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Bribery & Corruption

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Contributing Editors: **Jonathan Pickworth & Jo Dimmock**

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United Kingdom

Jonathan Pickworth & Jo Dimmock
White & Case LLP

Brief overview of the law and enforcement regime

The main legislation in the UK governing bribery and corruption is the Bribery Act 2010 (the "Act"), which came into force on 1 July 2011.

The Act defines the criminal offences of bribery very widely and includes the principal offences of bribing another person, being bribed and bribing a foreign public official. Significantly, the Act also introduced a new strict liability corporate offence of failure to prevent bribery, where the only defence available to a commercial organisation is for it to show there were "adequate procedures" in place to prevent bribery.

The Act applies to conduct alleged to have taken place on or after 1 July 2011.

The principal bribery offences

The offence of bribing another person includes offering, promising or giving a financial or other advantage intending to induce or reward improper conduct, or knowing or believing its acceptance to amount to improper conduct.[1] "Improper" means breaching an expectation of good faith, impartiality or trust. The bribe does not actually have to be given; just offering it, even if it is not accepted, could be sufficient to constitute bribery. In addition, the offer does not have to be explicit, and any offer made through a third party will fall within the Act.

An individual being bribed also commits an offence under the Act.[2] This includes requesting, agreeing to receive, or accepting a financial or other advantage where that constitutes improper conduct, or intending improper conduct to follow, or as a reward for acting improperly.

There is a separate offence under the Act of bribing a foreign public official to gain or retain a business advantage.[3] In contrast to the offences above, this does not require evidence of an intention on the part of the person bribing to induce improper conduct, or knowledge or belief that its acceptance will amount to improper conduct; only that the person bribing intends to influence the official acting in his or her official capacity. Unlike the US Foreign Corrupt Practices Act 1977 ("**FCPA**"), as amended, facilitation payments (also known as "grease" payments) are not permitted under the Act.

The corporate offence of failure to prevent bribery

It is possible for a corporate body and its senior officers to be found guilty of any of the general offences of bribing, being bribed and bribing a foreign public official. For a corporate body to be found guilty of the general offences, the prosecution must show that the necessary mental element can be attributed to the directing mind of the corporate body.

For senior officers, it is necessary to show that the offence has been committed with the consent or connivance of such a senior officer.[4]

The significance of the separate corporate offence of failing to prevent bribery is that it is not necessary to show that any senior officer had any particular mental element, removing a critical obstacle for the prosecution in taking action against corporate entities.

The corporate offence is committed by a relevant commercial organisation where a person "associated" with it bribes another person with the intention of obtaining or retaining business or a business advantage for that organisation.[5] For the purposes of the Act, an "associated" person is widely defined as a person who performs services for, or on behalf of, the relevant commercial organisation. This could include not only employees or agents but also, depending on the circumstances, subsidiaries, consultants, representatives or others who perform services on the relevant commercial organisation's behalf.

The only defence available to the commercial organisation is that it had "adequate procedures" in place to prevent bribery. Section 9 of the Act requires the Secretary of State to publish guidance about such procedures; this guidance was issued on 30 March 2011[6] and last revised in October 2012. It sets out the following key principles:

- **Proportionate procedures** – the procedures to prevent bribery should be proportionate to the bribery risks faced by the organisation and the nature, scale and complexity of the organisation's activities.
- **Top-level commitment** – senior management should be committed to preventing bribery and a senior person should have overall responsibility for the anti-bribery programme.
- **Risk assessment** – the organisation should carry out periodic, informed and documented assessments of its internal and external exposure to bribery, and act on them.
- **Due diligence** – appropriate checks should be carried out on persons performing services for the organisation, and those persons should in turn be required to carry out similar checks on the persons they deal with.
- **Communication (including training)** – bribery prevention policies should be clearly communicated internally and externally, and there should be continuous training.
- **Monitoring and review** – the risks and procedures should be regularly monitored and reviewed to ensure that they are being followed in practice.

Extraterritorial reach

Importantly, under the Act, the act of bribery itself does not necessarily need to have occurred in the UK for the offence to have been committed.

In relation to the general offences of bribing, being bribed or bribing a foreign public official, provided the person committing the offence has a close connection with the UK (for example, they are, among others: a British citizen; a British overseas territories citizen; ordinarily resident in the UK; or a body incorporated in the UK), the physical act of bribery can occur inside or outside of the UK.[7] This means that an individual who is a citizen of, for example, the British Virgin Islands or Bermuda, will be subject to these laws even if the act occurs entirely outside of the UK mainland itself and the individual is not, and never has been, a British citizen.

The corporate offence of failure to prevent bribery is not just confined to acts of bribery carried out in the UK. Provided the organisation is incorporated or formed in the UK, or the organisation carries on a business or part of a business in the UK (wherever in the world it is incorporated), then the organisation is within the ambit of the offence, wherever the act of bribery takes place. The guidance issued by the Secretary of State asserts that the question of whether or not an organisation carries out a business or part of its business in any part of the UK will be answered by applying a common sense approach, and the final arbiter in any particular case will be the courts (who have not yet had the opportunity to do so at the

date of writing). The guidance states that the Government would not expect, for example, the mere fact that a company's securities have been admitted to the UKLA's official list and are trading on the London Stock Exchange to, in itself, qualify that company as such for the purposes of the corporate offence. Likewise, in relation to a UK subsidiary of a foreign parent company, since a subsidiary may act independently of its parent company, its parent company may not necessarily be caught by the offence, but the point is yet to be tested.

Investigating and prosecuting authorities

According to the Joint Prosecution Guidance on the Bribery Act 2010 issued on 30 March 2011, the Serious Fraud Office ("**SFO**") is the primary agency in England and Wales for investigating and prosecuting cases of overseas corruption; the Crown Prosecution Service ("**CPS**") also prosecutes bribery offences investigated by the police, committed either overseas or in England and Wales.

