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General Chapters:

1	**The Shrinking Scope of Privilege in Multi-Jurisdictional Investigations** – Gary DiBianco, Skadden, Arps, Slate, Meagher & Flom (UK) LLP	1
2	**Deferred Prosecution Agreements in the UK – The Dawning of a New Era in Criminal Enforcement Against Corporates?** – Richard Sallybanks & Shaul Brazil, BCL Burton Copeland	5
3	**The Use of Wiretaps to Investigate Financial Crimes Post-*Rajaratnam*** – Douglas Jensen & Amy Dieterich, Park & Jensen LLP	9
4	**An Overview of Business Crime in Latin America** – Michael Diaz, Jr. & Carlos F. Gonzalez, Diaz Reus	14

Country Question and Answer Chapters:

5	**Argentina**	Estudio Durrieu Abogados S.C.: Nicolas Durrieu & Amanda Muñoz de Toro	19
6	**Austria**	wkklaw attorneys at law: Norbert Wess & Bernhard Kispert	27
7	**Brazil**	Torres|Falavigna Advogados: Luís Carlos Dias Torres & Andrea Vainer	37
8	**BVI**	Maples and Calder: Arabella di Iorio & Victoria Lord	44
9	**Burundi**	Mkono & Co. Burundi Sprl: Alice Nijimbere & Gustave Niyonzima	51
10	**Canada**	MacPherson Leslie & Tyerman LLP: Douglas Hodson, Q.C. & John Agioritis	57
11	**Cayman Islands**	Maples and Calder: Martin Livingston & Adam Huckle	65
12	**Colombia**	Diaz Reus: Michael Diaz, Jr. & Marcela Cristina Blanco	74
13	**England & Wales**	BCL Burton Copeland: Guy Bastable & Shaul Brazil	82
14	**France**	Metzner Associés: Aurélien Hamelle	90
15	**Germany**	Knierim | Huber Rechtsanwälte GbR: Hans-Peter Huber & Dr. Anna Oehmichen	98
16	**Greece**	Anagnostopoulos Criminal Law & Litigation: Ilias G. Anagnostopoulos & Jerina (Gerasimoula) Zapanti	106
17	**India**	Kachwaha & Partners: Ashok Sagar & Sumeet Kachwaha	114
18	**Italy**	Studio Legale Pisano: Roberto Pisano	123
19	**Japan**	Nishimura & Asahi: Yoshinori Ono & Norimitsu Yamamoto	132
20	**Jersey**	Baker & Partners: Stephen Baker & Cyril Whelan	143
21	**Liechtenstein**	Lampert & Schächle Attorneys at Law Ltd.: Siegbert Lampert & Rudolf Schächle	150
22	**Mexico**	Portos, Ortiz Larregui y Asociados, S.C.: José Manuel Portos Ubierna	157
23	**Netherlands**	Houthoff Buruma: Aldo Verbruggen & Hansje van den Noort	164
24	**Nigeria**	Bloomfield – Advocates & Solicitors: Adekunle Obebe & Dayo Adu	171
25	**Portugal**	Rogério Alves & Associados, Sociedade de Advogados, RL: Rogério Alves	177
26	**Russia**	Ivanyan and Partners law firm: Vasily Torkanovskiy	186
27	**Senegal**	Geni & Kebe: Mouhamed Kebe & Papa Massal Sow	197
28	**Singapore**	Latham & Watkins: Ing Loong Yang & Tina Wang	204
29	**Spain**	De Pedraza Abogados, S.L.P.: Mar de Pedraza & Cristina de Andrés	213
30	**Switzerland**	Homburger: Flavio Romerio & Roman Richers	226
31	**Turkey**	ELIG, Attorneys-at-Law: Gönenç Gürkaynak & Ceyda Karaoğlan	236
32	**USA**	Skadden, Arps, Slate, Meagher & Flom LLP: Gary DiBianco & Gary A. Rubin	243

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Deferred Prosecution Agreements in the UK – The Dawning of a New Era in Criminal Enforcement Against Corporates?

BCL Burton Copeland

Richard Sallybanks

Shaul Brazil

1. Introduction

"*It would be inconsistent with the basic principles of justice for the criminality of corporations to be glossed over by a civil as opposed to a criminal sanction*."

