THE ANTI-BRIBERY AND ANTI-CORRUPTION REVIEW

SEVENTH EDITION

Editor
Mark F Mendelsohn

THE LAWREVIEWS

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PREFACE

Anti-corruption enforcement continues to be an increasingly global endeavour and this seventh edition of *The Anti-Bribery and Anti-Corruption Review* is no exception. It presents the views and observations of leading anti-corruption practitioners in jurisdictions spanning every region of the globe, including new chapters covering Canada, Israel and Korea.

Given the exceptionally large penalties levied last year against Odebrecht SA and Braskem SA, as well as those against Rolls-Royce Plc, Telia Company AB, and VimpelCom Limited, the size of the fines in global enforcement actions have declined somewhat year-on-year, but multinational cooperation in global enforcement has remained robust. For example, the September 2018 conclusion in the United States of an US$853.2 million settlement with Petróleo Brasileiro SA (Petrobras) entailed cooperation between Brazil's Federal Public Ministry (MPF), the US Department of Justice (DOJ), and the US Securities and Exchange Commission (SEC). Under the non-prosecution agreement with Petrobras, the DOJ and SEC will credit the amount the company pays to the MPF, with Brazil receiving 80 per cent (US$682,560,000) of the penalty. Likewise, the conclusion of an enforcement action against SBM Offshore NV, a Netherlands-based oil services company, and its US subsidiary entailed the participation of the MPF, the Netherlands Public Prosecution Service and the DOJ, each of which shared a combined worldwide criminal penalty in excess of US$478 million. Similarly, Keppel Offshore & Marine, Ltd, a Singapore-based shipping services company, and its US subsidiary entered into coordinated settlement agreements with the DOJ, MPF and Singapore's Corrupt Practices Investigation Bureau. In an enforcement action against Paris-based Société Générale SA and its wholly owned subsidiary, the DOJ credited half the penalty assessed in connection with the bribery charges (over US$292 million) for payments to the French National Financial Prosecutor's Office. In a related enforcement action against Maryland-based Legg Mason, Inc, the DOJ also credited amounts paid to other law enforcement authorities.

Crediting fines in this way is in keeping with the DOJ's policy, announced in May 2018, of discouraging 'piling on', and encouraging coordination with other enforcement agencies in an attempt to avoid multiple penalties for the same conduct. In the FCPA context, the new policy arguably goes further than Article 4 of the Organisation for Economic Co-operation and Development's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which requires signatory states with shared jurisdiction over a foreign bribery case merely to consult with each other 'with a view to determining the most appropriate jurisdiction for prosecution'. For example, notwithstanding evidence of violations of the US Foreign Corrupt Practices Act, the DOJ closed its investigation of Güralp Systems Ltd, a UK-based manufacturer of broadband seismic instrumentation and

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monitoring systems, in part owing to a parallel investigation and subsequent charges brought by the UK Serious Fraud Office (SFO).

Large-scale multinational coordination has also continued in connection with ongoing efforts to prosecute corruption in international football. Since May 2015, approximately 45 individuals have been charged in the United States alone. Likewise, there have been further developments in the worldwide investigations into the misappropriation of more than US$3.5 billion in funds by senior government officials from state-owned strategic development company 1Malaysia Development Berhard (1MDB), including the arrest of former Malaysian prime minister Najib Razak, who was charged with money laundering and various other offences, and eight former officers of the Malaysian External Intelligence Organisation, including its former chief. Hundreds of millions of dollars in assets have been seized. Following a formal request from the DOJ, Indonesia impounded in Bali and agreed to convey to Malaysia a US$250 million luxury yacht belonging to Low Taek Jho, the Malaysian financier at the centre of the 1MDB scandal.

At an even more fundamental level, and in concert with the growing trend towards multinational cooperation in global enforcement, this past year, around the world, countries have adopted important enhancements to their anti-corruption laws. Argentina established criminal liability for domestic and foreign companies and imposed strict liability for various offences, including active domestic bribery, transnational bribery and participating in the offence of illicit enrichment of public officials. Canada implemented legislation outlawing 'facilitation payments', which are made to government officials to facilitate routine transactions, such as permits. In China, the Standing Committee of the National People's Congress adopted amendments to the country's Anti-Unfair Competition Law that specify the range of prohibited recipients of bribes and expand the definition of prohibited bribery to include bribery for the purpose of obtaining transaction opportunities or competitive advantages. The amendments also impose, with limited exceptions, vicarious liability on employers for bribery committed by employees, and provide for increased penalties. India passed the Prevention of Corruption (Amendment) Act, which criminalises giving an 'undue advantage' to a public official, establishes criminal liability for corporations and creates a specific offence penalising corporate management. Furthermore, Italy announced a new law aimed at strengthening protection for whistle-blowers, while Peru passed a law imposing criminal liability on domestic and foreign corporations.

