

## The unattractive proposition

*Mabey & Johnson may have agreed to plead guilty to corruption offences after self-reporting to the Serious Fraud Office but companies have not exactly been falling over themselves to own up and make a fresh start. Bill Waite of The Risk Advisory Group finds sound reasons for their reticence.*

### A disappointing first year

Keith McCarthy, Head of Anti-Corruption at the Serious Fraud Office (SFO) recently stated that UK corporations have shunned the US plea bargaining model, and rejected SFO Director Richard Alderman's encouragement to come forward and confess all in return for more lenient treatment.

Only four companies have presented themselves in the past 12 months – “Those cases are perhaps not as many as Richard and I anticipated might happen” (*Financial Times*, 22 June 2009).

Mr McCarthy and the Director put this lack of candour down to the EU 2004 Procurement Directive, which bars business convicted of corruption from being awarded EU contracts. They are wrong.

There are a significant number of complex reasons why their expectations have not been met. As well as the current state of English law, the risks of concurrent exposure to US jurisdiction cannot and should not be ignored. Nor will the Bribery Bill, if it becomes law, make it more likely that the floodgates will open.

At the heart of the recalcitrance lies the inescapable conclusion that corporations risk far more by doing deals than remaining silent, unless forced to do so because of circumstances outside their control.

So what then are the risks?

### Defective law

First, as everyone recognises, the current English law in relation to bribery and corruption – particularly with respect to overseas corruption – remains defective. The prospect of the SFO or any other prosecutorial body being able to charge an offence or, if they do, securing a conviction after a trial is low.

Whilst the Bribery Bill published in March partially deals with some of these barriers, for example by introducing vicarious liability for corporates, prosecutions will remain problematic.

The fundamental rights of a defendant to know

what is being alleged, to see the evidence of it and not be treated more harshly for maintaining their rights to legal professional privilege will not be changed by the new law. The absolute requirement that the evidence of an accomplice be treated with the utmost circumspection by courts and juries alike will not be removed. These rights, which have evolved over centuries to protect the individual against oppressive acts by the state, assist those accused of crimes to make informed decisions about whether allegations should be fought or pleas should be agreed.

### US – tipping the scales of justice

The US system is fundamentally different. It is established US prosecutorial tradecraft to use junior people involved in alleged criminal conduct to give incriminating evidence against those who are senior to them – whether it be the Mafia or a Fortune 500 business. No disclosure is made of the prosecution case and often very little independent investigation is done. Prosecutors rely on their powers and their ability to affect sentences through plea agreements and sentencing memoranda to extract admissions of guilt and cooperation.

Defendants receive massive encouragement to plead and to give evidence for the government in return for lenient sentences. Even without this enticement, the disparity between sentences for guilty pleas and convictions after a contested trial is so great as to make the notion of free choice an illusory one. A review of the sentences handed down to individuals in contested *Foreign Corrupt Practices Act* (FCPA) cases versus those where guilty pleas were entered makes stark reading for those considering a not guilty plea, however confident they are in their defence.

In her report on the SFO, Jessica de Grazia stated that in the three District of New York prosecutors' offices there was a 97% conviction rate for fraud-related matters, the vast majority of which were the result of plea deals. In the history of the US *Foreign Corrupt Practices Act* there has never been a contested trial of a corporate. All cases have been settled by prospective defendants by way of guilty pleas, deferred prosecution agreements or non-prosecution agreements. This illustrates the power of the state in US criminal process.

Negotiated settlements have led US prosecutors to

become more and more extravagant in constructing legal theories to extend criminal liability in the almost certain knowledge that those theories will not be challenged. In the indictments for Siemens and KBR, the US Department of Justice (DoJ) pleaded that a US dollar-denominated transaction that clears through correspondent accounts in US intermediary banks establishes jurisdiction over all who were party to the transaction, whether they be foreign corporates or individuals. In the NatWest Three trial, 95% of the criminal conduct allegedly took place in the UK and the “victim” was a UK entity, yet the DoJ maintained, and the English courts agreed, that the US authorities had jurisdiction.

### **Commercial imperatives and foreign exposure**

To simply point the finger at the EU directive misses these fundamental differences. The EU directive is not a barrier – the combined effect of civil recovery orders and serious crime prevention orders mean that corporations can come forward and do deals without exposure to the directive by entering agreements with the prosecutors which are not predicated by a guilty plea to a criminal offence. Balfour Beatty’s negotiated settlement with the SFO in 2008 demonstrates that very point.

The Director’s argument ignores the fact that corporations convicted in America also risk being banned from federal government procurement. This is a fundamental driver to entering a negotiated plea agreement and not a deterrent.

