THE ANTI-BRIBERY AND ANTI-CORRUPTION REVIEW

Tenth Edition

Editor
Mark F Mendelsohn

THE LAWREVIEWS

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TENTH EDITION

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PREFACE

The covid-19 pandemic has had a monumental and disruptive effect on practically all aspects of business, politics, law and daily life in nearly every corner of the globe. For companies conducting cross-border business, and legal practitioners who advise them, corruption remains a substantial risk area. And with national governments engaging in large-scale economic stimulus programmes and contracting on an emergency basis with a wide range of suppliers of critical goods and services, the opportunities for fraud, corruption and abuse are replete. The current global health crisis unfolded onto a world stage that is dynamic and roiling with anti-corruption activity and developments. This tenth edition of *The Anti-Bribery and Anti-Corruption Review* presents the views and observations of leading anti-corruption practitioners in jurisdictions spanning the globe, including a new chapter covering Portugal. The comprehensive scope of this edition of the Review mirrors that dynamism.

Over the past two years, countries across the globe have continued to investigate and prosecute a range of corruption cases – many involving heads of state and senior officials – strengthen their domestic anti-bribery and anti-corruption laws, and adopt important new law enforcement policies and guidance documents, though tumultuous international relations, rising economic competition and the effects of the pandemic are combining to threaten international cooperation and the progress of cross-border investigations more generally.

2020 saw French-headquartered Airbus SE reach a US$3.9 billion coordinated corporate bribery and export controls resolution with authorities in France, the United Kingdom and the United States. The wide-ranging allegations involved alleged bribery of government officials in more than a dozen countries, as well as US export controls-related offences, and now other jurisdictions from Ghana to Malaysia are pressing forward with their own investigations. At the same time, the 1MDB scandal continued to play out, with still further US asset forfeiture actions, criminal charges against a major US Republican fundraiser for allegedly acting as an unregistered foreign agent in an attempt to illegally lobby the Trump administration to drop its probe into the 1MDB corruption scandal and an appeal by former Malaysian prime minister Najob Razak against his convictions on bribery and money-laundering charges and the resulting 12-year prison term. And in Brazil, which has for many years been a hotbed of anti-corruption investigations, President Jair Bolsonaro took the controversial step of ending his country's long-running Car Wash probe, following the resignation of his justice minister who, as judge, had previously presided over the probe.

Given the political turmoil and the global health crisis still confronting us in the remainder of 2021 and into 2022, this book and the wealth of country-specific learning that it contains will help guide practitioners and their clients when navigating the perils of

corruption in foreign and transnational business, and in related internal and government investigations. I am grateful to all of the contributors for their support in producing this highly informative volume.

Mark F Mendelsohn
Paul, Weiss, Rifkind, Wharton & Garrison LLP
Washington, DC
November 2021

Chapter 7

ENGLAND AND WALES

Tim Bowden, Roger A Burlingame, Matthew L Mazur and Tom Stroud[1]

I INTRODUCTION

This year marked the 10th anniversary of the introduction of the Bribery Act 2010. Deferred Prosecution Agreements (DPAs) followed in the Crime and Courts Act 2013, and the two in combination have redrawn the UK anti-corruption enforcement landscape.[2]

In recent years, that landscape has been defined by the Serious Fraud Office (SFO) repeatedly and increasingly using DPAs to resolve allegations of bribery and corruption against corporates (often in multi-jurisdictional investigations involving multiple enforcement agencies), while failing to effectively prosecute individuals for the same conduct.

Heading into 2022, UK prosecutors will be seeking to address that problem to maintain a position in the first rank of active enforcers of bribery offences. To that end, the SFO has demonstrated an increasing willingness to use the broad extraterritorial reach of the Bribery Act to pursue cases which span the globe – a trend that will continue.

Effectively navigating bribery and corruption investigations requires an appreciation of the nuances of the legal and enforcement regime in the UK, including important recent developments such as the Supreme Court's clarification of the limit of the SFO's investigative powers with respect to foreign companies, the ongoing review into proposed changes to corporate liability laws and the emerging impact of Brexit.

It is also critical to note that bribery investigations often involve authorities from more than one country, and it has never been more important to understand how enforcement practices in the UK compare, contrast and coordinate with the expectations of major anti-corruption enforcers in other jurisdictions, in particular the US Department of Justice (DOJ), which remains an active presence in the UK (and globally).

II DOMESTIC BRIBERY: LEGAL FRAMEWORK

The Bribery Act contains three offences applicable to domestic bribery in both the public and private sectors:

a bribing another person (Section 1);
b receiving a bribe (Section 2); and
c the corporate offence of failure to prevent bribery (Section 7).

---

1 Tim Bowden, Roger A Burlingame and Matthew L Mazur are partners and Tom Stroud is an associate at Dechert LLP.

2 When discussing 'UK enforcement' practices in this chapter, the authors are principally discussing enforcement in England and Wales. The SFO's remit covers England, Wales and Northern Ireland, but not Scotland, the Isle of Man or the Channel Islands.

These offences all apply equally to foreign and domestic bribery. The key features of the main Bribery Act offences, along with the rules applicable to corporate liability and jurisdiction, are covered in detail in Section IV.