In England and Wales, consent needs to be sought from the Director of Public Prosecutions ("**DPP**") or the Director of the SFO for proceedings to be initiated for offences under the Act. They will make this decision in accordance with the Code for Crown Prosecutors (applying the two-stage test of whether: (i) there is sufficient evidence to provide a realistic prospect of conviction; and (ii) a prosecution is in the public interest), and also by taking into account the Joint Prosecution Guidance on the Bribery Act 2010, together with the Joint Guidance on Corporate Prosecutions, where relevant.

The prosecutor with responsibility for offences under the Act in Scotland is the Lord Advocate; in Northern Ireland, the Director of Public Prosecutions for Northern Ireland and the Director of the SFO are responsible.

Penalties

The penalty for an individual convicted of any of the general offences under the Act is a maximum of 10 years' imprisonment and/or an unlimited fine. A commercial organisation convicted under the Act faces an unlimited fine. In addition to any fine and/or sentence of imprisonment, a person can face forfeiture of the proceeds of crime (under the Proceeds of Crime Act 2002). Forfeiture can be by way of a criminal process known as confiscation, or by way of a civil process known as a civil recovery order.

The Sentencing Council Definitive Guidelines on Fraud, Bribery and Money Laundering Offences (the "**Guidelines**"), effective from 1 October 2014, provides Criminal Courts with guidance on how to approach the sentencing of individuals and commercial organisations in cases of bribery and corruption.

The high-level fines specified for the sentencing of corporate offenders suggest that heavy reliance is placed upon deterrent sentencing as a means of enforcing the Act. The Guidelines indicate that the Criminal Courts must first consider making a compensation order, requiring an offender to pay compensation for any personal injury, loss or damage resulting from the offence. Confiscation must then be considered if either the Crown asks for it or if the court thinks that it may be appropriate. Confiscation must be dealt with before, and taken into account when assessing, any other fine or financial order (except compensation).[8] The Guidelines state that the level of fine will be determined by reference to the level of culpability and harm caused by the offending corporation. Examples of high culpability are:

- a corporation plays a leading role in organised, planned unlawful activity (whether acting alone or with others);
- corruption of local or national government officials or ministers;

- corruption of officials performing a law enforcement role; and
- offending committed over a sustained period of time.

An example of lesser culpability will be where some effort has been made to put bribery prevention measures in place but these are insufficient to amount to a defence (this applies only to the offence under section 7 of the Act).

Under the Guidelines, the harm is a financial sum representing the gross profit from the contract obtained, retained or sought as a result of the offending. An alternative measure of harm for offences under section 7 of the Act may be the likely cost avoided by failing to put in place appropriate measures to prevent bribery. The fine to be imposed is calculated by the level of culpability multiplied by the harm figure. For instance, a case in which the court determines the corporation's role to have been of high culpability would multiply the harm figure by around 300%. In circumstances where the gross profit from a contract obtained was £1,000,000, the level of fine would, therefore, constitute *circa* £3,000,000 (300% of £1,000,000). A case determined by the court to involve low culpability would multiply the harm figure by around 100%. Once a starting point for the fine is determined, it can be adjusted to take into account aggravating or mitigating factors. If a guilty plea was entered, this will also serve to reduce the fine.

Other consequences that may flow from a conviction under the Act include directors' disqualification and trade sanctions, such as disbarment from EU contract tenders.

Civil bribery

In addition to the criminal offences under the Act, there is long-established case law in the UK relating to the civil tort of bribery. This concerns the payment of secret commissions to agents without the principal's knowledge or consent. Where the payer is aware of the agency relationship and the payment is kept secret from the principal, there is an irrebuttable presumption of corruption. If a claim for bribery is made, the principal may be entitled to recovery of an amount equal to the bribe paid. Indeed, in a recent case (***FHR European Ventures LLP & Ors v Cedar Capital Partners LLC***),[9] the Supreme Court decided that bribes and secret commissions are held on trust by an agent for his principal.

Key issues relating to investigation, decision-making and enforcement

Self-reporting

Until October 2012, the SFO had indicated the potential for matters that had been self-reported to the SFO to be dealt with through a civil process. Under the leadership of Sir David Green QC between 2012 and 2018, the SFO was very keen to emphasise its role as a prosecutor, and stated that "self-reporting was no guarantee that a prosecution will not follow". Under the Joint Guidance on Corporate Prosecutions, self-reporting is, at most, a public interest factor tending against prosecution. However, the SFO has also stated that a self-report can also be the single most important factor in a decision not to prosecute.

Co-operation

In August 2019, under the leadership of its new Director, Lisa Osofsky, the SFO issued guidance on corporate co-operation. The five-page guidance sets out what the SFO expects of a corporate who wishes to co-operate. Co-operation is described as relevant to the SFO's charging decision and an important factor in considering whether a Deferred Prosecution Agreement ("**DPA**") is appropriate. Co-operation is described as providing assistance which goes above and beyond what the law requires and includes:

- identifying suspected wrongdoing and criminal conduct and the people responsible;
- self-reporting to the SFO within a reasonable time;

- preserving evidence and providing it in a digestible and ready-to-use format by the SFO (including digital and hard copy); and
- obtaining and providing material, including summaries and relevant background and industry information.

The SFO's corporate co-operation guidance also focuses on the waiver of privilege in relation to witness accounts which may have come into being as a result of an internal investigation conducted by a corporate, and which are viewed by the corporate as privileged. Through its guidance, the SFO has expressed a willingness to challenge claims of privilege or to require a corporate to submit the material to an independent lawyer for consideration.

The decision to self-report and/or co-operate will depend on whether there is sufficient incentive to do so or, indeed, sufficient adverse consequences from not doing so. The SFO's co-operation guidance makes it clear that even where a corporate has co-operated, that is no guarantee of any particular outcome. The considerations to take into account in such circumstances are numerous and complex, and it is rare for a company to self-report to the SFO without taking legal advice. Companies considering self-reporting and/or co-operating should take specialist advice on the potential consequences, as well as the process.