A significant trend in legislative changes this past year was the widespread introduction of alternative forms of resolution for companies, short of criminal conviction and often referred to as deferred prosecution agreements (DPAs). Argentina, as part of its new law establishing criminal liability for domestic and foreign companies, introduced 'effective collaboration agreements', which allow for non- and deferred-prosecution agreements. Canada created a legal regime for 'remediation agreements' to resolve corporate offences under the Criminal Code and the Corruption of Foreign Public Officials Act. Singapore also introduced similar new legislation. Notably, these new DPA regimes, unlike non-prosecution agreements in the American regime, but in keeping with US DPAs and the regime in the United Kingdom, all require court approval of any proposed agreement. Additionally, in November 2017, France announced its first deferred prosecution agreement under the Sapin II Law with HSBC Private Bank (Suisse) SA, enacted in December 2016.

There have also been a number of significant developments in data protection laws that affect the conduct of international investigations, of which the EU General Data Protection Regulation (GDPR) is the most well known and impactful. In the first court ruling

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concerning the application of the GDPR, a German court held that the Internet Corporation for Assigned Names and Numbers could no longer demand from a registrar of domain information data containing, among other things, the contact information for domain name registrants, administrators and technicians. Meanwhile, a number of developments affect the ability of law enforcement authorities to compel production of certain records from outside their national borders. For example, in the United States, Congress passed the Clarifying Lawful Overseas Use of Data Act (or CLOUD Act), which expressly requires email service providers to preserve and disclose to law enforcement electronic data within their possession, custody or control even when that data is located outside the United States. Following two decisions of the Court of Appeal of England and Wales, the SFO can compel production of documents held outside the United Kingdom by companies incorporated outside the United Kingdom, but the protections of 'litigation privilege' will still be accorded to documents produced in internal investigations. It will be interesting to see how courts and companies navigate these differing and evolving legal regimes in the year ahead.

The chapters in this book, which contain a wealth of learning about these significant developments around the world, will serve as a useful place to begin. They will help to guide practitioners and their clients when navigating the perils of corruption in the conduct of foreign and transnational business, and of related internal and government investigations. I wish to thank all the contributors for their support in producing this volume and for taking time from their practices to prepare these chapters.

Mark F Mendelsohn
Paul, Weiss, Rifkind, Wharton & Garrison LLP
Washington, DC
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Chapter 7

ENGLAND AND WALES

Shaul Brazil and John Binns[1]

I INTRODUCTION

The criminal law in England and Wales in relation to bribery and corruption is made up of an assortment of statutory provisions that apply depending on when the relevant conduct took place.

Historically, the principal anti-bribery and corruption provisions in England and Wales were contained in two antiquated statutes: the Public Bodies Corrupt Practices Act 1889 (the 1889 Act) and the Prevention of Corruption Act 1906 (the 1906 Act).[2] It was not until 14 February 2002, however, that the offences in these statutes were given specific extraterritorial effect. The law changed again, on 1 July 2011, when the Bribery Act 2010 (the 2010 Act) came into force. The 2010 Act was heralded as one of the toughest anti-bribery and corruption regimes in the world, particularly as regards its extended extraterritorial reach and provision for strict corporate criminal liability.

More recently, the Crime and Courts Act 2013 (the 2013 Act) has introduced a scheme of deferred prosecution agreements (DPAs) for corporations accused of various offences, including bribery. The scheme is designed to apply to conduct that takes place either before or after its commencement on 24 February 2014. At the time of writing, three such agreements have been concluded in connection with bribery offences. Guidance on sentencing of business crime, including bribery and corporate fines, came into force for individuals and organisations sentenced on or after 1 October 2014.

II DOMESTIC BRIBERY: LEGAL FRAMEWORK

i The Public Bodies Corrupt Practices Act 1889 and the Prevention of Corruption Act 1906

The 1889 Act and the 1906 Act continue to apply to conduct occurring before 1 July 2011.

The offences

The 1889 Act relates specifically to the corruption of public bodies and creates an offence for a person corruptly to give, promise or offer (or to receive or solicit) any advantage whatsoever

1 Shaul Brazil and John Binns are partners at BCL Solicitors LLP.

2 The historic common law offence of bribery also survives but is rarely if ever used. In brief, the common law provides that where a person in the position of trustee to perform a public duty takes a bribe to act 'corruptly' in discharging that duty, both the person who pays the bribe and the person who receives the bribe commits an offence (*R v. Whitaker* [1914] 3 KB 1283).

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to any person, whether for their or another's benefit, as an inducement to or reward for or otherwise on account of any servant of a public body doing or forbearing from doing something in respect of the public body's activities. No agency is involved as the public servant performs the public body's business as principal. If the payment is made or received as an inducement for that public servant to do or forbear from doing something then the payment is corrupt. The maximum sentence is seven years' imprisonment (for individuals) or an unlimited fine or both.

A public body is defined in Section 7 of the 1889 Act and in Section 4(2) of the Prevention of Corruption Act 1916 as including local and public authorities of all descriptions. The definition does not include those operating on behalf of the Crown, who do so as agents of the Crown and not as public officers in their own right.

The 1906 Act provided for a similar prohibition (with the same maximum sentence) as the 1889 Act, with the critical distinction being that the bribe must have been made to an agent as an inducement or reward for doing or forbearing to do something in relation to his or her principal's affairs. The activity of the principal and his or her state of knowledge therefore becomes relevant. The term 'agent' may cover any person who is employed by or who acts for another. The 1906 Act therefore applies to commercial bribery as well as bribery of Crown agents, who are expressly included by virtue of Section 1(3) of the 1906 Act.

