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ANTI-BRIBERY & CORRUPTION

United Kingdom

LEXOLOGY

Anti-Bribery & Corruption

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RELEVANT INTERNATIONAL AND DOMESTIC LAW

International anti-corruption conventions

To which international anti-corruption conventions is your country a signatory?

The United Kingdom is a signatory to the following conventions:

- the Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions;
- the Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union;
- the Council of Europe Criminal Law Convention on Corruption (implementation of this convention is monitored by the Group of States against Corruption);
- the Additional Protocol to the Council of Europe Criminal Law Convention on Corruption;
- the United Nations Convention against Corruption;
- the Convention on the Protection of the European Communities Financial Interests and Protocols;
- the Council of Europe Civil Law Convention on Corruption (not yet ratified); and
- the United Nations Convention against Transnational Organized Crime (UNTOC).

The conventions above establish legally binding standards to criminalise bribery of foreign public officials and officials of public international organisations.

The Mechanism for the Review of the Implementation of the UNTOC was launched in October 2020, after 10 years of negotiation. The Review Mechanism is a peer review process designed to assist states to implement the UNTOC. Each state will be reviewed by two peers, selected by the drawing of lots at the beginning of each year of the review cycle. The process will be overseen by the Implementation Review Group, an intergovernmental group of state parties.

The UK also signed the Agreement for the Establishment of the International Anti-Corruption Academy on 2 September 2010. This agreement has not yet been ratified.

The UK has left the European Union (EU) and the transition period ended on 31 December 2020. The question of whether, in the absence of specific provision in UK law, the UK is bound by its international obligations depends on the nature of the convention, and is itself the subject of conflicting views. Where the convention in question is one to which the UK is a party, not in its own right, but as an EU member state, it is likely that the agreement will no longer apply.

In May 2021, the UK and EU Trade and Cooperation Agreement came into force. This agreement sets out 'preferential arrangements' in many key areas such as trade, law enforcement and judicial cooperation in criminal matters.

Law stated - 4 December 2024

Foreign and domestic bribery laws

Identify and describe your national laws and regulations prohibiting bribery of foreign public officials (foreign bribery laws) and domestic public officials (domestic bribery laws).

The Bribery Act 2010 (UKBA)

The UKBA, which came into force on 1 July 2011, is the main legislation governing bribery and corruption offences. The UKBA applies to conduct occurring on or after 1 July 2011 and contains four principal bribery offences:

- bribing another person (section 1);
- offences related to being bribed (section 2);
- bribery of foreign public officials (section 6); and
- failure of commercial organisations to prevent bribery (section 7).

The failure to prevent offence, under section 7, introduced a strict liability offence for commercial organisations that fail to prevent bribery.

The UKBA is considered an example to other countries of what is needed to deter bribery (see The Bribery Act 2010: post-legislative scrutiny). By virtue of section 12, the UKBA has extraterritorial reach. Under sections 1, 2 and 6, the UK courts have jurisdiction over offences where no part of the conduct takes place in the UK, but would form part of an offence if it occurred in the UK and the person concerned has a 'close connection' with the UK.

The main categories of persons or entities with a 'close connection' with the UK include:

- British citizens and British overseas nationals and citizens;
- an individual ordinarily resident in the UK; and
- a body incorporated in the UK.

The failure to prevent bribery offence in section 7 applies to UK commercial organisations and to any commercial organisation that carries on a business, or part of a business, in the UK. The commercial organisation is liable for the conduct of an 'associated person', defined in section 8 as a person who performs services for or on behalf of an organisation, in any capacity. An offence is committed irrespective of where the conduct constituting the offence takes place. The 'close connection' test does not apply to the section 7 offence.

UKBA Guidance about procedures that relevant commercial organisations can put in place to prevent persons associated with them committing bribery was published in March 2011 and remains unrevised and unamended (the Bribery Act Guidance).

The old law

The UKBA applies only to conduct that occurred on or after 1 July 2011. Conduct that occurred before that date is subject to the 'old law'. The key offences under the old law are:

- the common law offences of public sector bribery:

  - receipt or offer of an undue reward by or to a person in public office; and
  - misconduct in a public office;

- bribery (active or passive) under the Public Bodies Corrupt Practices Act 1889 (the 1889 Act) and the Prevention of Corruption Act 1916 (the 1916 Act); and
- corrupt transactions with agents under section 1(1) of the Prevention of Corruption Act 1906 (the 1906 Act) and the 1916 Act. This offence applies to all agents in the public or private sector. (The 1906 Act is most commonly used when prosecuting conduct occurring before 1 July 2011.)

The 1889, 1906 and 1916 Acts, together, will be referred to as the 'old law'.

The statutory offences under the old law require the accused to have acted 'corruptly'. It is generally accepted that dishonesty is not an element of the offences. 'Corruptly' has been held to mean 'not dishonestly, but purposely doing an act which the law forbids as tending to corrupt'. (See ***Cooper v Slade*** (1857) 10 ER 1488.)

The jurisdictional reach of the old law was clarified by section 109 of the Anti-terrorism, Crime and Security Act 2001 (the 2001 Act). This made clear that the UK had jurisdiction where the conduct of a UK citizen or corporate took place outside the UK, but such conduct would, if carried out in the UK, constitute any common law offence of bribery or a statutory offence under the old law.

The UKBA repealed the old law.

The offence of conspiracy to commit bribery, contrary to section 1(1) of the Criminal Law Act 1977, may also be used to prosecute offences of bribery.

The Global Anti-Corruption Sanctions Regulations 2021

The Global Anti-Corruption Sanctions Regulations 2021 came into force on 26 April 2021. The stated purpose of the regulations is the combating of 'serious corruption'. This is defined in the regulations as consisting of bribery and the misappropriation of property.

The regulations go on to define bribery as the offering, promising or giving of any advantage to a foreign public official with the intention that the advantage should induce that person to improperly perform a public function, or act as an award for so doing.

Under the regulations, misappropriation of property occurs where property that is entrusted to a foreign public official is improperly diverted for the benefit of that person or another.

The regulations enable the Secretary of State to designate a person (for the purpose of one or both of the asset freeze and immigration sanctions) where there are reasonable grounds to suspect that that person meets the definition of an 'involved person' in the context of corruption. This includes a corporate that is owned or controlled by such a person. To meet this definition, a person must be involved in serious corruption and the scope of this involvement is drawn very widely, and encompasses engaging in, supporting or profiting from bribery or the misappropriation of property. It also includes the concealment or transfer of the profits of such activity. A much wider range of activity than that contemplated by the UKBA would bring an involved person within the scope of the regulations. As at 8 December 2023, 39 individuals have been designated under the regime.

The Secretary of State is able to pass to law enforcement and regulatory agencies any information acquired during the designation process.

