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Insights

IF THE SFO DID WISH LISTS…

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SUMMARY

On 8 October 2020, Lisa Osofsky spoke to the Royal United Services Institute about future challenges in tackling the world of economic crime. Most eye-catching was her 'wish list for the SFO', which outlined three desired changes to the legislation that underpins the prosecutorial tools within her armoury. We give our views on each of these below.

Failure to Prevent Fraud?

Top of the list was a "failure to prevent" fraud offence, which would no doubt closely follow the equivalent offences regarding failure to prevent bribery and the facilitation of tax evasion. These are essentially strict liability offences, which force companies with offending employees or associates to prove that, prior to the criminal behaviour, they had established adequate (or reasonable) procedures designed to prevent such outcomes.

The dramatic increase in online fraud in 2020 (the FT reported a 66% increase in financial scams during the first half of the year) combined with the precise drafting of the 2006 Fraud Act, whose offences would slot easily into a wider corporate offence, renders Ms Osofsky's wish not entirely fanciful.

Her logic is understandable. As things stand (disregarding the above corporate offences), prosecution of large and multinational companies is extremely difficult. This is due to the narrow application of the "directing mind" test, whereby a corporate body is guilty only in circumstances in which its employee(s), in the performance of a particular function, embodies the "mind" of the corporate with entire autonomy, and in so doing, commits a criminal offence. Judicial comment suggests that even de facto control by the offending employee is insufficient, and wherever the Board retains approval with regard to any stage of the negotiations, transaction, or payment, corporate guilt is highly improbable.

The result, in our view, is a grossly distorted landscape in which large organisations are protected inadvertently from prosecution, while small companies make for easy pickings. And this is not the

only aspect of the criminal law that favours these large organisations. As explained in our May 2020 article which considered the courts' renewed approach to dishonesty, the effective removal of the subjective element of a dishonesty-related offence leaves small companies more vulnerable to prosecution, but does nothing to address the lasting difficulty in prosecuting larger companies.

We agree that another failure to prevent offence would go some way to addressing this imbalance. Nonetheless, Ms Osofsky's logic in furthering this cause was curious. Her reference to the 2018 High Court judgment (which ruled on the SFO's case against Barclays) does nothing to help in this context, as the jury subsequently hearing the trial of the individual executives charged appear to have categorically concluded that there simply was no fraud. In that case, a failure to prevent offence would, ultimately, have been of no benefit to the SFO.

Such an offence would have much greater utility if cases similar to LIBOR or FX manipulation were to occur in the future. In such cases a failure to prevent offence would, in many ways, mirror any systems and control failures which are the subject of enforcement action by the FCA.

Section Two Powers

Second on her wish list was the freedom to deploy the SFO's extensive investigative powers before a formal investigation is launched. Conferred on the SFO by section 2 of the 1987 Criminal Justice Act, and commonly known as Section 2 Powers, they enable the SFO to:

- compel persons to attend interviews with SFO staff (where there is no general right to silence);
- compel persons to produce documents or any other information; and
- apply to the court for a search warrant.

Ms Osofsky complained that, in cases of fraud and domestic bribery, Section 2 Powers are unavailable to the SFO at the stage of initial enquiry. The use of such powers earlier on would, in Osofosky's words, facilitate an "*early "proceed or abandon decision", saving scarce resources*", a point which is hard to dispute. Notwithstanding this, the expansion of these draconian powers, two of which are already unfettered by judicial oversight, should not be taken lightly. As it stands, the formality of opening an investigation acts as an appropriate safeguard on the use of Section 2 Powers, without which it is difficult to justify the level of power that would otherwise be afforded to the SFO in the absence of external checks and balances.

An Offence of "Tipping Off"

Finally, Ms Osofsky suggested a new "tipping off" offence for the recipients of a notice concerning Section Two Powers, intended to safeguard an investigation's confidential status and prevent unwanted interference. Such an offence might closely mirror the equivalent money-laundering offences, whereby it is a crime to disclose either (1) the existence of a suspicious activity report in the knowledge that a leak would prejudice an investigation or (2) the existence of an investigation

where disclosure would result in similar prejudice. Held up against the money-laundering regime, therefore, parallel provisions in the context of SFO investigations seem overdue.

That said, Part XI of the Financial Services and Markets Act 2000 provides for no such offence concerning either criminal or civil interviews conducted by the FCA, who typically request that interviewees keep their interviews confidential in content if not in fact (though no mechanism exists to enforce this). However, given the gravity that accompanies an SFO investigation, we see no reason not to support Ms Osofsky's proposal, which would do much to preserve the integrity of sensitive investigations and the identity of those providing information.

Can we expect changes?

Perhaps the long-awaited and unconscionably overdue results of the Government's 2017 Consultation on corporate liability for economic crime will serve as the next clue regarding upcoming alterations to the UK's corporate criminal framework. Notably, the paper suggested that both the common law offence of conspiracy to defraud and the offences listed under the 2006 Fraud Act could comprise part of a larger, corporate offence of failure to prevent economic crime.

The steady trend towards greater corporate accountability is undoubted. The same cannot be said as to whether legislative changes akin to Ms Osofsky's wish list are realistic in the near future or at all. Regardless, the principal impediment to the implementation of any such changes is both the appetite of the UK Government and the severe demands it currently faces.

The government has now published the much-anticipated response to the call for evidence on corporate liability for economic crime referred to above. Simultaneously the Law Commission announced a project to investigate the law concerning corporate criminal liability. We are analysing both of these developments and will publish our analysis shortly.

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