Liability of companies

The liability of a corporation for the above (and most other) offences can be established only by implementing 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 or her actions – committed the offence him or herself; then, that director's guilt would be 'attributed' to the company. The difficulty encountered in proving such liability in practice provided part of the impetus for the changes to the law in the 2010 Act, including the new strict liability offence applicable to 'commercial organisations' of failing to prevent bribery.

ii The Bribery Act 2010

The 2010 Act applies to conduct occurring on or after 1 July 2011. The 2010 Act reformulates the offences relating to bribing another person (Section 1) and being bribed (Section 2), and creates a specific offence of bribery of foreign public officials (Section 6). The principal distinguishing feature of the new 2010 Act, however, is the creation of a strict liability offence relating to the failure of commercial organisations to prevent bribery (Section 7). The maximum sentence for each offence is 10 years' imprisonment (for individuals) or an unlimited fine, or both.[3]

The general offences

The offence of bribing another person (Section 1) is committed where a person directly or indirectly offers, promises or gives a financial or other advantage to another person and (1) he or she intends the advantage to either induce a person to 'perform improperly' a relevant function or activity or to reward a person for such improper performance; or (2) he or she knows or believes that the acceptance of the advantage would itself constitute the improper

3 The Bribery Act 2010, Section 11.

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performance of a relevant function or activity. In either case, it does not matter whether the person to whom the advantage is offered, promised or given is the same person who is to perform, or has performed, the function or activity concerned.

The term 'relevant function or activity' is defined very broadly in Section 3 of the 2010 Act to include any function of a public nature, any activity connected with a business (i.e., trade or profession) or performed in the course of a person's employment and any activity performed by or on behalf of a body of persons. To qualify, however, the person performing the function or activity must either be expected to perform it in good faith or impartially, or he or she must be in a position of trust by virtue of performing it.

The term 'improper performance' is defined in Section 4 of the 2010 Act as the performance of a relevant function or activity in breach of a relevant expectation. The term 'relevant expectation' means the expectations arising from the conditions mentioned in Section 3 of the 2010 Act: good faith, impartiality or any expectation arising from the position of trust. For bribery that takes place overseas or in respect of overseas persons (addressed further below), the expectation is what a reasonable person in the United Kingdom would expect and should therefore disregard any local custom or practice unless it is permitted or required by the applicable written law.

The offence of being bribed (Section 2) is committed where a person (R) requests, agrees to receive or accepts a financial or other advantage: (1) intending that, in consequence, a relevant function or activity should be performed improperly (whether by R or another person); (2) when the request, agreement or acceptance is itself improper; (3) as a reward for such improper performance (whether by R or another); or (4) where the improper performance is undertaken in anticipation of, or in consequence of, the request, agreement to receive or acceptance of the advantage. In all cases, it does not matter whether the request, agreement to receive or acceptance is made directly or through a third party. Nor does it matter whether R (or the person who performs the function or activity) knows or believes that the performance of the function or activity is improper.

Individuals may be liable for the general offences according to the normal rules of criminal liability. In addition, however, the 2010 Act addresses the liability of senior officers for bribery offences committed by companies. If a company commits one of the general offences (or an offence under Section 6, addressed below) and it is proved that the offence was committed with the 'consent or connivance' of a director, manager or corporate secretary (or other similar officer), then the senior officer can also be prosecuted for the offence.[4]

Liability of companies

As with the law applicable to conduct that took place prior to 1 July 2011, both individuals and companies (via the identification doctrine) may be liable for the general offences in the 2010 Act (or for an offence under Section 6 of the 2010 Act, addressed below).

In addition, the 2010 Act has introduced a new strict liability offence for relevant commercial organisations where they fail to prevent bribes being paid on their behalf (Section 7). The offence is committed where a person 'associated' with the organisation bribes another person within the meaning of Section 1 or Section 6 of the 2010 Act intending to obtain or retain business or an advantage in the conduct of business. A 'relevant commercial organisation' means a corporation or a partnership that carries on a business or part of

4 The Bribery Act 2010, Section 14.

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a business in any part of the United Kingdom. An 'associated person' means anyone who performs services for the organisation or on its behalf and may therefore include employees, agents, suppliers, contractors and joint venture partners.[5]

While the Section 7 offence is one of strict liability, the 2010 Act provides a defence if the organisation can prove that it had in place 'adequate procedures' designed to prevent persons associated with it from paying the bribe. The 2010 Act does not define adequate procedures; however, the Ministry of Justice (MOJ) has published guidance for commercial organisations on implementing adequate procedures to prevent bribery. Rather than adopting a prescriptive, one-size-fits-all approach, it incorporates flexibility by being based on six core principles:

a Proportionate procedures: maintaining bribery prevention policies that are proportionate to the nature, scale and complexity of the organisation's activities, as well as to the risks that it faces.

b Top level commitment: ensuring that senior management establishes a culture across the organisation in which bribery is unacceptable, which may include top-level communication of the organisation's anti-bribery stance and being involved in the development of bribery prevention policies.

c Risk assessment: conducting periodic, informed and documented assessments of the internal and external risks of bribery in the relevant business sector and market.

d Due diligence: applying due diligence procedures that are proportionate to the risks faced by the organisation; since an organisation's employees are associated persons, appropriate due diligence may become part of recruitment and HR procedures.

e Communication and training: ensuring that bribery prevention policies are understood and embedded throughout the organisation through education and awareness.

f Monitoring and review: putting in place auditing and financial controls that are sensitive to bribery, including consideration of obtaining external verification of the effectiveness of an organisation's anti-bribery procedures.

