

# BLP Corporate Crime & Investigations column: July 2016

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Berwin Leighton Paisner LLP's Corporate Crime & Investigations team is led by Aaron Stephens. The team regularly share their views on topical corporate crime and investigations issues with our subscribers.

## SFO releases new operational guidance on section 2 interviews

As promised, following the Serious Fraud Office's (SFO's) success in the High Court last year defending its decision to prohibit specific lawyers accompanying witnesses to an interview (because the lawyers also represented the witnesses' employer: *R (Lord and others) v SFO* [2015] EWHC 865 (Admin)), the SFO has published new guidance on its process for handling requests for witnesses interviewed under section 2 of the Criminal Justice Act 1987 (CJA 1987) to be accompanied by a lawyer. The guidance was published on 6 June 2016 and is available on the SFO's website. For more see *Legal update, SFO publishes new operational guidance on presence of legal advisors at section 2 interviews*.

### Section 2 of Criminal Justice Act 1987: requirements

Section 2 gives the Director of the SFO (or his delegate) the power to "require a person whose affairs are to be investigated ... or any other person whom he has reason to believe has relevant information to answer questions or otherwise furnish information with respect to any matter relevant to the investigation ...".

Failure to comply with a requirement to attend an interview or otherwise provide information, without reasonable excuse, can lead to prosecution and result in imprisonment or a fine (or both). The interviews, however, are not under caution and the PACE codes do not strictly apply.

### SFO's new operational guidance

The SFO's new guidance comprises three separate notes:

- *Internal guidance.*
- *Guidance for interviewees.*
- *Guidance for lawyers* advising those required to attend for interview under section 2 of the CJA 1987.

The guidance reiterates some of the points made by the SFO, and accepted by the court in *Lord*, such as the SFO's ability to lawfully refuse to allow a specific lawyer to attend with the witness (for example, where that lawyer also represents another suspect in the investigation). The guidance notes, however, go further and state that a lawyer

will be allowed to attend only if the SFO case controller believes that it is likely the lawyer "will assist the purpose of the interview and/or the investigation, or that they will provide essential assistance to the interviewee by way of legal advice or pastoral support ... ". This apparent "criteria" is slightly concerning and seems unnecessary in circumstances where any individual forced to attend a compelled interrogation by the SFO would undoubtedly benefit from, at the very least, "pastoral support".

Most interesting is the guidance for lawyers as this sets out what is expected from an interviewee or their lawyers in advance of the interview to seek permission for a lawyer to attend. Written notification must be served on the SFO at least seven days before the date of the interview, or three days after the date on which the SFO's guidance note accompanying the section 2 notice is received (whichever is later). The notification must include:

- The name of the particular lawyer and the reasons why their presence in the interview will assist the purpose of the interview or the investigation, or that the lawyer concerned will provide essential assistance to the interviewee by way of legal advice or pastoral support.
- Written undertakings from the legal firm relating to, among other things, confidentiality of information and documents, and confirmation that the firm does not represent or owe any duty of disclosure to any individual or company who is a suspect of the investigation.
- Written acknowledgement of the parameters of the role of the lawyer in the interview, namely that the lawyer may only provide "legal advice or essential assistance", must not do anything to undermine the free flow of full and truthful information, and generally that only one lawyer will be permitted to attend the interview. Exceptionally, an additional lawyer may be permitted to attend solely for the purpose of taking a note.

The SFO's new guidance is noticeably different in its tone and level of prescription from the SFO's previous policy and practice, as set out in its Operational Handbook. This is perhaps not surprising given the more robust approach taken by David Green CB QC since taking the reins of the SFO in 2012, and the issues that arose in *Lord*. However, the undertakings, in particular, may be viewed as excessive and unnecessary in circumstances where lawyers are already bound by legal and ethical duties of confidentiality and to avoid conflicts of interest.

Various details will need to be hammered out between the SFO and law firms. For example, the first undertaking (that the firm does not represent any individual or legal person who is a suspect in the investigation) presumes that the firm will be in a position to know all existing (or indeed potential) suspects in an investigation. Will the SFO actively inform the firm of all existing and potential suspects to enable the firm to safely give this undertaking? Also, what if the corporate employer is a major corporation regularly employing a range of law firms? Will any individual legal adviser's firm be required to undertake that the firm has never represented the corporate in any capacity? Or only in a capacity that is relevant to the investigation? If the former, this could vastly reduce the pool of potential legal advisers available to individuals who get caught up in SFO investigations into major corporates.