Law stated - 4 December 2024

Successor liability

Can a successor entity be held liable for violations of foreign and domestic bribery laws by the target entity that occurred prior to the merger or acquisition?

Under English law, parent companies are not generally criminally liable for the entirely historic acts of newly-acquired subsidiaries, but the latter could continue to be liable for such conduct post-acquisition. If the wrongdoing continues post-acquisition, then there may also be some risk that the parent entity could find itself liable – most likely for failing to prevent bribery under section 7 of the UKBA. The acquiring parent entity may also find itself liable under the UK's broad proceeds of crime laws if property derived from historic corruption (eg, profits earned from contracts obtained by corruption) remain within the target entity.

Under paragraph 2.8.2(v) of the Deferred Prosecution Agreements Code of Practice, the fact that, after the act, an entity has been taken over by another commercial organisation or has had its corporate structure and management changed, are factors in favour of being offered a deferred prosecution agreement (DPA). In addition, guidance issued by the Serious Fraud Office (SFO) in October 2020 identifies as a public interest factor against prosecution, the fact that '(t)he offending is not recent and the Company in its current form is effectively a different entity from that which committed the offences.' The examples given include where the company has been taken over by another organisation, and where the company's management team may have completely changed.

Each case is considered on its own facts and companies should, and are expected to, undertake sufficient due diligence to detect such conduct.

Law stated - 4 December 2024

Civil and criminal enforcement

Is there civil and criminal enforcement of your country's foreign and domestic bribery laws?

Breaches of the UKBA, and the old law, constitute criminal offences and are subject to criminal enforcement.

According to the Joint Prosecution Guidance on the UKBA, issued on 30 March 2011, the 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 addition to criminal enforcement, the SFO may make use of civil enforcement tools, such as civil recovery orders.

Joint principles published in 2018 by the SFO, CPS and National Crime Agency (NCA), set out a framework to compensate victims of economic crimes overseas. The principles aim to ensure that overseas victims of bribery, corruption and economic crime, are able to benefit from asset recovery proceedings and compensation orders made in England and Wales.

Finally, although the Financial Conduct Authority (FCA) does not enforce the UKBA, it may impose civil or regulatory penalties on those individuals and entities that it regulates. It may, for example, impose penalties on regulated firms for failing to meet their regulatory obligation to establish and maintain effective systems and controls to mitigate the risk of financial crime; or for failing to disclose to the FCA conduct involving bribery or corruption under Principle 11 of the FCA Handbook.

Law stated - 4 December 2024

Out-of-court disposal and leniency

Can enforcement matters involving foreign or domestic bribery be resolved through plea agreements, settlement agreements, prosecutorial discretion or similar means without a trial? Is there a mechanism for companies to disclose violations of domestic and foreign bribery laws in exchange for lesser penalties?

There are several means by which it is possible to resolve a criminal investigation or other enforcement action and avoid a trial.

Civil recovery orders

A civil recovery order (CRO) is an order obtained in the High Court for the recovery of property that is (or represents) property obtained through unlawful conduct. Whether property was obtained through unlawful conduct is determined by the civil standard, namely on a balance of probabilities. A CRO targets property, rather than an individual, and can be made against any person thought to hold the property.

Deferred prosecution agreements

Deferred prosecution agreements (DPAs) were introduced into English law by the Crime and Courts Act 2013 (CCA 2013), on 24 February 2014. However, a DPA is available in relation to conduct which pre-dates the CCA 2013 coming into force. DPAs are not available in Scotland and Northern Ireland.

A DPA is a voluntary agreement between a prosecutor and a body corporate, a partnership or an unincorporated association, under which a criminal prosecution is deferred, subject to the defendant complying with the terms of the agreement.

The DPA is for a fixed period and is available in relation to offences set out in Part 2 to Schedule 17 of the CCA 2013. These include offences under the UKBA, money laundering offences, and other financial crimes. A DPA is not available to individuals.

The decision to enter into negotiations for a DPA is at the discretion of the prosecutor. The DPA Code of Practice (the DPA Code), issued under the CCA 2013, is a Joint Code published

by the Director of the SFO and the DPP, which sets out the prosecutors' approach to the use of DPAs. On 23 October 2020, the SFO published a chapter from its handbook that offers guidance on how it approaches DPAs (DPA Guidance). Under the DPA Code and the DPA Guidance, the prosecutor will apply a two-stage test, comprising the evidential stage and the public interest stage. The evidential stage requires there to be sufficient evidence to provide a realistic prospect of conviction. Under the public interest stage, the prosecutor must be satisfied that the public interest would be properly met by entering into a DPA with the company instead of proceeding to prosecution. The public interest stage requires a balancing of the factors for and against a prosecution. Each case is dealt with on its own facts.

In addition to public interest factors in the DPA Code, the DPA Guidance also lists relevant public interest factors in favour of prosecuting. These include:

- a history of similar conduct or prior civil, regulatory or criminal enforcement action;
- the conduct alleged is part of the established business practices of the company;
- the offence was committed at a time when the company had no or an ineffective corporate compliance programme and it has not been able to demonstrate a significant improvement in the programme since then;
- the company had previously received a warning, sanctions or criminal charges, but had failed to take adequate action to prevent future unlawful conduct;
- failure to notify the wrongdoing within a reasonable time of the offending coming to light;
- reporting the wrongdoing but failing to verify it, or reporting it, knowing or believing it to be inaccurate, misleading or incomplete; and
- significant level of harm caused directly or indirectly to the victims of the wrongdoing or a substantial adverse impact to the integrity or confidence of markets, local or national governments.

Additional public interest factors against prosecution, identified in the DPA Guidance, include:

- cooperation;
- a lack of history of similar conduct;
- the existence of a proactive corporate compliance programme, at the time of the offending and at the time of reporting;
- the offending represents isolated actions by individuals, for example, a rogue director;
- the offending is not recent and the company in its current form is effectively a different entity from that which committed the offences;
- a conviction is likely to have disproportionate consequences for the company; and
- a conviction is likely to have collateral effects on the public, the company's employees and shareholders or the company or institutional pension holders.

In August 2019, the SFO published guidance on how it assesses corporate cooperation in an investigation (the Co-operation Guidance). The Co-operation Guidance emphasises the significance of cooperation to the decision of whether a DPA is appropriate. Through its Co-operation Guidance, the SFO has expressed a willingness to challenge claims of

legal professional privilege, which prevent certain material, such as witness accounts, from disclosure and, therefore, affects the SFO's ability to evaluate the level of cooperation given. The decision of a company to self-report is an important one and may depend on a risk-benefit analysis. The Co-operation Guidance makes clear that, even where a company has self-reported or cooperated, it is not a guarantee of a particular disposal, such as a DPA. Companies considering self-reporting should seek legal advice on the potential consequences, as well as the process.

