

## **The Role of the Prosecutor in Combating Corruption & Money Laundering**

### **Introduction**

Corruption and money laundering, by their very nature, are difficult crimes to detect and to prosecute. However, the experience of many jurisdictions, both civil law and common law, is that those difficulties can be reduced by:

- The building of specialisation amongst the ranks of prosecutors and investigators;
- The giving of early advice and timely direction to a case by the prosecutor;
- Having explicit laws which provide for a full range of investigative and prosecutorial tools, including a proactive capability, and having prosecutors who are confident in advising upon/deploying them;
- The prosecutor ensuring that the prosecution case is not too widely drawn;
- Effective use by the prosecutor of mutual administrative and mutual legal assistance.

### **SPECIALISATION & CO-ORDINATION**

Co-ordination and co-operation between investigator, prosecutor and judge is a vital precondition. Corruption is a sophisticated crime and, as such, investigation and prosecution requires particularly close co-operation between those agencies involved. That is a conclusion reached by most States and one which is as applicable to the investigation of low level, or so-called petty, corruption as to large scale transnational criminality.

A key component is mutual trust between the various disciplines which make up the investigation, prosecution and the judiciary. At the same time a balance is needed between an integrated approach on the one hand, and ensuring prosecutorial independence on the other.

The task of building specialisation is not an easy one, and for some jurisdictions will be exacerbated by the process of identifying suitably taint free individuals from the ranks of investigators, prosecutors and judges.

### **THE PROSECUTOR & INVESTIGATIVE TOOLS: REACTIVE & PROACTIVE/INTELLIGENCE-LED INVESTIGATIONS**

Most crime, by its nature, is the subject of investigation and proceedings after its commission and will be the subject of what is commonly referred to as 'reactive investigation'; however, there are crimes such as corruption and other financial crimes lend themselves to proactive investigations and the proportionate use of covert techniques. Traditionally, though, anti-corruption investigations tended to be reactive, as opposed to proactive.

First, It is worth setting out that concerns have often been voiced in respect of proactive investigations, namely that it involves the engagement of State resources and additional cost implications which may, at the end of it, produce no result other than perhaps building an intelligence picture. These concerns are somewhat misplaced as much can be achieved with moderate outlay and in, for instance, a case where State wealth has been dissipated through front companies, banks and financial institutions, even greater strain will be put on State resources if there is a need, after the event, to trace the assets and to pierce the corporate veil to identify beneficiaries. An extreme illustration is the Marcos case, where investigations after the event continue to this day!

Reactive investigations, particularly in relation to commercial corruption and corruption in relation to the obtaining of contracts, will often rely on forensic accountancy, asset tracing and financial investigation. However, one of the most compelling pieces of testimony for a prosecutor in a corruption case, but equally one of the most dangerous to all sides, is that from the individual who is within the corrupt company (the so-called 'whistleblower') or was part of the corrupt criminal network. In many jurisdictions, a specific legislative framework concerning whistleblowers is in place to provide the necessary assurances for those coming forward. As for the evidence of the whistleblower, the risk is obvious: is he or she a credible witness or has his/her evidence been distorted or even fabricated through frustration, resentment or in the hope of some other reward? Equally, is he or she simply providing evidence because of some form of inducement? The risks around the evidence of the criminal participant, the individual in the corrupt criminal network are, however, even more stark. The concerns will be principally those of inducement and credibility, but this time set against a background of quite possible risk to life, manipulation of the process and, very often, a history of past and present criminality.

The nature of corrupt transactions is such that sometimes the traditionally reactive measures of investigation are either fraught with difficulties or are simply inadequate. The offer or solicitation of a bribe or other advantage will often be face to face between two parties, with no independent witnesses; so the only evidence is from a willing witness, for instance a party who has been solicited by an official who may be unreliable or tainted.