Second, neither Mr McCarthy nor the Director has recognised the fact that whilst a deal with them may result in a more lenient sentence, corporations have wider considerations than simply the English or the European position. The DoJ has not been shy to initiate parallel investigations and prosecutions where alleged criminality touches on US jurisdiction. In the Siemens and Statoil cases, for example, prosecutions and plea agreements have been made in both geographies. Although credit may be given for fines paid domestically, it does not mean that prosecutions will not be brought by the US authorities. This will particularly be the case if they determine that domestic prosecutors have not been aggressive enough in their charging process, or they consider that the penalties imposed or deal reached are an insufficient deterrent or retribution.

In the Akzo Nobel case, DoJ intervention went further – the deferred prosecution agreement with the

company specifically required Akzo Nobel “to reach resolution” with the Dutch prosecutorial authorities and to pay a fine at a specific level. If Akzo Nobel paid less than the specified amount, they were required to pay the difference to the US Treasury. In this way the DoJ essentially exported the federal sentencing guidelines to Holland.

By entering a negotiation with the SFO any settlement will be made public, providing both the information and, via mutual legal assistance, the evidence to allow the DoJ to pursue its own course.

### **Compliance penalties**

Third, US plea agreements not only impose financial sanctions, they also permit the prosecutors to require the corporation to appoint monitors and compliance counsel to investigate allegations of corruption, to create new compliance programmes and to monitor the corporation’s compliance with those programmes. These powers are also coveted by the Director. However, in the US the exercise of these powers has become the subject of significant criticism. “Rogue monitors” – often former prosecutors – have become a law unto themselves. Allegations of cronyism on appointment, undefined remits and the loss of a corporation’s privilege, coupled with huge professional fees, have resulted in significant concern within the FCPA defence bar and within those corporations who have been made subject to this requirement. Admission in the UK could result in sanction in the US, including the appointment of US monitors. Even if this were not the case, if the Director gets what he wants, the prospect of the SFO having ongoing access to confidential information and the ability to reopen cases is not an attractive one. Thus far, as an organisation the SFO has not demonstrated a deep understanding of business and the financial services community.

### **Extradition & faith in US justice**

Fourth, extradition. A great deal of controversy has emerged about the ability of the US authorities to seek and obtain extradition of English nationals to the US. In short, it is much easier than it used to be because of changes in the law directed at anti-terrorism.

Mark F. Mendelsohn, the Deputy Chief of the Fraud Section of the Criminal Division at the DoJ, has stated at a number of conferences this year that the prosecution of individuals is central to the DoJ’s strategy in fighting corruption, and indeed more individuals are being charged than ever before in the history of the *Foreign Corrupt Practices Act*.

The only protection that an individual has against the threat of extradition is prosecution in their home state for the same conduct. In the NatWest Three case the defendants, cognisant of the massive difference in their rights here and the consequences of a conviction in Texas, did everything they could to make the SFO charge them in the UK, yet they failed.

Why would a board expose itself to the risk of some of its members or its senior managers being extradited if, all else being equal, there was no realistic prospect of a prosecution in England, or if in so doing they would give up their fundamental rights and risk massively increased consequences if there were a US prosecution?

### Civil proceedings

Finally, Mr McCarthy and the Director are focused on criminal process. There is nothing to indicate that they have considered the potential for civil action, which may follow admissions, however caveated in plea agreements. The victims, whether they be the nation states in which bribery has allegedly been used to secure contracts, competitors or potential shareholders, could use the admissions to pursue their own claims.

In view of all of the above it would be prudent for a corporation to speak to its insurers before booking a cab to Elm Street.

### Bribery Bill – not the answer

The Director believes that the Bribery Bill 2009 will make his life easier and in some respects it will. He probably also believes that when it is enacted more admissions will follow.

In this respect it is unlikely that he is correct. Not only will the issues above still be live, the drafting of the statutory defence in the Bill creates a major problem for those it is meant to protect.

Section 5 creates an offence where a person who is performing services on a corporation's behalf bribes another person and the bribe was "in connection with the corporate's business" and "a responsible person, or number of such persons taken together, was negligent in failing to prevent the bribe".

A responsible person is "any person connected with or employed by the corporate whose functions at the time of the bribe included preventing persons from committing offences under section 1 or 4 or, if there is no such person, any senior officer of the corporate."

For the responsible person to be convicted, the

principal, ie, the bribe payer or offerer, does not have to be convicted or even prosecuted (section 5(2)).

It is however a defence for the corporate "to prove that [it] had in place adequate procedures designed to prevent persons performing services for or on behalf of the corporate from committing offences under section 1 or 4 in connection with [its] business." (Section 5(4))

So far so good.