An advantage to the SFO of a DPA (discussed in more detail below) is that if the terms of the agreement are not met and the DPA is terminated, prosecution is likely to follow. For companies, however, the outcome of self-reporting and co-operation is uncertain and a DPA is not guaranteed. The DPA with Rolls-Royce (discussed below) indicates that a DPA is not automatically barred by the lack of a self-report, but the company will simply be at a "disadvantage", which might require exceptional co-operation to compensate. Negotiation with the SFO is now more difficult also due to the risk that, unless complete control is provided to the SFO (including but not limited to the SFO expecting a waiver of privilege over certain documents), the DPA may be withdrawn without much hesitation. The High Court has criticised the SFO for relying on "oral summaries" of employees' interviews. The Court, in *obiter* comments, criticised the SFO for failing to require from the corporate, under the provisions of the DPA, waiver of privilege in respect of the full interview notes.[10]

The position taken by the SFO in its corporate co-operation guidance is that an organisation that does not waive privilege and provide witness accounts, does not attain the corresponding factor against prosecution that is found in the Code for Crown Prosecutors.

Further, the requirement to enter into a detailed statement of facts admitting liability against the backdrop of a criminal indictment makes the DPA process a difficult one for some companies to engage with. Companies are often encouraged to admit facts to obtain a DPA so that the company can remain (in one form or another), and employees who have committed no wrongdoing do not lose their jobs. However, the admissions are required at a relatively early stage of the investigation when the evidential landscape is unclear and the basis of the case broad.

We are yet to see the result of a trial following a terminated DPA, but it is likely that the SFO may seek to rely on the statement of facts provided in the course of the DPA proceedings as an admission to be used against the company in any subsequent trial. Section 13 of Schedule 17 of the Crime and Courts Act 2013 provides that the DPA statement of facts is not barred by statute and can be used as evidence in criminal proceedings: (i) in a prosecution for an offence consisting of the provision of inaccurate, misleading or incomplete information; or (ii) in a prosecution for some other offence where, in giving evidence, a person makes a statement inconsistent with the material.

All of the above serves to make the self-reporting/co-operation option less certain, less controlled, more intrusive, potentially more expensive and arguably less worthwhile for many corporations.

Deferred Prosecution Agreements

DPAs were introduced by the Crime and Courts Act 2013, the relevant provisions of which came into force on 24 February 2014, and introduced a new enforcement tool to the UK. DPAs can be used in cases involving financial crime, including bribery and corruption and, from 30 September 2017, in cases brought under the Criminal Finances Act 2017. DPAs are voluntary agreements entered into between prosecutors and corporate and unincorporated entities (but not individuals) under which a prosecutor agrees to put on hold criminal proceedings (an indictment having been "preferred" (i.e. the prosecutor serving the draft indictment on the Crown Court officer) but then "deferred" on terms agreed between the parties and the court), provided the entity in question complies with a range of conditions.

Such conditions may include the payment of penalties, the disgorgement of profits and the implementation of training and compliance programmes. When imposed, a DPA must also specify an expiry date; that is, the date on which it ceases to have effect. Since DPAs came into force, the courts have approved them in nine cases, six of which have involved offences of bribery and corruption. The terms of a DPA are the result of negotiation between the parties. However, once agreed, the proposed DPA must be brought before the court for judicial approval. The first four DPAs were dealt with exclusively by the President of the Queen's Bench Division, Sir Brian Leveson, until his retirement in June 2019. It does not appear that a single judge will have similar exclusive oversight of future DPAs. The subsequent DPAs have been dealt with by Mr Justice William Davis (***Serco Geografix***, ***Güralp Systems*** and ***G4S Care & Justice Services (UK) Ltd***), the current President of the Queen's Bench Division, Dame Victoria Sharp (***Airbus SE***) and Mrs Justice May (***Airline Services Limited***).

Once negotiations for a DPA have begun, the Director of the SFO or the DPP (as the case may be) must apply to the Crown Court for a declaration that the DPA is likely to be in the interests of justice and that the proposed terms of the DPA are fair, reasonable and proportionate. This first hearing must be in private. Once the DPA is approved, the judge must make the declaration in open court and give reasons. If, once the DPA is agreed and the criminal proceedings have been deferred, the prosecutor believes that there has been a breach of the terms of the agreement, it may apply to the court, which may determine whether there has been a breach and ask the parties to remedy the breach or terminate the DPA. Termination of the DPA will lead to the prosecution being pursued. Any variation of a DPA must be approved by the court.

It is intended that any financial penalty under a DPA shall be broadly comparable to a fine that the court would have imposed upon the organisation following a guilty plea. This is intended to enable the parties and the courts to have regard to sentencing guidelines in order to determine the penalty.

Organisations that enter into DPAs can expect a reduction of one-third off any fine (the same as entering an early guilty plea), or potentially a further reduction in certain cases; for example, where an organisation assists the authorities. In ***XYZ Ltd*** and ***Rolls-Royce***, reductions in excess of one-third were granted to recognise the companies' exceptional co-operation with the SFO investigation. Nonetheless, any reduction in the financial penalty will very much be at the discretion of the judge.

A joint code (the "**DPA Code**") published by the Director of the SFO and the DPP sets out the prosecutors' approach to the use of DPAs. The DPA Code and sentencing guidelines bring

greater clarity to the DPA process itself and the guiding factors for and against prosecution, particularly in relation to self-reporting. The factors set out in the DPA Code make it clear that DPAs are available only to pro-active, genuine and complete reports. What this means has been elucidated by the SFO's recent guidance on corporate co-operation. The guidance undoes the SFO's prior emphasis on its position that a company which reports a problem to the SFO early and genuinely co-operates in resolving the issue is unlikely to be prosecuted. Under the co-operation guidance, even full co-operation does not mean a company is unlikely to be prosecuted.

In January 2020, the SFO published guidance on how it evaluates a compliance programme and the relevance of its assessment.[11] This guidance sets out the relevance of the state of a compliance programme at three stages: (1) at the time of offending; (2) its current state; and (3) how it might change going forward. According to the guidance, the assessment is relevant to a decision to prosecute, whether an organisation should be invited to enter into DPA negotiations, to the possible conditions of a DPA, the existence of a defence of adequate procedures, and in relation to sentencing considerations.

