

## THE DE-CRIMINALISATION OF CORPORATE CRIME?

On 9<sup>th</sup> January, 2009 the Financial Services Authority (FSA) imposed a record £5.25m financial penalty upon the insurance giant AON Limited (AON) for a breach of FSA Principle for Business 3, as a result of its failure to organise and control its affairs responsibly and effectively. But for AON's co-operation with the FSA the penalty would have been £7.5 m.

The penalty related to systems and controls failings with regard to 66 payments AON had made over a 3 year period totalling approximately £5m to certain overseas third parties. These payments had been made in attempts by AON to win or retain business in 6 countries in circumstances where it ought to have been reasonably obvious that there was a significant risk that the recipient might bribe the target client and/or that there was no obvious commercial rationale for making the payment.

In essence, the FSA's concern was one of bribery and corruption and the corporate was dealt with not by the police but through the regulatory system for systems failings. What is not clear from the FSA's Final Notice is whether there is currently an ongoing police investigation into the activities of individuals within AON who were responsible for the approval of these payments.

The FSA's disciplining of AON through the imposition of a large financial penalty as a means to punish a corporate failing linked to financial crime as an alternative to more traditional criminal process seems to be part of a developing trend. When dealing with corporate misconduct law enforcement seems to be increasingly willing not to use the criminal tool of prosecution, provided the corporate defendant is prepared to take an immediate financial "hit".

The Serious Fraud Office's (SFO) recent experience, through its failed attempt to prosecute several pharmaceutical companies for alleged price fixing, provides some justification for such an approach. Operation Holbein, as the SFO's investigation was called, was the largest it had ever undertaken, it lasted 6 years and approximately £30m of taxpayers money was spent attempting to prosecute corporates and individuals for conduct which the House of Lords held was not in fact criminal at the time it occurred. Total defence costs, while still to be taxed, are likely to be even higher.

Faced with such expensive and high profile failures, some would argue that a radical re-think as to how to deal with corporate misconduct is necessary. Others would disagree, holding the belief that corporates who have committed financial crimes should be hauled through the criminal courts and if found guilty should face the stigma of a criminal conviction with all the negative publicity that entails. Without such prosecutions, they would argue, where is the incentive on the corporate to comply?

Economic reality appears to dictate otherwise. In these chastened times corporate prosecutions are expensive and corporate defendants, even more so than individuals, tend to retain the best lawyers available. Given that a successful criminal prosecution of a corporate achieves a fine, other far less expensive enforcement tools can be deployed to achieve a similar result. In fact, the level of financial penalties imposed by, for example, the FSA compares very favourably in terms of size, to the general level of fines imposed on corporate defendants by the Crown Courts following conviction.

The recent civil recovery order of £2.25m against Balfour Beatty obtained by the SFO in October 2008 for “inaccurate accounting practices” at an Egyptian joint venture may well be the forerunner as to how criminal financial misconduct by corporates will be resolved in future. Richard Alderman, the New Director of the SFO, has hinted at the increasing use of alternative tools. At a speech to the Anti-Corruption and Bribery Conference on 18<sup>th</sup> November, 2008 Mr Alderman said “*I want Boards of corporates and their professional advisers to engage with us and to report corruption that they uncover. I appreciate that uncovering this gives the Board a problem and that they will want to know what to do to resolve this and move on.*”

While leaving the prospect of a prosecution still open for individuals, such action provides relatively quick and favourable publicity for law enforcement. Moreover, it frees up limited resources and at the same time allows the corporate under investigation to admit its wrongdoing and draw a line to the incident through a “quick hit” upon its balance sheet, but without the risk and stigma of a criminal conviction. Additionally, an admission by the corporate that it has committed wrongdoing may assist any subsequent prosecution of individuals, thereby narrowing the issues and making any criminal trial less complex and expensive.

On its face, such an outcome appears a win-win for both the corporate and law enforcement. However, if there is a move away from prosecution, it is being done with limited public debate. Such a debate is necessary. If, in an increasing number of cases, corporates are likely to escape the criminal consequences of their actions through the use of alternative disposals then that is a matter of significant public importance.

Any system of alternative disposal needs to be put on a firm and possibly even a statutory footing. The leniency provisions within the Enterprise Act 2002 and the immunity provisions within Serious Organised Crime and Police Act 2005 show that sophisticated non-prosecution arrangements can be implemented, enabling users to have confidence and certainty in the process and to know what is expected and required of them.

When dealing with corporate wrongdoing it is desirable that if such changes are to be implemented they are done so without delay. At present the adhoc and unpredictable attitude of law enforcement to corporate wrongdoing presents a real dilemma for the corporates and their legal advisers as to how they can and should proceed when they uncover evidence of criminal misconduct both within their organisations and through their normal business activities. For a corporate that wishes to self-report the present arrangements ultimately involve a calculated risk in that by “coming clean” they will avoid prosecution. The problem is that there are no certainties. Once full details have been provided to the authorities the corporate is at the mercy of law enforcement as to how they should be dealt with. For many corporates this may be too much of a calculated risk. As a result, serious instances of corporate wrongdoing may well be going unreported. Without a more formalised and structured system in place, Mr Alderman’s desire that corporates “come clean” is in some jeopardy.

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