BCLP. Client Intelligent

Insights

FALLOUT FROM THE GLENCORE RESOLUTIONS & LESSONS LEARNED

Jun 10, 2022

SUMMARY

Update 24 June 2022: Having pled guilty on all counts, Glencore Energy (UK) Ltd was convicted on 21 June 2022 on all seven charges of bribery brought against it by the SFO. It will be sentenced later this year, on 2 and 3 November.

On 24 May 2022, Glencore International AG announced a series of coordinated resolutions with various international enforcements agencies including the Department of Justice ("DOJ"), the Commodity Futures Trading Commission ("CFTC"), Brazil's Ministerio Publico Federal ("MPF"), and the Serious Fraud Office ("SFO") following investigations into bribery and market manipulation by the group and its affiliates. What do the financial penalties involved reveal and how is the sentencing of Glencore Energy UK Ltd on 21 June 2022 likely to play out?

Global resolutions

In one of the two plea agreements with the DOJ, both of which remain subject to court approval, Glencore International AG pleaded guilty to one count of conspiracy to violate the FCPA over the period 2007 to 2018, and agreed to pay $428,521,173 in fines and $272,185,792 in criminal forfeiture and disgorgement. It accepted liability for, among other things, making and concealing payments worth $79.6 million to secure improper advantages in Nigeria, Cameroon, Ivory Coast, and Equatorial Guinea, plus $27.5 million in the DRC, as well as allowing corrupt payments to be made to Brazilian and Venezuelan officials. Sentencing has been set for 3 October 2022. In a separate agreement filed in the District of Connecticut, Glencore Ltd pleaded guilty to one count of conspiracy to engage in commodity price manipulation covering the period January 2011 and August 2019. Should this agreement be approved, Glencore Ltd will pay a fine of $341,221,682 and criminal forfeiture of $144,417,203. Sentencing is expected to take place on 24 June 2022.

On the same date, the CFTC issued an order against Glencore International AG, Glencore Ltd (New York) and Chemoil Corporation (New York), which contained details of both the charges and

settlement agreed regarding findings that the group manipulated the oil markets, defrauded other market participants through corruption, and misappropriated material nonpublic information. Under the negotiated settlement, the group has agreed to pay a total of $1.186bn in disgorgement and penalties, representing the highest civil monetary penalty this agency has achieved to date.

Glencore International AG separately agreed to pay $39,598,367 under a resolution signed with the MPF in connection with the investigation into bribery allegations arising from the "Operation Car Wash" global probe.

In a press release published at the same time, the UK's SFO announced that Glencore Energy (UK) Ltd had had its first appearance before the magistrates' court. The company has been charged with five substantive counts of bribery and two counts of failing to prevent bribery (under s7 of the Bribery Act 2010 ("BA 2010")) in relation to allegations that the company (via agents and employees) paid bribes worth over $25 million for preferential access to oil in connection with its operations in Cameroon, Equatorial Guinea, Ivory Coast, Nigeria, and South Sudan; many of the same jurisdictions covered by the DOJ's FCPA agreement. The company has indicated it will plead guilty to all charges and sentencing will take place in the Crown Court on 21 June 2022. This resolution will bring to a close a criminal investigation which commenced in December 2019 and which was being conducted in parallel with the US and collaboratively with Dutch and Swiss enforcement authorities.

Significant amounts were credited against penalties agreed with other enforcement agencies in each of the negotiated settlements with the DOJ and CFTC. The CFTC settlement provided that a sum of $852,797,810, representing the disgorgement and penalties, may be offset by the amount of any payment made pursuant to the resolutions with the DOJ. Under the terms of the FCPA plea agreement with the DOJ, the department agreed to credit nearly $256m in payments to the CFTC, to the court in the UK, as well as to authorities in Switzerland if they reach a resolution swiftly there. Under the price manipulation agreement, the department agreed it would credit over $242m of the payments that the company makes to the CFTC.

Glencore had set aside a sum of $1.5bn to meet its total liabilities arising from these investigations, according to its 2021 financial statements.

According to its statement, the group is continuing to cooperate with the investigations by the Office of the Attorney General of Switzerland ("OAG") and Dutch Public Prosecution Service. The timing and outcome of these investigations remains uncertain.