In the UK, DPAs are not available to individuals. As a result, when an organisation enters into a DPA, one issue which arises is the naming of individuals in the DPA itself or in the Statement of Facts agreed by the corporate. The Statement of Facts often names individuals, who have no right to intervene at court, and criticises them. Although the details of the DPA are not published until after the trial of the individuals, in the event of an acquittal, the Statement of Facts is not amended to take into account the result. As a result, the conflicting outcomes are left in the public domain. This creates a real risk of reputational damage and is at odds with the position taken by the Financial Conduct Authority ("**FCA**") in relation to its notices. In ***FCA v Macris***[12] the Supreme Court held that the FCA erred in identifying a former JP Morgan manager in a notice, even if he was not named directly but rather identified by the position he held at the bank. No such safeguard currently exists in relation to DPAs: this has caused some consternation in relation to a DPA agreed with Tesco Plc and Sarclad, whose executives were subsequently prosecuted unsuccessfully.

Another concern for individuals in the context of DPAs is whether material disclosed by the company, for example as the result of an internal investigation, can be used in subsequent criminal proceedings brought against them. The SFO has the power to disclose information obtained to other government authorities.[13] In fact, there is no explicit safeguard against the sharing of information with third parties, most notably foreign regulatory agencies. However, whether evidence obtained from the company might be considered inadmissible in future trials against the individuals has yet to be tested, particularly in relation to employees' interviews conducted by the company as part of internal investigations and later shared with prosecution authorities. The SFO's current difficulties, highlighted in its co-operation guidance, arise out of the difficulty in obtaining the accounts at all.

Overview of enforcement activity and policy during the past two years

Prosecutions of commercial organisations

Only a few corporations have been prosecuted for offences under the Act, and all have been in respect of the new section 7 offence of failing to prevent bribery (perceived to be much easier to prosecute than the principal bribery offences under sections 1, 2 or 6 of the Act, referred to above). The section 7 offence is committed on a strict liability basis, where a bribe has been paid by someone who performs services for, or on behalf of, the relevant commercial organisation. Unlike the principal bribery offences, it does not require the prosecutor to establish intent on the part of a directing mind of the company.

The only defence for the corporate offence is for the company to show that it had in place "adequate procedures" to prevent the bribery from taking place. As a result, it is expected that any decision as to whether or not to prosecute will involve detailed consideration of the procedures that the suspect company has had in place and how they have been implemented. It is important to emphasise here that the focus will not just be on what the written procedures look like, but how they have operated in practice. The prosecutor will be looking at questions such as:

- What is the tone from the top, and does this company really subscribe to anti-corruption compliance in its truest sense?
- Has this company undertaken a properly documented risk assessment? Without this, it will be difficult for a company to show that it has put in place appropriate and proportionate procedures to plug the risk gaps.
- What do its written procedures look like, and are they adequate?
- How does the company go about the process of due diligence on third parties who perform certain services on its behalf?
- Is the training adequate?
- To what extent has the company monitored compliance, evaluated the adequacies of its procedures and assessed the true understanding of its employees and agents?

The wording of the section 7 offence means that the onus of establishing "adequate procedures" is on the company as the defendant in proceedings. The defence must be established to the civil standard of proof (on a balance of probabilities). All that the prosecution must establish is that a bribe has been offered, promised or paid, even if the individual who committed the bribery offence has not themselves been prosecuted. If the company has established the defence to the relevant standard, it is for the prosecution to rebut it to the criminal standard of proof (beyond reasonable doubt).

To date, eight DPAs have been entered into. However, of these, three do not involve bribery offences. The fraud and/or false accounting DPAs are included to demonstrate the court's approach to DPAs. Irrespective of the offences, the courts have approached the question of DPA approval in the same way.

Bribery/corruption related DPAs

- ***Standard Bank*** – November 2015. This was the first prosecution opened for the strict liability offence of failing to prevent an act of bribery, which was concluded by way of the first DPA requiring the payment of US$25 million.
- ***'XYZ' Limited*** – in July 2016, Sarclad Limited, referred to as XYZ Limited in its DPA in order protect the fairness of the subsequent trial of its former executives, entered into a DPA and paid a £6.5 million fine. In July 2019, the three former executives were acquitted by a jury of charges of bribery.
- ***Rolls-Royce*** – in January 2017, Rolls-Royce entered into a DPA in relation to offences including two counts of failure to prevent bribery carried out by its employees or intermediaries. It paid a £497 million fine. No individuals were subsequently charged or prosecuted.
- ***Güralp Systems Ltd*** – in October 2019, Güralp Systems Ltd entered into a five-year DPA in relation to offences of conspiracy to make corrupt payments and the section 7 offences of failing to prevent bribery. No fine was imposed as the SFO was satisfied (and the judge agreed) that the company could not sensibly meet any penalty over and above the disgorgement sum of £2,069,861. The judge concluded that the total sum payable was fair, reasonable and proportionate in the circumstances. Three individuals were charged with offences of conspiracy to make corrupt payments. In December 2019, they were all acquitted by a jury. The Statement of Facts was published following the acquittal.

- ***Airbus SE ("Airbus")*** – in January 2020, Airbus SE entered into a three-year DPA with the SFO as part of a global settlement involving the Parquet National Financier (PNF) in France and the Department of Justice ("**DOJ**") in the US. The total penalty imposed was €3.6 billion, the largest penalty paid by an organisation under a DPA. The DPA agreed with the SFO involved the payment of a fine of €398,034,571 and disgorgement of €585,939,740. In addition, Airbus was required to pay the SFO's costs of €6.9 million. The monies payable under this DPA exceed the total value of all preceding DPAs. To date, the SFO has not made a decision in relation to whether to charge any individuals.
- ***Airline Services Limited*** (**ASL**) – in October 2020, ASL entered into a one-year DPA for three offences of failing to prevent bribery (section 7 offence). The terms included payment of a fine of £1,238,714, disgorgement of profit of £990,971 and payment of £750,000 of SFO costs.

