WHITE & CASE

The Bribery Act: The changing face of corporate liability

Five years since its inception, the UK Bribery Act has significantly raised the bar on corporate liability and shaken up existing rules on tackling corruption

Contents

The UK Bribery Act: Five lessons in five years

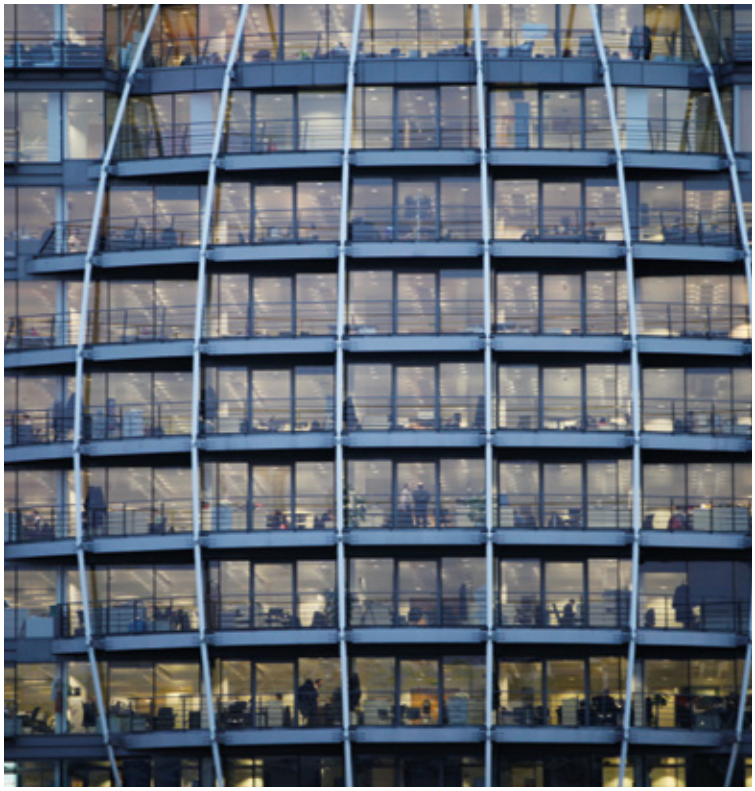
The UK Bribery Act is the toughest anti-bribery legislation in the world. In its pledge to take a leading role in the global fight against corruption, the UK Act goes even further than the US's far-reaching Foreign Corrupt Practices Act.

Since coming into force, the new UK Bribery Act has driven better corporate behaviours, as companies are stepping up efforts to strengthen their defences and ensure adequate anti-graft procedures are in place. Five years on, five distinct themes are beginning to emerge:

1. Corporate culture is key to driving out corruption: Adequate anti-bribery procedures are an essential part of any corporate ethics policy. But without a strong corporate culture in which there is a genuine desire to stamp out poor behaviour, no written policy document will ever be sufficient.

2. Individuals implicated in wrongdoing should have a voice in the investigation: When conducting an internal investigation into alleged corporate wrongdoing, individuals at the centre of such investigations must be given a fair chance to respond to the allegations before the investigation is complete. Failure to do so runs roughshod over the rights of those individuals.

3. Incentivising timely self-reporting is an important part of the solution: Bribery, by its very nature, is a secret matter. A system that makes self-reporting an attractive option will bring more transparency to the process and will allow co-operating companies to move forward.



4. Allegations of corrupt behaviours are commonly international in scope: With many UK companies operating on a global scale, the Serious Fraud Office (SFO) has a global passport to prosecute bribery wherever the offence takes place. But investigations can be hampered by international bureaucracy and hurdles. In self-reporting, the SFO has a useful tool in overcoming some of these hurdles. It needs to provide real incentives for companies to do so.

5. The effectiveness of any law is judged on how it is enforced by the authorities: The Bribery Act can be a useful template for tackling other forms of financial crime. But at a time when the United States is shifting its focus towards individuals for greater responsibility in corporate wrongdoings, the SFO seems to be moving in the opposite direction by taking criminal enforcement action against companies. Is this in the best public interest? Only time will tell.

When are 'adequate procedures' adequate enough?

The Bribery Act has put anti-corruption compliance on the boardroom agenda like nothing has done before, but the full force of the legislation is yet to be seen.

By **Jonathan Pickworth**, **Deborah Williams**, **Rebecca Findlay**

When the Bribery Act was introduced into the UK in 2011, the most significant change to the pre-existing law was the establishment of the corporate offence of failing to prevent bribery—an organisation is liable to prosecution if an associated person (who performs services for or on behalf of the company) bribes another, intending to obtain or retain business or an advantage in the conduct of business for that organisation. Significantly, when organisations can prove that they have 'adequate procedures' in place to prevent such unlawful conduct, a full defence is available. But five years on, the question remains—how can a company ensure its 'adequate procedures' are adequate? What has become clear is that this is far more than just a 'box-ticking' exercise.

No one can doubt that the Act (and, in particular, the threat of the corporate offence) has had a huge impact on how bribery and corruption compliance is now viewed by most companies that carry on any of their business in the UK. Indeed, it is now common practice for companies to assess their high-risk areas and develop a myriad of procedures and processes to mitigate their risks as far as possible, and ensure 'adequate procedures' are in place.

12

Criminal investigations opened in 2015 – 2016

Source: SFO

Reaching far and wide

Compliance with the Bribery Act has not only impacted those companies that operate in the UK. The jurisdictional reach is extremely wide. But even businesses which are strictly beyond that reach can no longer easily work with those that are within it. Due to the sometimes extensive due diligence carried out on third parties by UK companies, it has significantly affected how overseas companies now view their own bribery risk profile. There has been a particular focus on third-party companies that act as agents or introducers for business or are foreign public officials, where the risk of bribery and corruption is arguably at its greatest. The

> **"Ensuring adequate procedures is far more than just a 'box-ticking' exercise**

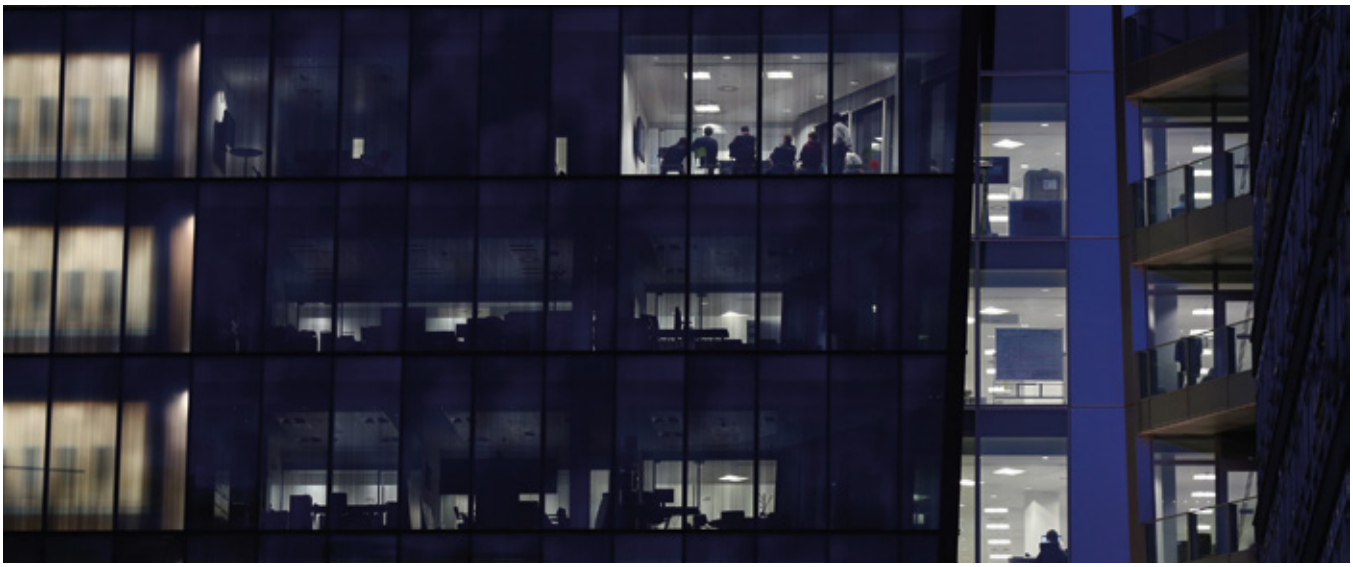
impact of the corporate offence of the failure to prevent bribery (and the potential defence of adequate procedures) is viewed as very significant in achieving better compliance practices.

Limited judicial interpretation so far

But how has the defence of 'adequate procedures' been tested so far, and what does it mean to say procedures are 'adequate'? Given that the Ministry of Justice's guidance is just that (guidance), the law can only be developed by way of case law or legislative intervention. The recent case of Sweett Group plc, which involved the first company to be sentenced and convicted for the corporate offence in February 2016, did not take the analysis of adequate procedures any further, since Sweett pleaded guilty and did not try to avail itself of the defence.