The Bribery Act applies to conduct that took place on or after 1 July 2011; conduct occurring prior to this date is prosecuted under pre-existing laws dating back to the turn of the 20th century.[3] The maximum penalties for Bribery Act offences are the same for domestic and foreign bribery: for corporates an unlimited fine, and for individuals a maximum sentence of 10 years' imprisonment, an unlimited fine, or both.[4] Under pre-existing bribery laws, the maximum sentence available is seven years' imprisonment, an unlimited fine, or both.[5]

III ENFORCEMENT: DOMESTIC BRIBERY

Enforcement of domestic bribery has tended to focus on lower-level bribery offences committed by individuals. This type of conduct has primarily been investigated by specialist police units and prosecuted by the Crown Prosecution Service (CPS). Examples of cases conducted by the CPS include the prosecution of corrupt football agents for bribes paid to the coach of an English football club.[6]

Serious and complex bribery and corruption, often with an international component, is investigated and prosecuted by the SFO. Nevertheless, there have been several high-profile domestic bribery cases investigated by the SFO. The SFO's use of DPAs is discussed in detail in Section VI. Of the 12 DPAs concluded thus far by the SFO, only the two most recent (concluded in July 2021) related to domestic bribery. In August 2021, the SFO charged five individuals in relation to the suspected payment of bribes to win contracts within the UK construction sector.[7]

Domestic corporate prosecutions under the Bribery Act have been extremely rare, with the sole prosecution (by the CPS) coming in 2018 when Skansen Interiors Limited was convicted of failing to prevent bribery (under Section 7 Bribery Act). The CPS has certainly been a more prolific prosecutor than the SFO: from 2013 to 2020 the CPS secured over 60 convictions for Bribery Act offences, whereas from July 2011 to March 2020 the SFO secured only four convictions under Sections 1 and 2 Bribery Act (for domestic or foreign bribery).[8] This, however, reflects the number and complexity of cases falling within the responsibility of each agency.

3 The Prevention of Corruption Act 1906, the Public Bodies Corrupt Practices Act 1889 and the common law offences of bribery and accepting a bribe.

4 Section 11, Bribery Act 2010.

5 Section 1, Prevention of Corruption Act 1906; Section 2, Public Bodies Corrupt Practices Act 1889.

6 www.cps.gov.uk/cps/news/former-barnsley-fc-assistant-head-coach-and-two-corrupt-football-agents-sentenced-bribery.

7 www.sfo.gov.uk/2021/08/17/serious-fraud-office-charges-five-persons-with-bribery-and-money-laundering/.

8 CPS June 2021 response to Freedom of Information Act request by Dechert LLP; www.sfo.gov.uk/foi-request/2020-040-bribery-act-2010/.

IV FOREIGN BRIBERY: LEGAL FRAMEWORK

Both UK and foreign corporates must be alive to the broad jurisdictional reach of the Bribery Act. The introduction of the Section 7 'failure to prevent bribery' offence provides a quasi-strict liability route to corporate liability and, critically, extends jurisdictional reach to foreign-incorporated companies that conduct part of their business in the UK (even in circumstances where all the relevant features of the corrupt conduct occurred outside the UK).

i What offences and defences are applicable to foreign bribery?

The Bribery Act contains one offence specifically targeted at foreign bribery: the offence of bribing a foreign public official (Section 6). Sections 1, 2 and 7 also apply to foreign bribery and provide broad coverage of both public and private overseas corruption.

Section 1 and Section 6 both concern, directly or through a third party, the offer, promise or giving of any financial or other advantage with a specified intention. The key difference is that for Section 1 the briber's intention must relate to inducing or rewarding the 'improper performance' of a relevant function or activity (by a private person or public official), whereas under Section 6 the intention need only be to influence an official in their capacity as a foreign public official (while intending to obtain or retain business or a business advantage).[9] This reflects the impropriety of public officials receiving additional benefits at all as a result of their official position.

Under Section 7 a commercial organisation (i.e., a company or partnership – the offence is not applicable to natural persons) is guilty of an offence where it can be shown that a person associated[10] with the company (e.g., an employee, agent or subsidiary) bribes another person intending to obtain or retain business or a business advantage for the company.[11] The unique jurisdictional and corporate liability features of this offence are discussed further in subsections (ii) and (iii) below. A defence is available to the Section 7 offence if it can be shown that the organisation had in place adequate procedures designed to prevent bribery. UK guidance on what qualifies as adequate procedures is covered in Section X.

Are payments through third party intermediaries caught under the Bribery Act?

Payments via third parties still result in liability under the Bribery Act – both the instigator and the intermediary will be guilty of the relevant offence under Section 1 or 6 if they have the requisite intent.

Notably, under Section 7, a bribe paid by an intermediary results in the company being liable if the intermediary performs services for or on behalf of the company and bribes another person with an intention to obtain or retain business or a business advantage for the company. This may result in a company being held liable in circumstances where no company employee intended that a bribe be paid, or was aware of the intermediary's corrupt actions. Liability may arise even where an intermediary is explicitly instructed not to act corruptly,

9 It is a defence to the Section 6 offence to show that the foreign public official is permitted or required to be so influenced under the written laws of the relevant country (Section 6(3)(b), Bribery Act 2010).