There will be circumstances, as discussed above, where a reactive investigation, perhaps with the benefit of whistleblower or protected witness evidence, is the only or most appropriate route. However, since the late 1990s many jurisdictions have recognised the value of an intelligence led proactive approach, very often utilising covert methodologies as a way of progressing enquiries. Such an approach is, of course, entirely consistent with the growth of intelligence-led policing.

The prosecutor needs to familiarise him/herself with the methodologies of covert deployment and to recognise that these may form the basis of intelligence gathering, evidence obtaining, or both, in the course of a corruption investigation. The proactive operation might involve information from a source, intelligence and/or evidence from the deployment of an undercover agent or participating source, surveillance or telecommunications product. The investigation might comprise of what is best described as a 'sting' operation or, more specifically, the increasingly useful intelligence-led integrity test (discussed in more detail below).

## ***The Use of Intrusive Techniques & the Impact of Human Rights Considerations***

The deployment of covert, intrusive techniques is not new. However, since the early 1990s there has been ever increasing reliance on intelligence led and proactive criminal investigations. The use of such techniques may well be the only way to investigate alleged corruption in any given instance, whether it is suspected on the part of a law enforcement officer with connections to organised crime or whether it is bribery within the commercial sphere.

The use of intrusive techniques, by their nature, infringes on the rights of privacy and therefore engages considerations of human rights. The role of the prosecutor is steering the investigation and prosecution through this difficult path is paramount. Upon examining the jurisprudence from across various regional instruments around the world, the following needs to be borne in mind when conducting proactive investigations:

### ***'In Accordance with the Law'***

There must be a basis in domestic law or legislation which provides for the deployment of the covert technique. Such legislation must be accessible to those liable to be affected. In addition, such legislation, including that which authorises the activity liable to interfere with the right to a private life, must have sufficient clarity so as to give a person an indication as to the circumstances and conditions in which covert methods by a public authority may be used.

The European Court of Human Rights (ECtHR) has indicated that it expects that there should be a regime of independent supervision of the use of covert, intrusive powers. As to the process of authorisation, the more independent the authorising or reviewing individual/body is, the more likely that a court will regard the authorising and reviewing regime as appropriate. Indeed, in *Klass v Germany*<sup>1</sup> the ECtHR noted that judicial control of the authorisation procedure provided *'the best guarantees of independence, impartiality and a proper procedure'*.

### ***Necessary in a Democratic Society***

The interference with an individual's qualified rights must fulfil a pressing social need, be in pursuit of one of a legitimate aim and any deployment must be only that which is necessary to achieve what is sought to be achieved (i.e. the detection of the particular crime). In addition, safeguards must be in place to prevent abuse by intrusive techniques and remedies must be available in the event of such abuse.

### ***Proportionality***

The interference must be proportionate to what is sought to be achieved by it. Thus, for example, the deployment with a listening device in a target's bedroom may require much greater justification than a deployment in a living room.

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<sup>1</sup> [1978] 2 EHRR 214.

In considering whether a covert technique or deployment is indeed proportionate to the legitimate aim which is being pursued, the prosecutor should consider, and be prepared to make submissions on the following:

- Have sufficient, relevant reasons been set out in support of the deployment?
- Could the same aim have been achieved by use of a less intrusive method?
- Did the authorising/decision making process as to the deployment take place in a way which was procedurally fair?
- Do adequate safeguards exist to prevent abuse?
- Does the interference in question destroy the very essence of the right of privacy?

The effect of a breach of the (qualified) right to a private life during a proactive anti-corruption investigation may, depending on the jurisdiction, raise a number of challenges:

1) The use by the prosecution of evidence that was obtained in breach of the right, in circumstances where the breach cannot be justified, has the effect of denying the defendant his right to a fair trial. Therefore, the proceedings in question should be stayed.

Alternatively,

2) Evidence obtained as a result of an unjustified breach should be excluded.

However, in relation to either or both of the above challenges, the test is the same: what is the effect of the admission of the evidence on the fairness of the proceedings on a whole?