Fortunately, the long-awaited first Deferred Prosecution Agreement (DPA), with Standard Bank plc at the end of 2015, provided judicial consideration (albeit limited) of the meaning of adequate procedures. Lord Justice Leveson found that there was no allegation of knowing participation in an offence of bribery by Standard Bank or its employees; the offence was limited to an allegation of inadequate systems to prevent associated persons from committing an offence of bribery. The applicable policy was found to be unclear and was not reinforced effectively to the Standard Bank deal team. In addition, the training for Standard Bank did not provide sufficient guidance

> **"If the right corporate culture exists, and if there is a genuine desire to stamp out poor behaviour, then it is more likely that the procedures will be 'adequate'**



where a different Standard Bank entity engaged an introducer or consultant.

It's all about the culture

The DPA judgments highlight the importance of not just having anti-bribery policies and procedures in place, but ensuring that employees understand those policies and procedures and what those policies are trying to achieve. The DPA also highlights the importance of understanding the various risks in different business transactions—a 'one size fits all' approach is not appropriate when it comes to tailoring 'adequate procedures'. As Ben Morgan, Joint Head of Bribery and Corruption at the Serious Fraud Office (SFO) commented in December 2015: "…Where the risks and red flags are prevalent, it seems to me no amount of just sticking to a policy is going to be adequate, in the final reckoning. What is really needed is a culture in which people are able to spot what is in front of them, and react to it…"

60

Active criminal investigations as of July 2016

Source: SFO

The Standard Bank DPA (and the commentary by the SFO) has gone some way to re-emphasise that identifying the relevant risks and putting in place 'adequate procedures' is not just a 'box-ticking' exercise; there needs to be a clear understanding within every organisation as to the purpose of what such policies and procedures are intended to achieve. The law is yet to be stress-tested. In the meantime, it is important to remember that the purpose of establishing 'adequate procedures' should not merely be to enable defence arguments to be run. Adequate anti-bribery procedures are an essential part of the overarching ethics policy of every company. If the right corporate culture exists, and if there is a genuine desire to stamp out poor behaviour, then it is more likely that the procedures will be 'adequate'. Without such a culture, no written policy document or ethics statement will suffice.

Ministry of Justice:

The Bribery Act 2010 – Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing (section 9 of the Bribery Act 2010)

In March 2011, the Ministry of Justice published guidance setting out six high-level principles to be considered when implementing procedures to prevent bribery:

1. Proportionate procedures

2. Top-level commitment

3. Risk assessment

4. Due diligence

5. Communication, including training

6. Monitoring and review

This guidance has been used as the basis for many UK-based anti-bribery and corruption programmes.

Unheard voices

The corporate bribery offence has ushered in a new age of enforcement, but at what cost to individuals who may be implicated?

By **Jonathan Pickworth**, **Fred Kelly**

In the last few weeks of 2015, the enforcement landscape for corporate entities carrying on business in the UK changed forever. On 30 November 2015, Lord Justice Leveson approved the UK's first Deferred Prosecution Agreement (DPA) between the Serious Fraud Office (SFO) and Standard Bank plc. The DPA suspended an indictment against Standard Bank alleging failure to prevent bribery contrary to the Bribery Act 2010. Just days later, on 18 December 2015, Sweett Group plc pleaded guilty to a charge of failing to prevent an act of bribery intended to secure and retain a contract, contrary to the Bribery Act.

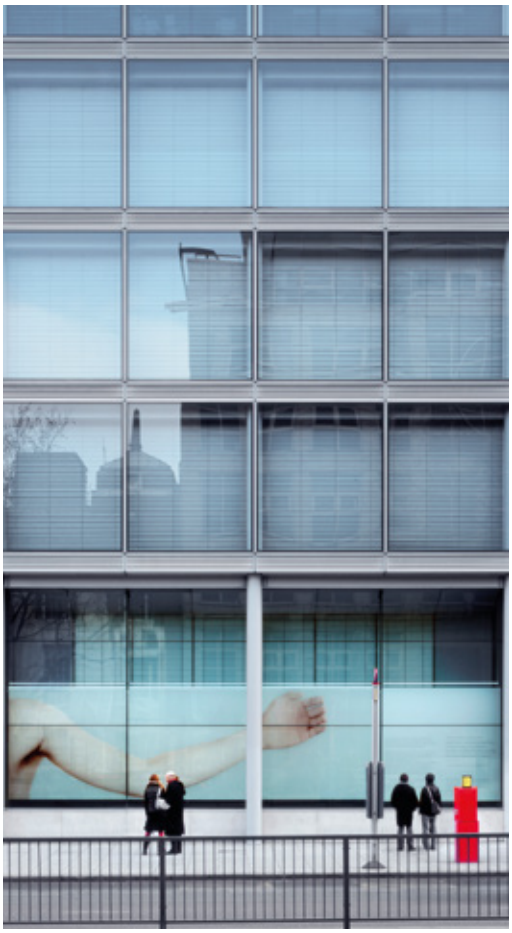
Both Standard Bank and Sweett Group were required to pay substantial financial penalties as a result of their breaches of the Bribery Act. These fines confirmed that corporate criminal liability under the Bribery Act is no longer merely a theoretical possibility. One knock-on effect of these corporate resolutions, however, has been the unseen impact on third-party individuals who are implicated in the wrongdoing, but whose voices are not necessarily heard.

Individuals overlooked

In reaching a DPA with Standard Bank, the SFO relied upon Standard Bank's internal investigation for its evidence for the Statement of Facts. The SFO conducted some additional interviews as part of its investigation but did not request or obtain any documentation from the Government of Tanzania or the local agent.

Indeed the SFO has reportedly received a petition signed by more than a 1,000 people, including Tanzanian politicians, calling for the SFO to reopen its investigation into Standard Bank. The petition comes after the former head of investment banking at Stanbic Bank claimed that Standard Bank misrepresented the fact that it was not aware of the local third-party involvement in the deal. The former Stanbic employee also claims that, although Standard Bank's internal investigation report implicated her in the alleged bribery, she was not given an opportunity to see the allegations or respond to them before they were published.

Similarly, in the Sweett Group case, a number of individuals were referred to by name in court and implicated as being involved in bribery. However,



> **Failing to interview individuals at the centre of allegations of wrongdoing runs roughshod over the rights of those individuals**

some of these individuals were not interviewed by the company or the SFO as part of the investigation which led to the company's guilty plea. It therefore appears that in both these cases, conclusions have been reached without giving all the individuals implicated a chance to respond to the allegations brought against them.

A common theme for corporate investigations

At the same time that the SFO is coming under fire for its investigations into the Standard Bank and Sweett Group cases, the Financial Conduct Authority (FCA) has also been under increased scrutiny for the way it has handled the publication of its findings in respect of several of its recent investigations.

A number of individuals have lodged appeals with the Financial Services Tribunal concerning the FCA's enforcement notices in respect of its investigations into the so-called 'London Whale' trades, the foreign exchange market and also LIBOR benchmarks. These traders claim that they were prejudicially identified in the enforcement notices in respect of these investigations and that, by explicitly criticising their conduct without giving them a chance to respond, the FCA showed complete disregard for their rights, reaching its conclusions without carrying out a full and proper investigation. One such challenge, in relation to the 'Whale trades' enforcement notice, will be considered by the UK's Supreme Court later this year and could result in the FCA being forced to amend its findings in respect of its investigation.

Significantly, the Financial Services Tribunal recently rejected an application by the FCA to stay an application from a former bank trader regarding his identification in an FCA Final Notice in relation to its investigation into alleged EURIBOR benchmark manipulation. The SFO had supported the FCA's application for the stay on the basis that, until the SFO's criminal investigation into the former trader for alleged EURIBOR manipulation has concluded, there would be a real risk of prejudice. The judgment by the Tribunal indicates that the judiciary recognises individuals implicated in reports of corporate wrongdoing should be given a timely opportunity to voice their concerns.

Only time will tell

Failing to interview individuals at the centre of allegations of wrongdoing runs roughshod over the rights of those individuals and also potentially leads to a truncated and incomplete investigation. The law as it currently stands might permit this kind of approach, but there is a fundamental unfairness about it. Anyone named as a perpetrator of corrupt acts is tainted by such serious allegations, particularly when they are endorsed by the courts. Inconvenient as it might be to law enforcement agencies, at least offering those individuals the right to give their version of events would go a long way to mitigating that unfairness.

