

Do companies have a moral duty to self-report to the SFO?

03 May 2022



Brian Spiro, Jessica Chappatte and Robert Hunt at Herbert Smith Freehills (Credit: Herbert Smith Freehills)

Although Amec Foster Wheeler's corporate bribery settlement has not introduced any legal obligation to self-report wrongdoing to the Serious Fraud Office, the judgment does encourage companies to seriously consider their moral and ethical duties when deciding whether to do so, argue Herbert Smith Freehills partners Brian Spiro, Rob Hunt and senior associate Jessica Chappatte.

In an age where businesses are becoming increasingly focused on environmental, social and governance (ESG) issues and are being held to a higher moral standard on the back of movements such as #MeToo, there is an increasing expectation on companies to behave in a moral way. The Amec

Foster Wheeler (Amec) deferred prosecution agreement (DPA) addressed this issue in the context of self-reporting wrongdoing to the SFO.

Despite encouraging companies to do the right thing from an ethical corporate governance perspective, the Amec case confirmed that self-reporting is not essential to achieving a DPA.

The Amec DPA

On 1 July 2021, Lord Justice Andrew Edis approved the DPA between the SFO and UK-based engineering company, Amec. Under the DPA, Amec accepted responsibility for ten offences relating to the use of corrupt agents and concealing corrupt conduct in five countries between 1996 and 2014.

Amec's parent company, Wood Group, agreed to pay a £103 million penalty which included compensation payments to the people of Nigeria, a disgorgement of profits and the SFO's investigation costs.

The DPA's statement of facts, published in February this year, revealed that the Amec board chose not to report wrongdoing despite instructing external lawyers to conduct four separate investigations between 2007 and 2010 which uncovered evidence of potential bribery in Nigeria, Malaysia and Saudi Arabia. The court said the company's repeated decisions not to self-report these findings was "deplorable" but did not extend his criticism to Amec's lawyers who had advised the company that it had no legal obligation to self-report. Regardless of this advice, Edis LJ said Amec's board should have chosen to report to the SFO as a "matter of ethical corporate governance". While accepting they are not legally required to do so, the judge said companies have the same "moral duty" to report suspected crimes as individuals.

Edis LJ said the lack of a self-report from Amec made it harder to investigate and prosecute the individuals who perpetrated the bribery schemes and also enabled the wrongdoing to continue within the company. The court referred to misconduct in Brazil that may have been prevented if Amec had self-reported and reasoned that Amec's failure to self-report was compounded by its failures to prevent subsequent corruption.

Has the Amec DPA raised the bar and imposed a moral obligation to self-report?

Lord Justice Edis said that the Amec DPA is likely to encourage companies in England and Wales to report wrongdoing to the SFO when they discover it and when they first find evidence of it following the acquisition of another company. This is consistent with the commentary in previous DPA judgments and the

DPA Code of Practice which emphasises the importance of early, proactive, self-reporting. To date, the SFO has entered into 12 DPAs; 10 of which involved companies that self-reported (albeit some less proactively than others). The cases where a DPA has been approved notwithstanding the lack of a self-report therefore continue to operate as the exception rather than the rule.

When considering whether to grant a DPA, the court has to consider whether doing so would be in the interests of justice and whether the terms of the DPA are fair, reasonable and proportionate. One of the factors that the court will consider when assessing whether prosecution is not in the public interest is the level of a company's cooperation. As well as self-reporting, the other cooperation factors listed in the DPA Code of Practice include disclosing information not yet known to the SFO, identifying relevant witnesses and making them available for interview, providing a report on any internal investigation undertaken and taking remedial actions. These other factors could equally be described as examples of companies being encouraged to act in a moral way without imposing a legal obligation to do so. Rather, they are factors that will help the prosecutor decide whether to offer a DPA and aid the court's decision to approve it. The distinction is important.

In the Amec case, a DPA was awarded despite the fact there had been no self-reporting of the "serious" and "widespread" misconduct which involved senior employees and continued until 2014 -- seven years after the company became aware of wrongdoing. The DPA was granted, however, because there had been a complete change in ownership and management, Wood Group was effectively left to "carry the can" for the wrongdoing, and because of the extent of Amec's subsequent cooperation. Edis LJ made it clear that granting a DPA in circumstances where any of the individuals implicated in the underlying conduct (including the management that was responsible when the wrongdoing took place) had any ongoing connection with the company would have been inappropriate.

In the Rolls-Royce case – where the UK engineering company also did not self-report to the SFO – Sir Brian Leveson QC accepted the SFO's argument that Rolls-Royce's "extraordinary" co-operation meant that Rolls Royce should be treated (when it came to considering the terms of the DPA) as if it had self-reported from the outset.

Similarly, in the Airbus case, the court found that the aerospace company had cooperated with the SFO to "the fullest extent possible" despite only self-reporting after one of its creditors said it was going to report the company to the SFO anyway. The judge who oversaw Airbus's subsequent DPA took a broad approach to the concept of self-reporting, taking into account other

information that the company reported to the SFO after its investigation had begun.

The result of these judgments is a growing body of case law that suggests that as long as there is sufficiently extensive cooperation once the SFO starts investigating, including ongoing reporting of undiscovered misconduct, a DPA may be offered regardless of whether the company self-reported from the outset.

Deciding whether to self-report to the SFO is a critical decision for a company and one with particularly significant consequences. There are some recent examples of why companies might, in the right circumstances, wish to challenge cases brought against them by the SFO instead of accepting an offer – if one is made – to negotiate a DPA. For example, in the Barclays case, the bank effectively cleared its name by successfully dismissing all charges brought against it on the basis that the alleged criminal dishonesty of senior officers could not be attributed to Barclays. Furthermore, in four of the 12 DPAs that have been agreed, the SFO has pursued charges against individuals following the company's entry into a DPA. None of these have resulted in successful prosecutions against the individuals which suggests that had these companies had the appetite to challenge the cases at trial, they might have been acquitted of any wrongdoing.

Some companies, however, will also have reporting requirements that legally require them to disclose information to their regulators or to the market. In situations where companies are obliged to report an issue in accordance with these mandatory requirements, they will be more inclined to voluntarily disclose the same issue to the SFO – if the information could be relevant to the agency.

Is the criminal justice system the right mechanism for holding companies morally to account?

Criminal law is a mechanism to enforce infringements of the criminal code rather than holding individuals or companies to account based on a moral code. Since morality involves subjective value judgements, what one person or company thinks is morally right will not necessarily be the same for others. In contrast, the criminal law requires clear rules to enable a jury to decide beyond reasonable doubt whether an individual or a company is innocent or guilty of an offence. Whilst the criminal law will in many respects reflect the moral expectations of society at any given time, morality is not, and should not, be the basis to prosecute crimes.