In January 2020, the SFO published guidance on how it evaluates a compliance programme and the relevance of its assessment. The SFO will consider a compliance programme at the time of the offending, in its current state, and how it might change going forward. These considerations feed into the SFO's decision on whether to invite a company to enter into DPA negotiations.

Once negotiations for a DPA have begun, under the CCA 2013, the prosecutor must apply to the Crown Court for a declaration that the DPA is likely to be in the interests of justice and the terms of the DPA are fair, reasonable and proportionate. The terms of a DPA are the result of negotiation between the parties to the agreement. However, once agreed, the proposed DPA must be brought before the Crown Court for judicial approval. Once the DPA is approved, the judge must make the declaration in open court and give reasons for the approval. The terms of a DPA may include the payment of a penalty, payment of costs, the disgorgement of profits and the implementation of training and compliance programmes and monitoring.

The DPA process requires the prosecution to prefer an indictment, charging the corporate with the alleged offences. The proceedings are automatically suspended where a DPA has been approved. A DPA must contain a statement of facts, relating to the alleged offences, and such statement may include admissions made by the corporate.

The financial penalty under a DPA is likely to be broadly comparable to a fine the court would have imposed following a guilty plea. This enables the parties and the court to have regard to sentencing guidelines. Organisations entering into a DPA can expect a reduction of one-third of the penalty or, as has occurred in the DPAs with Sarclad Ltd and Rolls-Royce, a greater reduction in penalty, to reflect the companies' exceptional cooperation with the SFO investigation.

Individuals

DPAs are not available to individuals. A common term of a DPA is that the company must cooperate with the SFO in its continued investigation into the offending. The cooperation is expected to provide the SFO with material and assistance above and beyond what the law requires, with the objective of prosecuting individuals. The SFO has thus far only secured the conviction of one individual – Roger Dewhirst – for offences arising out of conduct forming the subject matter of a DPA (namely the DPAs entered into by Bluu Solutions Limited and Tetris Projects Limited in July 2021 for offences under section 1 and 7 of the UKBA). Dewhirst's conviction was secured following a guilty plea (as opposed to a contested trial) to two counts of receiving bribes contrary to section 2 of the UKBA. The process of negotiating a DPA invariably involves the identification of individuals, usually former senior executives, in the formal DPA documents. These individuals may subsequently be acquitted of any criminal conduct. Notwithstanding an acquittal, the DPA process may permit the publication of the DPA, the statement of facts and the final judgment, in which the acquitted individuals

are identified as having engaged in criminal conduct. This occurred in the Sarclad, Tesco and Güralp Systems DPAs. The acquitted individuals have no recourse for correcting or expunging their names from the DPA. At the end of 2020, the SFO published a chapter on DPAs forming part of its Operational Handbook. This guidance states that the SFO must give consideration to 'the necessity for and impact of the identities of third parties being published' (including data protection and human rights considerations). It also states that anonymisation of third parties may be appropriate prior to publication.

A July 2021 SFO announcement concerning DPAs contained the requirement that all reporting on these DPAs was to carry the following disclaimer:

> The DPAs only relate to the potential criminal liability of the companies and do not address whether liability of any sort attaches to any current or former employee or agent of the companies. Upon determining the issue of approval of the DPAs, the court did not make any findings of fact. No process took place by which the culpability of individual people was determined or assessed.

This appears to be a recognition of the issue referred to above and an attempt to address this issue.

Law stated - 4 December 2024

FOREIGN BRIBERY

Legal framework

Describe the elements of the law prohibiting bribery of a foreign public official.

It is an offence under section 6 of the Bribery Act 2010 (UKBA) to bribe a foreign public official with the intention to influence that official in his or her capacity as a foreign public official. 'Influence' in this capacity means influencing him or her in the performance of his functions as a foreign public official. Corrupt intent is not required. However, there must be an intention to obtain or retain a business or other advantage in the conduct of business (section 6(2)). The requirement to prove an intention to obtain or retain business can present some difficulty, particularly in light of the Bribery Act Guidance, which recognises that, in seeking tenders for publicly funded contracts, governments often permit or require those tendering to offer some kind of additional investment in the local economy. Where this is set out in 'written law', the 'additional investment' falls outside the scope of the section 6 offence (paragraph 25 of the Bribery Act Guidance).

A bribe has taken place if and only if:

- the defendant directly, or through a third party, offers, promises or gives any financial or other advantage to the public official or to another person at the official's request or with their assent or acquiescence;
- the advantage is given or promised with the intention of influencing the person to obtain or retain business or an advantage in the conduct of business; and
-

the public official is not permitted or required by the written law applicable to him or her to be influenced in his or her capacity as a foreign public official by the offer, promise or gift.

An offence under section 6 is committed if any part of the conduct, forming part of the offence, takes place in the UK or where no part of the conduct takes place in the UK, but would form part of an offence under section 6 if it occurred in the UK and the offender has a close connection with the UK. Those with a 'close connection' with the UK include:

- British citizens and British overseas nationals and citizens;
- an individual ordinarily resident in the UK; and
- a body incorporated in the UK.

The section 6 offence of bribing a foreign public official does not encompass the receipt of a bribe. It is only concerned with the offer, promise or giving of a financial or other advantage. The offence of being bribed is to be found in section 2 of the UKBA.

In addition, under section 7, a company may face prosecution in the UK for failing to prevent bribery of a public official, regardless of whether the conduct forming the offence, or part of the offence, takes place in the UK or elsewhere. Under section 7, the sole jurisdictional requirement is that the accused company is incorporated in the UK or carries on part of its business in the UK.

The offence of bribing another person in section 1 of the UKBA, and the offence of receiving a bribe under section 2 of the UKBA, applies to both the public and private sectors and maybe used where, for example, it is unclear whether the person being bribed is a public official. It is worth noting that there are differences between sections 1 and 2, and section 6. The Bribery Act Guidance highlights that unlike section 6, section 1 (and by analogy, section 2) requires proof of an intention for the advantage to induce the improper performance of a function or as a reward for the improper performance of such function. The offence under section 6 requires an intention to influence the public official to obtain or retain business or an advantage in the conduct of business.

Law stated - 4 December 2024

Definition of a foreign public official

How does your law define a foreign public official, and does that definition include employees of state-owned or state-controlled companies?

Under section 6(5) of the UKBA, a 'foreign public official' is a person who, outside of the UK, holds a legislative, administrative or judicial position (whether appointed or elected), exercises a public function, or is an official or agent of a public international organisation.

A 'public international organisation' is defined in section 6(6) as an organisation whose members are:

- countries or territories;
- governments of countries or territories;
- other public international organisations; and

- a mixture of any of the above.

Law stated - 4 December 2024

Gifts, travel and entertainment

To what extent do your anti-bribery laws restrict providing foreign officials with gifts, travel expenses, meals or entertainment?

