

Charging Decisions and the Company – the UK Serious Fraud Office Perspective

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Introduction

The Serious Fraud Office, London (“SFO”) is a small specialist department charged with responsibility for investigating and, if appropriate, prosecuting criminals, both individuals and companies, who have committed serious or complex fraud (which includes “corruption” as almost invariably corruption involves fraud). That is my area of expertise and fraud is the area that I will focus on, not the very many other offences for which a corporation can be liable in criminal law.

One of the reasons for the existence of the SFO is to act as a bulwark for the financial centre of the City of London – the heart of the UK economy and an engine room for the wider world economy. Until the SFO was established, petty frauds, clumsily committed, were likely to be detected and punished while the larger and more cleverly executed crimes escaped unpunished. Translating that across social descriptions, there was once law for the “blue collar thief” and another law for the “white collar fraudster”. The Roskill Report, which was behind the SFO creation, concluded that “If the government cherishes the vision of an

equity-owning democracy, then it faces an inescapable duty to ensure that financial markets are honestly managed”.

The company as SFO defendant

Looking at current cases that the SFO is currently prosecuting, only 11% of our cases involve corporate defendants, even though most of our investigations initially involve a company as a suspect. Gradually the companies are “investigated out”. It is fairly easy to see why this happens:

1. In many cases the companies which figure prominently in SFO investigations are themselves the victims of the fraud and it becomes clear early on in the investigation that there is no question of their being charged.
2. In other cases the fraudster, often a dominant, controlling individual, uses one or more companies as a vehicle through which the fraud is carried out. In those circumstances, the companies are merely tools used by the fraudster for his own benefit. In such a case, even if the legal and evidential requirements are met, the public interest is rarely served by a prosecution of the company as well as the individual who perpetrated the fraud.

Indeed it is common in both these situations for the company involved to cease to exist, which is another difficulty in bringing criminal proceedings against

corporations – one minute they are there and the next minute they are gone in a cloud of debt, for example Barings Bank and Enron, to name but two. So, to some extent, a “corporate body” is a difficult concept when trying to develop and apply criminal legal principles – it is amorphous, can change overnight and often simply disappears.

Of those cases where the SFO prosecutes the company, let’s look at why the decision is taken to proceed against the company. Here, a distinction should be drawn between “white collar crime” and “corporate crime”. In the two examples I have given it is the individuals, generally directors, who have committed the offences. However, in some cases, and looking at the current SFO investigations, the most serious cases, it is the corporation itself that commits the offence. The offences emerge from behind the unrestrained pursuit of company profit by those employed by companies to pursue the companies’ commercial interests within the business culture which the companies caused or permitted to exist. In such cases where the unrestrained pursuit involves acts of dishonesty it is SFO’s assessment the corporation should be prosecuted.

Public Policy Considerations

It is useful to look at some of the public interest reasons that favour prosecution in such cases:

- A key aim of the SFO is the reduction of fraud and the cost of fraud through deterrence of fraud. The public interest requires that the SFO does all that it can to achieve this. This means that, if justified by the evidence, the criminal conviction of these companies should be sought as a deterrent to other companies which may be tempted to cause or permit such frauds to be carried out by their directors or senior employees. It is even more important – “deterrence x 2” – where an offence is, as is frequently the case, difficult to detect and, once detected, difficult to prove in court. In this situation it is a basic principle of law enforcement and penal policy that if there is good evidence the company should be prosecuted.
- In the wider context, it should be remembered that companies which do not commit the resources and/or exercise the restraint necessary to meet the required standards of business conduct thereby gain competitive advantage over those companies that do. Blame lies in those companies which fail culpably to promote and require a law-abiding approach to the conduct of their business.
- There is a widespread public perception (perhaps encouraged by a cynical media) that a company can conduct its business in non-compliance with legal requirements without sanction. It is thought that a company can enjoy whatever financial advantages which accrue from that non-compliance in the knowledge that, when found out, it can simply dump criminal responsibility on to the relevant employees who at the material

time occupied the appropriate positions, even though the conduct of those individuals conformed to what the company required or expected of them. There is a strong public interest in demonstrating that this cynicism is misconceived.

