JUDICIARY OF
ENGLAND AND WALES

The Serious Fraud Office

-v-

Glencore Energy UK Ltd

<u>Sentencing Remarks of Mr Justice Fraser</u>

Southwark Crown Court

3 November 2022

Introduction

1. I shall refer to the defendant company, Glencore Energy UK Ltd, simply as "Glencore" throughout these sentencing remarks. I shall refer to the Serious Fraud Office as the "SFO". These sentencing remarks are somewhat lengthy, but it is necessary to explain the offending and calculation of penalties in some detail.

2. Glencore was charged on indictment with seven counts under the Bribery Act 2010 ("the Bribery Act"). Glencore pleaded guilty to all seven counts on 21 June 2022 before the Honorary Recorder of Westminster. Counts 1 to 5 are offences of bribery, contrary to section 1 of the Bribery Act. Counts 6 and 7 are offences of failure of a commercial organisation to prevent bribery, which is contrary to section 7 of the same Act. On 31 October 2022, the SFO was given permission to amend Count 5 to make a minor adjustment to the figure. Glencore entered a guilty plea to that amended count on that day.

3. The facts of the offending have been explained in some detail by Ms Healy KC for the SFO in her opening of the case yesterday, and these are contained in the SFO document now publicly available called the Case Summary. Those facts include material from Anthony Stimler, a former Glencore trader who has pleaded guilty to offences in the United States in relation to his involvement. I shall not provide full details in these remarks, but just a summary. The identity of some individuals and two limited companies are anonymised in the Case Summary document due to reporting restrictions I imposed on 24 and 31 October 2022 respectively. The reasons for these reporting restrictions are more fully explained in a written judgment which is available at the National Archives at ***Serious Fraud Office v Glencore*** [2022] EWCR 1. The individuals in question are currently under investigation by the SFO and no charges have been brought.

4. In this sentencing exercise it is necessary to assess the culpability of the behaviour of the company, but there has been no assessment of the culpability of individual people which has not yet been determined. Companies act through individuals, and it is necessary to consider their conduct for that reason, but the court has not heard from any individuals. These sentencing remarks therefore deal with the culpability of the defendant company and not that of any individual person. Culpability is determined by reference to the counts on the indictment, the pleas of guilty by the company, and the facts of the case as presented by the SFO. I am making no findings of any kind against any specific individual.

The details of the offending

5. The offending can be summarised for the purposes of these remarks. The five section 1 offences on the indictment (as amended) are as follows:
Count 1: between 1 March 2012 to 1 April 2014; amount of the bribe US$4,586,143; corruption of officials of the Nigeria National Petroleum Corporation ("NNPC").
Count 2: between 1 July 2012 to 1 August 2014; amount of the bribe US$2,047,004; corruption of officials of Ontario Trading SA Ltd ("OTSA").
Count 3: between 1 July 2012 to 1 April 2014; amount of the bribe US$335,920; corruption of officials of the NNPC.
Count 4: between 1 March 2012 to 1 March 2015; amount of the bribe EUR 10,532,712; corruption of officials of Société Nationale des Hydrocarbures and the Société Nationale de Raffinage ("SNH" and "SNR") in Cameroon. These are Cameroon's national oil and gas, and oil refinery, company respectively.
Count 5: between 1 July 2011 and the 1 April 2016; amount of the bribe EUR 4,757,474; corruption of officials of Société Nationale d'Opérations Pétrolières de la Côte D'Ivoire, Petroci Holdings and Société Ivoirienne de Raffinage in Ivory Coast. These are the state-owned oil operating and oil refinery companies in the Ivory Coast.

6. The five section 1 offences cover a total period of almost five years, with the corruption commencing on 1 July 2011 (the earliest date, being that in count 5) and the latest date being April 2016 (again, that of count 5). In Nigeria, Cameroon and Ivory Coast, the defendant paid a total of US$26,901,820 through intermediaries, agents and employees intending a portion to be paid as bribes to those concerned in allocating crude oil, primarily officials in state owned oil companies.

7. The two section 7 offences, namely failure of commercial organisation to prevent bribery, are in summary as follows:
Count 6: between 1 July 2011 and 1 December 2011; failing to prevent the bribing of officials in Equatorial Guinea.
Count 7: between 1 July 2011 and 1 December 2011; failing to prevent the bribing of officials in South Sudan.

