



Co-operation with the Serious Fraud Office following *Innospec* and *Dougall*

We have commented in recent briefings on the new approach by the Serious Fraud Office (SFO) to incentivise companies to self-report cases of corruption, a potentially fundamental change in the environment. However, the recent decisions in *Innospec* and *Dougall* have posed serious problems for this strategy by raising doubts as to whether courts will approve agreements between the SFO and co-operating companies or individuals, or order significantly lighter penalties because of such co-operation. As it currently stands, this tilts significantly the decision against self-reporting corruption and co-operating with the SFO, damaging a key SFO enforcement policy.

Introduction

For some time, the Serious Fraud Office (SFO) has been actively promoting a policy of encouraging companies with possible corruption issues to self-report and co-operate with the SFO, a policy crystallised in a July 2009 statement. A major incentive for companies to co-operate was that the SFO would consider seeking agreed civil remedies (ie civil recovery orders and monitors) rather than criminal sanctions, with the level of those remedies reflecting the extent of the company's co-operation. For individuals co-operating with the SFO, there was a prospect of significantly reduced custodial penalties. This represented a move towards a US style plea-bargaining approach.

This policy has achieved some initial success with the SFO concluding a series of plea 'agreements'. One such agreement received judicial approval in September 2009, with the court adopting the penalties 'agreed' between the SFO and Mabey & Johnson for corruption charges.

However, in the recent decisions in *Innospec* and *Dougall*, which involved criminal sentences rather than just civil remedies, the courts have been reluctant to approve the common understanding agreed between the SFO and the defendant, and criticised heavily elements of the SFO's approach. These decisions have created considerable uncertainty, both as to the benefits of self-reporting and co-operation and how that policy will operate in the future.

Innospec and *Dougall*

Innospec Limited pleaded guilty to conspiracy to corrupt in relation to delaying the introduction of lead-free petrol in Indonesia (thereby protecting the sale of its fuel additives) and also in Iraq as part of the Oil for Food scandal. The company co-operated in the investigation and reached a joint arrangement with the SFO and US regulators under which it would be recommended that it pay substantial fines but that those fines would be reduced to a level that would enable *Innospec* to remain solvent. The SFO agreed with the US authorities that it would seek \$12.7m (approximately a third of the total penalty imposed).

Separately, Robert Dougall, a mid-level executive with DePuy International Limited, co-operated with the SFO in its investigation of DePuy's corruption in relation to the sale of orthopaedic products in Greece, signing a formal agreement with the SFO that enabled the court to take account of his assistance.

In both cases, the court acknowledged the importance of co-operation and the need to encourage it, including by way of plea agreements. However, the approach of the SFO and the agreement reached with the defendants was heavily criticised. The seriousness of the issue, and the concerns of the judiciary, were emphasised by the fact that Lord Justice Thomas (the second most senior criminal judge in the UK) personally intervened in the *Innospec* case to give the judgment. Although he limited the total penalty imposed on *Innospec* to that agreed by the parties, he made it clear that he considered this

penalty inadequate and that the courts were not bound to accept a sentence ‘agreed’ in this way.

In *Dougall*, the SFO had supported Dougall’s request for a suspended sentence, but this was rejected by the judge at first instance (albeit later accepted by the Court of Criminal Appeal). Again, the court made clear its doubts about agreements between the SFO and individual defendants.

These decisions show that the courts are uncomfortable with the idea of prosecutors such as the SFO impinging on their constitutional role by seeking to abrogate to themselves the courts’ unfettered right to impose sentences, or by seeking to address the problem of corruption by a policy involving a mixture of measures, including behavioural remedies and incentives.

What are the principles emerging from *Innospec* and *Dougall*?

The following principles apply generally to sentencing for corruption offences.