The MOJ guidance includes a number of illustrative case studies. Ultimately, however, the question of whether an organisation has adequate procedures will turn on the particular facts of the case. There also remains the larger ambiguity of what constitutes a bribe. There is no exception in the 2010 Act for facilitation payments and much has been made of the threat to corporate hospitality. That said, the guidance attempts to reassure businesses that the 2010 Act 'is not intended to prohibit reasonable and proportionate hospitality and promotional or other similar expenditure intended for these purposes'.

III ENFORCEMENT: DOMESTIC BRIBERY

The investigation of bribery offences may be conducted by any police force in the United Kingdom, but in the context of large-scale commercial bribery often falls to the National Crime Agency (NCA) or the Serious Fraud Office (SFO). The latter has powers to compel the provision of information or documents and can apply to the courts for warrants to search

5 The Bribery Act 2010, Section 8.

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premises and seize documents.[6] The prosecuting agencies include the Crown Prosecution Service (CPS) (which handles any prosecution arising from an NCA or other police investigation in England and Wales) and the SFO.

Other sanctions available to the authorities in addition or as alternatives to the criminal law include inviting the courts to make a confiscation order following conviction[7] or a civil recovery order (CRO) in respect of the proceeds of criminal conduct.[8] Specified prosecutors can offer immunity from prosecution or a statement to assist mitigation to an individual who assists an investigation.[9]

The Director of the SFO and the Director of Public Prosecutions (for the CPS) published prosecutors' guidance on the 2010 Act on 30 March 2011, which included some discussion of the factors that would be deemed relevant to whether a corporation against which there is sufficient evidence is prosecuted for bribery (domestic or foreign), or subjected to a CRO, or neither.[10]

At the time of writing, the first few investigations, prosecutions and convictions under the 2010 Act have started to make their way through the system. A handful of individuals have been convicted, including several who paid bribes to obtain contracts for work at royal palaces. In 2018, a company called Skansen Interiors Limited became the first to be convicted of the corporate offence under Section 7 of the 2010 Act after a trial, having self-reported the payment of bribes to a (domestic) customer by its managing director, who was then dismissed. Although the jury rejected its argument that its procedures were adequate, the judge imposed only a nominal penalty in the form of an absolute discharge (there being no other practical alternative, given that Skansen was by then insolvent). The lesson from the case (which was prosecuted by the CPS, not the SFO) – that a self-report does not guarantee that a company will be treated leniently – clearly has the potential to be counterproductive from a law enforcement point of view.

IV FOREIGN BRIBERY: LEGAL FRAMEWORK

i The Public Bodies Corrupt Practices Act 1889 and the Prevention of Corruption Act 1906

Traditionally, English criminal courts had jurisdiction only in respect of offences committed in England and Wales. Since 4 September 1998, however, conspiracies in England and Wales to commit offences overseas have been triable in England and Wales (Section 1A of the Criminal Law Act 1977). Nonetheless, it initially remained arguable whether this provision applied to the 1889 and 1906 Acts. The position was put beyond doubt by the enactment of Section 109 of the Anti-Terrorism, Crime and Security Act 2001, on 14 February 2002, which extended the territorial reach of the 1889 and 1906 Acts to substantive corruption

6 The Criminal Justice Act 1987, Section 2.

7 The Proceeds of Crime Act 2002, Part 2.

8 The Proceeds of Crime Act 2002, Part 5.

9 The Serious Organised Crime and Police Act 2005, Sections 71 to 73.

10 'The Bribery Act 2010: Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions' (see www.sfo.org.uk).

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offences committed overseas by UK-incorporated companies or UK nationals. More recently, the Court of Appeal has ruled that bribery of a foreign official was an offence under the 1906 Act even prior to the 2001 Act.[11]

ii The Bribery Act 2010

The 2010 Act expanded significantly the territorial scope of the pre-existing bribery offences. First, a specific offence of bribery of a foreign public official was created; and, second, the range of individuals and entities who may be liable under the 2010 Act for offences committed overseas has been expanded, in particular as regards the new offence of failing to prevent bribery.