10 A person who performs services for or on behalf of the commercial organisation (Section 8(1), Bribery Act 2010).

11 An 'associated' person bribes another person if they are, or would be, guilty of an offence under Section 1 or Section 6 (the associated person need not be prosecuted for Section 7 to be engaged) (Section 7(3)(a), Bribery Act 2010).

if adequate procedures to prevent corruption were not in place. This only goes to reinforce the importance of implementing appropriate due diligence and compliance procedures when engaging agents or other intermediaries for organisations falling within the jurisdiction of the Bribery Act (see Section X for further detail).

ii In what circumstances can a company be liable for foreign bribery?

The general laws of corporate liability in England and Wales rely on the 'identification principle', under which a corporation can only be liable for a criminal offence if a 'directing mind and will' of the company (i.e., a very senior individual or group of individuals) has committed the offence in question.[12] These requirements apply if a corporation is to be convicted of offences under Sections 1, 2 and 6 of the Bribery Act, or under the previous law.

Section 7 sidesteps the difficulties of the identification principle and provides prosecutors with an easier route to corporate liability. There is no requirement for the offence to have been committed by senior management and liability can flow from the corrupt act of any associated person, however junior or remote to senior management. Section 7 thus imputed corporate liability for bribery by low-level employees, as well as third parties who provide services for or on behalf of the company.

iii The broad extraterritorial jurisdiction of the Bribery Act

The jurisdictional reach of Sections 1 and 6 Bribery Act, which can be used to prosecute individuals as well as companies (subject to the identification principle), is wide and can apply to actions taken entirely outside the UK if the person committing the offence has a close connection with the UK (covering British citizens, individuals ordinarily resident in the UK and UK companies).

The extraterritorial reach of Section 7 is broader even than that of Sections 1 and 6. The Section 7 offence applies to a 'relevant commercial organisation', which includes, in addition to a UK company or partnership, any other body corporate (wherever incorporated)[13] that 'carries on a business, or part of a business' in the UK.[14] Provided an organisation falls within the definition of a 'relevant commercial organisation', UK jurisdiction will apply regardless of whether the acts relevant to the corruption offence take place entirely abroad.[15] The Ministry of Justice (MoJ) set out the intention of the approach as being able to catch 'a bribe paid in Sweden, by a Philippine national on behalf of a Brazilian engineering company, that carries on a lift maintenance business in the UK, in respect of a contract relating to an infrastructure project in New Zealand'.[16]

12 In practice, the identification principle means that a company cannot be prosecuted for the actions of a low or mid-ranking employee with no control over the company's affairs. Recent case law indicates that, in certain circumstances, even the very senior management of a company (i.e., the CEO or chairman) may not be the 'directing mind and will' where the function in question requires the sign off of the entire board or relevant committee (*Serious Fraud Office v. Barclays plc* [2018] EWHC 3055 (QB)).

13 Or partnership (wherever formed).

14 Sections 7(5)(b) and (d), Bribery Act 2010.

15 The associated person does not need to have a 'close connection' with the UK, as is required for the Section 1 and Section 6 offences (Section 7(3)(b) Bribery Act 2010), and it does not matter where in the world the associated person commits the offence. See also 'Bribery Act 2010: Joint Prosecution Guidance of The Director of the Serious Fraud Office and The Director of Public Prosecutions'.

16 MoJ post Legislative Scrutiny Memorandum (2018), para. 58.

In light of the above, foreign corporates should consider whether they could be viewed as 'carrying on a business or part of a business' in the UK. Whether a foreign company can be regarded as carrying on a business or part of a business in the UK is to be answered by applying a 'common sense approach'.[17] There has been a general dearth of case law in interpreting the meaning of this phrase, but it is generally accepted that this will depend on the extent to which a foreign company exercises control over its UK subsidiary or business.[18]

iv Facilitation payments and gifts and entertainment

Facilitation payments are considered bribes under the Bribery Act. UK government guidance does recognise the problems that certain organisations will face in parts of the world where facilitation payments are common and prosecutorial discretion will apply in determining whether it is in the public interest to prosecute facilitation payment offences.[19]

With respect to gifts and entertainment, MoJ guidance states 'rest assured – no one wants to stop firms getting to know their clients by taking them to events like Wimbledon or the Grand Prix'.[20] Bona fide hospitality, promotional and other business expenditure that seeks to improve a company's image, better present products and services or establish cordial relations is 'recognised as an established and important part of doing business'. However, there are certain circumstances in which disproportionate gifts and entertainment can be considered bribes. Guidance indicates that the more lavish the hospitality and the higher the expenditure on travel, accommodation and other business expenditure, the greater the inference that it is intended to influence a person to grant business in return.[21]

V ASSOCIATED OFFENCES: FINANCIAL RECORD-KEEPING AND MONEY LAUNDERING

i Money laundering

The Proceeds of Crime Act 2002 prohibits all manner of acts in furtherance of money laundering – concealing, disguising, converting, transferring, removing, acquiring using or possessing criminal property, and entering into arrangements to facilitate such acts – and also creates liability for failing to disclose suspicions of money laundering for entities within

17 MoJ Bribery Act Guidance (2011), para. 36: (a) the Government would not expect the mere fact that a company's securities have been admitted to trading on the London Stock Exchange, in itself, to qualify the company as carrying on a business or part of a business in the UK; and (b) having a UK subsidiary will not, in itself, mean that a parent company is carrying on a business in the UK, since a subsidiary may act independently of its parent or other group companies.

