New Director to Refocus SFO Following Critical OECD Report on Bribery Enforcement

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David Green QC this month took over the directorship of the Serious Fraud Office ("SFO") promising to "rebalance the relationship between prosecution and civil settlement" and focus on "strategically significant cases[1]" in a clear departure from the approach of his predecessor, Richard Alderman. Mr. Green's statement of intent follows the publication last month of a report by an Organisation for Economic Co-operation and Development ("OECD") working group ("the Report")[2] on the implementation in the UK of the Bribery Convention, which is highly critical of much of Mr. Alderman's tenure.

The UK has, by no means, always accepted the recommendations of OECD working groups, which are of course aggressive by nature in their approach to prosecution, but the tenor of their comments and criticisms, some of which are set out below, is certainly echoed by Mr. Green, who concedes that "the perception has emerged over the last few years that perhaps there is more willingness to compromise than to prosecute". He is plainly set to change that perception. It is reported that the large, circular table around which deals have been thrashed out over the last four years has already been removed from the director's office in favour of an imposing desk[3].

OECD Criticisms - Role of the SFO

The SFO's new director is, it appears, entirely at one with the working group's fundamental observation that the SFO's statutory mandate is to conduct criminal investigations and prosecutions and does not include their recently self-appointed role advising companies on both specific transactions and corporate measures to prevent bribery.

The Report makes the point that this role has created a potential conflict of interest for the SFO, which is effectively acting as both legal advisor and prosecutor. Also criticised is the fact that, to the extent that the SFO has advised on corporate responses to past misconduct, it has been entering into *de facto* non-prosecution agreements with zero transparency or accountability.

The OECD recommends that the SFO reprioritise law enforcement, leaving the advisory role to other

government departments. Mr. Green puts the matter even more succinctly: "We are primarily a crime-fighting agency and we've got to remember that".

Leniency

The Report also cites a number of specific areas in which it considers that the SFO's approach to individual cases has been overly lenient in recent years.

Noting that all corporate bribery cases since *Innospec* have been settled by civil consent agreements, the Report urges the SFO to seek criminal sanctions whenever available. It criticises as potentially "unsound" the policy, set out in the SFO's "Approach to Dealing with Overseas Corruption", of settling self-reported bribery cases "civilly wherever possible".

The SFO's definition of "self-reporting" is also criticised in the Report as being overly generous. In particular, it is said that companies such as Macmillan, currently classified amongst 28 self-reported cases received by the SFO, should be excluded from that group, given that they approached the SFO only after a referral had been received from the World Bank and having already been raided by the City of London Police.

The SFO undertook to review its policy on self-reporting in light of the views of the working group, which echo those expressed by the judiciary, that self-reporting should be rewarded with reduced rather than a total absence of criminal penalties. Mr. Green has confirmed that he, too, "would like to rebalance the relationship between prosecution and civil settlement". He warns that "[a] corporate might say: if we come and self-report we might get prosecuted. Well they might get prosecuted".

It remains to be seen if either the OECD or the judges will be satisfied by deferred prosecutions as a form of criminal sanction. Mr. Green says he is 100% in favour of the arrangements, due for introduction before the end of this year, but stresses they will be only one of the options available to the SFO.

The Report is also critical of the terms of the settlements that have been reached in recent years as well as suspicious of their overuse. The working group first criticises the SFO's apparent willingness to agree settlements on implausible factual bases. They refer in particular to what little is known of the settlement with *Macmillan* which proceeded on the basis that the contract tender process in question was "susceptible" to corruption and that it was "impossible to be sure" that awards of contracts were "not accompanied by a corrupt relationship". In earlier World Bank proceedings, *Macmillan* admitted unequivocally that bribery had been committed.

The SFO was also urged, in the interests of transparency and deterrence, to stop including confidentiality clauses in the agreements it reaches with corporate offenders. Those who have secured such agreements may be disappointed to learn that, according to the SFO's explanation to the working group, they considered themselves obliged to accept such clauses, as the likely outcome of a failure to reach agreement would be that no further action would be taken against the

company in question. The working group expressed some puzzlement as to why no action would follow a failed settlement negotiation and it appears from his declared stance that Mr. Green might well share their view.

The working group was impressed by the Financial Services Authority's ("FSA") use of its powers to fine companies for failure to maintain proper controls against corruption but once again critical of the SFO's subsequent failure to investigate the criminal aspects of the same matters. The Report points out that the FSA's remit is to deal with lack of adequate internal controls only, so that prosecution could and should follow for corrupt acts that have actually occurred or been attempted. It notes that, to date, administrative, civil and criminal sanctions have been treated as if mutually exclusive, whereas the FSA and SFO should, in their opinion, be working in tandem to bring administrative, civil and criminal sanctions to bear.