16
defendants convicted in 2015 – 2016

Source: SFO

18
defendants convicted in 2014 – 2015

Source: SFO

Comparing the UK Bribery Act and the US Foreign Corrupt Practices Act

	Bribery Act 2010	FCPA 1977 (as amended)
Bribery of foreign officials	• Specific offence of bribing a foreign public official • The bribe can be given, offered or promised directly or indirectly • Offence is not committed if official is permitted or required under written local law to be influenced in his capacity as a foreign public official • No promotional expenses exception	• Only deals with offences related to the bribery of foreign officials • The offer, promise or gift can be direct or indirect • Affirmative defence available if payment expressly authorized by local laws • Narrow facilitation payments exception • Affirmative defence for reasonable and bona fide business expense directly related to the promotion, demonstration or explanation of products or services, other bona fide business matters of the payor, or payment was pursuant to a written contract
Commercial / Private bribery	• Commercial/private bribery is also covered	• Only applies to bribery of foreign officials • The US does use other laws to prosecute commercial/private bribery, such as the federal Travel Act and mail and wire fraud statutes and state criminal laws • Other US laws target both active and passive bribery of domestic officials
Active bribery bribing another person	• Offence to bribe any person (for example, a UK public official, a foreign public official, a private individual, a corporate entity): - by giving, offering or promising - a financial or other advantage (directly or indirectly)	• Offence to bribe foreign officials: - by offering, giving, promising or authorizing the payment (directly or indirectly): - of something of value - with a corrupt intent - to obtain, retain or direct business

	Bribery Act 2010	FCPA 1977 (as amended)
Passive bribery receiving bribes	• Offence to receive bribes • Offence to request or agree to receive bribes (directly or indirectly)	• Active bribery only i.e. offering, giving, promising or authorizing • Receiving bribes not an offence under FCPA • Receipt of bribes is prosecutable under other state and federal laws, including the Travel Act and mail and with fraud statutes
Intent required	**General offences:** • Evidence related to improper performance required, as determined by the standards expected by a reasonable person in the UK **Foreign officials:** • Evidence of intent to influence in order to retain or obtain business is required • No requirement to prove improper performance unlike the general bribery offences • No requirement for corrupt intent/dishonesty	• Evidence of corrupt intent required • Payment must be intended to induce the recipient to misuse his official position to obtain, retain or direct business • Does not require that the corrupt act succeed in influencing the official receiving the payment • Also an offence to provide a payment or anything of value to any other person while knowing or having reasons to suspect that any part of such offer, payment, loan or gift will be given or promised to a foreign official for an improper purpose • Evidence of a conscious disregard or deliberate ignorance of known circumstances that should reasonably alert one to high probability of violations of the Act will be sufficient to establish knowledge requirement
Acts or omissions – purpose in mind	**General bribery offences**: • Improper performance of a *"relevant function or activity"* in return for a *"financial or other advantage"* • A breach of an expectation of good faith or impartiality, or in breach of a position of trust **Foreign officials:** • Influencing the foreign official in their official capacity	• Influencing the foreign official in their official capacity • Inducing the foreign official to do or omit to do an act in violation of their lawful duty • Securing any improper advantage in order to assist in obtaining or retaining business for or with, or directing business to any person

	Bribery Act 2010	FCPA 1977 (as amended)
Business purpose nexus	Required for the offence of bribing a foreign official where the purpose must be to *"obtain or retain business or an advantage in the course of business"* • Required for the corporate offence of failing to prevent bribery in so far as the bribe that the corporate failed to prevent must have been committed with intention to *"obtain or retain business or an advantage in the course of business"* for that organisation • One of the functions or activities to which the active or passive bribery offences must relate is *"any activity connected with business"*	• Required • Payments of offers must be made in order to *"obtain or retain business"* or directing business to another party • Broad interpretation *"obtain or retain business"*; including, for example, reduction of tax obligation
Corporate offence	• Strict liability offence for *"relevant commercial organisations"* that fail to prevent bribery • Defence available where the corporate can demonstrate that it had *"adequate procedures"* in place to prevent bribery	• No comparable offence for corporate compliance failures except books and records violations • Compliance programs are not a defence to FCPA liability but are a factor that will be considered by the Department of Justice in determining whether to prosecute and the terms of a settlement
Liability of senior officers	• Senior officers who consent or connive in an act of bribery committed by the corporate will also be guilty of the same offence • This applies to the general bribery offences and bribing a foreign official. It does not apply to the corporate offence of failing to prevent bribery	• Conspiracy and aiding/abetting principles potentially applicable

	Bribery Act 2010	FCPA 1977 (as amended)
Jurisdiction	**General offences:** • If an act or omission forming part of the offence is committed in the UK, no connection with the UK required • Where no act or omission forming part of the offence takes place in the UK: - individuals who have a "*close connection*" with the UK (e.g., UK citizen or "*ordinarily resident*") - corporates that are incorporated in the UK **Corporate offence—failing to prevent bribery:** • The act or omission does not have to take place in the UK • Non-UK corporates are covered by the Act (for acts or omissions in any part of the world) if they have a UK office or do business in or via the UK **Senior officer offence:** • For a senior officer to be liable for bribery on the basis of consent or connivance, they must have a *"close connection"* with the UK (e.g., UK citizen or *"ordinary resident"*) • Senior officer is defined as *"director, manager, secretary or other similar officer"* or anyone purporting to act in such capacity (e.g., shadow director)	**Anti-bribery provisions:** • Domestic concerns (US citizens and US corporates) • Issuers of securities (includes non-US corporates) • Any officer, director, employee or agent of an issuer • Since 1998, the FCPA applies to foreign corporates and persons who cause, directly or through agents, an act in furtherance of such a corrupt payment to take place within the territory of the United States. This includes using US-based banks, email servers or meetings **Books and records:** • All issuers – including overseas issuers FCPA accounting provisions apply to *"issuers"*: - issuers are those required to file reports with the SEC or those with securities registered with the SEC - definition of issuer is sufficiently broad to cover corporates that issue American Depository Receipts traded on US markets or stock exchanges
Facilitation payments	• No specific exemption	• Limited and narrowly construed exemption for *"routine governmental action"* • e.g., obtaining permits, licenses, or other official documents; processing governmental papers, such as visas and work orders; providing police protection, mail pick-up and delivery

	Bribery Act 2010	FCPA 1977 (as amended)
Books and records	• No specific books and records provisions but criminal or civil enforcement possible for failure to keep accurate accounts under Companies Act legislation	• Includes specific books and records provisions—obligation to maintain books and records *"in reasonable detail"* that *"accurately and fairly reflect transactions and disposition of assets to the issuer"* (subject to civil or criminal enforcement) • There is no requirement that an issuer has knowledge in order to be held civilly liable for a violation of the books and records or internal control provisions. There is a knowledge requirement that must be technically proven to establish criminal liability for a books and record or internal controls violation
Criminal and civil enforcement	Both criminal and civil enforcement possible: • Criminal proceedings—against individuals and corporates mainly instituted by the Serious Fraud Office • Civil Recovery Orders under the Proceeds of Crime Act 2002 are available to recover sums obtained in relation to 'unlawful conduct' and where there is insufficient evidence to prosecute for corruption offences Related enforcement action by other regulators (e.g., FCA)	Both criminal and civil enforcement possible: **Anti-bribery provisions:** • DOJ – responsible for all criminal enforcement and for civil enforcement with respect to domestic concerns and foreign companies and nationals • SEC – responsible for civil enforcement of the anti-bribery provisions with respect to issuers **Books and records provisions:** • SEC responsible for civil enforcement action against violators of the accounting provisions • DOJ responsible for criminally prosecuting "wilful" violations of the accounting provisions

	Bribery Act 2010	FCPA 1977 (as amended)
Penalties	• Individuals – up to 10 years' imprisonment and/or an unlimited fine • Corporates – unlimited fine; possible debarment from public tenders **Note:** In addition to fines, criminal confiscation or civil recovery proceedings can be brought against individuals and corporates to confiscate the proceeds of crime	**Bribery – criminal:** • Individuals – up to five years imprisonment and fines of up to US$250,000 (or up to twice the benefit sought or received, whichever is greater) • Companies – fines of up to US$2 million (or up to twice the benefit sought or received, whichever is greater) **Bribery – civil:** • SEC – individuals and corporates – fines of up to US$10,000 • Court (in addition) to the above – fine equal to the gross amount of the pecuniary advantage; or a specific dollar limitation (individuals up to US$100,000; corporates up to US$500,000) **Books and records – criminal:** • Individuals – up to 20 years' imprisonment and fines of up to US$50 million • Companies – fines of up to US$250 million **Books and records – civil:** • Individuals – fines of up to US$150,000 • Companies – fines of up to US$500,000 **Note:** fines and terms of imprisonment can be imposed per charge

Anti-bribery & anti-corruption regimes across Europe

	BELGIUM	CZECH REPUBLIC	FRANCE
	Belgian Criminal Code (Book 2, Title IV, Chapter IV for public bribery and Book 2, Title IX, Chapter II, Section IIIbis for private bribery)	**Act No. 40/2009 Coll., Criminal Code** **Act No. 418/2011 Coll., Act on Criminal Liability of Legal Entities**	**FRENCH PENAL CODE (Book IV, Chapters II, III and V of Title III, and in Chapter V of Title IV)**
Commercial bribery	Public bribery concerns all persons discharging a public function. The definition of 'public function' is wide, and includes, for example, functions performed for a limited period (such as a juror or a private company acting within procurement). It also concerns candidates for public functions or persons acting like they discharge a public function. Private bribery applies to bribery by a director or manager of a legal person or officer or employee of a legal or natural person.	Applies to bribery of public officials (including foreign ones) and commercial bribery.	Applies to bribery of public officials and to commercial bribery (i.e., the solicitation, or acceptance at any time, directly or indirectly, of a bribe or any other advantage by a person who, not being a public official or charged with a public service mission, holds or occupies, within the scope of his professional or social activity, a management position or any occupation for any person, whether natural or legal, or any other body, in order to obtain the performance or non-performance of any act within his occupation or position or facilitated by his occupation or position, in violation of his legal, contractual or professional obligations)[1].

