

THE ANTI-BRIBERY AND
ANTI-CORRUPTION
REVIEW

EIGHTH EDITION

Editor
Mark F Mendelsohn

THE LAWREVIEWS

THE ANTI-BRIBERY AND ANTI-CORRUPTION REVIEW

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CONTENTS

PREFACE.....	vii
<i>Mark F Mendelsohn</i>	
Chapter 1	ARGENTINA..... 1
	<i>Vanina Caniza, Fernando Goldaracena, Francisco Fernández Rostello, Ayelén León, Cecilia Máspero and Karen Wegbraйт</i>
Chapter 2	AUSTRALIA..... 11
	<i>Robert R Wyld and Andreas Piesiewicz</i>
Chapter 3	BRAZIL..... 47
	<i>Heloisa Uelze and Marcelo Ramos Leite</i>
Chapter 4	CANADA..... 57
	<i>Mark Morrison and Michael Dixon</i>
Chapter 5	CHILE..... 69
	<i>Sebastián Doren and Juan Ignacio Donoso</i>
Chapter 6	COLOMBIA..... 79
	<i>María Carolina Pardo Cuéllar and Luis Alberto Castell</i>
Chapter 7	ECUADOR..... 91
	<i>Javier Robalino Orellana and Mareva Orozco Ugalde</i>
Chapter 8	ENGLAND AND WALES..... 105
	<i>Shaul Brazil and John Binns</i>
Chapter 9	FRANCE..... 119
	<i>Antonin Lévy and Ophélie Claude</i>
Chapter 10	GERMANY..... 130
	<i>Sabine Stetter and Christopher Reichelt</i>

Chapter 11	GREECE.....	141
	<i>Ilias G Anagnostopoulos and Jerina (Gerasimoula) Zapanti</i>	
Chapter 12	INDIA.....	150
	<i>Aditya Vikram Bhat, Prerak Ved and Shantanu Singh</i>	
Chapter 13	ISRAEL.....	164
	<i>Chaim Gelfand</i>	
Chapter 14	ITALY.....	175
	<i>Roberto Pisano</i>	
Chapter 15	JAPAN.....	188
	<i>Kana Manabe, Hideaki Roy Umetsu and Shiho Ono</i>	
Chapter 16	JERSEY.....	199
	<i>Simon Thomas and Lynne Gregory</i>	
Chapter 17	KOREA.....	209
	<i>Tony DongWook Kang and Yongman Bae</i>	
Chapter 18	MEXICO.....	219
	<i>Jonathan Edward Adams and Lorena Castillo</i>	
Chapter 19	NETHERLANDS.....	231
	<i>Aldo Verbruggen and Jasmijn Dorant</i>	
Chapter 20	PERU.....	245
	<i>Teresa Tovar Mena and Viviana Chávez Bravo</i>	
Chapter 21	POLAND.....	258
	<i>Tomasz Konopka</i>	
Chapter 22	RUSSIA.....	271
	<i>Alexei Panich and Sergei Eremin</i>	
Chapter 23	SWITZERLAND.....	283
	<i>Yves Klein</i>	
Chapter 24	UNITED STATES.....	297
	<i>Mark F Mendelsohn</i>	

Chapter 25	VENEZUELA.....	324
	<i>Jesús A Dávila and Adriana Gonçalves</i>	
Appendix 1	ABOUT THE AUTHORS.....	333
Appendix 2	CONTRIBUTORS' CONTACT DETAILS.....	353

PREFACE

The eighth 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 new chapters covering Argentina, Brazil, Chile, Colombia, Mexico, Peru and Venezuela. The comprehensive scope of this edition of the Review mirrors the scope of global anti-corruption activity and developments.

Over the past year, countries across the globe continued to bolster their domestic anti-bribery and anti-corruption laws, but shifting international relations and global economic competition may be undermining international cooperation. This is most clearly reflected in tensions between China and the United States and in recent comments by the chairman of the US Securities and Exchange Commission (SEC) that called into question the extent to which international cooperation is real or perceived, and whether deliberately asymmetric enforcement is disadvantaging US companies.

In China there were several notable legislative developments that affect anti-bribery and anti-corruption enforcement. The Standing Committee of the National People's Congress adopted amendments to the country's Anti-Unfair Competition Law, which came into force in January 2018. The amendments specify the range of prohibited recipients of bribes, expand the definition of prohibited bribery to include bribery for the purpose of obtaining a competitive advantage, impose, with limited exceptions, vicarious liability on employers for bribery committed by employees and provide for increased penalties. China also amended its Criminal Procedure Law to codify rules encouraging cooperation in government investigations and to permit trials in absentia, including for bribery and corruption. The new Chinese Supervision Law creates commissions with authority to supervise public functionaries and to detain suspects for prolonged periods while investigating corruption cases.