18 *Akzo Nobel NV v. Competition Commission & Ors v. Metlac Holding SRL* [2014] EWCA Civ 482 interpreted the meaning of 'carrying on business' in the UK in a competition law context and could be viewed as persuasive in the context of interpreting the meaning under Section 7 Bribery Act. The UK Court of Appeal upheld a decision of the Competition Appeal Tribunal which held that Akzo Nobel NV, a Dutch registered company, carried on business in the UK as its management structure showed that its participation in the activities of its subsidiaries, including those in the UK, was extensive and included the approval of operational decisions.

19 MoJ Bribery Act Guidance (2011), paras. 44–47.

20 MoJ Bribery Act Guidance (2011), page 2.

21 MoJ Bribery Act Guidance (2011), para. 27.

the 'regulated sector'.[22] The 'regulated sector' broadly encompasses financial services firms regulated by the Financial Conduct Authority (FCA) (the UK's financial conduct regulator), as well as professional services firms such as accountants and lawyers, among others.[23] Bribery and other financial crimes are predicate offences under money laundering legislation; dealing or otherwise being involved with the proceeds of corruption may therefore engage UK money laundering offences and disclosure obligations.[24] There are also specific due diligence and systems and controls requirements for 'relevant persons' under the Money Laundering Regulations 2017 (MLR 2017).[25] It should be expected that any investigation into allegations of corruption will also involve a money laundering or proceeds of crime investigation.

ii Financial record-keeping

UK law criminalises false accounting[26] and the UK statute book contains various offences that can be committed by companies that fail to implement adequate accounting records processes.[27] Liability may therefore follow where the purposes of payments are misdescribed or concealed in accounts.

VI ENFORCEMENT: FOREIGN BRIBERY AND ASSOCIATED OFFENCES

Companies and individuals navigating the enforcement terrain in the UK must be aware of the practices and expectations of the SFO. Since the introduction of DPAs in 2014, the SFO has prioritised the resolution of significant corporate foreign bribery investigations with DPAs, with considerable success. However, this has not so far translated into corresponding success in prosecuting individuals relating to the same misconduct.

i What investigative powers does the SFO have at its disposal?

The SFO's primary investigative powers are found in Section 2 of the Criminal Justice Act 1987 and are used with respect to foreign and domestic bribery cases. In addition to the power to obtain warrants to search premises and seize materials, Section 2 provides for two powers that the SFO may exercise once it has formally accepted a case for investigation:[28]

22 The primary money laundering offences are found in Sections 327–329 Proceeds of Crime Act 2002 (POCA 2002) and the secondary failure to disclose offences are found in Sections 330–332 POCA 2002. The requirement to disclose is engaged by knowledge or suspicion of money laundering, as well as 'reasonable grounds for knowing or suspecting', which introduces an objective element into the legislation.

23 See Schedule 9 POCA 2002.

24 If operating in the regulated sector, failure to make a disclosure to UK authorities may result in criminal liability. Disclosures (known as 'Suspicious Activity Reports') are made to the Financial Intelligence Unit (FIU) with the National Crime Agency (NCA).

25 'Relevant persons' – covering similar categories of firms, including financial institutions and professional services firms – are subject to the MLR 2017, which require firms to conduct due diligence and implement appropriate systems and controls to prevent money laundering. Regulation 8, MLR 2017 defines 'relevant persons'. It is a criminal offence to breach a relevant MLR 2017 requirement (regulation 86(1), MLR 2017).

26 Section 17, Theft Act 1968.

27 See, for example, Section 387 of the Companies Act 2006.

28 With respect to bribery and corruption, Section 2 powers are also exercisable at the pre-investigation stage for the purposes of determining whether to commence an investigation into offences under Section 1, 2 or 6 of the Bribery Act 2010 (see Section 2A, Criminal Justice Act 1987).

a powers to compel persons to attend an interview with the SFO to answer questions or otherwise furnish information (Section 2(2)); and

b powers to compel persons to produce documents or any other information to the SFO (Section 2(3)).[29]

Failing to respond to these powers or providing misleading information in response to them is a criminal offence, although certain safeguards apply. A Section 2 notice cannot be used to obtain material subject to legal professional privilege, and while there is no right to silence in respect of the Section 2(2) interview powers, the answers provided cannot be used in a prosecution of the interviewee for the offence under investigation.[30] Section 2(2) powers are therefore primarily used to obtain evidence from potential witnesses who are not suspects in the investigation.