There is no legislation specifically dealing with gifts, travel expenses, meals or entertainment. The Bribery Act: Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions (the Joint Guidance) published on 30 March 2011 (and reviewed in September 2019), recognises that hospitality and promotional expenditure that is reasonable, proportionate and made in good faith is an established and important part of doing business and the UKBA does not seek to penalise this activity. However, hospitality and promotional expenditure may amount to an offence under the UKBA, provided the elements of the relevant offence are satisfied.

Law stated - 4 December 2024

Facilitating payments

Do the laws and regulations permit facilitating or 'grease' payments to foreign officials?

Facilitation or 'grease' payments would fall foul of section 6 of the UKBA, as well as the old law. English law, including the UKBA, draws no distinction between a bribe and a facilitation payment.

Law stated - 4 December 2024

Payments through intermediaries or third parties

In what circumstances do the laws prohibit payments through intermediaries or third parties to foreign public officials?

It is irrelevant, in respect of an offence of bribery under section 1 of the UKBA, whether the bribe was offered, promised or given by the defendant directly or through a third party. Similarly, in respect of an offence under section 6 (bribery of foreign public officials), the circumstances in which an offence is committed include where the bribe is offered, promised or given directly by the defendant or through a third party, and where the bribe is offered, promised or given to another person at the request of the foreign public official or with his or her acquiescence.

A corporate body may be held criminally liable for bribery committed by an 'associated person' (which could include an intermediary or a third party) through the offence of failure to prevent bribery under section 7 of the UKBA.

Law stated - 4 December 2024

Individual and corporate liability

Can both individuals and companies be held liable for bribery of a foreign official?

Yes. Both companies and individuals can be held liable for bribery of a foreign public official under sections 1, 2 and 6 of the UKBA.

Under section 14 of the UKBA, if bribery offences under sections 1, 2 and 6 of the UKBA are proved to have been committed by a body corporate, with the consent or connivance of a senior officer of the body corporate or a person purporting to act in such capacity, both the senior officer, as well as the body corporate, is guilty of the offence unless the senior officer does not have a 'close connection' with the UK (as defined in section 12(4) of the UKBA).

In addition, under section 7 of the UKBA, a commercial organisation (but not individuals) can be held strictly liable for failure to prevent bribery. The offence is committed by a relevant commercial organisation where an 'associated person' bribes another person, intending to obtain or retain business for the commercial organisation, or intending to obtain or retain an advantage in the conduct of business for the organisation. The bribery must constitute an offence under sections 1 or 6 of the UKBA.

An 'associated person' is defined in section 8 of the UKBA as a person who performs services for or on behalf of the commercial organisation and includes employees, agents and subsidiaries. Where the person is an employee, there is a rebuttable presumption that he or she is an associated person.

The only defence available for the commercial organisation is to prove that it had in place 'adequate procedures' designed to prevent bribery.

Law stated - 4 December 2024

Private commercial bribery

To what extent do your foreign anti-bribery laws also prohibit private commercial bribery?

The offences under section 1, 2 and 14 of the UKBA apply to private and public sector bribery. Similarly, the section 7 failure to prevent bribery offence also applies to bribery by associated persons in the private sector.

Law stated - 4 December 2024

Defences

What defences and exemptions are available to those accused of foreign bribery violations?

There are limited defences available to those accused of foreign bribery offences. The Bribery Act Guidance recognises that there may be circumstances in which an individual is left with no alternative but to make payments to protect against loss of life, limb or liberty. In those circumstances, the common law defence of duress is likely to be available.

Section 6 offence (bribery of foreign public officials)

Under section 6(3)(b) of the UKBA, for the offence to be complete, the foreign public official must be neither permitted nor required by the written law applicable to them to be influenced in their capacity as a public official by the offer, promise or gift. A mistaken belief that the public official was so permitted or required is not a defence.

Section 7 commercial organisational offence (failure to prevent bribery)

It is a defence for the commercial organisation to prove that it had in place adequate procedures, designed to prevent an associated person from bribing another person. It is for the organisation to establish, on the balance of probabilities, that it had adequate procedures in place.

The Bribery Act Guidance sets out six key principles for commercial organisations wishing to prevent bribery being committed on their behalf by associated persons:

1. Proportionate procedures. The procedures should be proportionate to the risk faced and to the nature, scale and complexity of the commercial organisation's activities. Procedures must be clear, practical, accessible, effectively implemented and enforced.
2. Top-level commitment. The top-level management must be committed to preventing bribery by persons associated with the organisation and should foster a culture within the organisation in which bribery is never acceptable.
3. Risk assessment. This involves an assessment of the nature and extent of the exposure to potential external and internal risks of bribery on the organisation's behalf. The assessment should be periodic, informed and documented.
4. Due diligence. The application of due diligence procedures, taking a proportionate and risk-based approach, in respect of associated persons in order to mitigate identified bribery risks.
5. Communication (including training). This involves seeking to ensure that the bribery prevention policies and procedures are embedded and understood throughout the organisation through internal and external communication, including training, that is proportionate to the risks faced.
6. Monitoring and review. The risks and procedures should be regularly monitored and reviewed, and improvements made where necessary.

Section 13 of the UKBA provides a defence to an offence under sections 1 and 2 of the UKBA, where the defendant proves his or her conduct was necessary for the proper exercise of any function of an intelligence service, or the proper exercise of any function of the armed forces when engaged on active service. The defence does not apply to an offence under section 6 of the UKBA.

Law stated - 4 December 2024

Agency enforcement

What government agencies enforce the foreign bribery laws and regulations?

The Serious Fraud Office's (SFO) remit is to investigate and prosecute serious or complex fraud, including domestic or overseas bribery or corruption:

- that undermines UK plc commercial or public interests;
- where the actual or potential financial loss is high;
- where the potential economic harm is significant; and
- where there is a significant public interest.

The Crown Prosecution Service (CPS) may also prosecute offences involving bribery and corruption, but the SFO is the primary agency engaged in such prosecutions.

The National Crime Agency (NCA) leads the UK law enforcement's response to bribery, corruption and sanctions evasion. It provides intelligence support and specialist operational capability. The work of the NCA extends to corruption overseas and it engages with foreign law enforcement agencies. The International Corruption Unit (ICU) within the NCA investigates international bribery, corruption and related money-laundering offences. The ICU traces and recovers the proceeds of international corruption. Its key role is to investigate:

- money laundering in the UK resulting from corruption of high-ranking officials;
- overseas; bribery involving UK-based companies or nationals that has an international element; and
- cross-border bribery where there is a link to the UK.