[1] Articles 445-1 and 445-2 of the French Penal Code.

GERMANY	POLAND	RUSSIA
German Criminal Code (Strafgesetzbuch – StGB) **International Bribery Act (Gesetz zur Bekämpfung Internationaler Bestechung - IntBestG)**	**Polish Criminal Code** **Act on Liability of Collective Entities for Acts Prohibited under Penalty of 28 October 2002**	**Russian Criminal Code** **Russian Administrative Offences Code** **Federal Law No. 273-FZ "On Combating Corruption" dated 25 December 2008** **Russian President Decree of No. 233 "On Various Issues Regarding Activity of the Presidium of the Anti-Corruption Council at the Russian President" dated 25 February 2011**
Applies to bribery of public officials and commercial bribery (restricted to competitive purchase of goods or commercial services).	Applies to bribery of public officials and commercial bribery.	Applies to bribery of public officials, foreign public officials or officials of public international organisations and commercial bribery (i.e., the illegal transfer of money, securities or any other assets and/or provision of services of a material nature to a person who performs managerial functions in a commercial or any other organisation for this person to act in the interests of the transferor/ provider of such assets or services).

	BELGIUM	CZECH REPUBLIC	FRANCE
Recipient of a bribe	Prohibition of passive corruption, defined as soliciting, accepting or directly or indirectly receiving a bribe.	Criminalises the acts of requesting, agreeing to receive, accepting, giving or arranging for a bribe, whether directly or indirectly, even if it is for the benefit of another person. Bribe is understood to mean any material or personal benefit or promise of such.	Criminalises the solicitation or acceptance, anytime, directly or indirectly of a bribe (i.e., offers, promises, donations, gifts) or any other advantage even if it is for the benefit of another person.
Corporate liability	Legal persons can be held criminally liable for offences intrinsically linked to the achievement of its purpose or to the defence of its interests, or when the facts demonstrate that the offence has been accomplished on its behalf. If the criminal responsibility of the legal person is in question exclusively because of the intervention of an identified natural person, only the person who committed the most important offence will be convicted. However, if such natural person acted knowingly and voluntarily, both the legal and natural person can be convicted.	Corporate entities can be held liable for committing the offence of bribery. A corporate entity is criminally liable for illegal actions taken in its interest or within the scope of its activities by its executive, manager or controlling person, or by an employee acting upon assignment, decision or approval by such persons. A legal entity may further be held liable for employees' actions if the criminal conduct occurred due to lack of measures either required by statute to be taken or such as may be reasonably required to be taken by the company to prevent the occurrence of the criminal conduct. The legal entity may absolve itself of criminal liability if it can prove that it made every effort which may be reasonably required from it to prevent criminal conduct. The criminal liability of an executive, manager or controlling person of a company may be attributable to the corporate entity. However, even where no such individual is found guilty, a company may still be criminally liable.	Corporate entities can be held liable for committing the offence of bribery if committed on their account by their organs or representatives[2].

[2] Article 121-2 of the French Penal Code.

GERMANY	POLAND	RUSSIA
Criminalises a request, agreement to receive or acceptance of a bribe, even if it is for the benefit of another person.	Criminalises the solicitation or acceptance of a bribe, i.e., any material or personal benefit or promise of such.	Criminalises the taking of a bribe or commercial bribe, including through an intermediary.
Corporate entities cannot be held liable under the German Criminal Code. However, they can be sanctioned with an administrative fine up to €10 million and an unlimited forfeiture or skimming-off of profits from the criminal act. In addition, corporate entities may suffer from debarment from public contracts, an entry in a public commercial register and other ancillary consequences.	Under certain conditions, corporate entities can be held liable for committing the offence of bribery. The prerequisites of this liability are: (i) final conviction of the perpetrator acting on behalf of the entity; (ii) negligence on the part of the entity in the choice or supervision of this person or organisational negligence leading to failure to prevent committing the crime within the company; (iii) gained profit or possible profit for the entity.	Corporate entities cannot be held liable under the Russian Criminal Code. However, according to the Russian Administrative Offenses Code, if bribery/commercial bribery is committed on behalf of, or in the interests of, a legal entity (including a foreign legal entity), that entity may be subject to administrative fines equal to three times the amount of the assets or services in question, and no less than RUB 1 million (approx. €13,700[3]) plus the confiscation of assets. If the bribery qualifies as a large scale one (i.e., more than RUB 1 million—approx. €13,700) or a very large scale one (i.e., more than RUB 20 million—approx. €280,000) the amount of administrative fines raises respectively to 30 times the amount of the assets or services in question, and no less than RUB 20 million (approx. €280,000), or to 100 times the amount of the assets or services in question, and no less than RUB 100 million (approx. €1.37 million), in both cases—plus confiscation of assets[4].

[3]Hereinafter, at the Rouble to Euro exchange rate of 73.00 (which is an approximate average rate in August 2016)

[4]Article 19.28 of the Russian Administrative Offences Code.

	BELGIUM	CZECH REPUBLIC	FRANCE
Senior officer liability	The senior officer who committed or accepted bribery bears criminal liability.	Anyone (including senior officers) may be held criminally liable if they were aware that another person committed bribery, and either did nothing to prevent it or did not report it to the authorities.	The criminal liability of legal persons does not exclude that of any natural persons who are perpetrators or accomplices to the same act.
Facilitation payments	No exception for facilitation payments.	No exception for facilitation payments.	No exception for facilitation payments.

GERMANY	POLAND	RUSSIA
Senior officers can be held liable for a corporate entity's organisational negligence and/or for aiding and abetting a violation of the legislation.	The criminal liability of a senior officer may result in holding the corporate entity liable.	Senior officers can be held liable for 1) misuse of powers for personal benefit or privilege; 2) tax evasion by the corporate entity; 3) commercial crimes such as bribery, certain violations of antimonopoly, bankruptcy and currency exchange regulations; and 4) other crimes connected with the activities of the corporate entity and defined as such by the Russian Criminal Code.
Generally, there is no explicit exception from punishment for facilitation payments in Germany. Nevertheless, in accordance with the OECD Convention, the German Criminal Code permits (facilitation) payments to foreign public officials in circumstances where official duties are not violated.	No exception for facilitation payments.	Russian Civil Code contains exceptions similar to facilitation payments—gifts the price of which may not exceed the statutory maximum. The maximum price of a gift that may be presented to a state official is RUB 3,000 (approx. €40). If the gift exceeds this amount, the official must hand it over to his/her employer[5].

[5]Article 575 of the Russian Civil Code.

	BELGIUM	CZECH REPUBLIC	FRANCE
Business expenses and presents	Bribery does not depend on the amount of the bribe but on the purpose for which it is done. In private bribery, minor presents can be considered as commercial usage, and therefore acceptable.	No exception for business expenses.	No affirmative defence for business expenses.
Books and records	Offences related to annual accounts and bookkeeping are provided in the Belgian Company Code and in the Belgian Code of Economic Law. Directors, managers or representatives knowingly failing to keep records can be fined from €156 to €60,000 (based on the current legal surcharges).	Offenses relating to the maintenance of books and records are included in the Criminal Code. Failure to maintain accurate books and records is punishable by imprisonment of up to 8 years (depending on the magnitude of the damage caused). Methods of punishment of legal entities are the same as described below.	The French Commercial Code requires the accurate recording of any and all transactions.