8. For these two section 7 offences concerning Equatorial Guinea and South Sudan, Glencore made payments of US$ 1,000,000 and US$ 1,075,000 respectively to its agents and failed to prevent them from using some portion of those funds to pay bribes to officials in order to secure valuable oil contracts for Glencore.

9. These counts in aggregate represent corporate corruption on a widespread scale, deploying very substantial sums of money in bribes. The sums in question are extremely

large. The corruption is of extended duration, and took place across five separate countries in West Africa, but had its origins in the West Africa oil trading desk of the defendant in London. It was endemic amongst traders on that particular desk. Bribery is a highly corrosive offence. It quite literally corrupts people and companies, and spreads like a disease. Honest businesses miss out on legitimate opportunities, and honest employees and officials suffer, as a result of it. The proper and lawful conduct of business is seriously impacted and markets can be affected on a significant scale. Depending upon the type of bribery, national oil companies run the risk of losing significant revenue, although here losses to particular government entities are difficult to quantify (a subject to which I return at [12] below). Any bribes are serious, but when those bribes are measured in the millions of US dollars or Euros – and in count 4 here alone, in excess of 10 million Euros – then the figures speak for themselves. This is significant offending.

10. Apart from the amounts themselves, other notable features of the offending in this case are as follows. The facts demonstrate not only sustained criminality but sophisticated devices to disguise it, including drawing significant cash sums (such as in count 4) for other stated purposes that would be legitimate, such as the expenses of opening a new office, which were in reality used for corrupt purposes. The bribery was across borders and in different jurisdictions. I shall describe only very briefly in outline the facts associated with the offending under each count when I deal with categorisation. It all relates to crude oil trading, part of the business of Glencore.

11. The correct approach is to sentence each count separately. Most of the counts do however share some common features. The relevant sentencing guideline is the Sentencing Council's Definitive Sentencing Guideline for Corporate Offenders: Fraud, Bribery and Money Laundering Offences. There are a number of steps required, and they must be approached sequentially.

Step One: Compensation

12. The court has the power to order compensation. The Guideline provides that where an offence has resulted in loss or damage the court must consider whether to make a compensation order. If the court decides not to do so, it must under section 55 of the Sentencing Act 2020 give reasons for this.

13. I do not make any compensation order in this case. The SFO does not seek to have such orders imposed, and I agree with that approach. The three reasons given by the SFO are as follows:
1. the nature of the offences are not such that the amount of compensation can be readily and easily ascertained. In particular, I would add that any losses caused by the trading in contracts that were granted to Glencore rather than other companies would be complex and potentially require contested evidence.
2. Identifying third parties that have suffered quantifiable loss is also very difficult.
3. Potential victims are entitled to pursue claims for compensation in the civil courts, and those courts are more suitable as a forum for assessing the correct measure of compensation. Those claims can still be advanced in those courts, which are more suited to such an exercise than the Crown Court.

14. These reasons are consistent with the existing authorities, and the rationale behind the award of compensation orders. This approach is explained further in ***Federal Republic***

of Nigeria v SFO and Glencore [2022] EWCR 2, a judgment handed down last week when the Federal Republic of Nigeria applied to make representations on having a compensation order made in its favour. That judgment should be consulted by anyone who wishes to read more detail.

Step Two: Confiscation

15. A confiscation order is available as a result of sections 6 and 13 of the Proceeds of Crime Act 2002. This must be dealt with before, and taken into account when assessing, any fine. Mr Kinnear KC made submissions on this for the SFO.

16. The SFO seeks a confiscation order and both the principle and amount of that are agreed by Glencore. I record that although none of the currency of each of the counts is in pounds sterling – the sums are in US dollars or Euros – the confiscation order is made in pounds sterling. All the financial calculations that lie behind the figures in these sentencing remarks have been converted into pounds sterling at agreed exchange rates.

17. I am satisfied that all the requirements for the making of a compensation order are satisfied in this case. Both the recoverable amount and the benefit figure are agreed by the SFO and the defendant, and this has been done in accordance with the statutory provisions. Ms Montgomery KC for Glencore has asked for time to pay, which is not contested.

18. I therefore make a confiscation order as follows:
1. I certify that Glencore's benefit from its general criminal conduct is £93,479,338.95.
2. I find that the available amount exceeds that sum, such that the recoverable amount is also £93,479,338.95.
3. Given the size of the sum, I grant Glencore the period of time requested for payment to be made, which is 30 days from today.