A foreign public official (FPO) is defined as an individual who holds or exercises a public function outside the United Kingdom and includes an official of a public international organisation such as the World Bank. The offence of bribing an FPO (Section 6) is committed where a person offers, promises or gives a bribe to an FPO, or another person at his or her request, intending to influence the FPO in his or her capacity as an FPO and to obtain or retain business or an advantage in the conduct of business. Notably, there is no requirement that the FPO should act improperly. The only exception is where the FPO is expressly permitted by the written law to receive the offer, promise or gift. The maximum sentence is 10 years' imprisonment (for individuals) and an unlimited fine.[12]

As with the old law, the new general offences under Sections 1 and 2 and, axiomatically, the new specific offence of bribing an FPO, may be committed abroad. The test is whether the person committing the offence has a 'close connection with the United Kingdom'. The definition of this term has expanded the scope of persons who may be liable in England and Wales for acts committed overseas; in summary, those persons include a British national or person ordinarily resident in the United Kingdom, a body incorporated in the United Kingdom or a Scottish partnership.[13]

Furthermore, the scope of entities that may be liable under the new failing to prevent bribery offence (Section 7) is very wide: they include commercial organisations based or incorporated overseas in circumstances where the organisation carries on a business, or part of a business, in part of the United Kingdom. While the MOJ has indicated that a 'common-sense approach' should be taken in interpreting this provision such that a company with no 'demonstrable business presence in the United Kingdom' ought not to be caught by the provision, the SFO has expressed an intention to interpret it widely. Therefore, arguably, a permanent physical presence in the United Kingdom together with trading activity taking place in the United Kingdom will be sufficient.

11 *R v. AIL, GH and RH* [2016] EWCA Crim 2.

12 The Bribery Act 2010, Section 11.

13 The Bribery Act 2010, Section 12.

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V ASSOCIATED OFFENCES: FINANCIAL RECORD-KEEPING AND MONEY LAUNDERING

The commission of bribery offences often also entails ancillary offences such as false accounting,[14] money laundering,[15] and failure by a company to keep adequate records.[16]

Under the Theft Act 1968, a person (including a company) is guilty of false accounting if he or she dishonestly, with a view to gain or cause loss, destroys, defaces, conceals or falsifies any account, record or document required for an accounting purpose, or where he or she produces or makes use of any such account, etc. knowing it is or may be misleading, false or deceptive in a material particular.

Under the Proceeds of Crime Act 2002, it is, in general terms, an offence to deal with 'criminal property' (i.e., property that constitutes or represents a person's benefit from criminal conduct and the alleged offender knows or suspects that this is the case). These provisions can be particularly relevant at the point at which a company becomes aware that funds have potentially been derived as a result of bribery within its organisation. In these circumstances, the company may have to report its suspicions to the authorities to avoid committing a money laundering offence. Additionally, companies in the regulated sector (such as financial services companies, accountants and some lawyers), have a duty to report knowledge or suspicion of money laundering and may, if they do not, commit offences as a result of breaches of anti-money laundering regulations.[17]

The various Companies Acts create numerous offences, including failure to keep adequate accounting records, making false statements to an auditor and fraudulent trading (where a person is knowingly party to the carrying on of a business for any fraudulent purpose). These offences have, historically, been utilised as an alternative to a prosecution for a substantive corruption offence (see, for example, the guilty plea by BAE Systems PLC in December 2010 in respect of allegations of overseas corruption).

VI ENFORCEMENT: FOREIGN BRIBERY AND ASSOCIATED OFFENCES

The enforcement of foreign bribery is generally conducted by the SFO. Historically, however, criminal enforcement in England and Wales against companies for foreign bribery has been rare, mainly because of the inherent difficulty in attributing liability and obtaining foreign evidence. As a result, in the past decade or so, the SFO has sought to encourage companies to self-report their wrongdoing and cooperate with their investigation. In so doing, the SFO initially made use of new tools at its disposal, in particular its powers to enter into settlements by way of CROs as an alternative to prosecution.

Between 2008 and 2012, the SFO, under its then director, Richard Alderman, entered into numerous consensual civil settlements with companies accused of being involved in foreign bribery. They included: Balfour Beatty (£2.25 million) in 2008; AMEC (£4.95 million) in 2009; MW Kellogg (£7 million) in 2009; DePuy International (£4.829 million) in 2011; Macmillan Publishers (£11 million) in 2011; and Oxford Publishing Limited (£1.89 million) in July 2012.

14 The Theft Act 1968, Section 17.

15 The Proceeds of Crime Act 2002, Part 7.

16 The Companies Act 2006, Section 387.

17 The Money Laundering Regulations 2007.

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

A new director of the SFO, David Green QC, was appointed on 23 April 2012 and signalled a less consensual, more traditional prosecutorial approach, more in keeping with the above comments than his predecessor. Guidance on self-reporting, which was understood by many to imply that a corporation that self-reported could safely consider itself at a low risk of prosecution, was withdrawn on 9 October 2012.[18]

The SFO under Mr Green obtained convictions under the 2010 Act (in a case primarily concerning fraud, with connections to Cambodia), as well as the first conviction, after a contested trial, of a corporate entity for foreign bribery (Smith and Ouzman, a printing company prosecuted under the pre-2010 law), the first conviction of a corporate entity for failing to prevent bribery under Section 7 of the 2010 Act (the Sweett Group PLC, which pleaded guilty in December 2015 and was sentenced and ordered to pay £2.25 million in February 2016), and three deferred prosecution agreements in relation to bribery (see Section VIII.i).

