# Bribery and Corruption – Is There a Future for Self Reporting and Plea Bargaining?

***By Rob Elvin***

In July 2009, the Serious Fraud Office (SFO) issued a document entitled "Approach of the Serious Fraud Office Dealing with Overseas Corruption," which encourages companies to approach the SFO to self report corruption in exchange for receiving a US style plea bargain settlement, thus providing the company with certainty of outcome. However, unlike in the United States, there are no legal procedures in the UK that cover self reporting or plea bargaining. The cases below illustrate how the SFO is using these tools and that although the courts have been upholding plea agreements, they have made clear that the SFO actually does not have the power to enter into them, and although parties can put forward a joint submission on sentencing, they should not include a specific agreed upon sentence.

The first case of this type in Britain and the first US-style plea bargaining negotiations occurred in 2009, when Mabey and Johnson Limited was sentenced at Southwark Crown Court for conspiring to corrupt officials in Ghana and Jamaica and breaching the United Nations Sanctions against Iraq. The allegations were that Mabey and Johnson knew that its agents were involved in close relationships with government officials in Jamaica and Ghana and it approved those agents to pay bribes directly to the government officials. The court adopted the penalties agreed to by the company and the SFO, and Mabey and Johnson was ordered to pay a fine of £750,000 for each of its two corruption offences and £2 million for breaching the sanctions, in addition to a £1.1 million confiscation order. The company was given credit for cooperating with the SFO and for waiving privilege in its internal investigations.

In another case on 18 March 2010, Innospec pleaded guilty to bribery and corruption charges in relation to its activities under the UN Oil-for-Food Programme for which it sold products to Iraq. The Iraqi government imposed a 10 percent duty on all companies trading into Iraq under this programme. This duty was held to be a bribe, as it was a payment made to secure business. Innospec reached a plea bargain with authorities in the United States and the UK for fines totaling around US$40 million. The agreement was made as full and final settlement of all outstanding issues and was accepted by all parties.

The settlement was approved by the US courts, but issues arose in the UK. The original trial judge at Southwark Crown Court, Geoffrey Rivlin QC, described the plea bargaining proposals as "deeply wrong". The matter was transferred to a more senior appellate judge, Lord Justice Thomas, who concluded that

the SFO does not have the power to enter into plea arrangements such as the one in this case and unequivocally stated that "no such arrangement should be made again". He noted that the parties could put forward a joint submission of sentencing, but that they should not include a specific sentence or agreed upon range other than those set out in the sentencing guidelines. He noted that only the court could make the final decision as to the appropriate sentence. Despite thinking that the settlement was inadequate, the court reluctantly allowed it to stand because of the financial circumstances Innospec was in and because the US courts had approved the settlement, Innospec had cooperated with the SFO's investigation, details of the settlement had been announced to the market, and Innospec had already put in place new systems to prevent future corruption.

The SFO has since stated that it respects the judge's comments and will take note of this guidance in its future actions, but that it is committed to using the plea-negotiation framework as the basis for dealing with suitable cases.[1] Indeed, in December 2010, plea bargaining was used again after BAE Systems self reported and pled guilty to one offence in relation to accounting irregularities for payments to a businessman who worked as its agent in helping to secure a politically contentious radar deal in Tanzania in 1999. The accounts described the payments as "provision of technical services", when in reality, the agent was given free reign to make such payments to such persons as he saw fit. The SFO agreed not to prosecute BAE for alleged past corruption, whether disclosed or otherwise, in exchange for BAE's agreement to a US$400 million fine in the US, but only £500,000 in the UK courts. Mr Justice Dean, at Southwark Crown Court, said that the plea bargain entered between BAE Systems and the SFO was "loosely and perhaps hastily drafted". The low fine in the UK, which has been criticised by critics, is said to have been a signal to the judge of the weakness of the plea bargain agreement. However, BAE promised in the agreement to make an ex-*gratia* payment of £30 million to the people of Tanzania, which the judge said "places moral pressure on the court to keep the fine to a minimum so reparation is kept at a maximum".

In the UK, an ever increasing range of sanctions are being used for regulatory offences. Some of these sanctions are provided through legislation such as the Corporate Manslaughter and Corporate Homicide Act 2007, which allows a court to make publicity orders forcing companies found guilty of corporate manslaughter to publicise the case. Another example includes undertakings, and enforcement orders from the court if the undertakings are breached, in relation to consumer protection offences under the Enterprise Act 2002. Other sanctions that were perhaps not intended for use in relation to regulatory offences are also being used, such as serious crime prevention orders, which are used to impose prohibitions, restrictions or requirements to protect the public by preventing, restricting or disrupting involvement in a serious crime. Also, some plea bargains allow additional and alternate sanctions to be used which are outside the traditional sentencing powers of the courts. In addition to the financial

[1] Amaee, Robert, "World Bribery and Corruption Compliance Forum" (speech,14 September 2010).

penalties above, Innospec was ordered to pay for an external bribery and corruption monitor for three years. Plea bargains, therefore, seem to allow for flexibility in sentencing and arguably allow sanctions to be imposed that are more likely to achieve future compliance than financial penalties alone.

Although the judiciary has made it clear that it retains the power to decide on the level of sentence and that to agree a sentence is outside the powers of the SFO, it will impose sentences that reflect those agreed upon in plea bargains. For now it seems likely that the SFO will continue its approach of encouraging self reporting by offering plea negotiation agreements, despite the level of uncertainty imposed by the courts. However, companies that choose to self report should be aware of the potential risk that an understanding with the SFO as to penalties may be disregarded by the courts.

It remains to be seen whether the SFO will change its approach once the Bribery Act 2010 comes into force, which is expected to occur in summer 2011, and whether or not plea bargaining under the Bribery Act will be permissible. It seems, however, that legislation is needed in the UK to formalise a position in relation to self reporting and plea bargaining so that all parties know where they stand.

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