Step Three – determining the offence category

19. The category of offence must be determined by reference to culpability and to harm. I have to weigh up all the different factors to arrive at a fair assessment of culpability, taking account of all the different characteristics present. I shall deal with harm first because it is not contentious.

Harm

20. For offences under the Bribery Act, the appropriate figure to calculate harm will normally be the gross profit from the contract obtained, retained or sought as a result of the offending. There is an alternative measure for the two offences under section 7 which is the likely cost avoided by failing to put in place appropriate measures to prevent bribery.

21. Here, determining harm has been made very straightforward by the fact that the SFO and Glencore have agreed what the correct figure is for this by performing agreed calculations for each count. The amount of harm agreed for each count is shown at [53] below. I am very grateful to all the legal representatives for the work that has gone into agreeing these figures. The total agreed figure for harm is £81,034,197.

Culpability

22. There are two assessments that must be made. The first is the relevant culpability; this is required to determine the relevant category range. Then, the relevant multiplier must be assessed within that category range. It need not necessarily be the same for each count. Following those two assessments, the multiplier is applied to the harm figure. This arithmetic function determines the fine level, which is then subject to further consideration at Steps Five (adjustment of the fine) Six (factors justifying a reduction) Seven (reduction for guilty pleas) and Nine (the totality principle).

23. In my judgment, the conduct the subject of this indictment is properly categorised as being of high culpability. The following high culpability factors are present. The defendant company played a leading role in organised and planned unlawful activity. It did not act alone but used agents. It corrupted local officials who worked for state-owned oil corporations, such as the NNPC in Nigeria and officials in Cameroon's national oil and gas company and national refinery organisations. It was an abuse of the defendant's dominant market position. The offending was also committed over a sustained period of time. For most of the counts, these were not isolated acts of bribery that occurred on single occasions. It is clear that for some counts, the same techniques were used month after month, for the whole period covered by the relevant count in the indictment. Bribery was clearly part of the culture for a number of personnel on the West Africa desk. These counts represent sophisticated offending that was sustained over prolonged periods of time that are measured in years.

24. So far as the two section 7 offences are concerned, I consider that all the material put before the court for sentencing makes clear that there was a culture of wilful disregard of commission of such offences by employees at Glencore. There was no significant effort expended at the relevant times to put effective systems in place to stop the offending. The amount of the cash sums drawn from the company's cash desk by using simple though deceptive descriptions such as "office expenses" makes it clear that the whole system, such as it was, was patently open to abuse and could not be described as remotely effective in preventing corruption.

25. Glencore submit that there was some effort to put in place effective preventative measures, which for the section 7 offences is a lesser culpability factor. I accept that there were some measures – for example, there were published anti-bribery and corruption policies, and there was a compliance officer appointed – but these efforts were somewhat ineffectual and feeble. One of the policies, for example, dates from 2006, but there is no evidence its terms were enforced or their importance emphasised. Two of the personnel in London with roles concerning ethics at Glencore are individuals who are themselves now under investigation by the SFO, whose names have been anonymised. Such measures that were in place do not lessen my overall conclusion that the offending as a whole, taking all the facts and circumstances into account, is high culpability.

26. I accept that in principle an offence under section 7 is not, in general terms only, as serious as an offence under section 1, and adopt the reasoning of Sir Brian Leveson P in ***Serious Fraud Office v Rolls-Royce plc and Rolls-Royce Energy Systems Inc*** [2017] Case No. U20170036 when he said at [93] that:

"…failing to prevent bribery is less egregious than an offence of bribery or corruption not least because although it represents a serious failure of corporate governance, the operative minds of the company are not involved in the predicate offence."

27. However, counts 6 and 7 on the indictment still represent significant corruption and criminality, and in my judgment are also properly characterised as being of high culpability. I propose to reflect the different seriousness of the section 7 offences by considering this at the stage when I fix the multiplier separately for the different counts on the indictment.

Step Four (starting point and category range)

28. The starting point in terms of multiplier for high culpability is therefore 300% with a category range of 250% to 400%. This applies to all offenders regardless of plea or previous convictions. Have determined this, the court must go on to consider adjustment within the category range.