GERMANY	POLAND	RUSSIA
"Reasonable and bona fide" business expenses directly related to the "promotion, demonstration, or explanation" of products or services are permitted.	No affirmative defense for business expenses as such, but in practice "reasonable and bona fide" business expenses directly related to the "promotion, demonstration, or explanation" of products or services are permitted.	Russian law permits business expenses ("representation expenses") related to formal reception and/or other services (including, e.g., meal, transportation and translators) provided to representatives of other companies taking part in negotiations in order to establish and maintain mutual cooperation[6] and to individuals being current or potential clients of the company[7], unless such business expenses can be qualified as corruption offences.
There is no provision on "books and records" in connection to/ associated with legislation for bribery. Nevertheless, German corporate entities are subject to requirements for accurate accounting provisions. These provisions are contained, e.g., in the German Commercial Code, and some infringements are criminal offenses. Also a "books and records" type offence is included in the German Criminal Code[8].	Offences relating to maintenance of books and records are included in the Accountancy Act and in the Fiscal Criminal Code. Failure by the company's management to maintain accurate books and records is punishable by a fine of up to PLN 1,080,000 (approx. €250,000) and imprisonment up to 2 years. Individuals who fail to keep books or records or keep them dishonestly may be punished by a fine of up to PLN 480,000 (approx. €110,000). The conviction for such an offence may entail criminal liability of the company.	Company officers are subject to administrative liability for "severe violations" of bookkeeping rules and reporting, as well as procedures for the storage of books and records[9]. Additionally, the Russian Criminal Code establishes criminal liability for company officers for crimes related to: **(i)** non-disclosure, destruction or forgery of books and records of a company committed in the event of insolvency and resulted in substantial losses[10]; **(ii)** forgery of books and records of a financial organisation (such as a bank, insurance company, professional participant on the stock market, etc.) committed for the purpose of concealing indications of insolvency or grounds for revocation of license[11].

[6] Article 264 of the Russian Tax Code.

[7] Letter of the Russian Ministry of Finance No. 03-03-06/2/32859 dated 5 June 2015.

[8] Cf. Sections 283 and 238b German Criminal Code.

[9] Article 15.11 of the Russian Administrative Offences Code.

[10] Article 195 of the Russian Criminal Code.

[11] Article 172.1 of the Russian Criminal Code.

	BELGIUM	CZECH REPUBLIC	FRANCE
Extra-territorial effect	As a matter of principle, Belgian criminal law only applies to criminal acts committed in Belgium. Belgian courts can have jurisdiction even if only some elements of the bribe (including the intention) or aggravating factors took place in Belgium. Belgian courts are also competent if the offence is committed abroad in certain specific circumstances such as when the offence was committed by a Belgian or a person having principal residence in Belgium, provided that the offence is criminally sanctioned at its place of commission. Special extra-territorial competences are provided for public bribery: • In the case of public bribery of a person discharging a public function for the Belgian State, the Belgian judge will be competent, whatever the nationality of the offender or the place of commission of the bribe • In the case of public bribery of a person discharging a public function for a foreign State or an organisation organised under public international law, the Belgian judge will be competent if the person discharging the public function is Belgian or if the international organisation has its seat in Belgium.	Generally, the Czech Criminal Code does not have extra-territorial effect. However, Czech criminal law applies to acts committed abroad **(i)** by a Czech citizen, and/or **(ii)** violating interests protected by the Criminal Code located within the territory of the Czech Republic, and/or **(iii)** aimed against a Czech citizen or a foreigner having permanent residence in the Czech Republic, and/or **(iv)** by a foreign national provided (a) the action is punishable also within the territory where it was committed, (b) the perpetrator was not extradited and (c) a foreign state or other authorized subject that demanded extradition requested that the criminal proceedings take place in the Czech Republic.	The Penal Code has an extra-territorial effect: **(i)** when the offence is committed outside the territory of the French Republic against a French citizen[12]; or **(ii)** when the offender is a French national, and if the conduct is punishable under the legislation of the country in which it was committed[13]. The offence of bribery of public officials of the French Penal Code is also extended to European public officials and foreign public officials[14].

[12] Article 113-7 of the French Penal Code.

[13] Article 113-6 of the French Penal Code.

[14] Articles 435-1 and 435-3 of the French Penal Code.

GERMANY	POLAND	RUSSIA
Generally speaking, the German Criminal Code does not have extra-territorial effect. However, the German bribery provisions apply to acts committed abroad, if there is a link/connecting point to German criminal law. Amongst many possible connecting points/ links in this context the most important one is the perpetrator's German nationality. However, for a corporate liability in Germany a supporting act from German territory can be sufficient.	Generally, the Polish Criminal Code does not have extra-territorial effect. However, Polish criminal law can apply to acts committed abroad if the act is punishable at the place of its commission and if the perpetrator was a Polish national at the time of the act. The Criminal Code extends the application of the bribery provisions to foreign officials.	In certain circumstances Russian anti-bribery laws may have extra-territorial effect. Foreign citizens or stateless persons can be subject to criminal liability for crimes committed outside Russia in certain circumstances. For example, pursuant to certain conventions to which Russia is a party concerning "universal prosecution" of certain crimes (universality principle) or if the crime harms the interests of Russia or a Russian citizen[15]. Likewise, legal entities which committed an administrative offence outside Russia may be subject to Russian administrative sanctions for bribery-related offences in case the offence was directed against the interests of Russia, or if it is envisaged in the relevant treaties or other international obligations binding on Russia, provided that such foreign entity was not held criminally or administratively liable for that offence in a foreign state[16].

[15] Article 12 of the Russian Criminal Code.

[16] Article 1.8 (3) of the Russian Administrative Offences Code.

	BELGIUM	CZECH REPUBLIC	FRANCE
Punishment	For public bribery, the penalty depends on the nature of the solicited act: • Fair act but not subject to salary: 6 months to 1 year of prison and/or €600 to €600,000 fine • Unfair act: 6 months to 2 years of prison and €600 to €150,000 fines • Accomplishment of a criminal offence: 6 months to 2 years of prison and €600 to €300,000 fine • Use of influence: 6 months to 1 year of prison and/or €600 to €600,000 fine The sanctions are aggravated if the bribe is accepted and/or the requested act accomplished. The maximum is doubled if the corrupt person is a policeman or a public prosecutor. Increased sanctions are provided if the bribe concerns an arbitrator, a juror or a judge. Private bribery is sanctioned by imprisonment of 6 months to 2 years and/or a fine of €600 to €60,000. The sanction is aggravated when an agreement has been concluded between the corruptor and the corrupted (maximum of 3 years of prison and maximum fine of €300,000). In addition, the judge can decide on (i) the seizure of the product of the bribe, (ii) loss of some political and civil rights and (iii) professional suspensions/bans.	Corporate entities: a fine between CZK 20,000 and up to CZK 1.46 trillion (approx. €750 – €54 million), depending on the company's financial situation and the gravity of the crime committed. Also, the court may order forfeiture of all assets, individual items or financial benefits gained from the criminal act, or adjudge various prohibitions such as the prohibition to obtain subsidies and grants, or to participate in public tenders. Individuals: (i) passive bribery: imprisonment of up to 12 years; (ii) active bribery: imprisonment of up to 6 years; (iii) solicitation: imprisonment of up to 3 years. In addition, individuals may be sentenced to forfeiture of assets or pecuniary punishment.	Up to 10 years' imprisonment and a fine of €1,000 (or, in some circumstances twice the amount of the benefit obtained by the bribery). Commercial bribery, on the other hand, could lead to up to 5 years imprisonment and a fine of €500,000 (or, in some circumstances twice the amount of the benefit obtained by the bribery)[17]. In addition, those found liable could face[18]: **(i)** Loss of civic, civil and family rights **(ii)** Disqualification of public functions, disqualification from a professional or social activity in the course of which the crime was committed, disqualification from holding directorship of a commercial or industrial enterprise or a commercial company **(iii)** Confiscation of the proceeds of the bribe. If the briber is a company, the maximum amount of the fine is five times that which is applicable to natural persons by the law sanctioning the offence[19]. In this case, the briber could also be sentenced to additional punishment, such as[20]: **(i)** Disqualification of direct or indirect exercise of professional or social activities **(ii)** Placing under judicial provision **(iii)** Exclusion from financial markets **(iv)** Prohibition to proceed to public offerings or prohibition to have its securities admitted to trading.

[17] Articles 445-1 and 445-2 of the French Penal Code.

[18] Articles 433-3, 435-14 and 445-22 of the French Penal Code.

[19] Article 131-38 of the French Penal Code.

[20] Articles 131-9, 433-15, 435-25 and 445-39 of the French Penal Code.