It is difficult to determine at this stage the practical impact this new guidance will have on employees who are required to attend interviews pursuant to section 2, as well as any corporate employers who are or may come under suspicion in due course; perhaps it will simply result in earlier appointment of separate legal representatives for individual employees. Importantly, the guidance does not appear to restrict consultation before the interview, which may be important, for example, to ensure that the employee's independent lawyer understands any corporate legal privilege issues that might arise during the interview.

## **Government to consult on new corporate crime offences**

We have recently commented on the government's proposals regarding the introduction of a strict liability criminal offence for corporations that fail to prevent the facilitation of tax evasion (see *BLP Corporate Crime & Investigations column: April 2016*). For more, see *Legal Update, Consultation opens on new corporate offence of failure to prevent the criminal facilitation of tax evasion*). In further announcements in May 2016, the government has now confirmed that it also intends to resurrect its plans for a new offence for failure to prevent "economic crime" more broadly. Following on from the fallout experienced in the wake of the Panama papers, these back-to-back proposals offer a clear indication of the government's direction of travel in driving its fight against corporate crime. It remains to be seen whether Brexit and the current leadership vacuum will delay or even scupper these initiatives.

### **Background to the proposals**

Failure to prevent bribery has been a strict liability offence since the Bribery Act 2010 (BA 2010) came into effect on 1 July 2011. The offence, set out at section 7, allows for a corporate to be prosecuted where any person associated with it commits an act of bribery on behalf of that corporate with the intention of obtaining or retaining business or gaining an advantage in the conduct of business. The only defence is for the corporate to show that it had in place "adequate procedures" designed to prevent bribery. The draft legislation for the proposed failure to prevent facilitation of the tax evasion offence also mirrors section 7 of the BA 2010, although interestingly, the defence in this case is to have in place "reasonable" as opposed to "adequate" procedures, which is generally considered to be a lower standard.

Since 2013/14 the government has been considering proposals to create an analogous offence for corporate failure to prevent economic crime more broadly (see, for example, *Berwin Leighton Paisner's corporate crime and investigations column: October 2014*). Speaking at the Cambridge Symposium on 1 September 2014, David Green CB QC, the Director of the SFO, had stated that the SFO's mission was clear: to tackle the "top strata" of economic crime. Many were therefore surprised when the proposals were shelved in September 2015 purportedly on the basis of a statement in Parliament that "there [was] little evidence of corporate economic wrongdoing going unpunished." Up to that point, however, there had been no corporate prosecutions under the BA 2010, whereas the subsequent period saw the SFO entering into a Deferred Prosecution Agreement (DPA) with ICBC Standard Bank plc in November 2015, as well as the successful conviction of Sweett Group plc in December 2015 for the section 7 offence. These corporate resolutions, in conjunction with the revelations regarding offshore tax havens and the emphasis on transparency following the Panama papers, have now prompted the government to reconsider resurrecting the expansion of corporate liability for other types of economic crime.

### **The new offence(s)**

David Cameron first announced the government's intention to resurrect the offence in *The Guardian* on 11 May 2016, where he stated that:

"In the UK, in addition to prosecuting companies that fail to prevent bribery and tax evasion, we will consult on extending the criminal offence of "failure to prevent" to other economic crimes such as fraud and money laundering so that firms are properly held to account for criminal activity that takes place within them."

These proposals were subsequently confirmed by a government press release following the Anti-Corruption Summit in London on 12 May 2016, which stated that the consultation would explore whether the "failure to prevent" model should be extended to complement existing legal and regulatory frameworks.

Details remain limited pending publication of the consultation later this summer. However, it looks likely that "economic crime" will be interpreted broadly, and will most likely include fraud and money laundering.

In addition, it can also be expected that any new offence will be modelled on section 7 of the BA 2010, in which case we can anticipate the following:

- "Associated person" to be widely defined as those who perform services for or on behalf of the corporate, and could therefore include employees, agents and subsidiaries.
- The legislation to have extra-territorial effect and to apply to offences committed by associated persons anywhere in the world.
- The legislation to apply to any company that is incorporated in the UK, or which conducts business or part of a business in the UK (whether or not it is incorporated there).
- A defence for the corporate if it can show that it has in place procedures designed to prevent the associated person from undertaking the relevant conduct.

It will be interesting to see whether the defence adopts the standard of "adequate" procedures or the lower "reasonable" standard. Either way, it is expected that the new offence will be accompanied by extensive guidance, which will hopefully provide clarity as to the relevant threshold.