Adjustment within the category range to reflect aggravation and mitigation

29. The Sentencing Guideline makes it clear that having determined the appropriate starting point, the court should consider adjustment within the category range for aggravating or mitigating features. In some cases it may be appropriate to move outside the identified category range.

30. The SFO has chosen to propose specific figures for the actual multiplier for each count, within the category range. I do not consider that this should have been done. It seems to me to be similar to the prosecution contending for a specific term of years upon a conviction for an imprisonable offence, something that should not occur. I consider that the actual figure for the multiplier is a matter for the court. I take account of the features drawn to the court's attention but reach my own separate and independent conclusions on the correct percentage figures for each count. Although the multipliers I select are the same, in most cases, as those proposed by the SFO, they have been arrived at independently by me.

31. The following aggravating factors apply to all seven counts. Fraudulent activity was endemic within the West Africa desk operation at Glencore, and attempts were made to conceal the misconduct by using false invoicing methods, and false descriptions for the cash withdrawals. Substantial harm was caused to the economic operations of the entities within the different countries that were engaged in oil trading, production and distribution operations. Further, I consider that damage was caused to the integrity and confidence of the markets, and also substantial harm was caused to the integrity of local government owned operations in oil production and refinement. Finally, the offences were committed across borders and jurisdictions. These were truly international offences.

32. Senior personnel at Glencore were closely involved in the criminal activity. A culture had developed in which bribery was accepted as part of the West Africa desk's way of doing business. This undermined any formal compliance responsibility or culture, to quote from the defendant's own sentencing submissions. Anti-corruption statements and policies were largely ignored.

33. The following mitigating factors apply in Glencore's favour. It has no previous relevant convictions, although as has been observed in another case by Edis LJ, this simply means that the offending has gone undetected for so long. A point to its credit is that Glencore co-operated fully with the investigation, as already explained. It also made early admissions. Further, the offending was committed under the previous management, and those involved in the misconduct no longer work for the company. Glencore has engaged in corporate reform, and today appears to be a very different corporation than it was at the time of these offences. I also take some account of the fact that it is being prosecuted by the Department of Justice in the US, although the counts to which Glencore has pleaded guilty in this jurisdiction in terms of overt acts are different (with only one very limited exception). Also, the reason that so many offences remain to be prosecuted and sentenced elsewhere is because there was so much offending. Therefore I do not give the existence of those other pending proceedings significant weight, although I do take account of it to a limited degree.

34. Glencore has the benefit of having made full guilty pleas, but these are taken into account at Step Seven. It is very much in Glencore's favour at this stage of the sentencing exercise that it demonstrated such full co-operation with the investigation. It not only instituted its own internal review, and engaged external professionals to assist, but shared the fruits of that with the SFO, including limited waiver of privilege over some internal interviews. A considerable number of documents that were identified as relevant, referred to as "hot docs", totalling in the thousands, were provided by Glencore to the SFO. Formal admissions were made by Glencore in a witness statement from its legal representatives dated 6 April 2022. Without that extensive co-operation, the multiplier would be at the very top of the category range. I therefore take full account of that co-operation. Ms Montgomery KC submits that the co-operation on each of counts 5, 6 and 7, when the investigation and evidence supporting each count was at a very incomplete stage, justifies reducing the multiplier from the starting point for each of those counts. However, I consider it justifies downward movement for counts 6 and to a lesser extent count 7. I take account of it for count 5 too, but the overall result is not specific downward movement from the starting point for that count.

35. The following summaries of each count will suffice to explain the multiplier that I have chosen as a percentage for each.

36. Count 1: Glencore created addenda to a service agreement with its agent, who operated through a company, to give the illusion that the bribes advanced to that agent were payments to him for legitimate services. Invoices were created for "service fees" and these were paid by the defendant as a way of advancing funds to the agent so they could be used for bribes. 16 different payments were made in this way that go to the total figure for count 1. One email exchange on 19 June 2012 shows that officials at the NNPC were under pressure internally to favour local traders rather than large international traders such as the defendant. By bribing them in the way that occurred, those officials instead favoured the defendant and allocated Glencore very advantageous quantities and grades, which Glencore used in trading to make profits. This allocation by NNPC would have been to the detriment of the local traders who, absent the corruption, could have benefitted from these contracts being awarded to them instead. In my judgment, the circumstances of this offending justifying moving upwards within the category range and the correct multiplier for this count is 350%.