Whether the SFO's powers under Section 2(3) were intended to have extraterritorial application has long been a matter of discussion. In February 2021, the Supreme Court unanimously ruled that the SFO could not force a foreign company to hand over material that it holds abroad through a Section 2(3) notice. The Supreme Court's decision does not affect the SFO's ability to compel UK companies to produce documents under their care and control that are held overseas. The decision also did not address whether a Section 2(3) notice could be validly served on a foreign company that carried on business or had a registered office in the UK.[31] This leaves open an argument that a Section 2(3) notice could be validly served on a foreign company with a greater UK presence, but it can be anticipated that the SFO may increasingly rely on the promised benefits of cooperation to encourage voluntary disclosure, along with a quicker recourse to mutual legal assistance requests.

ii The SFO's use of deferred prosecution agreements

Understanding the benefits and drawbacks of the DPA regime is critical for companies facing a possible SFO investigation into corruption. A DPA is an agreement between the prosecutor[32] and an organisation under which the organisation can avoid prosecution if it complies with the terms of the agreement, which typically include disgorging any profits, paying a financial penalty, resolving to make compliance and remediation enhancements, and cooperating with any ongoing investigations.[33]

DPAs provide for a lower evidential bar than securing a conviction against a defendant at trial, a feature that enables cases to be disposed of more quickly and with greater certainty for both prosecutor and potential corporate defendant. A case may be capable of resolution through a DPA before all the evidence required for a consideration of whether to charge is

29 The powers require information to be provided at either a specified time or place, or 'forthwith'; the powers can therefore be used as 'here and now' powers when there is a reason for information to be provided immediately.

30 Answers provided in a Section 2 interview can, however, be used to prosecute an individual for false or misleading responses in a Section 2 interview (see Section 2(8) and 2(14), Criminal Justice Act 1987).

31 According to the judgment, KBR Inc (a US incorporated company) had never carried on business, had a registered office, or any other presence in the UK.

32 DPAs are available to the SFO and CPS, but have to date only been used by the SFO.

33 Under a DPA the prosecutor agrees to institute proceedings (by preferring a bill of indictment), which are then automatically suspended for the duration of the DPA (Paras. 1 and 2, Schedule 17, Crime and Courts Act 2013). If the DPA remains in force until its expiry, the proceedings instituted by the prosecutor are discontinued (Para. 11, Schedule 17, Crime and Courts Act 2013).

assembled – a particularly time-consuming process where evidence from abroad is required.[34] The SFO must also be satisfied that the DPA is in the public interest, taking into account factors such as the seriousness of the offence, any history of misconduct, the organisation's cooperation with the SFO and compliance and remediation changes implemented by the organisation. The proposed DPA must also be judicially approved, with the Court considering for itself whether the DPA is indeed in the interests of justice, and that its terms are fair, reasonable and proportionate.[35]

It is easy to see why DPAs are an attractive proposition for the SFO (which can avoid the inherent difficulties of securing a conviction at trial), but why would a company want to secure a DPA? Many companies prize finality and the ability to move on highly, especially when compared with the prospect of several years of uncertain proceedings and a public trial. Reputational damage can therefore be minimised, and the required compliance and remediation steps, and improvement in culture, can be a positive benefit. Crucially, DPAs provide for the ultimate financial penalty payable by a company to be reduced by up to 50 per cent.[36] DPAs also enable companies to mitigate public debarment risks, which can have a catastrophic effect on businesses which rely on public contracts.[37]

Securing a DPA

For a company looking to secure a DPA, two critical requirements are cooperation with the SFO's investigation and taking appropriate compliance and remediation measures.

Recent DPAs have confirmed that self-reporting is not a prerequisite to obtaining a DPA, but it is clear that if a company does not self-report, then it must cooperate significantly with the SFO to warrant a DPA (in the *Rolls-Royce* DPA the company's subsequent cooperation was described as 'extraordinary' and offset the absence of a self-report). The SFO has specific expectations with respect to cooperation and expects companies to adopt a 'genuinely proactive approach' to the SFO investigation.[38] For example, cooperation will include identifying relevant witnesses and disclosing their accounts (the SFO expects

34 For a conviction, a jury must be sure that the defendant is guilty, whereas the evidential test under a DPA only requires either: (1) sufficient evidence for a realistic prospect of conviction; or (2) if the test in (1) is not met, a reasonable suspicion of the commission of the offence in circumstances where continued investigation would satisfy the test in (1).

35 See paras. 7 and 8, Crime and Courts Act 2013.

36 Under applicable legislation (Section 5(4), Schedule 17, Crime and Courts Act 2013), the financial penalty under a DPA should be broadly comparable to a fine that the Court would have imposed upon the company following a guilty plea (i.e., a one third reduction in penalty). The UK Court however retains a discretion to discount further and to date the maximum discount granted has been 50 per cent (see discussion in the *Rolls-Royce* DPA).

37 A conviction for a substantive bribery offence (i.e., Section 1, 2 or 6 Bribery Act, or pre-Bribery Act) results in mandatory debarment from public contracts; a conviction for a Section 7 Bribery Act offence would also be a ground for a public authority to discretionarily debar a company (Section 57(1), Public Contracts Regulations 2015). It is possible to avoid mandatory or discretionary debarment if the company can show that it has 'self-cleaned' (i.e., made positive compliance changes). DPAs are not considered convictions and therefore a company that enters into a DPA will not be subject to the mandatory debarment provision; DPAs may still result in discretionary debarment, although the presence of a DPA (which often includes measures to improve compliance and remediation) may help satisfy the self-cleaning provisions under UK legislation (Section 57(13)-(17), Public Contracts Regulations 2015).