(*Lord Justice Thomas, R v Innospec Ltd*, 26 March 2010)

Corporations have been recognised in the UK as separate legal persons for over a century, and may therefore incur criminal liability for most kinds of offences. It is only relatively recently, however, that the appetite in the UK for the investigation and prosecution of corporate entities has increased significantly.

Historically, prosecutions of companies were generally limited to offences of strict liability, such as those under trading standards and health and safety legislation. These offences effectively impose an absolute duty on the company, do not require the proof of a mental element, e.g. intention or negligence, and allow a company to be prosecuted in its own right, with the actions of its employees being taken as its own and aggregated. In contrast, the prosecution of companies for offences requiring a mental element, such as fraud and corruption, continues to be a rare occurrence in the UK.

The two principal reasons for the historic lack of criminal enforcement against companies in the UK are first, the difficulty in attributing liability in cases which require proof of a mental element and, secondly, the absence of any significant impetus for corporate prosecutions (no doubt exacerbated by the difficulty in attributing liability). Generally, the individuals at fault were prosecuted and any redress against the company itself was left to the civil courts.

However, the climate changed gradually following the ratification by the UK in 1998 of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, and the subsequent international criticism of the UK for failing successfully to prosecute bribery cases against a company. Further impetus was created following the onset of the worldwide financial crisis in 2007/8.

In light of these developments, and as reflected in the words of Lord Justice Thomas quoted above, recent years have witnessed in the UK a groundswell in opinion that a company should not be treated differently from an individual, and escape criminal prosecution, merely because of its artificial personality. The greater desire for criminal enforcement against companies, combined with the difficulties in attributing liability, has led to a significant change in the approach to the investigation and prosecution of corporate crime in the UK, both in terms of the substantive law and enforcement.

2. Development in the Substantive Law

Unlike the position in the United States where a company may be held criminally liable if an employee commits a crime within the scope of his employment and with intent to benefit the company, in the UK the aggregation of the actions of employees is not permitted and a company can generally only be convicted of an offence which requires proof of a mental element by the implementation of the 'identification doctrine'. In other words, the prosecution must establish that the company's 'directing mind' – a senior individual, usually a director, who could be said to embody the company in his actions – committed the offence himself by proving each element of the offence against him; then, his guilt would be attributed to the company without the need to prove anything further.

Quite apart from whether the 'identification doctrine' is, conceptually, an appropriate method of establishing the criminal liability of corporations, the doctrine has, in practice, caused prosecutors in the UK great difficulty in proving the liability of companies for serious crimes. This is especially so when the company involved is of so substantial a size that its 'directing mind' is far removed from the relevant events. This led to particular criticism of the doctrine's effect, as in reality it made it easier to prosecute a small company where its 'directing mind' was more likely to have been personally involved; thereby creating an incentive for companies to operate with devolved structures that had the effect of insulating directors (and thus the company) from criminal liability.

In recent years, however, a number of commentators have urged a departure from the strict application of the 'identification doctrine' towards adopting a purposive interpretation of the relevant statutory regime in order to identify the appropriate basis on which to hold companies liable. The Law Commission – an independent body created by statute to keep the law under review and recommend reform where needed – noted in its 2010 Consultation Paper 'Criminal Liability in Regulatory Contexts' that this is something the courts have already started to do: in the 1995 case of *Meridian Global Funds Management Asia Ltd v Securities Commission*, the Privy Council held that where the normal rules of attribution would defeat the intended application of a particular statutory provision, a special rule of attribution might be necessary to determine whose act or knowledge or state of mind was for the purpose of that provision to be attributed to the company, irrespective of whether that person was properly described as the directing mind and will.

In addition to the proposed developments in the rules of attribution, the scope of corporate criminal liability has been extended by the enactment of a number of criminal offences focused on corporate

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offending and designed to avoid the pitfalls of the 'identification doctrine'. Such offences include 'failing to prevent bribery' under the Bribery Act 2010 – an offence of strict liability subject to the statutory defence of having 'adequate procedures' in place – and corporate manslaughter under the Corporate Manslaughter and Corporate Homicide Act 2007, which, rather than focusing on the guilt of a 'directing mind', concentrates on the way in which the company's activities are managed or organised and specifically allows the aggregation of the failings of senior management.