GERMANY	POLAND	RUSSIA
Generally, up to 5 years' imprisonment and/or up to a €10.8 million fine. In certain serious cases, up to 10 years' imprisonment.	Collective subjects: a fine of PLN 1,000 up to PLN 5 million (approx. €230 – €1.2 million), not more than 3% of a company's income in the year when the crime was committed. Also, the court may order forfeiture of items or financial benefits, or adjudge various prohibitions such as prohibition to advertise, obtain subventions and grants or participate in public tenders. Individuals: (i) passive or active bribery of public officials: imprisonment from 6 months to 8 years; (ii) commercial bribery: imprisonment from 3 months to 5 years (penalties are different for specific types of those offences such as the act of lesser gravity). Individuals may be additionally charged with various penalty measures (including disqualification from holding specific posts or performing specific professions) and the forfeiture of items.	Bribery of public officials may lead to criminal sanctions for the giver of the bribe of fines between five and 90 times the bribe amount or imprisonment for up to 12 years combined with a fine; and for the receiver of the bribe—fines between ten and 90 times the bribe amount or imprisonment for up to 15 years combined with a fine[21]. Acting as an intermediary, or otherwise aiding or abetting such bribery, may lead to criminal sanctions of fines between 20 and 90 times the bribe amount or imprisonment for up to 12 years combined with a fine; promising or offering to act as an intermediary may lead to a fine between 15 and 70 times the bribe amount or imprisonment for up to seven years combined with a fine[22]. Commercial bribery of those performing managerial functions in a commercial entity may lead to criminal sanctions for the giver of the bribe ranging from a fine of ten to 70 times the bribe amount to imprisonment for up to six years combined with a fine; for the receiver of the bribe—from a fine of 15 to 90 times the bribe amount to imprisonment for up to 12 years combined with a fine[23]. As a general rule, more severe sanctions apply in the case of organised crime, for large-scale bribery, if the bribe was given/ received for knowingly illegal actions (omissions) or if receiving of a bribe was extorted.

[21] Articles 290 and 291 of the Russian Criminal Code.

[22] Article 291.1 of the Russian Criminal Code.

[23] Article 204 of the Russian Criminal Code.

Incentivising self-reporting

Bribery by its very nature is generally a secret matter. Self-reporting is therefore a useful tool by which the Serious Fraud Office (SFO) can learn of, and take action against, wrongdoing. But what are the incentives for a company to self-report?

By **Jonathan Pickworth**, **Jonah Anderson**, **Deborah Williams**

The total immunity afforded in some cartel cases is unlikely to ever be considered a satisfactory resolution for a company self-reporting bribery. There are some drivers, particularly in the financial services sector, but more could be done to make self-reporting a more attractive option.

What are the potential drivers for a company to self-report?

Exchange of information between regulators

A company which uncovers a suspected bribery scheme may consider making a suspicious activity report (SAR) to the National Crime Agency (NCA) to avoid liability for a money laundering offence. Similarly, a regulated financial services firm which has obligations under Principle 11 of the Financial Conduct Authority's (FCA) Principles for Businesses must deal with its regulators in an open and cooperative way. It must disclose to the appropriate regulator anything relating to the firm of which that regulator would reasonably expect notice. A company may take the view that having reported suspicions regarding bribery to the NCA and/or the FCA, it should raise them directly with the SFO at the same time given the formal gateways for exchange of information between regulators.

16

criminal investigations opened in 2014 – 2015

Source: SFO

A Deferred Prosecution Agreement

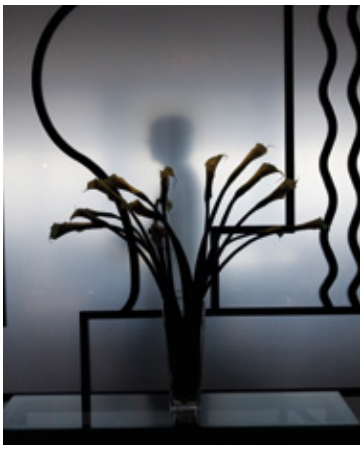
The SFO's view of an optimal outcome of a self-reporting process is currently focused on a company ending up in a DPA process. In addition, the adequate procedures defence has yet to be tested in court. At some point, a company with sufficient financial resources will take the point, and we can expect appellate court guidance on the issue. In the meantime, however, companies may be loath to be the first test case and await judicial guidance as to how effective such a defence may actually be in practice, therefore self-reporting (and a potential DPA) may be an attractive outcome.

Waiting it out is not a pleasant strategy

Doing nothing in terms of self-reporting on the basis the evil day may never come is psychologically difficult for any board. A company wants a contingency plan and some certainty on its future, particularly if there is any likelihood of a future sale or capital raising. Allegations can be made public or come to a regulator's attention via civil litigation, a whistleblower, investigative journalists or the anti-money laundering regime. At that point, any potential credit of making a self-report may be lost.

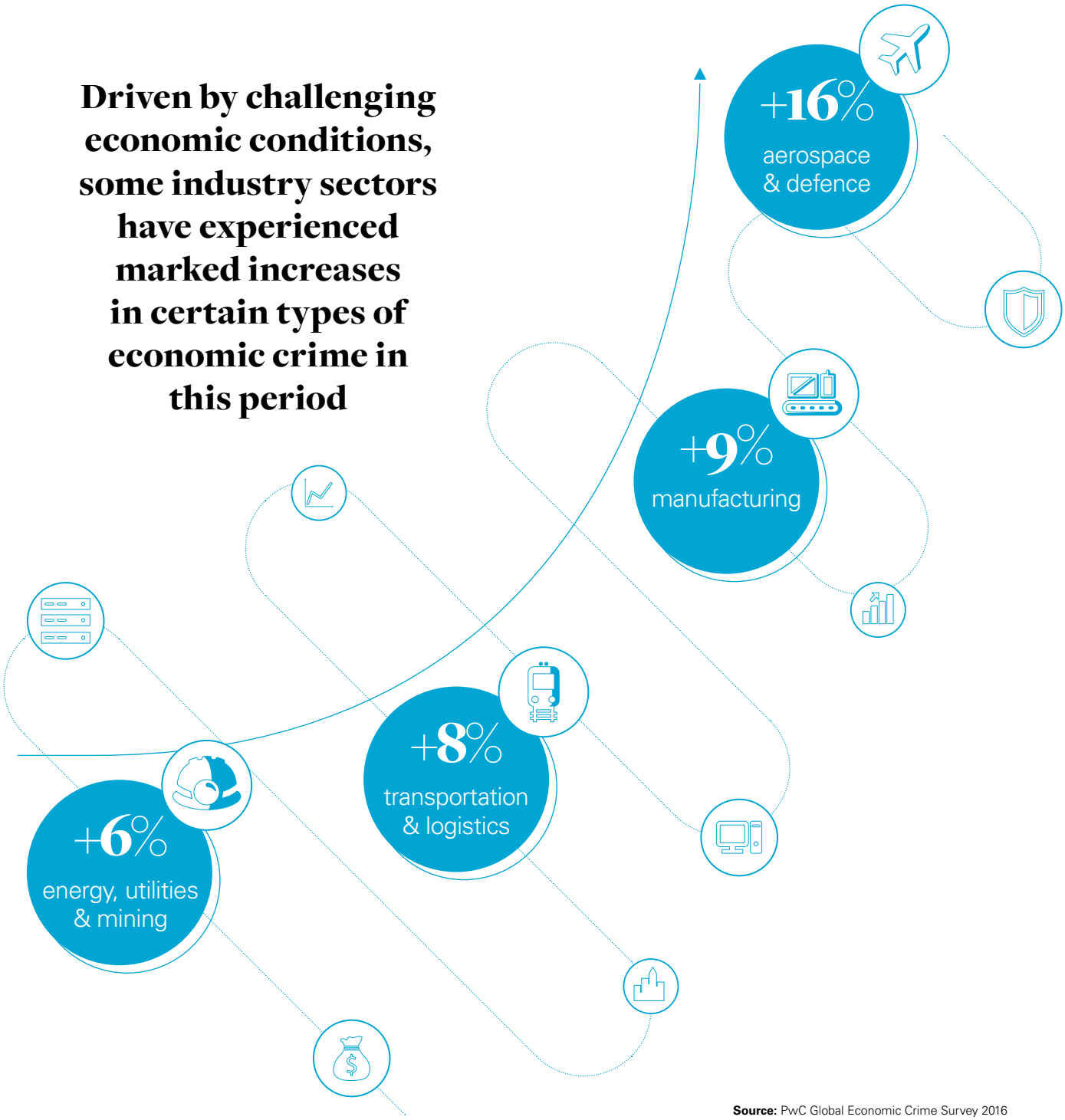
Good corporate citizenship

The value of being a good corporate citizen, balanced against potential damage to the company, is a difficult call to make for any board. In a recent speech, a representative of the SFO referenced potential