38 These are principally set out in the DPA Code of Practice and SFO Corporate Cooperation Guidance. The SFO also has released a section of its Handbook providing guidance on DPAs.

a company to 'disclose any recording, notes and/or transcripts of the interview').[39] In addition, the SFO has particular requirements with respect to the preservation and provision of investigation material.[40] Corporates conducting investigations in cases where the SFO may exercise jurisdiction should be aware that actions taken during the early stages of an investigation may jeopardise the cooperation credit available to the company down the line under a prospective DPA.

Compliance and remediation measures, which may include removing implicated individuals, changing senior management and strengthening of the compliance function, are now a significant feature of all DPAs and weigh heavily in the SFO's decision to enter into a DPA (and the Court's subsequent decision as to whether to approve the DPA). Where the conduct has been pervasive rather than isolated, the company may be called upon to demonstrate that it is fundamentally changing its business culture.

To date there have been 12 DPAs concluded by the SFO. Of these, nine have related to bribery and corruption offences and each has included at least one Section 7 Bribery Act offence.[41] The past year has seen the SFO enter into DPAs with Airline Services Limited and Amec Foster Wheeler relating to foreign bribery offences.

iii Prosecutions

Since the advent of DPAs, SFO corporate prosecutions for foreign bribery have been few and far between. This year a notable exception was the guilty plea of GPT Special Project Management Limited to a single pre-Bribery Act offence, under which GPT agreed to pay £28 million plus costs in relation to contracts awarded to GPT in respect of work carried out for the Saudi Arabian National Guard. The SFO also announced in September 2021 that Petrofac Limited, an oil and gas company, intended to plead guilty to offences of failing to prevent bribery between 2011 and 2017.[42] This is an indicator that the SFO will continue to pursue corporate prosecutions in cases where it believes that companies have not satisfied the requirements for entering into a DPA.

The SFO has secured a number of convictions of individuals in foreign bribery cases in recent years, including in connection with investigations into Unaoil and SBM Offshore. The SFO is, however, still to achieve a single conviction in relation to an individual connected to the corporate misconduct covered by a DPA. DPAs contain a lower evidential burden than a criminal prosecution, so it is to be expected that not every DPA will lead to a successful prosecution. It may also be appropriate for some individual defendants to be tried in other jurisdictions in respect of conduct which crosses national boundaries. However, some critics have claimed that the commercial benefits of DPAs may prompt companies to settle weak evidential cases that would not stand up to rigorous examination in court.

39 Para. 2.8.2(i), DPA Code of Practice; see also 'Witness Accounts and Waiving Privilege', SFO Corporate Cooperation Guidance.

40 See 'Preserving and Providing Material', SFO Corporate Cooperation Guidance.

41 A number of DPAs have also included pre-Bribery Act offences due to the conduct having occurred before the enactment of the Bribery Act 2010.

42 www.sfo.gov.uk/2021/09/24/sfo-charges-petrofac-with-failure-to-prevent-bribery-offences/.

UK and US enforcement – parallels and tensions

The UK Bribery Act and the US Foreign Corrupt Practices Act 1977 (FCPA) both have an extensive extraterritorial reach and in many cases will capture broadly the same corrupt conduct. Companies and individuals subject to UK jurisdiction under the Bribery Act must therefore be alive to interest from US anti-corruption authorities that maintain a strong track record of both corporate enforcement and individual prosecutions. President Biden's June 2021 national security memorandum signalled that fighting global corruption is a national security priority under his administration,[43] and earlier this year officials confirmed that coordinated resolutions with foreign agencies are a key priority for the DOJ.[44]

Multi-jurisdictional DPAs in the UK are increasingly common and a number of the DPAs concluded so far have involved the DOJ, along with increasingly assertive enforcement authorities in France and Brazil. Corporates cannot simply comply with the standards of a single authority and must instead navigate a complex web of sometimes contradictory laws and expectations. Where other prominent global enforcers of anti-corruption laws are involved – such as the French Parquet National Financier (PNF) – this only adds to the complexity.

While there are many similarities between UK and US enforcement practices and standards, there are a number of important differences. For example, in the US, attorney–client privilege will generally apply to lawyers' interview memoranda, whereas such notes will generally not be covered by legal advice privilege in England and Wales. The expectations of the SFO and DOJ with respect to waiving privilege also differ: the DOJ Corporate Enforcement Policy states that 'eligibility for cooperation or voluntary self-disclosure credit is not in any way predicated upon waiver of the attorney–client privilege or work product protection', whereas the SFO views the waiver of privilege over certain material (including interview notes) as a 'strong indicator of cooperation'.[45]

There are also differences in the legal approach to issues such as facilitation payments, which are illegal in the UK but not in the US.[46] Importantly, under the US law doctrine of *respondeat superior*, a company can be criminally liable for the acts of low-level employees acting within the scope of their employment; for the majority of English law criminal offences a company cannot be criminally liable for the actions of low-level employees, with the notable exception of Section 7 Bribery Act. While there is no equivalent adequate procedures defence under US law, the US framework does provide for a 'leniency' programme under which compliance enhancements may be considered positively by the DOJ in deciding on an appropriate course of action against a company.

The US is perceived as a more effective and active anti-corruption enforcer against individuals for overseas bribery. The SFO did not charge any individuals following the *Rolls-Royce* DPA, whereas the DOJ charged a number of Rolls-Royce executives and employees, describing the charging decisions as highlighting its 'commitment to holding

43 www.whitehouse.gov/briefing-room/presidential-actions/2021/06/03/memorandum-on-establishing-the-fight-against-corruption-as-a-core-united-states-national-security-interest/.