There are also several practicalities which will require further clarification, including the potential awkwardness in transposing elements of the section 7 offence across to new offences which do not sit so easily within the anti-bribery model. It is difficult to see how a requirement for the associated person to commit the relevant crime with the intention of "obtaining or retaining business, or an advantage in the conduct of the business" can, for example, apply to a money laundering offence. Furthermore, it is uncertain how an offence for failure to prevent money laundering would interact with the extensive existing procedures in place to counter money laundering in the regulated sector, or indeed, how such an offence would apply to corporates in the non-regulated sector.

### **Implications for corporates**

Currently, it is extremely difficult to hold a company liable for corporate forms of economic crime other than bribery, in part due to the "identification principle" whereby the prosecution must have evidence that an individual at board or executive level (the company's "directing mind and will") took part in the offending conduct. This is notoriously difficult to prove. However, if the new offence is introduced, the wide definition likely attributed to a corporate's associates would allow prosecutors to circumvent the "identification principle", representing a huge expansion in corporate criminal liability.

Notably, many corporates are still struggling to achieve adequate procedures five years on from the implementation of the BA 2010. In these circumstances, while the government is clearly keen to entrench the UK's reputation as a global leader in anti-corruption, there are unsurprising concerns resulting from the inevitable compliance burden that would be placed on corporates in the wake of even broader legislation.

Taking this on board, the key take away message appears to be this: plan, prepare and do not wait until the legislation is in effect.

Corporates would be wise to seek a head start by considering the procedures that may be required now. This will of course depend on the corporate's risk profile, and will require a consideration of the nature, scale and complexity of its activities. Areas to focus on include the following:

- Risk assessment procedures.
- Extent of reliance on third party service providers.
- Due diligence processes.
- Training policies.
- Procedures to monitor the effectiveness of the policies and implement any improvements required over time.

Corporates will also need to demonstrate visible board level involvement in the formulation of these policies.

## **US v Hoskins may rein in FCPA jurisdiction**

Developments in a US prosecution under the Foreign Corrupt Practices Act 1977 (FCPA) appear to limit the aggressive extra-territorial reach of the FCPA. The case in question is the ongoing prosecution of Alstom executive Lawrence Hoskins (see *United States District Court: United States of America v Lawrence Hoskins*).

The starting point is to remember that according to the text of the FCPA itself, there are three jurisdictional "hooks" that make a company (or individual) subject to the FCPA:

- Any "domestic concern" (US incorporated company) or "issuer" (company, US or otherwise, whose shares are traded on a US stock exchange) that makes use of US interstate commerce in furtherance of a bribe or corrupt payment to a non-US public official is caught by the FCPA. In addition, any officer, director, employee or agent (regardless of nationality) of such a US "domestic concern" or "issuer" is also caught by the FCPA and can be prosecuted for their involvement in the offering, making, authorising etc of the bribe or corrupt payment.
- Any US citizen, national or resident that offers, makes, authorises etc a bribe or corrupt payment to a non-US public official, regardless of whether they make use of US interstate commerce and regardless of where in the world the offending conduct takes place (that is, to be prosecuted they do not need to be in US territory when committing any element of the offence).
- Any other person (legal or natural), regardless of nationality, who while in the territory of the US acts in furtherance of a bribe or corrupt payment to a non-US public official.

In 2014 Alstom SA pleaded guilty to various allegations of bribery involving payments to public officials in Indonesia, Saudi Arabia, Egypt and the Bahamas. Mr Hoskins was the Senior Vice President of Alstom for the Asia Region, and was employed by Alstom UK (but seconded to Alstom Resources Management SA, a French entity and subsidiary of Alstom SA) during the relevant time period. At no time during the relevant period was Mr Hoskins based in the US, and presumably he did not carry out any offending conduct "while in the territory of the US".

The prosecution of Mr Hoskins is proceeding on the primary basis that during the relevant period he was an "agent of a domestic concern" (that is, an agent of Alstom Power US) and that he committed violations of the FCPA in that capacity (therefore falling within the first hook above). However, as an alternative basis of liability, the US government's indictment also states that even if he is not an "agent of a domestic concern", he may still be found guilty of a conspiracy to violate the FCPA because he "acted together with a domestic concern to violate the FCPA."