However, although it is still early days, particularly in relation to the Bribery Act 2010 which has been in force for only two years, there has been limited success in prosecuting companies under the two Acts. There have been only three successful prosecutions of companies for corporate manslaughter (Cotswold Geotechnical Holdings, JMW Farms and Lion Steel Ltd) and the UK's Serious Fraud Office (SFO) is yet to charge, let alone successfully prosecute, any companies for the 'failure to prevent bribery' offence. The SFO is, however, reported to have at least two live investigations of companies suspected to have breached the Bribery Act. Furthermore, the current Director of the SFO, David Green QC, has recently advocated the extension of the type of corporate offence under the Bribery Act to other forms of business crime such as fraud.

3. Developments in Enforcement of Criminal Liability Against Companies

In parallel to the developments in the substantive law, recent years have witnessed an increased enforcement focus on corporate offending, together with the application of a series of new enforcement tools.

In June 2008, former US prosecutor Jessica de Grazia published her report comparing the performance of the SFO with two prosecution agencies in New York, which undertook similar work. The report was excoriating in its criticism of the SFO: amongst other criticisms, it condemned the SFO's lower productivity and conviction rates, the "skills shortages" among its lawyers and a culture which "discourages robust decision-making and innovative and effective use of powers".

The SFO's apparent failure to adopt "innovative and effective use of powers" was, however, soon addressed by the SFO's then newly appointed Director, Richard Alderman. Mr Alderman sought to create a "modern, outward-facing and collaborative organisation" by adopting what might be described as an "Americanised" model of law enforcement.

Under Mr Alderman's directorship, the SFO sought to encourage companies to self-report their wrongdoing and co-operate with their investigation. In so doing, the SFO made use of new tools at its disposal, in particular the ability to enter into formal 'plea agreements' pursuant to the Attorney General's Guideline on Plea Discussions in Cases of Serious or Complex Fraud (e.g., *R v Mabey and Johnson Ltd*, 2009, in which the company agreed to pay £6.6m in relation to charges of overseas corruption and a breach of UN sanctions), and its powers under the Proceeds of Crime Act 2002 to take civil action to recover property obtained by companies as a result of criminal activity.

The use of these 'civil recovery' powers, as opposed to a criminal prosecution, was until recently promulgated by the SFO as an incentive to companies to self-report their wrongdoing. The SFO's published guidelines at the time stated that it would 'wherever possible' seek to deal with self-reporting companies by way of civil settlement. Indeed, the SFO has entered into numerous consensual civil settlements on this basis (e.g., Macmillan Publishers Ltd, Oxford Publishing Ltd and DePuy International Ltd, all in relation to allegations of overseas corruption).

Notwithstanding the apparent success of Mr Alderman's strategy (in 2011-2012, for example, the SFO obtained three civil recovery orders and recovered £50.2 million in connection with criminal conduct; a large figure for the UK, albeit low in comparison to the level of funds recovered routinely in the US), the SFO's approach did not meet with universal acclaim. Particular criticism was made by the next Lord Chief Justice of England and Wales, Sir John Thomas, in the 2010 case of *R v Innospec Ltd*.

Under a 'global settlement', Innospec agreed to plead guilty in the UK to corruption in Indonesia and, in the USA, to corruption in Iraq. Innospec's weakened finances meant that the amount available for the consequential penalties was USD40.2 million, which was split into USD12.7 million in the UK and USD27.5 million in the USA. The SFO and Innospec agreed that USD6.7 million of the USD12.7 million would be the subject of confiscation for the Indonesian corruption and USD6 million would be the subject of a civil recovery order for the Iraqi corruption.

Ultimately, Innospec was fined USD12.7 million in the UK for the Indonesian corruption, thereby leaving nothing for the proposed civil recovery order. In sentencing the company, the court made a number of criticisms of the SFO's conduct, including that sentencing remains a matter for the discretion of the court (and therefore cannot be agreed between prosecutor and defendant), and that the criminality of companies should rarely be dealt with by means of a civil recovery order; the criminal courts can take account of co-operation and provision of evidence against others by reducing the fine otherwise payable.