- These are serious criminal offences. Courts have a duty to impose substantial criminal penalties.
- Plea agreements which comply with the rules are welcome, but a prosecutor (such as the SFO) has no power to enter into an agreement with an offender as to the penalty for an offence, whether a specific sentence or agreed range, and the court will form its own view as to an appropriate sentence.
- Prosecutors must not advocate on behalf of the defendant. In both cases, the courts were critical of the SFO for such advocacy. A prosecutor must limit itself to drawing objectively to the court’s attention those matters of potential mitigation, without recommending a specific sentence.
- In *Dougall*, the court rejected the SFO’s suggestion that the first person to co-operate with an investigating authority should necessarily receive the most favourable sentencing outcome. Such conduct will normally constitute substantial mitigation, but must be considered in the overall context of the case.

The following points relate particularly to companies.

- Corruption offences are serious. There needs to be an effective deterrent. UK courts should primarily impose criminal fines. Such fines should be of amounts comparable to those imposed in cartel cases and for

corruption in the US, and may be measured in the tens of millions in serious cases.

- Civil recovery orders and confiscation orders may supplement criminal fines, but *Innospec* suggests that it will ‘rarely’ be appropriate for serious corruption by a company to be dealt with solely by means of a civil penalty. This removes a major incentive from the SFO’s policy, not least because of the issues of debarment from public contracts associated with a criminal conviction.
- Global settlements are problematic. Any agreement between regulators to divide total penalties is beyond the power of the SFO and constitutionally unsound (although Thomas LJ suggested consideration should be given to principles upon which courts can allocate penalties across multiple jurisdictions). This removes a further incentive: companies are generally interested in a single international solution, with such an approach becoming more common in other areas (such as antitrust and financial services).
- The court criticised the use of monitors as part of the total penalty, regarding this as unnecessarily costly in some cases.

The following points are particularly relevant for individuals.

- The court in *Dougall* emphasised that a corrupt businessman, once convicted, joined the ranks of the ‘common criminal’. A sentence of imprisonment may be the only appropriate penalty for serious wrongdoing.
- The SFO had submitted that white-collar offenders will be reluctant to co-operate unless there is a reasonable prospect of receiving a suspended sentence, rather than a shorter custodial sentence. The court emphasised that a decision whether to suspend a term of imprisonment will always be fact-specific and one that only a court should take. Only defendants who have shown a very high degree of co-operation and assistance to the authorities will have a good chance of receiving a suspended sentence.

Are self-reporting and co-operation still an attractive option?

Similar tensions between prosecutors and courts arose in the early stages of co-operation and plea bargaining in corruption cases in the US. It took time for an

understanding to be built about the extent to which prosecutors could assist co-operating defendants and for a 'tariff' to be commonly understood, even if it were not binding. Even today, US prosecutors must be very careful to show deference to the courts and to avoid requesting a specific sentence or advocating on the part of a defendant. This uncertainty does not prevent a high degree of corporate co-operation with prosecutors in the US, albeit that this occurs in the context of a tradition of much higher fines and it being dramatically easier to convict a company. (Note that both those factors will exist in the UK when the Bribery Act 2010 comes into force.)

Nevertheless, the message coming from the judiciary in *Innospec* and *Dougall* creates practical difficulties for the SFO's co-operation strategy: those considering co-operation must accept a higher risk that an understanding with the SFO as to penalties will be disregarded by the court, which will impose substantial penalties even following a discount for co-operation. The situation will be particularly difficult for companies seeking a global settlement.

Self-reporting and co-operation may, in some situations, remain the best strategy. For example, given that the legal obligation to self-report corruption to the Serious and Organised Crime Agency may arise (because corruption often involves handling the proceeds of crime), there may sometimes be no choice. Moreover, it is possible that even heavier penalties will be imposed in the absence of self-reporting, particularly in light of the forthcoming exposure under the Bribery Act 2010 (which includes an unlimited fine for the corporate offence created by the Act).

It is to be hoped that, when the settlement between the SFO and BAE Systems (for corruption in the supply of military equipment) comes before the courts, the SFO or the judiciary will seize the opportunity to clarify their respective roles and the future for co-operation. However, in the absence of a new policy, judicial clarity or legislative change (such as the coalition government's proposals for creating a new agency fusing elements of, inter alia, the SFO and the FSA), the SFO's policy will be considerably less attractive to those who are concerned that they may have a potential exposure to corruption.

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