The Report also urges wider prosecution of individuals where related corporate entities enter into settlement agreements and notes the lack of individual prosecutions associated with a number of cases, including those of *Aon*, *Willis*, *Macmillan*, *Balfour Beatty*, and *Mabey & Johnson* (where individuals were prosecuted in relation to UN sanctions breaches only and not bribery).

In respect of the definition of "carrying on a business in the UK" as a basis for jurisdiction over commercial organisations failing to prevent bribery[4], the Alderman regime confined its interpretation to "buying and selling in the UK" and indicated that its priority was to "target foreign companies who are depriving 'ethical' UK businesses of a business opportunity" but otherwise to decline to investigate. The OECD group was not impressed with this approach and exhorted the SFO to exercise prosecutorial discretion in a manner that "creates a level playing field amongst companies from all Parties to the Convention".

As far as future "targets" are concerned, Mr. Green has indicated that he is looking for "significant strategic" cases which threaten confidence in the City and British business rather than the consumer-oriented frauds that interested Mr. Alderman. He is also keen to bring the first "big" Bribery Act case.

Guidance to Commercial Organisations ("GCO")

The working group's criticisms did not stop with the SFO and it also found the GCO, published by the Ministry of Justice, to be overly lenient in its approach.

It took particular exception to illustrations of "reasonable and proportionate" hospitality and promotional expenditure. A scenario in which a company pays for flights and accommodation to allow foreign public officials to meet UK executives in New York, the package to include fine dining and baseball match tickets for "an official *and his or her partner*", was of particular concern. While the GCO cited this as a case which was unlikely to raise the necessary inferences to constitute bribery, the working group (which added the italics) felt this was "unadvisable and high-risk activity

under almost all circumstances".

The Report further criticised the failure of the GCO to distinguish in various scenarios between private clients and public officials given that, in the latter case, the risk of corruption is substantially increased. The working group was also unhappy with the GCO's reliance upon the measure of whether expenditure is "commensurate with the reasonable and proportionate norms for a particular industry" as a relevant factor in inferring the *mens rea* for bribery. The Report notes that many industries suffer a high incidence of corrupt payments and, in any event, the government has in place no information or methodology as to how to evaluate sector norms.

The Report also emphasised the caution with which the GCO should be treated. While the Joint Prosecution Guidance requires prosecutors to take its provisions into account in considering prosecutions of commercial organisations for failure to prevent bribery, the judges interviewed by the working group declared themselves unlikely to pay the guidance much regard when interpreting the Act. Those interviewed considered it to have a similar status to an academic text and noted that government statements about legislation are "normally not of great relevance".

Recovery of Dividends

One innovation of which the working group did, unsurprisingly, approve was the SFO's recently announced policy to seek to recover from shareholders dividends paid out of the proceeds of unlawful conduct. This policy follows the recovery by way of consent order of dividends paid to Mabey Engineering (Holdings) Ltd, the parent company of Mabey & Johnson, which were derived from contracts performed by the latter in breach of UN sanctions in Iraq. The SFO has said that it will focus in this respect on those institutional shareholders who could be expected to exercise greater due diligence over the activities of their subsidiaries.

The Way Forward

The OECD, which is plainly looking to the SFO for a far more aggressive prosecution policy and a move away from the more pragmatic and cooperative approach of the last four years, will no doubt be delighted with the arrival of David Green. His task will not be an easy one, however, given that he labours under a much reduced budget, down 26% from the 2008-09 fiscal year to £33.9m this year and due to fall a further 25% by 2014-15 to £30.5m.

One solution to his budgetary problems plainly lies in renegotiating the terms upon which the SFO can retain the fruits of its labours. Currently, it receives none of any criminal fine imposed and only 37.5% of the proceeds of an order confiscating the benefit derived from an offence. Mr. Green has, unsurprisingly stated that he is "all in favour of prosecuting authorities being funded, to a greater or lesser extent, by money taken from criminals".

At present, however, Mr. Green is facing a herculean task on a very small budget and cannot ignore the need to cut deals in order to avoid costly and risky trials. He plainly understands, however, the

need to talk and walk tough in order to keep the upper hand at the negotiating table. He is now looking for some big scalps to prove his point and all indications are that his approach to them will be significantly different from that of his predecessor.

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[1] *Financial Times*, 27th April 2012.

[2] OECD Working Group; Phase 3 Report on Implementing the OECD Anti-Bribery Convention in the United Kingdom.

[3] Ibid.

[4] S.7 Bribery Act 2010.

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