfairness or bias, and damaging public trust and confidence.

The SRA flags that it is particularly important that investigating solicitors act with independence and integrity in order to ensure a robust internal investigation that delivers an objective and unbiased outcome.

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