44 https://globalinvestigationsreview.com/just-anti-corruption/anti-corruption/fcpa-enforcement-officials-share-top-priorities-2021.

45 www.sfo.gov.uk/2019/04/03/fighting-fraud-and-corruption-in-a-shrinking-world/; while the SFO Corporate Cooperation Guidance states that companies will not be penalised for not waiving privilege, a company that does not do so will 'not attain the corresponding factor against prosecution that is found in the DPA Code'.

46 A specific exception for certain types of facilitation (or 'grease') payments is provided for under the FCPA.

individuals – and not just corporations – accountable for violating the FCPA'.[47] Individuals should be alive to the fact that the US is more than happy to pick up any slack in the enforcement of overseas bribery offences in the UK.

iv Civil and regulatory enforcement of bribery and corruption

The FCA requires firms in the regulated sector to establish and maintain effective systems and controls to counter the risk that they might be used to further financial crime, including bribery.[48] Regulated firms can be subject to FCA enforcement actions for failing to implement effective ABC systems and controls, regardless of whether bribery or corruption has actually taken place.[49]

v Enforcement: money laundering and financial-record keeping offences

To date the main bribery DPAs and corporate prosecutions have not included associated money laundering offences. While the *Rolls-Royce* DPA included one count of false accounting, financial record-keeping provisions have been used sparingly in corporate foreign bribery enforcement actions in recent years, probably due to the easier route for corporate liability provided for by Section 7.[50]

VII INTERNATIONAL ORGANISATIONS AND AGREEMENTS

The UK is a signatory to a number of anti-corruption conventions, including the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.[51] The UK is also a party to international organisations that operate in the financial crime space, including the Financial Action Task Force and the Council of Europe's Group of States Against Corruption.

Brexit

Following Brexit, the terms of the UK's withdrawal means that tools such as European Arrest Warrants and European Investigation Orders are no longer available to the UK. Several EU member states have already confirmed that they will no longer extradite their own nationals to the UK under the new 'surrender' system. Evidence from abroad will have to be secured under mutual legal assistance provisions, which are likely to be considerably slower than the previous arrangements. The UK's departure from the EU has also affected the extent to which

47 www.justice.gov/opa/pr/five-individuals-charged-foreign-bribery-scheme-involving-rolls-royce-plc-and-its-us.

48 SYSC 3.2.6R and SYSC 6.1.1R.

49 FCG 6.1.4; firms are also under a duty to deal with the FCA in an open and cooperative way, and must disclose to the FCA appropriately anything relating to the firm of which the FCA would reasonably expect notice; different obligations will therefore apply to regulated firms when considering the merits of self-reporting (Principle 11, FCA Principles for Businesses).

50 A number of DPAs have been concluded by the SFO outside of the bribery enforcement landscape, including with respect to Tesco, Serco and G4S. Individual follow-on prosecutions have likewise suffered from failures in SFO case strategy and management. A recent trial of individuals at Serco collapsed following failures in disclosure and judicial criticisms of how the case was framed.

51 The UK is also a signatory to treaties including the UN Convention against Corruption, the UN Convention against Transnational Organised Crime and the Criminal Law Convention on Corruption.

it can participate in agencies such as Eurojust and Europol, although UK authorities will still be able to form joint investigation teams (JITs) with EU prosecutors (as was the case in the *Airbus* DPA).[52]

The new European Public Prosecutors Office (EPPO) – a body tasked with investigating and prosecuting crimes against the EU budget – will not operate in the UK, although the EPPO (as well as OLAF, the European Anti-Fraud Office) may work in close coordination with UK authorities.[53]

VIII LEGISLATIVE DEVELOPMENTS

The Bribery Act is widely admired and considered a model for many countries, and there are no pending changes to the Act itself; a recent parliamentary report stated that the overall structure of the Bribery Act and its deterrent effect are aspects which 'have been almost universally praised'.[54]

Major developments may, however, be approaching in respect of corporate liability generally. The Law Commission's review of corporate criminal liability will make proposals for law reform in this area. Currently there is a contradiction between the laws applicable to bribery and tax evasion,[55] both of which allow for corporate criminal liability on the 'failure to prevent' model, and the law applicable (under the 'identification principle') to other offences such as fraud and money laundering.[56] A major criticism of the identification principle is that it is easier to prosecute smaller companies than large ones with complex organisational structures, where the directing mind is harder to identify. The Law Commission is due to present a number of options for reform in late 2021. One possibility may be the extension of the 'failure to prevent' model to other financial crime offences. Broader reform of the identification principle to expand corporate liability for substantive offences could, however, affect liability under Sections 1, 2 and 6 Bribery Act.

IX OTHER LAWS AFFECTING THE RESPONSE TO CORRUPTION

i Data protection and blocking statutes

While the UK has now left the EU, the EU General Data Protection Regulation (GDPR) has been onshored as the UK GDPR, retaining the vast majority of data protection rights and obligations. Companies will often need to navigate the tensions between data protection obligations and the need to collect, review and potentially disclose information to authorities in a bribery and corruption investigation.