Richard Alderman's tenure as Director of the SFO ended in April 2012. In contrast to the "outward-facing and collaborative organisation" envisaged by Mr Alderman, his successor, David Green QC, has indicated that the SFO will in future adopt a more traditional approach to law enforcement: the previous guidance on self-reporting has been withdrawn. Nonetheless, the momentum towards a more conciliatory approach to the disposal of corporate criminality has not wholly reversed.

4. Deferred Prosecution Agreements in the UK

Deferred Prosecution Agreements (DPAs) are a new method (at least in the UK) of dealing with cases of suspected financial crime by companies. Introduced by the Crime and Courts Act 2013, but unlikely to be in force until 2014, a DPA is a discretionary tool by which the prosecutor may invite a suspect company to agree a DPA as an alternative to prosecution for specified kinds of financial crime (including fraud and corruption). Under the procedure, which is not available to individuals, an indictment will be preferred against the company; however, the proceedings will then be suspended as part of a written agreement between the prosecutor and the company.

The written agreement between the prosecutor and the company must include a statement of facts relating to the alleged offence, but need not include any admissions by the company. The agreement may also impose requirements on the company which may include: the payment of a financial penalty; compensation for victims; a donation to charity; disgorgement of profits; implementation of a compliance programme; co-operation with an investigation into the alleged wrong-doing; and payment of the prosecution's reasonable costs. The amount of any financial penalty agreed must be broadly comparable to the fine that a court would have imposed on the company on conviction for the alleged offence following a guilty plea.

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As required by the Act, the Director of the SFO and the Director of Public Prosecutions have recently published a draft Code of Practice for consultation covering their proposals on the criteria for cases suitable to be resolved by way of a DPA, and the process for putting them into practice. In relation to the decision as to whether a DPA is a possible means of disposal of alleged criminal conduct, the draft Code specifies that both an evidential and public interest test must be applied (as with all other criminal cases in the UK).

Notably, however, in relation to the evidential stage of the test, the draft Code allows for a DPA in circumstances where there exists only a 'reasonable suspicion' that the company has committed the offence. Whilst the prosecutor must also have reasonable grounds to believe that continuing the investigation would provide further evidence so as to provide a realistic prospect of conviction, the proposed evidential test clearly lowers the bar substantially as to the circumstances when an offender may be sanctioned for criminal conduct: in all criminal cases, the evidential test to be applied before a prosecution can be commenced is whether there already exists a realistic prospect of conviction.

As to the public interest stage, the factors suggested in the draft Code as being relevant are perhaps not surprising: they include a 'genuinely proactive approach' by the organisation and an 'effective corporate compliance programme'. A self-report will help, though in itself it will not be determinative. It should be noted, however, that the draft Code asserts that a criminal prosecution will continue to be the appropriate course of action in many cases. Further, as to the status of civil recovery proceedings, the draft Code explicitly places this option below that of a DPA and prosecution; that is, where it is not possible to prosecute the company and where the evidential test for a DPA is not satisfied. This represents a clear change from the SFO's previous approach to corporates where a self-report and proactive approach were factors tending towards a disposal of the matter under the civil recovery regime.

It is also of note that, as with the criteria outlined in the extant guidance on corporate prosecutions generally, the draft Code specifies that one of the public interest factors against prosecution (and in favour of a DPA) is the adverse consequence that may arise under European Law; specifically, mandatory debarment from public contracts within the EU following conviction of fraud relating to the protection of financial interests of the European Communities, corruption or a money laundering offence. In corruption cases, however, this consideration may be difficult to reconcile with Article 5 of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which provides that the investigation and prosecution of the bribery of a foreign public official should not be influenced by, among other things, considerations of national economic interest.

Whilst the introduction of the DPA scheme in the UK was undoubtedly influenced by the success of the model applied in the US (where, no doubt, the ease of establishing corporate criminal liability and the potential size of financial penalty helped focus the corporates' attention), great pains were nonetheless made to avoid a wholesale replication and instead to "have something that was more suited to the British situation". It was with this in mind that, unlike the situation in the US where the court is involved only at the very end of the process (and almost invariably approves the terms agreed between prosecutor and defendant), in the UK, the terms of the agreement may not even be agreed by the parties without a declaration by the court that entering into a DPA is likely to be in the interests of justice and that the proposed terms are fair, reasonable and proportionate.