The Financial Conduct Authority (FCA) is the regulatory body responsible for regulating financial services firms and financial markets in the UK, and the prudential supervisor. Although it does not prosecute matters under the UKBA, any conduct by a regulated firm relating to bribery or corruption risks may also constitute a breach of the rules or principles of the FCA Handbook. Under Principle 11 of the FCA Handbook, a firm must deal with its regulator in an open and cooperative way, and must disclose to the appropriate regulator anything relating to the firm, of which that regulator would reasonably expect notice. Accordingly, a regulated firm maybe required under Principle 11 to report conduct involving bribery or corruption to the regulator.

Law stated - 4 December 2024

Patterns in enforcement

Describe any recent shifts in the patterns of enforcement of the foreign bribery rules.

In recent years, one of the most noteworthy shifts in the patterns of enforcement is the use of deferred prosecution agreements (DPAs) to resolve a criminal investigation into a body corporate. From the point of view of the SFO, a DPA can result in very large penalties and the

recovery of prosecution costs. A DPA also avoids the uncertainty of a criminal trial, which is costly and risky for both the SFO and the corporate defendant.

For the SFO, DPAs are a success. However, the continued investigations into individuals who may have been involved in unlawful conduct forming the basis of a DPA have only resulted in one conviction. Nevertheless, there is every indication that the SFO intends to continue, and increase, its use of DPAs.

In December 2023, the CPS entered into its first DPA. The DPA arose out of an investigation conducted by HMRC, and related to conduct in breach of section 7 of the UKBA.

The increased cooperation between prosecutors in different jurisdictions has been clear. This is likely to expand further as more jurisdictions introduce DPAs in some form. The Airbus DPA (January 2020) is a good example of this. It resulted in a global settlement in which the company entered into DPAs in the USA and the UK, and a ***Convention judiciaire d'intérêt public*** in France. The prosecutors in each jurisdiction coordinated and agreed which jurisdictions each would investigate.

Law stated - 4 December 2024

Prosecution of foreign companies

In what circumstances can foreign companies be prosecuted for foreign bribery?

Under the UKBA, a foreign company which carries on a business or part of a business in any part of the UK is a 'relevant organisation' for the purpose of section 7 of the UKBA. As such, a foreign company may be prosecuted for the section 7 offence of failure to prevent bribery even where none of the associated person's relevant conduct occurs in the UK (section 7(5)(b) and (d), and section 12(5) of the UKBA).

Law stated - 4 December 2024

Sanctions

What are the sanctions for individuals and companies violating the foreign bribery rules?

Offences under section 1, 2 and 6 of the UKBA carry a maximum penalty of 10 years' imprisonment for an individual and/or a fine. The individual may also be required to pay a financial penalty. In relation to a body corporate, the court may impose an unlimited fine. The fine imposed is based on:

- an assessment of the gross profit from the advantage obtained, retained or sought as a result of the bribery offence ('the harm'); and
- multiplying the harm figure by reference to a determined level of culpability.

Conviction of an offence under the UKBA may also be subject to confiscation or a civil recovery order under the Proceeds of Crime Act 2002. Non-payment of any confiscation can result in a custodial sentence.

The financial penalty under a DPA is likely to be broadly comparable to a fine the court would have imposed following a guilty plea.

Under the Public Contracts Regulations 2015, a conviction for an offence under section 1, 2 or 6 of the UKBA will result in mandatory debarment for up to five years. The debarment prevents a company from entering into public contracts as a provider, supplier or contractor.

A conviction for an offence under section 7 of the UKBA does not trigger mandatory debarment, but could attract discretionary debarment of three years, which could have a significant impact on a company.

Law stated - 4 December 2024

Recent decisions and investigations

Identify and summarise recent landmark decisions or investigations involving foreign bribery.

DPAs

There have been 13 DPAs since their introduction in 2014. Of these, 10 have involved offences involving bribery and corruption. 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 in France and the US Department of Justice. The total penalty imposed was €3.6 billion. This was the largest penalty imposed under a DPA. The DPA agreed with the SFO involved the payment of a fine of €398,034,571, disgorgement of profits of €585,939,740 and the payment of costs in the sum of €6.9 million. The sums paid by Airbus, under its DPA with the SFO, exceeds the total sum paid in all preceding DPAs.

On 13 February 2023, the SFO gave notice to the court and Airbus discontinuing the prosecution, and has since confirmed that it will not be prosecuting any individuals in connection the investigation.

In March 2023, the SFO secured the conviction of Roger Dewhirst – one of five individuals charged in connection with suspected bribery offences committed by Bluu Solutions and Tetris Projects, which entered into DPAs with the SFO in July 2021. Dewhirst pleaded guilty to two counts of receiving bribes contrary to section 2 of the UKBA in relation to the receipt of around £291,000 in bribes intended to help Bluu Solutions secure a refurbishment contract. Although the conviction resulted from a guilty plea, rather than a contested trial, it is the first time the SFO has been successful in securing an individual conviction where the corporate has agreed to a DPA, despite numerous previous attempts.

On 5 December 2023, Entain plc entered into a four-year DPA with the CPS to settle HMRC's investigation into the company relating to alleged breaches of section 7 of the UKBA by the company's Turkish-facing business, which was sold in 2017. The terms of the DPA include a financial penalty plus disgorgement of profits totalling £585 million, a charitable donation of £20 million and an obligation to pay a contribution of £10 million towards HMRC's and the CPS' costs. This is the first time that the CPS has entered into a DPA and represents the second largest DPA after the Airbus DPA in 2020.

On 22 October 2019, Güralp Systems Ltd entered into a five-year DPA with the SFO, under which Güralp Systems accepted charges of conspiracy to make corrupt payments and failure to prevent bribery and agreed to pay a total of £2,069,861. On 21 November 2024, the SFO announced that it has informed the court that it believed the terms of this DPA have been breached, without providing further details. This marks the first time the SFO has accused a business of breaching a DPA.

The SFO has requested a hearing at Southward Crown Court to take the matter forward. According to the UK's code of practice for DPAs, if the court rules that the DPA should be terminated, it '***shall cease to take effect from that point onwards, and the prosecutor may apply to have the suspension of the indictment covered by the DPA lifted***'. The court may also rule to amend the terms of the DPA without striking it entirely.

Section 2 notices – extraterritoriality

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. Whether this power extends to material held outside the United Kingdom was raised in a recent case, ***KBR v SFO*** [2018] EWHC 2010 (Admin). In that case, a section 2 notice was issued to KBR Inc, the parent company of the UK subsidiary under investigation (KBR Ltd), to provide documents 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 held 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'; language that does not appear in the legislation.