37. Count 2: Ontario Trading SA Ltd ("OTSA") is a large company incorporated in Ghana. OTSA also engaged in crude oil swap trading arrangements with another company. OTSA received crude oil allocations from NNPC. Again, addenda to services agreements were used as a device to disguise the bribes that were paid to OTSA through Glencore's agent.

38. The agent negotiated overall prices with OTSA for specific crude oil cargoes. The agreed total price was not paid directly to OTSA. In official correspondence an agreed lower price was confirmed with Glencore which reflected the direct payment made. On each occasion an addendum to the service agreement with the agent company was drawn up reflecting the balance as a "service fee" payable to the agent, and these agreements were a sham to disguise the true purpose of the payments. The fee was subsequently paid by Glencore directly to the agent.

39. The SFO draws attention on this count to what it says is an absence of harm to the integrity of local or national governments. In other words, this is corruption that impacted only upon another commercial entity, and not upon any state entity officials or employees. I accept that this feature makes this count slightly less serious. It should be noted that this count does however, as with the others, also include abuse of the defendant's dominant market position. I consider upward movement in the category range is justified, and I assess the relevant multiplier for this count at 325%.

40. Count 3: A company called Petroleos de Geneve S.A. Limited ("PDG") was contracted by the government of Malawi to administer a government-to-government crude oil term contract between Nigeria and Malawi in 2012. Glencore entered into a two year contract with PDG by which PDG granted Glencore all the barrels of crude oil allocated by NNPC to PDG at the Nigerian official selling price, with no premium or discount applied. Glencore undertook to sell the oil and pass 60% of the profits to PDG within 45 days of lifting. A portion of these profits were to be paid on to the Government of Malawi. Principal payments to NNPC for crude oil cargoes were not required until 90 days after the oil had been lifted, rather than the standard 30 days that was most common for NNPC contracts. Bribes were paid to NNPC officials to ensure that PDG received frequent oil allocations, which meant that Glencore could profit from frequent crude oil allocations to it, so that it could benefit from the far longer period of credit available under those contracts. The oil allocations were also of preferred grades of oil that were in demand in the market generally at the relevant times, so that these would be more profitable to Glencore.

41. Again, addenda to a service agreement between Glencore and its agent were used to disguise the funds that were to be used as bribes to pay the NNPC officials. I consider all the circumstances of this offending justify upward movement within the category range to a multiplier of 350%.

42. Count 4: Glencore paid bribes, through an employee on the West Africa desk, to officials in Cameroon's national oil and gas company and national refinery. This was to give Glencore favourable treatment in relation to the allocation and sale of crude oil and the purchase of oil products. What were called "service fees" were paid to the defendant's agent pursuant to addenda to a service agreement, and invoices disguised the true purpose of the payments. These sums were misdescribed in the internal

computer system to disguise them. The sums deployed using this technique were EUR 4,187,820. This created a fund of money which would be withdrawn in cash in Nigeria and transported, often by private jet, to Cameroon where it was made available to an individual who used it to pay bribes to these officials. There were two elements to the offending under this count. The second element is an individual also withdrew EUR 6,344,892 in cash from the Glencore cash desk in Baar, Switzerland, claiming this was for office expenses, or on one occasion, entertainment. This cash was taken to Nigeria and Cameroon and used to pay bribes to officials. The total sum under this count is the largest of the financial figures in any of the counts. Self-evidently, the total exceeds 10 million Euros.

43. The national oil refinery company in Cameroon is also known as “Sonara”. Glencore would both buy and sell to Sonara. Bribes were paid to officials in Sonara to ensure that Glencore was successful in selling crude oil to Sonara at prices that were advantageous to Glencore.

44. In my judgment this count merits a multiplier of 375%. This is for the following reasons. As well as the aggravating features present in the other counts which I have explained at [31] above, this count contains two distinguishing features. The extremely sizeable cash sums that were permitted to be withdrawn from the offices in Switzerland, using such spurious descriptions as office expenses, demonstrates the most blatant of conduct. It demonstrates the number of people at Glencore who must have been complicit in this behaviour. The first such cash withdrawal in Switzerland was in March 2012, with the stated purpose simply being “light crude oil – Cameroon entertainment”. This was in the sum of 225,000 euros. This was then followed on an almost monthly basis by other sizeable sums, all over 200,000 euros and one in September 2012 being 300,000 euros, with one withdrawal in Swiss francs. This conduct continued all the way through into February 2015, with the penultimate sum being in January 2015 of 330,000 euros, and the final one a month later being 200,000 euros. These sizeable amounts were drawn month after month. Additionally, there are the two elements to this count – both the cash withdrawn from Switzerland, and also the misdescription and false invoicing regarding service fees to obtain the money directed to Nigeria.