Fraud/false accounting related DPAs

- ***Tesco Plc –*** Tesco Plc was fined £129 million under a DPA. Three individuals were then prosecuted for offences of false accounting. The trial was abandoned in February 2018 owing to the ill-health of one of the defendants. The two remaining defendants were retried in October 2018, but the trial collapsed a month later after the trial judge ruled there was no case to answer against them. In January 2019, the SFO offered no evidence against the remaining defendant whose trial had been abandoned due to ill-health. He was formally acquitted.
- ***Serco Geografix Ltd ("SGL")*** – in July 2019, SGL entered into a three-year DPA in relation to three offences of fraud and two offences of false accounting. It was fined £19.2 million. £12.8 million in compensation had already been paid to the Ministry of Justice in 2013 as part of a £70 million civil settlement. In December 2019, the SFO charged two individuals with fraud and false accounting offences. To date, no trial date has been announced.
- ***G4S Care & Justice Services (UK) Ltd ("G4S")*** – in July 2020, G4S entered into a DPA in relation to offences of fraud. A financial penalty of £38.5 million was imposed and the company was required to pay the SFO's costs of £5.9 million. No order for disgorgement of profits was made as a civil settlement reached in 2014 between the company and the Ministry of Justice, the subject of the fraud admitted by G4S, involved the payment of £121 million. The Statement of Facts has not yet been published. In September 2020, the SFO charged three individuals. At the time of writing, no trial date has been set.

Plea to strict liability offence of failing to prevent bribery

Sweett Group – The proceedings against the Sweett Group in relation to its activities in the United Arab Emirates concluded in February 2016 when the company was sentenced in relation to an offence under section 7 of the Act – the strict liability offence of failing to prevent bribery. The conduct occurred between December 2012 and December 2015 and the company pleaded guilty in December 2015. The Sweett Group was ordered to pay £2.25 million made up of a fine of £1.4 million, £851,152.23 in confiscation and £95,031.97 in costs.[14] Following the sentencing hearing, the SFO had suggested the investigation into individuals was ongoing. As of October 2020, no individuals have been charged.

The first prosecution under the Act was brought by the CPS in February 2018 when it secured the first successful contested prosecution for failure to prevent bribery in respect of a small (and dormant) interior design company, Skansen Interiors Ltd. The case related to corruption in respect of the development of £6 million of prime commercial property in London. The company attempted to persuade the jury that it had "adequate procedures"

designed to prevent bribery occurring; however, this argument was rejected and the company was convicted. Since the company was dormant and without assets, the court ordered an absolute discharge.

Recent prosecutions of individuals

Individuals facing charges in respect of corruption offences may still face prosecution under the old law (the Prevention of Corruption Act 1906). Between 2016 and 2018, in a series of prosecutions brought against Alstom Group companies and individuals under the Prevention of Corruption Act 1906 and in relation to conspiracy to corrupt:

(i) Alstom Network UK Ltd was convicted in relation to trams and signalling equipment contracts in Tunisia, India and Poland. Two individuals were acquitted.
(ii) Alstom Power Ltd and two individuals pleaded guilty in relation to separate power station contracts in Lithuania. One individual was acquitted.
(iii) Alstom Network UK Ltd, and a further three individuals, were acquitted of charges relating to a Budapest Metro rolling stock contract in Hungary.

In September 2017, six current and former employees of F.H. Bertling Ltd ("**F.H. Bertling**"), and the company itself, were convicted of conspiracy to make corrupt payments between 2004 and 2006 to an agent of the Angolan state oil company, Sonangol, in relation to F.H. Bertling's freight forwarding business in Angola and a contract worth approximately $20 million. The SFO secured guilty pleas from the corporate entity, F.H. Bertling, as well as from five individuals, although the sole defendant, who chose to fight the accusations in court, was acquitted of the charges by a jury in the Crown Court. In 2018, in subsequent proceedings against F.H. Bertling executives concerning an alleged bribery scheme connected to an oil exploration project in the Jasmine field in the North Sea, three individuals were acquitted by a jury and one convicted. On an earlier occasion, three others had entered guilty pleas to related charges.

More recently, in May 2018, four individuals were charged with offences arising out of the Unaoil investigation, which was opened in March 2016 and concerned conduct between 2005 and 2011. In July 2019, one of the individuals pleaded guilty to five offences of conspiracy to give corrupt payments and provided co-operation following a SOCPA agreement.[15] He also asked for five additional offences to be taken into consideration by the judge when determining his sentence.[16] He was sentenced in October 2020 to three years and four months' imprisonment. In July 2020, following a trial, two of the remaining three individuals were convicted by a jury of offences of conspiracy to give corrupt payments. (The jury were unable to agree in relation to one count in respect of each defendant. The jury were unable to agree on the two counts faced by the fourth and final defendant. He is due to be retried.) The trial was unusual in that it started in January 2020, before the coronavirus pandemic was declared. In March 2020, the trial was adjourned due to the restrictions imposed and the closure of the courts. In May 2020, following a lengthy break and the introduction of social distancing measures, the trial was one of the first in the UK to resume and to be conducted with special measures introduced under the Coronavirus Act 2020. The defendants convicted after trial were sentenced to terms of three and five years' imprisonment, respectively. The sentences imposed may represent the general trend towards longer sentences for "white collar" offences. At least one of the defendants is known to be appealing against conviction and sentence.

In July 2020, following an investigation opened in 2012, the SFO also charged GPT Special Project Management Ltd ("**GPT**") and three individuals in connection with its investigation into allegations concerning the conduct of GPT's business in Saudi Arabia. The individuals have been charged with offences of corruption between 2007 and 2012 and misconduct in a public office between 2004 and 2008.

Interaction with other regulatory agencies

The interaction with the UK's anti-money laundering regime, which requires reporting to the National Crime Agency ("**NCA**") and applies very strictly to the regulated sector (but also in a number of circumstances to other business sectors), further complicates the position. Any suspicion that a bribery offence has been committed (together with any past or future revenues that flow from contracts related to such bribes) may, in certain cases, need to be reported to the NCA.