The mere fact that KBR Inc was the parent of KBR Ltd did not amount to a 'sufficient connection', nor the fact that KBR Inc had cooperated to a degree with the SFO's request for documents. However, among 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. The Supreme Court handed down its judgment in February 2021, overturning the High Court's decision. It held that it was not Parliament's intention for the Criminal Justice Act 1987 to give the SFO the power to compel a non-UK company (with no registered UK address) to produce documents held in the US. Other tools such as mutual legal assistance were available to assist with such a request and to facilitate international investigations. The Supreme Court held that implying a sufficient connection test into the legislation (in order to require a non-UK company to produce documents outside the UK) would be inconsistent with the intention of Parliament

and 'involve illegitimately rewriting the statute'. At its core the Supreme Court's judgment reflects the fact that UK legislation is generally not intended to have extraterritorial effect.

SFO investigations

At the end of September 2023, Nick Ephgrave QPM, a former senior police officer, took over from Lisa Osofsky as Director of the SFO. In August 2023, the SFO ended its investigations into two long-running corruption investigations (ENRC and Rio Tinto) ahead of the new director starting his role.

Law stated - 4 December 2024

FINANCIAL RECORD-KEEPING AND REPORTING

Laws and regulations

What legal rules require accurate corporate books and records, effective internal company controls, periodic financial statements or external auditing?

The financial reporting and accounting rules applicable to private and limited companies in the UK are set out in the Companies Act 2006. Since April 2016, UK companies have been required to publish a central and publicly accessible register of beneficial ownership (known as 'persons with significant control'). The Companies Act also contains provisions requiring certain overseas companies, with a presence in the UK, to file copies of accounting documents disclosed under the law of the parent.

The People with Significant Control (PSC) register requires UK companies (except listed companies) and limited liability partnerships (LLPs) to declare information about the individuals who own or control them, including their name, month and year of birth, nationality, and details of their interest in the company. A PSC is someone who holds more than 25 per cent of shares or voting rights in a company and has the right to appoint or remove the majority of the board of directors or otherwise exercises significant influence or control.

Regulated businesses are under an obligation to keep certain documents for a period of five years from the date on which a business knows or has reasonable grounds to believe that a transaction is complete or a business relationship has come to an end. Once the period has expired, all personal data obtained for the purpose of the regulations must be deleted, except in certain limited circumstances.

The Economic Crime (Transparency and Enforcement) Act 2022 requires overseas entities who buy, sell or transfer property or land in the UK to be on the Register of Overseas Entities. This register is held by Companies House and came into being on 1 August 2022. Such entities are also required to disclose their beneficial owners. As with PSCs, these include individuals who hold more than 25 per cent of shares or voting rights in the entity and have the right to appoint or remove the majority of its directors or otherwise exercise significant influence or control. The Economic Crime and Corporate Transparency Act 2023 has introduced further changes to Companies House aimed at improving transparency,

including an identity verification procedure and greater transparency requirements in respect of the information that must be provided by companies regarding their shareholders.

Law stated - 4 December 2024

Disclosure of violations or irregularities

To what extent must companies disclose violations of anti-bribery laws or associated accounting irregularities?

There is no general legal requirement for a company to disclose conduct violating anti-bribery laws. However, since the introduction of deferred prosecution agreements (DPAs), the emphasis on self-reporting has grown and self-reporting is taken into account when considering whether a company should be invited to enter DPA negotiations. In addition, there are a number of reporting requirements in relation to money laundering under the Proceeds of Crime Act 2002, which may be engaged by an underlying bribery offence.

Law stated - 4 December 2024

Prosecution under financial record-keeping legislation

Are such laws used to prosecute domestic or foreign bribery?

Laws in relation to record-keeping are not, in themselves, used to prosecute domestic or foreign bribery. In general terms, failure to comply with record-keeping requirements amounts to an offence in itself, but it is possible for the failure to be relied on to establish some form of wrongdoing, or even to provide support for allegations of bribery.

Law stated - 4 December 2024

Sanctions for accounting violations

What are the sanctions for violations of the accounting rules associated with the payment of bribes?

Under section 993 of the Companies Act 2006, if any business 'is carried on with intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose, every person who is knowingly a party to the carrying on of the business in that manner commits an offence'.

Failure to comply with section 386 of the Companies Act 2006 (relating to the keeping of accounting records) is an offence under section 387 and carries a maximum penalty of two years' imprisonment or a fine, or both.

More generally, the offences of false accounting under section 17(1) of the Theft Act 1968 (the Theft Act), and fraud by false representation or failing to disclose information, under sections 2 and 3 of the Fraud Act 2006 (the Fraud Act), may also be relevant. The offence under the Theft Act carries a maximum penalty of seven years' imprisonment. The Fraud Act offences each carry a maximum penalty of 10 years' imprisonment.

In future, large corporates may also be liable under the new 'failure to prevent fraud' offence, which was introduced under section 199 of the Economic Crime and Corporate Transparency Act 2023. This offence will come into force on 1 September 2025.

Law stated - 4 December 2024

Tax-deductibility of domestic or foreign bribes

Do your country's tax laws prohibit the deductibility of domestic or foreign bribes?

The HMRC Business Income Manual confirms that no deduction is allowed for payments that constitute a criminal offence under the Bribery Act 2010. Where a business has a criminal conviction for bribery, the tax treatment of the bribes will be checked by HMRC.

Law stated - 4 December 2024

DOMESTIC BRIBERY

Legal framework

Describe the individual elements of the law prohibiting bribery of a domestic public official.

The offence under section 1 of the Bribery Act 2010 (UKBA) can apply to the bribery of a domestic public official.

Law stated - 4 December 2024

Scope of prohibitions

Does the law prohibit both the paying and receiving of a bribe?

Yes. The offence under section 1 of the UKBA applies to the offer, promise or giving of a bribe. The offence under section 2 of the UKBA applies to the receipt of bribes.

Law stated - 4 December 2024

Definition of a domestic public official

How does your law define a domestic public official, and does that definition include employees of state-owned or state-controlled companies?

Although section 6(5) of the UKBA defines a 'foreign public official', the UKBA does not (in the context of domestic bribery) draw a distinction between bribes paid to a public official and those paid in the private sector. Therefore, the UKBA does not define a 'domestic public official'.

Law stated - 4 December 2024

Gifts, travel and entertainment

Describe any restrictions on providing domestic officials with gifts, travel expenses, meals or entertainment. Do the restrictions apply to both the providing and the receiving of such benefits?

There is no legislation specifically dealing with gifts, travel expenses, meals or entertainment, but they can constitute bribery.

There is no detailed guidance on what gifts or hospitality might constitute a bribe and each case will be considered on its facts.

Law stated - 4 December 2024

Facilitating payments

Have the domestic bribery laws been enforced with respect to facilitating or 'grease' payments?

English law draws no distinction between facilitation payments and bribes, both of which are illegal under the UKBA. These laws are enforced but a decision whether or not to prosecute is governed by the Full Code Test in the Code for Crown Prosecutors.