Nevertheless, enforcement of the UK bribery laws continues to be the subject of increasing scrutiny. An Organisation for Economic Co-operation and Development (OECD) report on 23 March 2017 noted various concerns about its progress in this area, in particular the high concentration in Scotland of companies operating in corruption-sensitive sectors, and the need for engagement with the Crown dependencies and overseas territories.[19] The Conservative Party's controversial manifesto pledge to fold the SFO into the NCA was not followed up in the Queen's Speech for the 2017–2018 legislative programme. Instead, a new National Economic Crime Centre has been created, with the aim of coordinating the approach of the various UK agencies tasked with fighting bribery and other economic crime, and with the power to direct the SFO to carry out particular investigations.[20]

Lisa Osofsky, a former Federal Bureau of Investigation counsel, took over as the SFO's latest director in August 2018.[21] She inherits a number of ongoing investigations, including those concerned with Airbus, ENRC, GlaxoSmithKline, Rolls-Royce, UnaOil, and Watchstone (formerly Quindell). In a speech to the annual Cambridge International Symposium on Economic Crime, she signalled her intention to use her experience to help the agency work more collaboratively with the private sector and with other law enforcement authorities.[22]

18 The guidance reverted to its previous version: www.sfo.gov.uk/publications/guidance-policy-and-protocols/corporate-self-reporting.

19 See the OECD website.

20 www.nationalcrimeagency.gov.uk/news/1257-national-economic-crime-centre-announced.

21 www.sfo.gov.uk/2018/08/28/lisa-osofsky-begins-tenure-as-sfo-director/.

22 www.sfo.gov.uk/2018/09/03/lisa-osofsky-making-the-uk-a-high-risk-country-for-fraud-bribery-and-corruption/.

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VII INTERNATIONAL ORGANISATIONS AND AGREEMENTS

The United Kingdom is a signatory to:

a the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions;
b the Convention on the Fight Against Corruption involving Officials of the European Communities or Officials of Member States of the EU;
c the Council of Europe's Criminal Law Convention on Corruption;
d the UN Convention against Corruption; and
e the UN Convention against Transnational Organised Crime.

The United Kingdom has, however, set its face firmly against the establishment of a European Public Prosecutor's Office. At the time of writing, the impact on bribery enforcement of the United Kingdom's pending exit from the EU is unclear.

VIII LEGISLATIVE DEVELOPMENTS

i Deferred prosecution agreements

The 2013 Act created a scheme of DPAs for corporations accused of various offences, including bribery. The scheme applies to conduct before or after its commencement on 24 February 2014.

The 2013 Act provides that a DPA is an agreement between a designated prosecutor (e.g., the SFO) and a person (meaning a corporate, partnership or unincorporated association, but not an individual) suspected of a specified offence (including the bribery offences considered above, as well as false accounting and money laundering). Under a DPA, the organisation agrees to comply with the requirements imposed on it by the agreement, and the prosecutor agrees that, upon approval of the DPA by the court, proceedings will be instituted but suspended until the DPA expires or is breached. A DPA must contain a statement of facts relating to the alleged offence, which may (but need not) include admissions of guilt. The requirements of a DPA may include, but are not limited to requirements to pay a financial penalty, compensation, or a charitable donation, or to disgorge profits; to implement or amend a compliance programme; to cooperate in any investigation relating to the alleged offence; and to pay the prosecutor's reasonable costs. The amount of any financial penalty must be broadly comparable to the fine that would have been imposed on conviction after a guilty plea. The sole criterion in the 2013 Act for whether a case is suitable for a DPA is that a judge thinks it is 'in the interests of justice'. (He or she will then go on to decide whether the terms proposed for the particular DPA are 'fair, reasonable and proportionate'.)[23]

The 2013 Act required a Code on DPAs to be issued giving relevant guidance to prosecutors. Published on 11 February 2014, the Code suggests guidance for when a prosecutor might 'invite' an organisation to agree to enter into a DPA. The first stage is to assess whether there is either a realistic prospect of conviction (the usual evidential test for a prosecutor) or 'at least a reasonable suspicion' that the organisation has committed the offence. The second stage is to assess whether the public interest would be properly served by a DPA as opposed to a prosecution. The factors the Code suggests are relevant in deciding

23 The Crime and Courts Act 2013, Section 45 and Schedule 17.

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that this test is satisfied include a 'genuinely proactive approach' by the organisation and an 'effective corporate compliance programme'. Self-reporting will help, though in itself it will not be determinative.

The process starts with a formal letter from the SFO and moves through 'transparent' negotiations, subject to undertakings about confidentiality and caveats about subsequent use of the information provided. The parties then draw up a 'statement of facts' and a set of proposed terms to present to the court. If the DPA is breached then the organisation may be prosecuted for the original offence, but only if the full evidential and public interest tests are satisfied. The statement of facts will be admissible in evidence, which will be particularly relevant if the organisation has admitted the offence (though it is not required to do so).[24]

At the time of writing, three DPAs have been concluded in respect of offences of failing to prevent bribery under Section 7 of the 2010 Act. The first, in November 2015, was with Standard Bank PLC, involving payment of financial orders of US$25.2 million and compensation of a further US$7 million to the government of Tanzania, as well as an agreement by the company to cooperate fully with the SFO and to be subject to an independent review of its existing anti-bribery and corruption controls, policies and procedures, and to implement the reviewer's recommendations. The second, in July 2016, was with a company that has not yet been named (pending the conclusion of proceedings against individuals), referred to as XYZ, and involved financial orders of £6,553,085, comprising a £6,201,085 disgorgement of gross profits and a £352,000 financial penalty. XYZ also agreed to continue to cooperate fully with the SFO and to provide a report addressing all third-party intermediary transactions, and the completion and effectiveness of its existing anti-bribery and corruption controls, policies and procedures within 12 months of the DPA and every 12 months for its duration.