Any regulated firms in the financial services sector are also subject to the enforcement powers of the financial regulator in the UK: the Financial Conduct Authority ("**FCA**") (previously the Financial Services Authority) or the Prudential Regulatory Authority (PRA), as the case may be. The significance of this is that any conduct relating to bribery or corruption risks may also constitute a breach of the rules and/or principles of the FCA Handbook, but, unlike the SFO, there is no need for the FCA necessarily to prove the act of bribery itself.

There are also indications that Her Majesty's Revenue and Customs ("**HMRC**") is using the Bribery Act during its enquiries and investigations into taxpayers. Although the extent of this is not clear, UK taxpayers should be wary that there are permitted information gateways between HMRC (and other regulators) and the SFO in relation to the sharing of information regarding illegal activities. The relevance of the Act to HMRC is that some companies may be claiming tax deductions for overseas bribes (which is no longer permitted) and are therefore under-declaring tax.

Co-operation with other global enforcement agencies

The development of an increasing level of co-operation between the UK authorities and other global regulators in the fight against corruption is also apparent. This was most evident in the Airbus investigation. In that case, a Joint Investigation Team (JIT) was set up and the investigation was divided between the authorities in France, the UK and the US – each agency investigating its allocated part. In *Airbus*, perhaps unusually, France led the investigation, rather than the US.

In the UK, the Crime (International Cooperation) Act 2003 empowers judges and prosecutors to issue requests to obtain evidence from another country for use in domestic proceedings or investigations. Additionally, the Proceeds of Crime Act 2002 enables prosecutors to send requests for restraint and confiscation to the Secretary of State, for onward transmission to the relevant authority abroad. The UK is also a party to numerous mutual legal assistance ("**MLA**") treaties, such as those with the US, China, Hong Kong and other EU Member States.

It is rare to find an SFO corruption case which does not involve co-operation with other global enforcement agencies. Traditionally, the SFO has worked closely with authorities such as the DOJ and the Office of the Attorney-General in Switzerland (OAG), but more and more countries now have highly effective anti-corruption provisions (such as France's *Sapin II* law, which came into force in 2017). This means that it is increasingly common to see parallel investigations being conducted, and a closer level of co-operation between countries. As more countries introduce DPA-like powers, there is more likely to be an increase in *Airbus*-type global investigations. The SFO itself states that "nearly all" of its cases involve working with partners – both domestic and international.[17]

Hot topics

Three areas in particular have led to much recent debate in the UK: privilege in internal investigations; extraterritoriality of SFO section 2 notices; and the Criminal Finances Act

2017. There is also piqued interest in the shifting focus of the SFO. In addition, there is a continuing discussion surrounding the question of whether DPAs for individuals should be introduced in order to level the playing field between corporates and individuals.

Privilege in internal investigations

The SFO has proved ready to litigate cases where it disputes assertions of privilege. Very recently, the Court of Appeal was called upon to decide claims of both litigation and legal advice privilege in the case of ***SFO v Eurasian Natural Resources Corporation Ltd***[18] ("**ENRC**"). In that case, ENRC's lawyers had been issued with a compulsory notice requiring them to produce a number of documents (including notes of interviews which had been conducted with ENRC employees as part of an internal investigation, and presentations to the board and governance committee about the investigation findings). ENRC claimed that such documents were either covered by litigation privilege, in that they were prepared for the dominant purpose of litigation (namely a criminal prosecution by the SFO), or legal advice privilege.

The SFO (who had been successful in the High Court) argued that litigation privilege did not apply because the documents had been created at too early a stage for criminal proceedings to have been in reasonable contemplation. The Court of Appeal overturned the High Court decision, and held that litigation privilege applied from the point at which ENRC engaged lawyers to conduct an internal investigation, which was well before the SFO opened its own investigation. Comments made by the SFO, and the sub-text of ENRC's interactions with the SFO, made clear that criminal proceedings were possible, if not likely, unless the matter was settled, and therefore within reasonable contemplation. The Court of Appeal stressed that it is *"obviously in the public interest that companies should be prepared to investigate allegations from whistle blowers or investigative journalists, prior to going to a prosecutor such as the SFO, without losing the benefit of legal professional privilege for the work product and consequences of their investigation"*.

ENRC had separately raised a claim of legal advice privilege in respect of some of the documents, including interviews of employees conducted as part of an internal investigation (if those employees were not tasked with seeking and receiving such advice on behalf of ENRC). Whilst the Court of Appeal concurred with the High Court that – under current English law – such privilege could only cover information received from ENRC (or persons it authorised to seek or receive legal advice), they did make it clear that as far as they were concerned, this position was out of step with international common law and (were they in a position to decide the matter) they would be in favour of broadening the concept of legal advice privilege. This, however, is a matter for the Supreme Court to decide in due course.

Extraterritoriality of section 2 notices

Under section 2(3) of the Criminal Justice Act 1987, the Director of the SFO has the power to compel any individual or entity to provide information or documentation which is believed to be relevant to a matter under investigation. There has long been debate as to whether this power extends to material held outside the United Kingdom – for example, many companies hold electronic data on servers located overseas.

The issue was raised in a recent case, ***KBR v SFO***,[19] where a section 2 notice had been issued to KBR Inc., the parent company of the UK subsidiary under investigation (KBR Ltd), to provide documents which were held outside of England and Wales, but which the SFO felt were potentially relevant to their investigation of KBR Ltd.

The High Court confirmed that section 2 notices must have an element of extraterritorial application, stating that it was *"scarcely credible that a UK company could resist an otherwise lawful s.2(3) notice on the ground that the documents in question were held on*

a server out of the jurisdiction". UK companies are therefore required, upon receipt of a section 2 notice, to furnish the SFO with relevant material that they hold both domestically and overseas, unless they have a reasonable excuse for failing to comply.