A key area where it is expected that some of the previous difficulties with the US system will not be repeated in the application of the UK model, will be the factors the prosecutor will take account of when deciding whether the corporate has adopted a 'genuinely proactive approach'. In the US, for many years the factors taken into account by prosecutors as tending against a DPA included: whether the corporate had failed to waive privilege in respect of its internal investigation; whether the corporate had met the defence costs of employees; and whether the corporate had entered into Joint Defence Agreements (i.e., agreements as to common interest privilege) with its employees. Fortunately, after heavy criticism of the approach taken by US prosecutors in this regard, the guidelines were amended in 2008 to prevent prosecutors from holding these factors against the company.

As to whether the DPA scheme in the UK heralds the dawning of a new era in criminal enforcement against corporates, it appears that the Government certainly believes it will. In its consultation on the introduction of the scheme, one of the reasons given for its introduction was the difficulty in applying the 'identification doctrine' to establish corporate liability; and in the Ministry of Justice's impact assessment, potential penalty income was estimated to be up to £60 million per year.

Whilst the Government's belief that the scheme will overcome the difficulties with the 'identification doctrine' is questionable – prosecutors are supposed to be satisfied that they have sufficient evidence, or will have sufficient evidence, to prosecute before agreeing to a DPA – it is clear that a key element in the success of the scheme will be the extent to which companies will be encouraged to enter into DPAs to achieve certainty of outcome. In this regard, the question of whether the court will agree the proposed financial penalty (and other terms) is paramount. Unfortunately, however, due to the significant lack of corporate prosecutions, there is very little precedent. It was clearly with this in mind that in parallel with the introduction of the DPA scheme, the Government requested the Sentencing Council to produce guidelines as to the appropriate fines payable by corporate offenders, which the courts must have regard to.

In June 2013, the Sentencing Council published its draft guidelines for consultation in cases of fraud, bribery and money laundering. In relation to corporate offenders, the proposed sentence is, essentially, based on the financial figure assessed as the gross amount obtained (or loss avoided) or intended to be obtained (or avoided) by the offender as a result of the offence. Thus, for bribery offences, the appropriate figure proposed is the gross profit from the contract obtained or sought. Where, however, it is impossible to calculate the actual or intended gain or loss, the guidelines suggest that the figure should be 10% of the relevant revenue (i.e., worldwide revenue derived from the product or business area to which the offence relates for the period of the offending).

To the figure calculated in accordance with the method outlined above, it is proposed that a multiple be applied, between 20% and 400%, based on the culpability of the offender assessed with reference to a list of non-exhaustive characteristics (e.g., whether the corporation played a leading role in organised, planned unlawful activity). Finally, the figure may be increased or reduced in accordance with aggravating or mitigating factors such as attempts to conceal the conduct *versus* co-operation with the investigation and early admissions.

5. Conclusion

It appears that the UK is well on the way to establishing a DPA model that will provide greater certainty to corporate offenders as

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to the likely outcome of self-reporting and co-operating with an investigation. The opportunity to avoid a conviction, and thereby possible debarment from participation in public contracts in the EU, will clearly be attractive. Combined with the increased risk of liability (particularly in relation to the corporate offence under the Bribery Act 2010) and the natural commercial imperative to avoid a lengthy investigation, the uncertainties of prosecution and the negative publicity that can be engendered in such situations, it is likely to be the case that the introduction of a DPA scheme will signal a new way forward in criminal enforcement against corporates in the UK. Whilst there will inevitably be teething pains, not least in relation to the calculation of the financial penalty (where the apparent flexibility in the approach to calculation may in fact lead to uncertainty, at least in the negotiation stage), it is undoubtedly the case that both prosecutors and corporate suspects will wish to make use of the opportunity to enter into a DPA to resolve cases more quickly, efficiently and with greater certainty of outcome than offered by the UK system to date.

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