There are other legal and practical reasons that come into consideration:

- In cases where the corporation has itself committed the offence, to prosecute the individuals involved without prosecuting the company would be to largely miss the point. There is generally no evidence of actual or intended personal benefit on any scale – the sole purpose is to increase the company profits.
- To prosecute the individuals alone would not only be inappropriate; it would also be a gift to defence counsel - a golden opportunity to portray to a jury the individual defendants as “scapegoats” or “fall guys”, with unwarranted acquittals against the weight of the evidence.
- Prosecution of the company will enable larger confiscation and compensation orders to be made because the benefit will be bigger. For example, the benefit to a company of obtaining a large contract by corruption will be the price of the contract. The benefit to an individual manager for arranging the corrupt deal may only be his salary and fringe benefits.

- We need to comply with international obligations such as the OECD Anti - Corruption Convention which requires that “each party shall establish liability of legal persons for the bribery of foreign public officials.”

Corporate Structures and the Criminal Law

The reasons I have put forward for pursuing criminal prosecutions against companies (on those occasions when the company itself, through the directing mind of its directors and managers, crosses over the divide from sharp business practice into dishonest and illegal activities) are in my view compelling. However, there are considerable difficulties in bringing such companies to account. I have already mentioned one of them – their ability to disappear – to lose their structure completely. But there are other difficulties (and here I am putting to one side the court process difficulties in managing these very large cases.)

Most of the corporate defendants we are currently looking at are multinationals or large companies that carry on a considerable part of their business outside their home jurisdiction. Globalisation and the use of technology inevitably bring additional considerations. For example, where did the offence occur? Are there competing jurisdictions? Can reliable evidence be obtained from abroad?

These complications allow a number of escape routes for well funded law-breaking companies which can only be overcome if investigators and prosecutors themselves become “multinational”, not in the sense of ceding their own national responsibilities but developing effective trans-national border accommodations.

Responses to multi national corporate offences

Such arrangements can be developed in a number of areas:

- We must go further in harmonising international laws so that the definitions of offences are common across jurisdictions. Such an approach is already underway, for example in the requirements for the offence of bribery, a single instance of which may cross a number of national jurisdictions. That is not a problem provided such an offence can be and is effectively prosecuted in one jurisdiction, which is much more likely to happen if all jurisdictions involved are working from the same offence definitions.
- There can be extensions to extra-territorial jurisdiction. For example, the UK's Anti-Terrorism Crime and Security Act 2001 which came into force on 14 Feb 2002 gives UK courts jurisdiction over corruption committed overseas by UK nationals or companies. But, to date, we have not thought it appropriate to exert jurisdiction over a company for actions which take place entirely in a foreign country.
- We should seek to develop more ways for joint investigations by law enforcement agencies from more than one jurisdiction to be undertaken. This is already underway in the European Union. Under the European Convention on Mutual Legal Assistance two or more member states may enter into an agreement to form a joint investigation team (JIT), where

they are all interested in investigating an offence that has cross-territorial and cross-jurisdiction issues. The structure of the JIT will take into account these issues. For example, there will be agreement on the composition of the international team and that it will follow the laws and practices of the country where it is operating. There will also be agreement on how it will decide what offences should be charged. Most importantly, JITs do not have to send formal Letters of Request to each other, saving time and avoiding opportunities for legal challenge.

Conclusions

In simple terms there needs to be a global response to global fraud. This requires Treaties, Conventions, parallel domestic legislation, Memoranda of Understanding, Protocols and local arrangements, not to mention the human requirements necessary to bring it all about - excellent organisation, planning, responsiveness and determination.

However, before going that route, we should ask the question whether it is the right route – there are alternatives:

- In areas like serious or complex fraud, companies are, for example, being made subject to much stronger external regulation enforceable in the civil courts. It is now common practice to include in commercial contracts for public procurement work anti-corruption provisions, entitling the government or local authorities to terminate the contract if any evidence of

corporate enticement or fraud in the winning of that contract is subsequently discovered. This approach could be extended further.

- Another option would be to look to new ways of ensuring that companies have effective internal controls (not simply regulation by shareholders which generally has not worked). The development of a strong “core values culture” for staff within a corporate structure is one way of enhancing internal controls.

Both these options have a role but that role is in addition to criminal enforcement against a company for fraudulent conduct. It is back to one of the key reasons for the existence of the criminal law – a separate and distinct body of law from the civil law. The wrong done is so great that it is a wrong against the State, not merely against the shareholders, and consumers, and banks and all those many others that are adversely affected by corporate fraud. It is a wrong committed against us all as it undermines the foundations of local economies and the wider global economy to which we look for our economic well-being. That is the thread which links all those SFO cases where the company is a defendant.