45. Such was the level of corruption within this count that it would merit a multiplier, absent the co-operation of Glencore generally, above the top of the category range. As it is, I assess the multiplier at 375%.

46. Count 5: similar devices were used to the other counts. This included sums disguised as “service fees” that were in reality advanced as funds to an agent to be used to pay bribes, this time for the national oil and refinery companies of the Ivory Coast. A loan facility was used with the agent to avoid controls on advance payments that had been introduced by Glencore. This corruption went on for almost five years, which is a long period of time. There is another feature particular to this count which is that this was during a period of political turmoil in Ivory Coast at the time.

47. Ordinarily, I would increase the multiplier above that of the other counts to reflect these other factors. However, I also take account of the fact that Glencore introduced some measures designed to limit advance payments and it was predominantly through the acts of individuals that these were circumvented. There was also extensive co-operation at an early stage of the investigation. Accordingly and in all the circumstances, I

consider the multiplier should be increased within the category range to a multiplier of 350% on this count.

48. I turn therefore to the last two counts, which are counts 6 and 7. These are for different offences, under section 7 rather than section 1 of the Bribery Act. Count 6 relates to a single payment of US$1 million disguised as a loan, to be used to bribe officials in Equatorial Guinea, and count 7 was in relation to two cash sums totalling US$1.075 million which were drawn as cash, with the reasons for them given as opening office costs. Some of the cash sums were taken in a private jet to South Sudan and used for corrupt purposes, and other meetings took place in Zurich and London. Very shortly after these events, Glencore was granted the supply of 2.6 million barrels of crude oil.

49. Count 6 concerns criminality over relatively limited duration, and Glencore made very full admissions into that offending notwithstanding that the investigation itself was at a far less advanced stage than the others. This is a section 7 offence. A corrupt payment to an agent was disguised as a loan in the internal accounting system. A portion of that payment was used to pay bribes in Equatorial Guinea in order to secure crude oil cargoes. I consider that in the circumstances the appropriate multiplier is at the bottom of the category range, and I assess it as 250%.

50. Finally, I turn to Count 7. This too is a section 7 offence. Large cash withdrawals were again made in the Swiss office, with the false description of office opening expenses. Employees travelled to South Sudan by private jet in August 2011, very shortly after it had obtained independence in July 2011, with US$800,000 in cash. This was used for bribes. Shortly afterwards a joint venture, in whom Glencore had an interest, received a lucrative contract for two million barrels of crude oil. There were however only two such payments, and early admissions were made by the company. I also assess the correct multiplier for this to be slightly lower than the category range starting point, and to be 275%.

The fines

51. The application of those multipliers to the figures for harm on each count lead to the following fines at this interim stage of the sentencing exercise. All figures have been rounded to the nearest pound.

Count	**Country**	**Agreed Harm**	**Multiplier**	**Interim Result**
1	Nigeria	£12,111,889	350%	£42,391,612
2	Ghana	£3,905,199	325%	£12,691,897
3	Malawi	£279,487	350%	£978,205
4	Cameroon	£22,752,498	375%	£85,321,868
5	Ivory Coast	£27,728,459	350%	£97,049,607
6	Equatorial Guinea	£12,943,712	250%	£32,359,280
7	South Sudan	£1,312,952	275%	£3,610,618
				Total: £274,403,087.

Step Five (adjustment of fine)

52. A company that is a defendant will, at sentencing, be made subject to a fine. The fine must reflect both the seriousness of the offence and must also take account of the financial circumstances of the offender. At this step of the sentencing exercise, the court should consider whether there are any further factors which indicate an adjustment in the level of the fine. The guidelines state that:

"the court should "step back" and consider the overall effect of its orders. The combination of orders made, compensation, confiscation and fine ought to achieve:
* the removal of all gain
* appropriate additional punishment, and
* deterrence."