As for whether KBR Inc. (as a foreign parent company) was obliged to provide the SFO with documents held overseas, the High Court stated that there was a clear public interest in the extraterritorial ambit of section 2(3). It held that section 2(3) should extend to foreign companies in respect of documents held outside the jurisdiction *"when there is a sufficient connection between the company and jurisdiction"*. The Court felt that this struck a principled balance between facilitating the SFO's investigation of serious fraud with an international dimension and making excessive requirements in respect of a foreign company with regard to documents abroad.

The mere fact that KBR Inc. was the parent of KBR Ltd did not amount to a sufficient connection, nor was the fact that KBR Inc. had co-operated to a degree with the SFO's request for documents. However, amongst other things, the SFO's investigation had revealed a purported link between KBR Inc. and the method of making the alleged corrupt payments, and the High Court held that this was a "sufficient connection". It is important to note that KBR Inc was granted leave to appeal to the Supreme Court and, at the time of writing, the appeal has been heard and the decision of the Supreme Court is awaited. The essential and important questions to be answered include whether the provision in question is extraterritorial and whether the "sufficient connection" test as formulated by the High Court has any place in its interpretation.

Arguably, the decision of the High Court in KBR is not inconsistent with the Crime (Overseas Production Orders) Act 2019 ("**COPO**"), which received Royal Assent on 12 February 2019 but its principal provisions have not been brought into force. COPO will enable UK law enforcement agencies to apply to the court for an order to obtain electronic data from a company based outside the UK in order to assist with a domestic investigation and prosecution of serious crime. The country in question must have in place an international co-operation agreement. The requirements for making such an order include that the judge must be satisfied that: (a) there are reasonable grounds for believing that an indictable offence has been committed and the offence is being investigated/prosecuted; or (b) if the order is sought for the purposes of a terrorist investigation, the material itself is of "substantial value" to the proceedings/investigation.

In this digital age, we should expect to see investigators and prosecutors increasingly seek to avoid the cumbersome MLA process to obtain documents – whether through the use of compulsory powers (e.g., section 2 Criminal Justice Act 1987) or from new legislation.

Criminal Finances Act 2017

The Criminal Finances Act 2017 is of particular interest because, although it was introduced to penalise corporates who failed to prevent the facilitation of tax evasion by persons performing services on their behalf, the offences themselves are modelled on the strict liability corporate offence in the Bribery Act. If a corporate can show that it had in place reasonable prevention procedures, then it can take advantage of the statutory defence, but otherwise these offences (like section 7 of the Bribery Act) are strict liability.

The government guidance refers to six guiding principles: risk assessment; proportionate procedures; top-level commitment; due diligence; communication (including training); and monitoring and review. Similar principles are set out in the Bribery Act Guidance, and companies may find that their existing anti-bribery procedures can be expanded to incorporate reasonable anti-facilitation measures. However, the Government has made

clear that it is not sufficient for relevant bodies to simply rely on (or make token additions to) existing procedures – they will need to show that they have considered these principles specifically in relation to the offences, and implemented appropriate procedures as a result.

Many commentators are anticipating that legislators, at some stage, will seek to introduce a "failure to prevent economic crime" offence, which will make it much easier to prosecute corporates for economic crime. The "failing to prevent" concept – first introduced in the Bribery Act – may be a blueprint of things to come.

SFO's shifting focus

Each year, the SFO publishes its Annual Report and Accounts. In July 2020, the SFO published its Report for 2019–2020 (for the year ended 31 March 2020). Much of 2020 has been dominated by the outbreak of the coronavirus pandemic and, like the vast majority of the globe, the SFO has had to adapt to a different way of working. The SFO reports that it has opened just five new cases. This is a significant decrease from the previous year, in which 11 new cases were opened. Nonetheless, there is a significant emphasis on DPAs and the monies generated. The current Director of the SFO, Lisa Osofsky, has spoken publicly about making difficult decisions not to prosecute. However, this has given rise to concern that the SFO's focus is shifting towards using the investigation process with a view to ultimately entering into a DPA with corporates. The Annual Report indicates that three corporates were charged with offences in the relevant period 2019–2020, but subsequently avoided criminal proceedings as a result of entering into a DPA. Since the publication of the Annual Report, GPT (discussed above) has been charged. It is not known whether this is likely to be resolved by way of a DPA. In addition, a number of investigations into corporates were closed without charge. This raises the question whether the SFO is an effective agency for the prosecution of corporate defendants, and whether, in fact, a criminal prosecution is its ultimate goal.

DPAs for individuals

When individuals are acquitted following a DPA entered into by their former employers, such as in the Tesco and Sarclad cases, the issue of whether DPAs for individuals should be available resurfaces. DPAs are not available to individuals in the UK as they are in the US. If DPAs were made available to individuals, it would enable them to engage in the process and participate in establishing the factual basis upon which any DPA, including one entered into by the corporate, is established.

As it currently stands, an individual may be named and blamed for misconduct in the formal DPA, and there is no recourse for correcting the documents in the event of the individual's acquittal. The integrity of the factual basis of the corporate DPA would be maintained where an individual is also able to take advantage of the DPA process. The process itself would involve the making of admissions by the individual. However, as explained below, there appears to be little legislative willingness to provide a mechanism for individuals which avoids criminal prosecution. The prosecution of individuals responsible for corrupt conduct is considered to be the ultimate objective, and the co-operation of the corporate is designed to assist in identifying and pursuing individuals.

What next for the Bribery Act?

On 14 March 2019, the House of Lords Select Committee on the Bribery Act 2010 published its post-legislative scrutiny report. In summary, it concluded that the Act is an *"excellent piece of legislation which creates offences which are clear and all embracing"* and an *"example to other countries, especially developing countries which need to deter bribery"*. The Select Committee recognised that the guidance issued is less useful for small and medium-sized enterprises. In relation to DPAs, the Select Committee did not accept the criticism that they were an easy way out for large companies. The discounts applied were

appropriate to encourage self-reporting, but not so large that they deprived the penalty of its effectiveness. It also concluded that a DPA with a company was not a substitute for the prosecution of individuals involved in corrupt conduct.