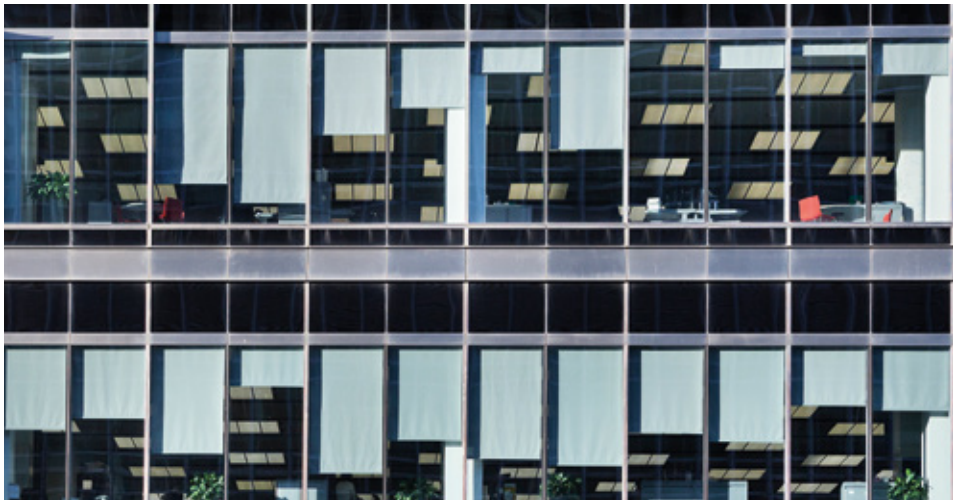


Biggest industry sector rises in the incidence of economic crime in the past 24 months

Driven by challenging economic conditions, some industry sectors have experienced marked increases in certain types of economic crime in this period



Source: PwC Global Economic Crime Survey 2016



"ethical obligations on corporates to self-report" while noting there is no obligation on companies to self-report. The weight given to the potentially nebulous concept of good corporate citizenship in any decision-making process by a company will vary.

Incentivising self-reporting: Moving forward by looking backwards

Self-reporting companies in England, Wales and Northern Ireland previously had the real possibility of achieving a civil settlement under Part 5 of POCA, which created a non-conviction-based civil recovery scheme. Under the tenure of David Green, such civil settlements have fallen out of favour.

One of the key reasons that civil settlements are no longer considered appropriate by the SFO is the judgment in ***R v Innospec***, given by Lord Justice Thomas (as then was) in March 2010, which stated: "Those who commit such serious crimes as corruption of senior foreign government officials must not be viewed or treated in any different way to other criminals. It will therefore rarely be appropriate for criminal conduct by a company to be dealt with by means of a civil recovery order; the criminal courts can take account of co-operation and the provision of evidence against others by reducing the fine otherwise payable. It is of the greatest public interest that the serious criminality of any, including companies, who engage in the corruption of foreign governments, is made patent for all to see by the imposition of criminal and not civil sanctions. It would be inconsistent with basic principles of justice for the criminality of corporations to be glossed over by a civil as opposed to a criminal sanction."

Following this judgment, the SFO entered into five civil settlements with companies while Richard Alderman was Director of the SFO. Since the appointment of David Green as Director, there have been only two civil settlements, one of which involved a company in 2012 and one which involved an individual in 2014. In both cases, the SFO published reasons for entering into the civil settlement in an attempt to bring more transparency to the process. A particular concern for the SFO regarding civil settlements is that an NGO or campaigner may seek to judicially review the civil settlement.

Why treat the Bribery Act differently?

To date, the SFO has not entered into a civil settlement under the Bribery Act and maintains an emphasis on a Deferred Prosecution Agreement as being the preferred alternative to prosecution.

Deferred Prosecution Agreements are not available in Scotland, and the Scottish authorities continue to use civil settlements as a method of incentivising self-reporting regarding bribery. Two civil settlements have been entered into between companies and the Scottish authorities so far, which clearly reference Section 7 of the Bribery Act.

There is merit to the Scottish approach. At a time when there is much pressure on SFO funding, a system that encourages self-reporting—perhaps with the carrot of a civil settlement for the company—would help to shift the financial burden of investigations away from the taxpayer and onto the company. This would not absolve the individuals, but it would allow reformed, co-operating and recalcitrant companies to move on.

> "A system that makes self-reporting an attractive option will bring more transparency to the process and will allow co-operating companies to move forward

International hurdles

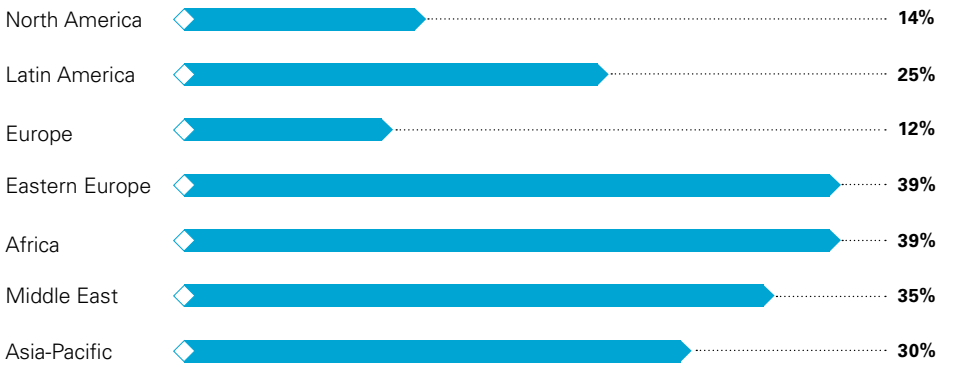
The Serious Fraud Office (SFO) can investigate companies operating both in the UK and overseas, prosecuting bribery wherever the offence takes place, but its efforts are frustrated by international obstacles to investigations and prosecution.

By **Jonathan Pickworth**, **Joanna Dimmock**, **Alexander Davey**

The SFO has spread its wings. It has visibly increased its efforts to investigate companies for bribery and corruption offences and in the last year it has had success with a new weapon: the Section 7 UK Bribery Act offence, which allows the SFO to prosecute companies for failing to prevent bribery. Those who have followed progress in this area will be aware of the guilty plea by Sweett Group to the Section 7 offence for bribery involving payments made by its employees in the Middle East.

Allegations of corrupt behaviour investigated by the SFO are commonly international in nature and, accordingly, as many UK-based companies operate on a global scale, the SFO has been given a passport to prosecute conduct all around the world. However, international conduct brings its own challenges to the SFO and provides obstacles in the way of a successful investigation. Aside from the obvious practical issues—including resources and time, bribery and corruption allegations often occur in jurisdictions considered as high risk or 'red flag'. This provides the SFO with fundamental evidence gathering challenges; primarily mutual legal assistance (the collection of evidence from foreign jurisdictions) and extradition (the prosecution of suspects based in foreign jurisdictions). Self-reporting provides a useful tool for the SFO to overcome some of these hurdles.

Regions reporting experiencing bribery and corruption in the last two years



Source: PwC's Global Economic Crime Survey 2014

Mutual legal assistance (MLA)

The investigation of international conduct forces the SFO to utilise procedurally slow, technical and bureaucratic channels to obtain foreign evidence to bring a prosecution. The obtaining of such evidence depends on the existence of treaties between the UK and the third-party jurisdiction, the effectiveness of international Letters of Request and, of course, political and diplomatic willingness.

The UK is taking measures to promote the global exchange of information in relation to anti-corruption measures, through events such as the international summit hosted by the Prime Minister on 12 May 2016. However, expediting the evidence gathering process through slow and unresponsive bureaucratic channels will not take place overnight and, indeed, commitments made between politicians at an international level do not always easily translate to the practical reality on the ground.

Extradition

Even if the SFO is able to gather sufficient foreign evidence to bring a prosecution, it would be criticised if it only targeted companies. The public demands accountability for criminal acts, presenting the SFO with another dilemma—how do they bring foreign-based individuals into an English courtroom?