53. It is important that there is no double counting, and if a factor has been taken into account at the previous stage of sentencing, it should not be considered again at this stage. Initially the SFO did not seek any adjustment at this stage, at a point when the figure for harm had not been agreed and the SFO was contending for a higher figure. Ms Montgomery KC for Glencore submits that no upwards adjustment is necessary or justified. She explained that in the earlier, higher figure for harm sought by the SFO, the costs of the hedging in which Glencore had engaged (to protect against its position taken in the oil trading contracts) had not been appreciated by the SFO. Some explanation and evidence was needed in order to persuade the SFO of the true figure for harm, and once this was done, this resulted in a harm figure that was lower than the SFO expected. The suggestion was that this lay behind the SFO deciding to reverse its position on seeking any uplift. Glencore also argue for an adjustment downwards, to reflect its co-operation, and the fact that other penalties are to be imposed in other jurisdictions.

54. The SFO did agree a figure for harm lower than the one it contended for initially, and this may explain its change of position on the issue of seeking an uplift at Step Five. In other words, having agreed a lower harm figure, it may be seeking to achieve a higher penalty overall by means of an uplift to increase overall the amounts imposed on Glencore. If that is what is behind the SFO seeking an uplift, that would show an error of approach. However, whether to impose an adjustment or uplift, or not, is a matter for the court, not for the SFO, and I pay no attention to whatever reasons lie behind the SFO's change of position.

55. Given that any adjustment is a matter for the court, I would have considered this step regardless of whether any uplift were sought by the SFO or not. Indeed, the Sentencing Guidelines make clear it is a separate step. Some matters are for the court to determine, and this is one of them. Therefore, although the change of position by the SFO may demonstrate a potential confusion on their part, it does not affect the decision that the court is required to make.

56. I accept the submissions by Ms Montgomery KC that I should not, in the circumstances here, consider the financial position of the parent company when engaged in this exercise. It is only the defendant's financial position that should be considered. I also take account of the fact that there are other financial penalties being imposed in other jurisdictions, and that these cumulatively can be seen as a deterrent generally.

57. I do not accept that other penalties imposed, or to be imposed, in other jurisdictions for other offending by different companies within the same group should be taken into account with precision or in an arithmetical way by this court when sentencing for these counts. The other offending being prosecuted elsewhere, including the US and Brazil, represents separate criminality, and is in relation to other companies within the Glencore group, and not the defendant. But I take some account of the fact that the same type of offending has resulted, or will result, in very significant penalties being imposed upon the Glencore group elsewhere.

58. I do not accept that the co-operation in the investigation shown by the defendant should be reflected in a downwards adjustment at this stage. That co-operation has been fully taken into account in arriving at the correct multiplier as I have explained. The company has demonstrated that there has been a change in corporate organisation at the defendant, with the appointment of a high number of compliance officers and a completely different approach to ensuring the correct corporate measures and protections are in place. I accept that this is to its credit, but if that had not been the case, the multipliers I have selected would be somewhat higher.

59. Nor do I accept that applying an uplift at this stage would be wrong in principle. In general, the combination of compensation order (if one is made), confiscation orders and fine is intended to achieve the following three objectives: removal of all gain; appropriate additional punishment; and deterrence. The fine may be adjusted to ensure that these objectives are met in a fair way. The fine must be proportionate, having regard to the size and financial position of the offending organisation and the seriousness of the offence. Those are the principles that need to be considered.

60. Factors to be considered are whether the fine fulfils the three objectives I have explained in the preceding paragraph; and the value, worth and means of Glencore. Factors militating towards a reduction must also be considered, such as whether the fine will impair the offender's ability to make restitution; whether it will detrimentally impact Glencore's ability to implement effective compliance programmes; the impact of the fine on its employees and other relevant users and customers (but not its shareholders); and impact on any charitable functions. There are no compensation orders to be factored into this stage of the exercise. However, in terms of removal of gain, I must take account of the confiscation order that I am also imposing today, and its size. This means that there are only two points to consider – sufficient punishment and deterrence.

61. Here, Glencore is a major and substantial company with sizeable financial depth. I have been provided with the accounts for recent years. The information demonstrates that in commercial terms Glencore is of very significant size financially. The SFO has drawn my attention to the amount set aside (in accountancy terms, a provision being made in the accounts) of US$410 million for potential penalties. However, I do not consider that figure in principle should guide my decision in this respect, as that would run the risk of penalising prudent accounting. I do however pay attention to the financial accounts in order to assess the factors identified in the preceding paragraph.