Negotiating coordinated resolutions with multiple regulators

The overlapping reach of anti-bribery and corruption regimes in the UK, US and other jurisdictions has given rise to increasing demands to negotiate global resolutions, by which means a company might achieve certainty as to the overall amount of penalties it might be facing. Key to achieving this is deciding where to self-report first as this will most impact which enforcement authority will

coordinate the negotiation and settlement of the resolutions. Careful consideration must be given to how and when to report to each authority. As can be seen from the Glencore case, another important factor to be kept in mind is the timing of announcements and prosecutor press releases; not least to avoid drip-feeding destabilising, asymmetric and/or undesirable news to the market.

Tensions have (once again) recently become public regarding which authority has the strongest claim to jurisdiction, particularly between UK and US prosecutors. It seems that the SFO and DOJ were able to set aside their differences in this case, with the DOJ clearly taking the lead. The lead agency will typically almost always come away with the biggest slice of the pie, as the Glencore resolutions aptly demonstrate. Two factors that likely play a significant role in the decision is the "home" country for the corporate and which office(s) directed or ratified the misconduct.

Corporate bribery sentencing in the UK

Unlike the US, the level of the penalties and ancillary orders the group will face in the UK is somewhat unclear at present. In the UK, sentencing is left for the court to determine following the provision of a suggested sentencing range by the prosecutor. The respective range, in anti-corruption cases, is determined by reference to corporate bribery offences sentencing guideline (the "Guideline").

The Guideline sets out a step-by-step approach to determining the amount of fine ("criminal penalty") a corporate offender will be required to pay. Before embarking on that assessment, the court must first consider making compensation and confiscation orders. Confiscation orders are designed to strip offenders of the proceeds of their crimes, whereas compensation orders are intended to compensate victims for their losses. Both types of order can be significant depending on the nature and scale of the offending.

In determining the criminal penalty itself, the court will first identify the culpability and harm factors. Simply put, culpability is a reflection of the seriousness of the offending from the perspective of the offender. While harm reflects the seriousness from the other side of the coin and, for corporate bribery offences, is usually gauged by reference to the gross profit from the contract obtained, retained or sought as a result of the offending.

Once the culpability level has been ascertained, it acts as a multiplier to the harm figure and will be applied by way of a percentage to achieve the starting point for determining the level of the fine. For the most egregious offending, this could be up to 400% times the value of the profit achieved via each corrupt contract. Any aggravating and/or mitigating features pertaining to the offender and the offence will also be weighed into the balance along with any available discounts (e.g. for an early plea), leading to a fine in principle.

Conclusion

When you remove the sums earmarked for the negotiated settlements in the US and Brazil from the amount which the group set aside, a conservative estimate places the overall level of the fine the group may face in the UK easily in the hundreds of millions of pounds. This would be consistent with not only other SFO cases but also the value of the conduct and the fact that the vast majority of the charges laid in the UK court involve substantive bribery offences which were carried out with the knowledge and approval of the company. This means that, when sentencing takes place later this month, there is a very good chance we will see a significant and potentially record-breaking fine being imposed.

RELATED PRACTICE AREAS

- Anti-Bribery & Corruption
- Investigations
- White Collar
- Regulation, Compliance & Advisory
- Securities Litigation and Enforcement

MEET THE TEAM

Andrey Spektor

New York

andrey.spektor@bclplaw.com
+1 212 541 2085

Mark A. Srere

Washington

mark.srere@bclplaw.com
+1 202 508 6050

This material is not comprehensive, is for informational purposes only, and is not legal advice. Your use or receipt of this material does not create an attorney-client relationship between us. If you require legal advice, you should consult an attorney regarding your particular circumstances. The choice of a lawyer is an important decision and should not be based solely upon advertisements. This material may be "Attorney Advertising" under the ethics and professional rules of certain jurisdictions. For advertising purposes, St. Louis, Missouri, is designated BCLP's principal office and Kathrine Dixon (kathrine.dixon@bclplaw.com) as the responsible attorney.

© 2024 Bryan Cave Leighton Paisner LLP.