52 Where the SFO and the French financial crime prosecutor, the PNF, formed a JIT and divided cases between them for investigation (along with the DOJ).

53 The EPPO has stated that it will work with the authorities of third countries through the development of 'working arrangements' which may cover the exchange of information and the 'secondment of liaison officers or contact points so as to improve practical cooperation'. (https://ec.europa.eu/info/sites/default/files/dg_justice_eppo_brochure_en.pdf).

54 Para. 36, House of Lords Select Committee Bribery Act 2010: Post-Legislative Scrutiny.

55 The Criminal Finances Act 2017 introduced failure to prevent the facilitation of tax evasion offences.

56 The review could affect liability under Sections 1, 2 and 6 Bribery Act, but (in light of the presence of Section 7 Bribery Act) would have a more wide-ranging impact on other financial crime offences.

Certain national laws also restrict the provision of information to foreign authorities, such as the French Blocking Statute. In multi-jurisdictional investigations any steps need to be taken with the assistance of expert legal advice to ensure that corporates can minimise the risk of violating blocking statutes while maintaining a cooperative stance with relevant authorities or regulators.

ii Overseas production orders

Overseas production orders (OPOs) are an additional tool in the SFO's investigative armoury that enable the SFO to make an application for an order requiring US communication services providers (CSPs), such as Facebook and Google, to provide electronic data in cross-border investigations into crimes including bribery and corruption.[57]

iii Whistle-blowing

UK legislation protects whistle-blowers from suffering any detriment for having reported specific types of protected disclosures (disclosures regarding potential bribery and corruption offences will qualify as protected disclosures). Companies must be alive to the need to treat whistle-blowers fairly (and ensure that they do not suffer any detriment) in the context of any internal investigation.

X COMPLIANCE

The adequate procedures defence is a key feature of Section 7 Bribery Act. The MoJ has published guidance on the defence which sets out six principles intended to inform organisations of the appropriate policies and procedures they can implement to prevent bribery. These principles broadly state as follows:

a Principle 1: Proportionate procedures: procedures should be proportionate to the bribery risks an organisation faces (taking into account the size, nature and complexity of its business).

b Principle 2: Top-level commitment: top-level management should be committed to preventing bribery by associated persons.

c Principle 3: Risk Assessment: the organisation assesses the extent of its exposure to applicable bribery risks.

d Principle 4: Due Diligence: the organisation applies due diligence procedures, taking a proportionate and risk-based approach, in order to mitigate identified bribery risks.

e Principle 5: Communication (including training): the organisation communicates and embeds its policies and procedures throughout the business and provides appropriate training on bribery risks.

f Principle 6: Monitoring and review: the organisation monitors, reviews and improves its procedures to prevent bribery.

57 The Crime (Overseas Production Orders) Act 2019 granted UK authorities new extraterritorial powers to apply for a UK court order compelling CSPs operating or based outside of the UK to provide electronic data stored outside the UK, provided that there is a Designated International Cooperation Agreement (DICA) in place between the UK and the country in which the CSP is based. In July 2020, the UK and US DICA entered into force.

In addition to the defence under Section 7 Bribery Act, there are a myriad of benefits for a company in implementing a robust compliance programme, not least in acting as a preventive measure to limit violations occurring in the first instance. Even if a violation occurs, early detection and timely reporting and resolution of the issue may be capable of establishing that adequate procedures are in place, that a prosecution is not in the public interest or that a DPA is appropriate.

As set out above, evidencing compliance changes is also a critical feature of the DPA regime (see further the SFO Guidance on Evaluating a Compliance Programme). In particular, a number of companies under investigation by the SFO (which subsequently went on to secure DPAs) appointed outside specialists to review and assess their compliance programmes pre-settlement, in order to both satisfy the SFO and the Court's expectations regarding compliance improvements, and to obviate any need for a post-DPA monitorship. There are indications of a possible move in the UK towards more US style monitorships following the *G4S* DPA (a non-Bribery DPA), in which the SFO prescribed the involvement of an external compliance reviewer (akin to a monitor) and more stringent compliance requirements than had been mandated under prior DPAs.

XI OUTLOOK AND CONCLUSIONS

Looking forward, we expect the SFO's focus on securing multi-jurisdictional DPAs with corporates for bribery offences to continue. DPAs offer a significant revenue raising function and it is notable that the settlement in the *Airbus* DPA[58] was more than double the total of all fines paid for all criminal conduct in England and Wales in 2018.[59] The SFO has recently closed a number of high-profile investigations without further action, including those into British American Tobacco, KBR Inc's UK subsidiaries, and GlaxoSmithKline. This may indicate a 'clearing of the decks' ahead of a renewed focus on pursuing anti-corruption cases (despite a slowdown over the past year due to covid-19). If the SFO can begin to match its success in concluding DPAs with securing individual convictions, then the enforcement regime in the UK will be more appropriately balanced and fearsome. Potential legislative developments with respect to corporate liability could also lead to an increase in the enforcement of other financial crime, but much depends on the political will and time in Parliament for change in this area.

58 That included a €991 million penalty in the UK (part of a global €3.6 billion settlement with French and US authorities).

59 Para. 1, *Airbus* DPA.

Appendix 1

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