The third DPA, and by far the largest and most significant, was in January 2017 and concerned the engineering giant Rolls-Royce, which admitted its involvement in systematic corrupt practices over nearly 30 years, in seven countries and involving three business sectors. It agreed to pay financial penalties amounting to £497.25 million (plus interest), as well as the SFO's costs of £13 million, and to take various remedial measures, rather than face prosecution. Notably however, it achieved this despite the fact that the investigation was triggered by an external source and not by self-reporting. In his judgment, Sir Brian Leveson (who has presided over all the DPAs so far concluded), stressed the extent of the cooperation the company had provided to the SFO throughout the investigation, including the disclosure of matters that would not otherwise have been discovered, as a key reason why the case warranted a DPA rather than prosecution. Nevertheless there has been some criticism of the case, with Corruption Watch describing it as 'proof that the UK is not willing to prosecute a large, politically connected company'.[25]

ii Sentencing Council guidelines

The United Kingdom's Sentencing Council has published guidelines on sentencing of various business crimes, including bribery, which entered into force for individuals and organisations sentenced on or after 1 October 2014.

In the absence of previous guidelines or established sentencing practice for organisations convicted of financial crimes, the Council took into account (among other things) the

24 'The Crime and Courts 2013: Deferred Prosecution Agreement Code of Practice' (see www.sfo.gov.uk).

25 Reported in *The Guardian*, 16 January 2017.

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regulatory and civil penalty regimes used by bodies such as the Financial Conduct Authority, civil and criminal penalties in other jurisdictions (notably the United States) and the sentencing guidelines for corporations produced by the US Sentencing Commission.

The Council prescribes a process that involves assessing the amount obtained (or loss avoided) or intended to be obtained (or avoided), and says that 'for offences under the Bribery Act, the appropriate figure will normally be the gross profit from the contract', although for the corporate offence of failing to prevent bribery 'an alternative measure . . . may be the likely cost avoided by failing to put in place appropriate measures to prevent bribery'. It goes on to suggest that in the absence of clear evidence the court may use a figure of '10–20 per cent of the relevant revenue derived from the product or business area to which the offence relates [during] the period of the offending'.

The next step of the process determines the multiplier within the category range (between 20 and 400 per cent) by reference to various aggravating and mitigating factors. The court may then adjust the fine to fulfil 'the objectives of punishment, deterrence and removal of gain', and to take into account 'the value, worth or available means of the offender' and the impact of the fine on the 'employment of staff, service users, customers and [the] local economy (but not shareholders)' and (if relevant) the 'performance of a public or charitable function'. The remaining steps consider other factors that would indicate a reduction (such as assistance to the prosecution); reduction for guilty pleas; ancillary orders; the 'totality principle' (whether the total sentence is just and proportionate); and the duty to give reasons.[26]

IX OTHER LAWS AFFECTING THE RESPONSE TO CORRUPTION

Allegations of bribery may involve numerous other legal issues, including the potential for civil claims and employment disputes, freezing of assets, possible debarment from participating in public contracts in the European Union, and potential breaches of regulatory provisions. A few points should be noted in the specific context of England and Wales.

First, with respect to potential civil claims, the privilege against self-incrimination does not apply in cases of fraud (which the courts have held includes bribery),[27] so that a person suspected of bribery who is required to provide information in the context of a civil claim may be forced to give evidence that incriminates him or her (although it may not then be used as evidence in criminal proceedings).

Second, with respect to employment disputes, individual suspects who are questioned as part of an external or internal investigation into suspected bribery offences in the United Kingdom increasingly find themselves engaged in disputes over the provisions of a relevant insurance policy that may entitle them to reimbursement of their legal fees. This is particularly significant in an environment in which the availability of publicly funded legal services is increasingly restricted and there are severe controls on defendants' ability to use restrained assets to pay for their defence.

Third, the UK authorities have a number of options to freeze assets on the basis that they may represent the proceeds of crime, including bribery, and these have recently been increased by provisions of the Criminal Finances Act 2017 (the 2017 Act). These options include restraining the assets of someone subject to criminal investigation, to ensure they

26 'Fraud, Bribery and Money Laundering Offences: Definitive Guideline' (see www.sentencingcouncil.org.uk).

27 *Kensington International Ltd v. Republic of Congo* [2007] EWCA Civ 1128.