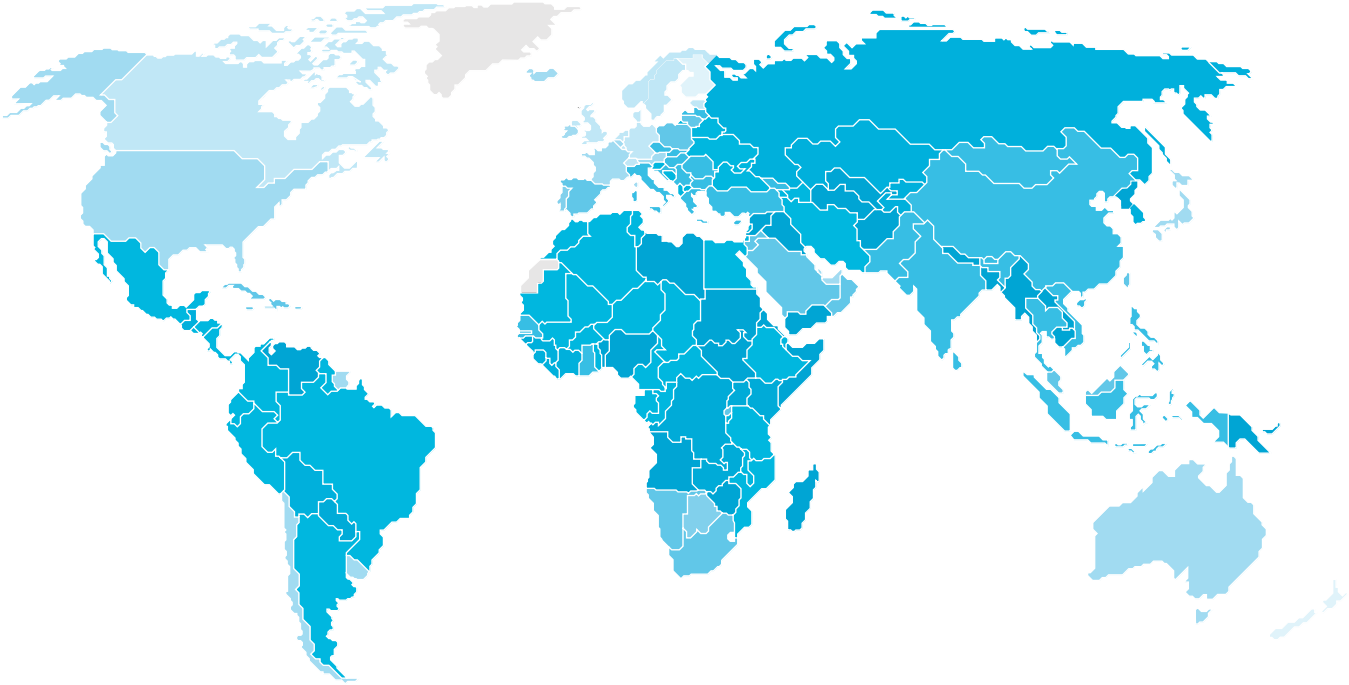
The answer is an extradition process that is frequently long and drawn out. As with MLA, the ability to extradite a person depends on the diplomatic relationship between the UK and the third-party country. Even in respect of the current European Arrest Warrant system, where the process for extradition is supposed to be streamlined, the process can be fraught with procedural pitfalls. By way of example, a number of European jurisdictions, such as Spain and Greece, refuse to extradite their own nationals, whilst others, such as Germany, impose time limits as a bar to extradition.

Both extradition and MLA are an expensive drain on the limited resources of an agency that is consciously aware of its need to benefit from high-profile successes.

The solution: The self-report

The SFO relies upon the threat of

Corruption across the world



Source: http://www.transparency.org/cpi2015#map-container

prosecution for offences of bribery and corruption in order to place pressure upon companies to provide the SFO with a self-report setting out the findings of any wrong-doing within that organisation. The self-report has the dual benefit of additionally providing the SFO with an evidential platform from which to mount a prosecution. It also resolves many of the obstacles the SFO would otherwise face in investigating international conduct.

A self-reporting company will often provide the SFO with the results of internal investigations: evidence (no need for technical MLA requests to foreign jurisdictions that are left unanswered) and witness testimony (no need for Section 2 interviews which carry no weight in respect of persons based outside the UK). The SFO may also use a self-report to push at the door of privilege, and to gain access to international evidence (such as bank accounts, payment data and witness testimony) which could otherwise only be obtained by lengthy MLA requests.

The SFO has removed from its website the guidance that historically confirmed that self-reporting companies would not be prosecuted. Accordingly, the SFO's current policy appears to demand a self-report but, following its receipt, to still consider charges against both the company and individual directors. This policy places the company at considerable risk; it faces the risk of prosecution despite the provision of a self-report which may have strengthened the SFO's position and provide the SFO with a prosecution on a plate, thus arming the SFO with substantive material regarding international conduct. The company, of course, will almost certainly be forced into an admission of liability either by way of guilty plea or DPA, and this, as with Sweett Group, will ensure that the SFO can proceed against individual directors without the need to evidence the foreign bribe itself through complicated MLA powers.

All of the above is achieved without a huge drain on the resources of the agency and guarantees the SFO's public success—at the very least a guilty plea by a company. Certainly a 'win-win' for an international offence investigated without the SFO having to leave their offices at Canada House, let alone the UK.

However, it does leave open the question: what is the real incentive for a company to still self-report?

55%
UK organisations experienced economic crime

Source:
PwC Global Economic Crime Survey 2016

"With many UK companies operating on a global scale, the SFO has a global passport to prosecute bribery wherever the offence takes place

What does the future hold?

UK prosecutor sees Bribery Act offence as a template for fighting other forms of financial crime.

By **Jonathan Pickworth**

The Serious Fraud Office (SFO) would like to extend the strict liability "failure to prevent bribery" offence that is currently encapsulated in Section 7 of the Bribery Act. Its thinking is that this will make its job as a prosecutor much easier when it comes to taking criminal enforcement action against companies. At a time when the United States are shifting towards a greater focus on individuals (as set out in the Yates Memo) why is the UK seeking to move in the opposite direction? And more importantly, to what end?

The hurdle of "directing mind"

The traditional position in English law is that a company cannot be held liable (either civilly or criminally) unless the offending act or omission was taken with the knowledge, or at the direction, of someone who is a "directing mind" of the company. It is already difficult enough for the SFO to secure convictions of individuals—after all, it only deals with the most serious and complex cases of fraud and corruption; it doesn't get many easy wins. But even where the SFO has been able to overcome all of the difficulties that are attendant in a complex fraud or corruption investigation, often spanning several jurisdictions, it then has the additional hurdle of passing the "directing mind" test. This perhaps explains why the SFO has secured very few convictions of corporate entities over the years since it was first formed in 1988.

Is the extension of strict liability wise?

One can see why the SFO would like to make its own life easier. The introduction of a strict liability corporate criminal offence of "failing to prevent financial crime" would certainly help it to achieve that. If such an offence were to mirror the Section 7 Bribery Act offence, then a company would automatically incur criminal liability for the act or omissions of any of its employees, agents or anyone else performing a service on its behalf where such acts or omissions involved any form of financial crime. This could be accounting fraud, tax fraud, false accounting, financial assistance and, of course, money laundering. An offence of this nature—presumably with an "adequate procedures" defence similar to that in the Bribery Act—will increase the compliance burden on companies operating in the UK very considerably. At one level, it is quite right to say that companies operating internationally should in any event take reasonable steps to prevent these forms of crime from being committed. That is not the point in issue. The real question is whether it serves any useful purpose to make companies criminally liable in circumstances where the directing mind test (or anything similar to such a test) is not satisfied.

Philosophically speaking, criminal offences are committed by individuals and not by companies. If, when wrongdoing is uncovered, companies are encouraged to come forward, and where appropriate action is taken against the individual wrongdoers, what useful purpose is served by taking criminal enforcement proceedings against the company itself? Such matters inevitably take a long time to come to fruition given that the average timescale of an SFO investigation and prosecution is four to six years. Who suffers when a company is prosecuted? Those that lose out are not the long-gone individual perpetrators of the alleged offence, but (often many years after the offence has been committed), it will be the current employees, shareholders (perhaps your pension fund) and customers who lose out. Of course where a company is found to be "rotten to the core" (as may from time to time be the case), or where it has simply failed to address any wrongdoing that it has uncovered, then the public interest would be well served by prosecuting the company. But in such circumstances, the directing mind test is unlikely to present an insurmountable hurdle to the prosecution.

For the majority of cases though, making it easy to prosecute companies is neither sensible nor should it be this Government's objective. Appropriate encouragement for companies to self-report without fear of being prosecuted will by contrast help satisfy the real public interest.

60%

Committed fraud in the UK by external perpetrators

Source: PwC Global Economic Crime Survey 2016

31%

Committed fraud in the UK by internal perpetrators

Source: PwC Global Economic Crime Survey 2016

> **"The real question is whether it serves any useful purpose to prosecute companies in circumstances when the 'directing mind' test is not satisfied**

WHITE & CASE

Jonathan Pickworth
Partner, London
T +44 20 7532 1663
E jonathan.pickworth@whitecase.com

Darryl Lew
Partner, Washington, D.C.
T +1 202 626 3674
E dlew@whitecase.com

Nathalie Colin
Partner, Brussels
T +32 2 2392 532
E ncolin@whitecase.com

Luděk Chvosta Snr.
Partner, Prague
T +420 255 771 201
E lchvostasr@whitecase.com

Ludovic Malgrain
Partner, Paris
T +33 1 5504 1525
E lmalgrain@whitecase.com

Karl-Jörg Xylander
Partner, Berlin
T +49 30 880911 950
E kxylander@whitecase.com

Michał Subocz
Partner, Warsaw
T +48 22 5050 113
E msubocz@whitecase.com

Igor Ostapets
Partner, Moscow
T +7 495 787 3019
E iostapets@whitecase.com

whitecase.com