Law stated - 4 December 2024

Public official participation in commercial activities

What are the restrictions on a domestic public official participating in commercial activities while in office?

There is no general restriction on a domestic public official participating in commercial activities while in office. However, public officials are required to comply with codes of conduct and requirements to declare and register interests to ensure no conflict arises, or appears to arise, between their public duties and private interests.

Law stated - 4 December 2024

Payments through intermediaries or third parties

In what circumstances do the laws prohibit payments through intermediaries or third parties to domestic public officials?

It is irrelevant under the UKBA whether the bribe was offered, promised or given by the defendant directly or through a third party.

Law stated - 4 December 2024

Individual and corporate liability

Can both individuals and companies be held liable for violating the domestic bribery rules?

Yes.

Law stated - 4 December 2024

Private commercial bribery

To what extent does your country's domestic anti-bribery law also prohibit private commercial bribery?

The offences under section 1, 2 and 7 of the UKBA apply to private and public sector bribery.

Law stated - 4 December 2024

Defences

What defences and exemptions are available to those accused of domestic bribery violations?

There are limited defences available to those accused of domestic bribery offences. The Bribery Act Guidance recognises that there may be circumstances in which an individual is left with no alternative but to make payments to protect against loss of life, limb or liberty. In those circumstances, the common law defence of duress is likely to be available.

Law stated - 4 December 2024

Agency enforcement

What government agencies enforce the domestic bribery laws and regulations?

The Serious Fraud Office's (SFO) remit is to investigate and prosecute serious or complex fraud, including domestic or overseas bribery or corruption:

- that undermines UK plc commercial or public interests;
- where the actual or potential financial loss is high;
- where the potential economic harm is significant; and
- where there is a significant public interest.

The Crown Prosecution Service (CPS) may also prosecute offences involving bribery and corruption, but the SFO is the primary agency engaged in such prosecutions.

The National Crime Agency leads the UK law enforcement's response to bribery, corruption and sanctions evasion. It provides intelligence support and specialist operational capability.

The Financial Conduct Authority (FCA) is responsible for regulating financial services firms and financial markets in the UK. Although it does not prosecute matters under the UKBA, any conduct by a regulated firm relating to bribery or corruption may also constitute a breach of

the rules or principles of the FCA Handbook. A regulated firm may, for example, be required under Principle 11 to report conduct involving bribery or corruption to the regulator.

Law stated - 4 December 2024

Patterns in enforcement

Describe any recent shifts in the patterns of enforcement of the domestic bribery rules.

In recent years, one of the most noteworthy shifts in the patterns of enforcement is the use of deferred prosecution agreements (DPAs) to resolve a criminal investigation into a body corporate. This also applies to domestic bribery. However, at least eight of the 10 DPAs (in relation to which there is publicly available information), which related to offences involving bribery and corruption, had an international element, and were not strictly speaking domestic bribery cases.

Law stated - 4 December 2024

Prosecution of foreign companies

In what circumstances can foreign companies be prosecuted for domestic bribery?

A foreign company that carries on a business or part of a business in any part of the UK is a 'relevant organisation' for the purpose of section 7 of the UKBA. As such, a foreign company may be prosecuted for the section 7 offence of failure to prevent bribery both where the bribery took place in the UK and where none of the associated person's relevant conduct occurs in the UK.

Law stated - 4 December 2024

Sanctions

What are the sanctions for individuals and companies that violate the domestic bribery rules?

Offences under sections 1, 2 and 6 of the UKBA carry a maximum penalty of 10 years' imprisonment for an individual and/or a fine. The individual may also be required to pay a financial penalty. In relation to a body corporate, the court may impose an unlimited fine. The fine imposed is based on:

- an assessment of the gross profit from the advantage obtained, retained or sought as a result of the bribery offence ('the harm'); and
- multiplying the harm figure by reference to a determined level of culpability.

Conviction of an offence under the UKBA may also be subject to confiscation or a civil recovery order under the Proceeds of Crime Act 2002. Non-payment of any confiscation can result in a custodial sentence.

The financial penalty under a DPA is likely to be broadly comparable to a fine the court would have imposed following a guilty plea.

Under the Public Contracts Regulations 2015, a conviction for an offence under section 1, 2 or 6 of the UKBA will result in mandatory debarment for up to five years. The debarment prevents a company from entering into public contracts as a provider, supplier or contractor.

A conviction for an offence under section 7 of the UKBA does not trigger mandatory debarment. However, a conviction under section 7 offence could attract discretionary debarment of three years, which could have a significant impact on a company.

Law stated - 4 December 2024

Recent decisions and investigations

Identify and summarise recent landmark decisions and investigations involving domestic bribery laws, including any investigations or decisions involving foreign companies.

Enforcement of domestic bribery has historically focused on low-level bribery by individuals, rather than corporates. These cases have generally been prosecuted by the CPS rather than the SFO. In April 2022, a group of individuals were convicted for their involvement in the bribery of an engineer at one of Coca Cola's UK subsidiaries and three companies were also fined under section 7 of the UKBA for failing to prevent bribery.

There have. nonetheless, been some high-profile domestic bribery cases investigated by the SFO. One of the more recent DPAs secured by the SFO related to domestic bribery: Bluu Solutions Limited and Tetris Projects Limited entered into a DPA in July 2021 regarding bribery offences under sections 1 and 7 of the UKBA. This was also significant for the SFO because an individual pleaded guilty to two counts of receiving bribes. He was sentenced to nine months' imprisonment (suspended for 18 months) and is the only individual to date who has been convicted in a DPA case.

Law stated - 4 December 2024

UPDATE AND TRENDS

Key developments of the past year

Please highlight any recent significant events or trends related to your national anti-corruption laws.

Continued focus on DPAs

There is every indication that the Serious Fraud Office (SFO) intends to continue, and increase, its use of deferred prosecution agreements (DPAs).

The increased cooperation between prosecutors in different jurisdictions has been clear. This is likely to expand further as more jurisdictions introduce DPAs in some form. Although a further four DPAs were entered into between 2021 and 2023, the Airbus DPA agreed in 2020

is still the best example of a multi-jurisdictional approach to bribery allegations. It resulted in a global settlement totalling €3.6 billion with authorities in the US, the UK and France. The prosecutors in each jurisdiction coordinated and agreed which jurisdictions each would investigate.

Changes to corporate criminal liability

On 26 October 2023, the Economic Crime and Corporate Transparency Act 2023 (ECCTA 2023) became law in the UK and is coming into force piecemeal. The Act made three significant changes to the legal framework for corporate criminal liability and is expected to lead to an increase in enforcement activity by prosecutors, such as the SFO, against corporates.

The reform of the identification doctrine

The ECCTA 2023 has reformed the 'identification doctrine' by expanding the group of individuals through which liability can be attributed to a company. The change came into force on 26 October 2023.