The above approach by domestic courts has the effect of mirroring that adopted by, for instance, the ECtHR, which has made it clear on a number of occasions that it is not concerned with questions of admissibility of particular evidence but rather on whether the proceedings as a whole are fair.<sup>2</sup>

One caveat to the above is that heed must be had to the possibility of an argument by the defence alleging entrapment. It may be open to a court to rule a piece of evidence inadmissible or to dismiss or stay the proceedings as an abuse of process in circumstances where there has been a breach of the right to a private life and it would be unfair for the defendant to be tried, not on the basis he cannot have a fair trial, but on the basis it would be unfair to try him at all as there has been a misuse of executive power which, if allowed to go unchecked, would be 'an affront to the public conscience'.

The key factor, therefore in relation to proactive investigations is the need to balance the rights of an individual against the wider interest.

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<sup>2</sup> See, for example, *Shenck v Switzerland* [1988] 13 EHRR 242.

## **'FOCUSED' PROSECUTIONS**

In corruption, money laundering and asset recovery cases, defendants will typically be seeking to delay and obstruct, both before and at court. The prosecutor must be prepared for this and should recognise that the opportunity for the defence to prevaricate and to 'blur' the issues increases with the complexity of the proceedings. Prosecutions of this sort, and related applications in respect of assets or criminal proceeds are most efficient when focused. It is generally better to put significant resources and thorough preparation into a small number of cases, than small resources into a significant number of cases. The prosecutor should, therefore, always have in mind what realistically can be achieved.

## **EFFECTIVE USE OF MUTUAL (ADMINISTRATIVE) ASSISTANCE AND MUTUAL LEGAL ASSISTANCE**

Prosecutors (and investigators) sometimes have recourse to mutual legal assistance without exploring whether informal mutual assistance would, in fact, meet their needs. It is often forgotten that the country receiving the request might welcome an informal approach that can be dealt with efficiently and expeditiously. Prosecutors must thus ask themselves whether they really need a formal letter of request to obtain a particular piece of evidence.

The extent to which countries are willing to assist with a formal request does, of course, vary greatly. In many cases, it will depend on a particular country's own domestic laws, on the state of the relationship between that State and the requesting State, and, it has to be said, the attitude and helpfulness of those on the ground to whom the request is made. The importance of excellent working relationships being built up and maintained trans-nationally between prosecutors cannot be too greatly stressed.

Although no definitive list can be made of the type of enquiries that may be dealt with informally, some general observations might be useful. Variations from State to State, must, however, always be borne in mind.

- If the enquiry is a routine one and does not require the country of whom the request is made to seek coercive powers, then it may well be possible for the request to be made and complied with without a formal letter of request.
- The obtaining of public records, such as land registry documents and papers relating to registration of companies, may often be obtained informally.
- Potential witnesses may be contacted to see if they are willing to assist the authorities of the requesting country voluntarily.
- A witness statement may be taken from a voluntary witness, particularly in circumstances where that witness's evidence is likely to be non-contentious.
- The obtaining of lists of previous convictions and of basic subscriber details from communications and service providers that do not require a court order may also be dealt with in the same, informal way.

Equally, it is possible to draw up a guidance list of the sorts of request where a formal letter will be required:

- Obtaining testimony from a non-voluntary witness.
- Seeking to interview a suspect under caution.
- Obtaining account information and documentary evidence from banks and financial institutions.
- Requests for search and seizure.
- Internet records and the contents of emails.
- The transfer of consenting persons into custody in order for testimony to be given.

Confusion can be avoided if prosecutors and investigators have regard for the limits of the conventions and treaties that relate to mutual legal assistance. It should be remembered that the regime of mutual legal assistance is for the obtaining of evidence; thus, the obtaining of intelligence and the locating of suspects or fugitives should only be sought by way of informal mutual assistance to which, of course, agreement may or may not be forthcoming.

**Martin Polaine**  
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