Hoskins first sought to dismiss the indictment in its entirety (by arguing that it failed to plead sufficient facts to prove that he was an "agent of a domestic concern"). This motion failed and the US District Court (Connecticut) ruled that whether an individual is an agent of a domestic concern is a highly factual inquiry that should be determined by a jury at trial, not by the court at the pre-trial stage. After this ruling, the US government amended its indictment (insofar as the alternative, conspiracy count was concerned) which opened the door for Mr Hoskins to bring a separate motion to dismiss that conspiracy count only.

He prevailed in this motion because the court agreed with him that the FCPA does not confer jurisdiction over an individual who neither:

- Carried out any corrupt act while in the territory of the US.
- Falls within any of the specific categories of person enumerated by the FCPA (for example, "agent of a domestic concern").

Accordingly, in circumstances where a person is incapable of being prosecuted for a substantive FCPA offence (due to the lack of jurisdiction over that person), they cannot be prosecuted for a conspiracy to violate the FCPA either.

The US government asked the court to reconsider this ruling, but the motion for reconsideration was denied. Accordingly, the case has now been appealed to the 2nd Circuit Court of Appeals. We understand that the government must file its appeal brief during August 2016.

The case is potentially significant in that it would act as a limit on the FCPA's application to non-US individuals and companies, provided they are not "issuers", "agents of a domestic concern", or commit some element of an FCPA offence "while in the territory of the US". Previously, the government has been successful in entering into multi-million dollar settlements with non-US companies who do not satisfy these requirements, by relying on a legal theory that such persons may still be prosecuted as members of a conspiracy. The court's judgment in *Hoskins* (if affirmed by the 2nd Circuit) would be a rejection of this legal theory in the FCPA context.

## **A summer of sport: what can be learned from the FIFA bribery scandal?**

Whether a sport enthusiast or not, most people will be enjoying at least one if not all of the Euros, Wimbledon and the Rio Olympics. It's going to be a good summer for sport, but it clearly hasn't been an easy couple of years for football, tennis or several other sporting disciplines.

Of course, there have been recent high-profile doping issues, with Sharapova recently banned from professional tennis for two years after taking a banned substance and the entire Russian athletics team being banned from Rio. However, the most significant matter remains the FIFA bribery scandal. Even if you are indifferent to football, you cannot escape coverage of the ongoing saga of the US prosecution of a host of very senior FIFA officials.

The prosecution is, in the words of the Department of Justice (DOJ), "one of the most complex worldwide financial investigations ever conducted", with 27 defendants spanning over 20 nationalities alleged to have engaged in several schemes all designed to solicit and receive well over \$200 million in bribes and kickbacks to sell lucrative media and marketing rights to international soccer tournaments and matches. High-profile dawn raids have been carried out on the FIFA headquarters in Switzerland, extradition of various defendants to stand trial in the US has been granted and eight defendants have already pleaded guilty and agreed to forfeit more than \$40 million.

The FIFA prosecution has resulted in the general public being much more aware, and interested in, the ongoing fight against corruption. It is also a timely reminder of several key points that all corporates and financial institutions should keep in mind:

- **Increased appetite and resources to prosecute corporate crime.** The DOJ has proved it remains willing and able to take on large international investigations, even in circumstances where the US interest in the underlying organisation is not obvious. Moreover, the number of white-collar prosecutors in the US has increased in recent times; prosecutors need cases, and with a crowded US market they will increasingly look abroad for juicy cases to pursue. We are also seeing signs of a confident and increasingly aggressive SFO.
- **Jurisdiction is not a barrier to prosecution.** Just because payments are made or received in jurisdictions outside the US or UK, and just because defendants are located outside the jurisdiction, this does not mean that the DOJ or SFO will be deterred from investigating or prosecuting.
- **Far-reaching reputational impact.** There has always been a reputational risk associated with committing corporate crime, but the FIFA scandal has highlighted the media's (and the general public's) increasing appetite for exposing unlawful behaviour in all sectors, including sport, even where that exposure is itself brought about by dubious or even illegal means.
- **Prosecution of senior individuals.** The extradition of senior FIFA officials reinforces the general trend across different sectors, including financial services, that regulators and prosecutors are increasingly focused on pinning liability on senior individuals within organisations affected by corporate crime.

So, while hopefully everyone enjoys the Euros, Wimbledon and the Olympics this summer, they act as a timely reminder for clients of how catastrophic the fallout from corporate crime can be for individuals, entities and whole sectors, as well as the importance of addressing and preventing corporate crime in the first place.

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