But section 5(5) states that the statutory defence "is not available if the negligence referred to in subsection (1)(c) was wholly or partly that of a senior officer of [the corporate] or a person purporting to act in such a capacity."

"Senior officer" in relation to a body corporate means a director, manager, secretary or other similar officer of the body corporate. (section 5(7)(a))

In most corporates that currently have such codes, policies and procedures in place, the chief executive is ultimately responsible for corporate compliance including anti-bribery controls, and beneath him the general counsel and, increasingly, the chief compliance counsel. These individuals would all fall comfortably within the definition of "senior officer".

In all cases, if a bribe were to be proffered or paid it could be argued that at that time it was part of their function to try and prevent bribes and in failing to do so they have been "wholly or partly" negligent.

If this is the case, the statutory defence would not be available to the corporate unless it could establish on a balance of probabilities that it had in fact implemented adequate procedures, but that no "senior officer" was responsible wholly or partly for them.

And there is more.

Section 8(2) states that "If the offence [under section 1, 2 or 4] is proved to have been committed with the consent or connivance of a senior officer of the body corporate or a person purporting to act in such a capacity, that person (as well as the body corporate) is guilty of the offence and liable to be proceeded against and punished accordingly."

In the absence of any guidance on what level of process and procedure should be adopted, how does a board protect itself from the allegation that it has either consented to or connived in the dishonest act?

The Bill creates significant opportunity for 20-20 hindsight prosecutions and in so doing breaches another fundamental principle of criminal law, specifically that it should be clear what is and what is not criminal conduct.

And the final irony is that, according to the government, “the draft Bill will not impose any significant administrative burden on business. The corporate offence is not regulatory in nature and there will be no monitoring of compliance. The intention here is that the offence will have a beneficial effect for corporate governance by encouraging those companies which have not already done so to adopt adequate systems to prevent bribery.” (Cm7570 Para 98)

Ultimately everyone accepts that bribery is not a good way to secure business and when identified should be thoroughly investigated, and in appropriate cases, punished. However, Mr McCarthy and the Director’s expectation that corporates would rush to Elm Street and confess is both misguided and ill-judged.

#### SFO guidance – nothing added

The Guidelines issued by the Serious Fraud Office on 21 July 2009 do little to help. In part they are no more than a repetition of what Richard Alderman has been saying publicly for the last three or four months. In other respects they run contrary to McCarthy’s comments in the *FT* – emphasising rightly, for example, that civil remedies will avoid the EU Procurement Directive.

The sabre rattling is also unhelpful and totally inconsistent with the regulatory impact assessment that accompanied the draft Bill, which states – presumably after consultation with the SFO – that there will only be an additional 1.3 prosecutions a

year by the SFO.

To add to the confusion, the guidance notes slip in a novel, in English Legal terms at least, extension to corporate liability for bribery under the heading on page 6 “Other Guidance”. Specifically the SFO raises the prospect of a corporate being potentially liable for the acts and/or omissions of a take-over target after its acquisition. One really does wonder what public interest this might serve and why, if it is contemplated, it is not the subject of substantive and considered legal reform rather than ill-considered aspiration from Elm Street.

The US system, whilst attractive to a prosecutor, has little to recommend itself to corporations or indeed to those who believe in the fundamental rights of individuals and corporations to have allegations that are made against them properly proved against a background of rights to legal counsel and legal privilege.

The government needs to rethink the law and in so doing needs to consider very carefully whether that which has been proposed does actually reflect its policy. It also needs to consider whether continuing to appease the US in its march towards global dominance of individual and corporate standards is an appropriate stance for an independent nation state to take. I would suggest not.

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*Bill Waite (+44 (0) 20 7578 0013, bill.waite@riskadvisory.net) is the Group CEO of The Risk Advisory Group plc, Europe’s largest privately owned corporate investigations and business intelligence practice.*

#### Stop Press

As we were going to print the UK Parliamentary Joint Committee on the draft Bribery Bill published its first report in which it proposed to remove the need to prove negligence on the part of a “responsible person” to ensure adequate anti-bribery controls under clause 5(1)(c) in favour of strict liability for the collective commercial organisation, subject to an adequate procedures defence. The committee said that such an approach would follow the model adopted in other leading countries. “A

commercial organisation “is well placed to demonstrate the adequacy of its procedures, preferably on a probative burden of proof.” (p84)

It is worth noting that the Law Commissioner, Professor Horder, thought it would not be fair to drop the negligence element, and the Directors of the Serious Fraud Office and Crown Prosecution Service and the International Chamber of Commerce (UK) agreed with him. The full report is available at [www.publications.parliament.uk/pa/jt200809/jtselect/jtbribe/115/115i.pdf](http://www.publications.parliament.uk/pa/jt200809/jtselect/jtbribe/115/115i.pdf)

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