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would be available to satisfy a confiscation order at the end of criminal proceedings,[28] and freezing assets pending proceedings for civil recovery.[29] A subset of the latter category allows seized quantities of cash to be detained and forfeited in summary proceedings, which the 2017 Act has expanded to cover various categories of personal property (such as artwork and jewellery) and funds held in bank accounts.[30] The 2017 Act also introduced Unexplained Wealth Orders (UWOs), under which a person can be ordered to explain an interest in a specified property and how it was obtained, or face a presumption that it represents the proceeds of crime.[31] Importantly for foreign bribery cases, a UWO can be made against a foreign politician where an interest in a property appears inconsistent with the politician's known sources of wealth.[32] The first UWO was obtained in July 2018, and survived a challenge from the respondent (the wife of an allegedly corrupt foreign official).[33] The 2017 Act also extended the period for which bank accounts can remain blocked following a report of suspicious activity and before any freezing order is sought.[34]

X COMPLIANCE

Efforts to embed compliance regimes in companies designed to reduce the risk of various offences (substantive bribery offences, ancillary offences, and others) are an increasing feature of the anti-bribery landscape in the United Kingdom. The 2010 Act encourages commercial organisations to put in place adequate procedures to prevent bribery offences as a means of ensuring a defence to potential allegations of failing to prevent bribery under Section 7 of the 2010 Act. The existence of an effective compliance programme might also be a factor in favour of not prosecuting a company, and perhaps agreeing to a DPA instead.

Meanwhile, as referenced above, the regime aimed at detecting and preventing money laundering offences under the Proceeds of Crime Act 2002 creates requirements (for financial institutions and others in the regulated sector) and incentives (for anyone at risk of committing a money laundering offence) to report their suspicions of acquisitive crime, including bribery. The lodging of reports under this regime is increasingly the trigger for criminal investigations, and must be borne in mind whenever bribery issues emerge as part of the tactical considerations on whether to self-report. In short, whenever accountants, auditors, banks, or even transactional solicitors suspect an offence has been committed by their client, there is a reasonable likelihood that they will report that suspicion to the authorities. The regulatory requirements on and reputational issues for the United Kingdom's financial institutions, which are under severe pressure to institute risk-averse systems for detecting financial crime, can only serve to increase that likelihood.

28 The Proceeds of Crime Act 2002, Section 41.
29 The Proceeds of Crime Act 2002, Section 245A.
30 The Proceeds of Crime Act 2002, Part 5, Chapters 3. 3A and 3B.
31 The Proceeds of Crime Act 2002, Sections 396A to 396U.
32 The Proceeds of Crime Act 2002, Section 362B (3) and (4)(a).
33 *National Crime Agency v. Mrs A* [2018] EWHC 2534 (Admin).
34 The Proceeds of Crime Act 2002, Section 336A.

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XI OUTLOOK AND CONCLUSIONS

The United Kingdom's response to bribery remains in a period of transition, and not only because there are still extant investigations that engage the 1889 and 1906 Acts as well as those that engage the 2010 Act. A tension has existed for some time between the need to display a tough attitude towards enforcing anti-bribery laws, and the pragmatic reality (particularly given the limited resources of the SFO, and the difficulties in proving liability in some cases) that the interests of justice may in fact be best served by a settlement between prosecutor and suspect (particularly a corporate suspect). CROs may now be out of favour, but DPAs in practice seem to be performing a similar function. Nevertheless, even these measures will need to be backed up with a credible threat of prosecution, conviction and severe sentencing if they can reasonably be expected to have some bite as a deterrent and a punishment for corrupt behaviour.

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Appendix 1

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Shaul Brazil is a partner at BCL Solicitors LLP, specialising in business crime and regulatory enforcement. He has acted in numerous high-profile matters, including international corruption and breach-of-sanctions investigations and prosecutions by the Serious Fraud Office (SFO) or overseas regulators; city fraud, insider dealing and market manipulation investigations and prosecutions by the SFO or the Financial Conduct Authority (formerly the Financial Services Authority); tax avoidance and evasion investigations by HM Revenue & Customs; international cartel investigations and prosecutions by the SFO, Office of Fair Trading and US Department of Justice; and extradition proceedings under the European Arrest Warrant scheme. Shaul also has broad experience acting in ancillary matters such as judicial review proceedings, restraint and confiscation proceedings, and proceedings for the civil recovery of the proceeds of crime. He also provides expert advice to companies in relation to anti-bribery and corruption and anti-money laundering compliance.

Shaul speaks regularly on business crime and related topics and has authored numerous publications, including the chapter on the main fraud offences prosecuted by the SFO in its book *Serious Economic Crime: A boardroom guide to prevention and compliance*, and the England and Wales chapter in the *International Comparative Guide to Business Crime*.

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John Binns is a partner at BCL Solicitors LLP, specialising in all aspects of business crime. His experience includes representing suspects, defendants and witnesses in cases invoking allegations of bribery and corruption, fraud and tax evasion. He has particular expertise in anti-money laundering regulations, civil recovery and confiscation of the proceeds of crime, and criminal offences of money laundering, as well as related areas such as financial sanctions. He regularly represents individuals and businesses in connection with confiscation, property freezing and restraint orders, including in relation to applications to defend, discharge or vary such orders. He has represented individuals in challenges to the European Court of Justice against their inclusion on targeted sanctions lists arising from the Arab Spring, and advised on numerous Interpol Red Notices and extradition requests. His business crime and proceeds-of-crime cases often involve mutual assistance or parallel investigations in other jurisdictions, or both.

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John trained and qualified at a general crime firm and then spent three years as a legal and policy adviser at the Legal Services Commission, before joining a leading criminal and regulatory defence firm of solicitors. He joined BCL in 2010 and has been a partner there since 2017.

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