The old 'directing mind and will' test, as set out in the case of ***Tesco Supermarkets Ltd v Nattrass*** [1971], meant that a corporate could only be held criminally liable if the commission of an offence could be attributed to a natural person who could be said to represent its 'directing mind and will' at the time the offence was committed. In practical terms, this represented a very narrow group of individuals and was a difficult threshold to attain, particularly in the context of large corporates with complex and diffuse management structures.

Under section 196(1) of the new legislation, criminal liability can be attributed to an organisation if a 'senior manager' acting within the actual or apparent scope of their authority commits a 'relevant offence', including money laundering offences, fraud, false accounting, tax evasion, bribery, and breaches of sanctions regulations.

The designation as a 'senior manager' will turn on the roles and responsibilities of the individual, and will apply to those who play a significant role in making management decisions about all or a substantial part of the organisation's activities, or in managing or organising those activities. It does not matter whether the organisation is incorporated or formed outside the UK. This change in the identification doctrine makes it easier to hold companies accountable for the actions of a wider range of employees, particularly those in managerial roles, by shifting the focus from identifying who had the directing mind or will to examining the role and responsibilities of the individual.

The introduction of a failure to prevent fraud offence

The new failure to prevent fraud offence was introduced under section 199 of ECCTA 2023. The offence is similar to the existing offences of 'failure to prevent bribery'. It imposes criminal liability on large organisations if an employee or an associated person (such as an agent or subsidiary) commits fraud for the benefit of the organisation or any person to whom services are provided on behalf of the organisation. An organisation would have a defence if it can demonstrate that it had reasonable procedures in place to prevent fraud.

On 6 November 2024, the Home Office published its guidance on the offence, clarifying certain aspects of the offence. Among other things, the guidance (1) provides theoretical examples where the offence may apply, and (2) sets out principles that organisations should follow when implementing reasonable fraud prevention procedures. The offence will come into force from 1 September 2025.

The expansion of the SFO's pre-investigation powers

Effective from 15 January 2024, ECCTA 2023 has also expanded the SFO's powers under section 2 of the Criminal Justice Act 1987 to compel individuals and companies to provide pre-investigation information (ie, to provide documents or attend interviews before a formal investigation begins). Previously, the SFO was only able to use these pre-investigation powers in relation to overseas bribery and corruption cases where it had 'reasonable grounds to suspect' that such a crime had been committed. Section 211 of ECCTA 2023 has expanded these powers to all potential SFO cases at the pre-investigative stage, including fraud, domestic bribery, and corruption. It is expected that these new powers will speed up SFO investigations.

Challenges faced by the SFO

The SFO has faced significant issues over the last couple of years in relation to disclosure failings, which ultimately resulted in the collapse of the prosecution against former Serco employees in April 2021, the Court of Appeal overturing the convictions of three individuals in relation to the Unaoil investigation between December 2021 and July 2022, and its decision to abandon its prosecution of three former G4S executives in March 2023. Nick Ephgrave QPM, who assumed the role of director of the SFO succeeding Lisa Osofsky at the end of September 2023, now faces the challenge of improving the SFO's handling of disclosure.

In his first public speech as director in February 2024, Ephgrave highlighted the immense volume of data generated by the SFO's cases, noting that their largest active investigation involves 48 million documents. He discussed the disclosure burden this data volume creates and, like his predecessor Osofsky, mentioned the constant fear of making a mistake that could severely impact the agency. Ephgrave emphasised, '***One mistake, and all of a sudden, the ship will be dashed***'.

In its five-year strategy for 2024–2029 and annual reports for 2023–2024, the SFO expressed its commitment to advocating for changes in the disclosure regime to meet today's challenges.

Technology, training and early engagement

To address these challenges, Ephgrave proposed potential solutions such as 'technology-assisted review' a form of machine learning that the SFO is piloting to help meet its disclosure obligations and expedite the review process.

In October 2023, the Home Office launched an Independent Review of Disclosure and Fraud Offences, chaired by Jonathan Fisher KC. In April 2024, Ephgrave welcomed the preliminary findings of Fisher's independent review. The initial findings of the review indicate that there is no compelling case for radical reform of criminal disclosure rules. Therefore, his final

recommendations will focus on improving the practical application of the existing rules. This includes (1) enhancing early engagement between the prosecution and the defence and (2) leveraging technology and AI to streamline the disclosure process, thereby addressing the practical challenges within the current framework. Fisher also identified, among other things, a need for better training and resources in relation to disclosure across the criminal justice system.

On 21 November 2024, the SFO's deputy head of fraud, bribery and corruption, Andy Parratt, disclosed that 'technology-assisted review' found the 'key materials' in a recent criminal case, which involved 12,000 documents, 39 per cent faster than any other review method.

Other areas of change

In a recent report on its inspection of the SFO's handling and management of disclosure published on 30 April 2024, His Majesty's Crown Prosecution Service Inspectorate (HMCPSI) stated that the SFO has made progress in improving its disclosure process following the collapsed prosecution of G4S directors. HMCPSI acknowledged the SFO's improvements over the past two years, such as incentivising staff to take on the disclosure officer roles and introducing a more functional document review platform.

However, HMCPSI identified areas for further improvement and made six recommendations, including introducing a peer review-like disclosure process, developing a long-term funding strategy, and reviewing the management of legal professional privilege material. Nonetheless, the report is optimistic that these improvements will enhance the SFO's handling of disclosure, with HMCPSI expressing satisfaction that recent changes provide assurance of the SFO's capability to meet its disclosure obligations.

Since his appointment, and contrary to the opinions of his predecessors, Ephgrave has also consistently advocated for the idea of financially incentivising whistleblowers in the UK, similar to the US system. In his first speech, he pointed out that a significant portion of the $2.2 billion in civil settlements and judgments recovered by the US Department of Justice was based on whistleblower information. He also noted that, '***since 2012, over 700 UK whistleblowers have engaged US law enforcement***'. The SFO's five-year strategy, launched two months after Ephgrave's speech, includes a pledge to '***explore incentivisation options for whistle blowers***.'

Whistleblower incentivisation regimes are not new among UK regulators: the Competition and Markets Authority may award whistleblowers up to £250,000 for reporting cartel activity, and HM Revenue & Customs has a discretionary scheme for reporting tax fraud. We may see Ephgrave delivering the same during his five-year tenure at the SFO.

Latest update

As part of his independent review, on 18 November 2024, Jonathan Fisher KC submitted the report 'Disclosure in the Digital Age' to the Home Secretary. The report covers his findings and proposals for aiding '***the creation of a modern disclosure regime fit for today's digital age***'. The government is yet to disclose or respond to the report.

* *Any views expressed in this publication are strictly those of the authors and should not be attributed in any way to White & Case LLP.*

Law stated - 4 December 2024