62. I have concluded that no adjustment to the fine is justified in this case, in either direction. This is for the following reasons. For a company the size of Glencore to be punished appropriately, the fine must be sufficiently large to have a financial impact

upon it that is noticeable. Otherwise there is a risk that companies such as Glencore will see penalties for bribery as risks worth running; alternatively, that penalties are merely a potential extra cost of doing business. But the overall fine here, absent an uplift and before discount for plea, is £274,403,087, together with a confiscation order of £93,479,338. These are sizeable figures.

63. I consider that these are of a sufficient level to act as a deterrent. I do not consider that the size of the fine, with or without discount for plea, needs to be reduced to avoid any detrimental impact upon Glencore's ability to provide restitution, or to implement effective compliance programmes, or its employees, or its customers, or the economies in which it operates, or upon any charitable functions. The issue really is at this stage, when the court stands back, to ask the question "should the fine be adjusted?" In this case, in my judgment, the correct answer to that question is No. The penalties are of sufficient financial impact properly to punish the defendant and to act as a sufficient deterrent. I also take account of the fact that applying any uplift could potentially disincentivise offenders from providing assistance of the positive type provided here. That positive assistance is to be encouraged, not discouraged, and here it goes considerably further than merely pleading guilty.

64. I do not therefore apply any adjustment, either upwards or downwards, to the fines.

Step Six (Factors justifying a reduction)

65. There are no Step Six factors in this case.

Step Seven (Reduction for Guilty Plea)

66. Glencore pleaded guilty at the earliest opportunity to all seven counts and is entitled to full credit for doing so. Given the stage of the case at which these pleas were indicated, the reduction is the full amount available of one-third. There are well-rehearsed policy reasons for such reductions for pleas of guilty, and it is not necessary to lengthen these remarks yet further by reciting them.

67. That reduction of one third is to be applied to all of the figures which I have calculated by way of fines. Therefore the agreed harm figure is considered for each count, to which is applied the multiplier I have chosen for that specific count. The resulting amount of the fine is then reduced by one-third. Although this may seem somewhat formulaic, it is the correct approach under the relevant Sentencing Guideline. These resulting figures are therefore the product of the sentencing exercise.

Summary

68. That exercise results in the following fine which I impose for each count, after the discount for the guilty pleas:

Count	Agreed Harm	Multiplier	Fine	Result after guilty plea reduction
1	£12,111,889	350%	£42,391,612	£28,261,075
2	£3,905,199	325%	£12,691,897	£8,461,265
3	£279,487	350%	£978,205	£652,137
4	£22,752,498	375%	£85,321,868	£56,881,245
5	£27,728,459	350%	£97,049,607	£64,699,738
6	£12,943,712	250%	£32,359,280	£21,572,853
7	£1,312,952	275%	£3,610,618	£2,407,079
			Total:	£ 182,935,392

Step Eight (Ancillary Orders)

69. The SFO seeks a costs order in its favour of £4,550,362, that being the costs of the prosecution. Glencore accepts that the principle of paying the prosecution costs is engaged, and also accepts the sum sought as correct.

70. I therefore make a costs order in the SFO's favour in that amount. I will give Glencore 30 days to make the necessary payment.

Step Nine (Totality)

71. Whenever a court sentences for more than one offence, the principle of totality means that the court must consider whether the total sentence is, in all the circumstances, just and proportionate.

72. The Definitive Guideline on Offences Taken into Consideration and Totality makes clear that where a fine is imposed on multiple counts, the total fine is inevitably cumulative. At this stage of the sentencing exercise, the total fines should be calculated and the court should consider whether the aggregate total is just and proportionate. If it is not, the court should consider how to reach a just and proportionate fine.

73. I consider totality and have concluded that the aggregate total is just and proportionate in all the circumstances of this case. I therefore make no reduction for totality, but have expressly considered, and taken into account, that principle.

Conclusion

74. The conclusion to this sentencing exercise is therefore that the defendant company Glencore is made subject to the following orders:
1. A confiscation order of £93,479,338.95.
2. Fines on each of the seven counts as set out at [68] totalling £182,935,392.
3. Payment of the SFO's prosecution costs of £4,550,362.

Glencore has 30 days to make all of these payments that I have ordered.

75. Finally, this is a significant overall total. Other companies tempted to engage in similar corruption should be aware that similar sanctions lie ahead.

Fraser J 3 November 2022