Cog or machine--are changes afoot in US and UK corporate crime prosecution?

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Corporate Crime analysis: On both sides of the Atlantic, agencies are beefing up their ability to find and prosecute corporate crime. Different approaches to prosecution, in particular whether individuals or corporations should be liable for corruption charges, are creating a situation of uncertainty. Alan Ward, associate at Stephenson Harwood, looks at changing times in corporate crime.

How is the prosecution of corporate crime changing in the US and UK?

For several years prosecuting agencies, non-governmental organisations (NGOs) and senior members of the judiciary in the UK have emphasised the importance of deterring corporate crime by prosecuting and imposing meaningful penalties on companies. In the past twelve months, this approach has found real resonance in the criminal courts.

In December 2014, the Serious Fraud Office (SFO) achieved its first conviction against a corporate entity for overseas bribery--printing company, Smith and Ouzman Ltd (see: Press Release: Printing company on corruption charges, LNB News 23/10/2013 76)

In June 2015, in *R v Thames Water Utilities Ltd* [2015] EWCA Crim 960, [2015] All ER (D) 31 (Jun), the Criminal Court of Appeal considered the proper approach to sentencing where a corporate offender's turnover was so large that it fell outside the scale set down in the sentencing guidelines. The court confirmed that sentencing courts should not be slow to impose very significant financial penalties--'even if this results in fines in excess of £100 million'--so as to 'bring home the appropriate message to the directors and shareholders of the company'.

More recently, at the end of July 2015, CAV Aerospace was convicted of corporate manslaughter at the Old Bailey (see: Aerospace manufacturer guilty of corporate manslaughter, LNB News 27/07/2015 131). The case was eye-catching for several reasons:

- CAV is the largest company to be convicted of corporate manslaughter to date--460 employees and over £73m annual turnover
- it was the first prosecution against a parent company, rather than the subsidiary on whose premises the accident occurred
- the fine imposed (£1m) was the largest ever imposed for corporate manslaughter
- the jury applied, and convicted on, the 'collective failure of management' model of corporate criminal liability

In the US, corporate criminal prosecutions and substantial penalties have been a common feature of the legal landscape for several years, but there are signs that the tectonic plates in America might also be in the process of shifting, albeit in the opposite direction to the UK.

Why is the focus shifting from an institutional to individual level in the US? Does this change carry risks?

Whereas in the UK pressure has built for more corporate prosecutions and convictions, in the US--where corporate convictions and deferred prosecution agreements have been comparatively commonplace for over a decade--both politicians and the judiciary have spent recent years pressing for more criminal convictions of culpable individuals. Perhaps the most vocal of the critics of the American focus on criminal outcomes against corporates has been Judge Jed S Rakoff. For example, in 2013, speaking about the financial crisis, Rakoff described 'the failure to prosecute those responsible' as 'one of the more egregious failures of the criminal justice system in many years'.

The response in the US to growing pressure for more individual liability arrived last month in the form of a Department of Justice (DoJ) Memorandum on Individual Accountability for Corporate Wrongdoing (also known as the Yates Memorandum). The Yates Memorandum mandates that DoJ attorneys must 'focus on individuals from the inception of the investigation' and provides that 'in order to qualify for any cooperation credit, corporations must provide to the department

all relevant facts relating to the individuals responsible for the misconduct.' In short, both investigations of corporates and DoJ decisions as to their outcome may be significantly recalibrated as a result of the Yates Memorandum.

The danger of creating a common interest between prosecutors and co-operating companies to secure the conviction of individuals deemed culpable is unjust outcomes. Individuals inevitably do not have the means to defend themselves that corporations do. The question as to what extent a company is liable to pay the defence costs of employees, where allegations arise out of their employment, is being litigated in New York at present--the outcome will be eagerly awaited.

Is there a history of collaboration between the US DoJ and the UK's SFO?

In some high profile cases--such as *European Commission v Parker Hannifin Manufacturing and Parker-Hannifin Corp (Re Marine Hoses Cartel)*: C-434/13 and the Innospec corruption prosecutions (see *Jalal Bezee Mejel Al-Gaood & Partner and another company v Innospec Ltd and others* [2014] EWHC 3147 (Comm), [2014] All ER (D) 230 (Oct))--the two agencies have co-operated to achieve outcomes in both jurisdictions.

However, the state of the relationship between the DoJ and SFO has varied quite wildly over the past decade, from SFO deference to US white-collar crime prosecution--as most notoriously in the case of the Natwest Three--to more recent SFO assertions of primacy, as in the case of Tom Hayes, who the SFO stepped in to arrest only a week before he was indicted by the American authorities.

As to the present state of transatlantic relations--it is widely appreciated that the SFO Director, David Green QC, wants the SFO to be an effective prosecutor, and the number of charges brought in relation to LIBOR (eleven individuals are currently on trial or awaiting trial, with more charges expected imminently) demonstrated that he has achieved some success in that regard. Regardless of David Green QC's ambitions, however, the resources at his disposal--and the uncertainty as to the future of his organisation--will likely lead the Americans to conclude that his reach will exceed his grasp. As such, an interventionist role in global corporate crime investigations is likely to endure in the US.

What would changes at the SFO mean for UK policy on corporate crime?

In August 2015, the government created the International Corruption Unit (ICU), which will be operated by the National Crime Agency, and take the lead role in international corruption in the UK. The ICU's remit will include investigating bribery of foreign public officials by individuals or companies from the UK and money laundering by corrupt foreign officials and their associates--work which was formerly within the purview of the SFO. David Green QC used a recent speech to rail against the SFO's 'grand bribery' brief seemingly being taken away from it by the ICU:

'from the SFO perspective, top level bribery or grand corruption and fraud go together, and should be kept together.'

There will be no change in corporate crime enforcement overnight. The SFO has a pipeline of work which will run through 2016 and beyond--a UK subsidiary of the French power and transport company, Alstom, is due to face trial on multiple corruption charges in May 2016.

Could we see problems arising from countries attempting to prosecute foreign nationals for actions carried out in their territories?

As the Tom Hayes LIBOR case (see: Man found guilty of LIBOR manipulation, LNB News 04/08/2015 89) illustrates a prosecutor's ambition to achieve convictions for white-collar crime can be severely curtailed by the absence from the jurisdiction of one or more of the individuals they would like to prosecute.

Three issues in particular may come before the courts in the near future, which could come to define the future parameters of multi-jurisdictional investigations:

- the effects of a plea agreement or conviction in one jurisdiction on the criminal process of another
- the degree to which the unavailability of key documentary or witness evidence--on account of such being outside the jurisdiction--gives rise to successful arguments that a fair trial is impossible
- the efficacy of the UK's 'forum bar' (ie, the requirement that there should be a court hearing to decide whether a person should stand trial in the UK or abroad), and to what extent the English courts find it to operate to prevent extradition, in particular to the US

Although a large number of corporate criminal investigations will continue to be multi-jurisdictional in nature, the answers that the courts produce in respect of these issues will determine the on-going and future viability of 'extra-territorial' prosecutions.

Interviewed by Julian Sayarer.

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