The future of the SFO

In an upturn in fortune for the SFO, discussions about its abolition and transfer of its powers to the National Crime Agency appear to have gone away for the foreseeable future.

Lisa Osofsky, who succeeded Sir David Green QC as Director of the SFO for a five-year term in August 2018, has allayed doubts about the future of the SFO and emphasised her commitment to *"maintaining the independence and prominence of this organisation"*.

The new Director has pledged to build upon the SFO's successes, including continuing to resolve cases through DPAs when appropriate and in the public interest do so, alongside strengthening co-operation with foreign enforcement agencies. Perhaps in contrast to her predecessor, the current Director has indicated less willingness to initiate prosecutions and has described the decision not to prosecute as one of the hardest a prosecutor has to make. She has also made clear that she intends for the SFO to work more efficiently and to make use of its intelligence capabilities. However, a distraction from the current Director's stated aims has been the judicial criticism of the SFO's conduct in the course of an investigation. This has yet to be addressed but may indicate the perceived constraints of the UK legal system, in comparison with the US system, with which the Director may be more familiar. The Director has also made reference to the "antiquated" laws, such as the identification principle, by which the corporate criminal liability of an organisation must be established, as being an obstacle to the prosecution of offences. It is worth noting that the identification principle does not apply to the strict liability offence under the Act and is therefore not a hindrance. More recently, the Director has expressed support for the creation of a "failure to prevent" offence as a basis of establishing corporate criminal liability in order to *"hold companies with complex governance structures to account for their fraudulent conduct"*.[20]

* * *

Endnotes

1. S. 1, Bribery Act 2010.
2. S. 2, Bribery Act 2010.
3. S. 6, Bribery Act 2010.
4. S. 14, Bribery Act 2010.
5. S. 7, Bribery Act 2010.
6. The Bribery Act 2010: Guidance about procedures that relevant commercial organisations can put in place to prevent persons associated with them from bribing another person (section 9 of the Bribery Act 2010).
7. S. 12, Bribery Act 2010.
8. Sentencing Council Definitive Guideline, Fraud, Bribery and Money Laundering Offences, 1 October 2014, p.49.
9. [2014] UKSC 45.
10. *R (on the application of AL) v Serious Fraud Office* [2018] EWHC 856 (Admin).
11. https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/sfo-operational-handbook/evaluating-a-compliance-programme/.
12. [2017] UKSC 19.
13. Section 3(5) of the Criminal Justice Act 1987.

14. https://www.sfo.gov.uk/2016/02/19/sweett-group-plc-sentenced-and-ordered-to-pay-2-3-million-after-bribery-act-conviction/.
15. A "SOCPA agreement" is a formal agreement between the prosecution and a defendant in criminal proceedings under the Serious Crime and Police Act 2005. The agreement requires a defendant to assist the prosecution in an investigation or prosecution of offences involving others in exchange for immunity (non-prosecution), an agreement not to use certain evidence (restricted use undertaking), or a reduced sentence.
16. Any defendant may ask for offences in addition to those on an indictment to be taken into consideration. This "clears the slate" for the defendant and avoids the risk of a subsequent prosecution. When determining the sentence, the judge will factor in the offending in the additional offences. However, the sentence imposed will be less severe than if the offences had been included on the indictment.
17. The Serious Fraud Office Annual Report and Accounts 2019–2020.
18. [2018] EWCA Civ 2006.
19. [2018] EWHC 2010 (Admin).
20. https://www.sfo.gov.uk/2020/10/09/future-challenges-in-economic-crime-a-view-from-the-sfo/.

Jonathan Pickworth
Tel: +44 20 7532 1663 / Email: jonathan.pickworth@whitecase.com

Jonathan heads the London White Collar Crime team and has over 30 years of experience representing corporates and individuals in investigations by UK and international agencies. He also advises firms on internal investigations, due diligence, compliance and risk in relation to criminal and regulatory matters. Clients benefit from his experience in dealing with law enforcement and regulators, his strategic thinking and his pragmatism.

Jonathan's practice focuses on allegations relating to money laundering, corruption, market misconduct, fraud, tax evasion and insider trading. He frequently interacts with the Serious Fraud Office, the National Crime Agency, HM Revenue & Customs, the Financial Conduct Authority, the police and other agencies.

Jonathan has represented corporate and individual clients under investigation in some of the most significant cases of the last three decades. These have involved investigations into money laundering, bribery and corruption, tax, accounting fraud, bench mark manipulation (e.g. foreign exchange and LIBOR), criminal cartels and insider dealing.

Jonathan is described in *The Legal 500 2021* as a "leading individual" in Fraud: White Collar Crime in relation to both individual and corporate clients. He is regarded as *"one of the most sophisticated thinkers in this area"* with *"a very good strategic approach and focus on the big picture"*.

Jo Dimmock
Tel: +44 20 7532 1647 / Email: joanna.dimmock@whitecase.com

Joanna has broad experience across a wide range of white collar-related areas. Many of her cases have an international dimension and she has particular experience of multi-jurisdictional investigations, including bribery and corruption and cartel investigations undertaken by authorities in both the UK and abroad (SFO, SOCA, Arab Republic of Egypt, DOJ, Canadian Competition Bureau), as well as complex extradition, Interpol red notices and mutual legal assistance matters.

Joanna also has considerable experience in the field of international sanctions, having represented individuals facing restrictive measures, as well as corporations requiring compliance and litigation advice arising from the enforcement of sanctions by the European Council, OFAC and the Swiss Federal Council.

The Legal 500 2021 describes Joanna as *"outstandingly able"* and she is ranked as a "Next Generation Partner" in "Fraud: White Collar Crime" for advice to both corporate and individual clients. Joanna is described as *"an up-and-coming star with extraordinary commitment to her clients' cases; she can achieve the impossible more often than not"*. Joanna is also regarded as having *"unrivalled knowledge and experience in her field"* with a *"laser like focus"*.

White & Case LLP

5 Old Broad St, London EC2N 1DW, United Kingdom
Tel: +44 20 7532 1000 / Fax: +44 20 7532 1001 / URL: www.whitecase.com

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