India and Japan also passed legislation bolstering their anti-corruption laws. The Indian Prevention of Corruption (Amendment) Act criminalises giving an 'undue advantage' to a public official, establishes criminal liability for companies and creates a specific offence penalising corporate management. The Japanese government has introduced a plea bargaining system, which allows individuals and companies to negotiate reduced criminal sentences in exchange for providing information regarding third parties suspected of or charged with enumerated offences, including crimes of corruption.

In Europe, the Italian parliament approved what is known as the 'bribe destroyer' law aimed at combating corruption in Italy's public sector. Among other things, the law increases the powers of prosecutors to investigate allegations of bribery, provides for increased penalties for individuals and increased sanctions for companies convicted for corruption and eases the statute of limitations for corruption cases. In Ukraine, as part of a US\$3.9 billion loan programme with the International Monetary Fund aimed at prosecuting corruption

and insulating court decisions from political pressure or bribery, former President Petro Poroshenko announced the launch of a special court to try corruption cases. The United Kingdom's Serious Fraud Office published guidance on corporate cooperation describing the steps a company can take if it wants to cooperate with prosecutors in an investigation, but the guidance is silent on the specific benefits of cooperation and does not guarantee any leniency for cooperative conduct. In addition, the European Parliament adopted a proposal for a Europe-wide whistle-blower directive aimed at defining the areas of EU law eligible for whistle-blowing and who qualifies for whistle-blower protections.

Despite these significant developments in national legislation around the world, SEC Chair Jay Clayton recently lamented that, although the SEC has 'vigorously enforced' the FCPA, it has done so 'largely alone' and 'other countries may be incentivized to play, and . . . are in fact playing, strategies that take advantage of [the SEC's] laudable efforts'. Similar sentiments may be behind the Foreign Extortion Prevention Act, proposed legislation introduced in the US Congress that would allow the DOJ to indict officials for demanding bribes to fulfil, neglect or violate their official duties.

Separately, on 1 November 2018, then-US Attorney General Jeff Sessions announced a new 'China Initiative,' to counter perceived national security threats to the United States from China. The China Initiative specifies 10 goals, including identifying FCPA cases involving Chinese companies that compete with American businesses. Prior to the announcement of the China Initiative, China adopted the Law on International Criminal Judicial Assistance, which prohibits individuals and entities in China from assisting foreign countries in criminal investigations absent governmental authorisation.

Notwithstanding Chairman Clayton's remarks and the DOJ's China Initiative, senior DOJ officials have continued to affirm their commitment to international cooperation. The significant resolution, announced in March 2019, of the DOJ and SEC enforcement actions against Mobile TeleSystems PJSC, the Russian telecommunications provider, for grand corruption in Uzbekistan, relied on extensive international cooperation between US enforcement agencies and authorities in 13 different European countries, though notably not Russia or Uzbekistan. Likewise, the announcement this past June of a resolution with Technip FMC PLC, a London-headquartered provider of oil and gas technology services, relied on cooperation between the DOJ and Brazilian authorities, along with six European countries. Admittedly, however, both settlements have been years in the making and may not be an indication of the DOJ's current views on international cooperation. Even so, elsewhere in the world, most notably in the prosecution of bribery throughout Latin America, international cooperation remains a central feature of anti-corruption enforcement.

Given the numerous recent changes in domestic legal regimes, and the uncertainty in international relations, this book and the wealth of learning that it contains from around the world, 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
October 2019

ENGLAND AND WALES

Shaul Brazil and John Binns¹

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).

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.

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 a

4 The Bribery Act 2010, Section 14.

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.

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 conviction⁷ 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 investigations, prosecutions and convictions under the 2010 Act have started to make their way through the system. A number 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.

With respect to the broader issue of corporate cooperation with a criminal investigation (including but not limited to bribery cases), the SFO has issued guidance about what will be taken into account in assessing the extent of such cooperation (which, in turn, will impact on the decision on whether to prosecute and, if so, whether a DPA would be appropriate).¹¹ Among other things, it suggests that 'true co-operation . . . will be reflected in the nature and tone of the interaction between a genuinely co-operative organisation, its legal advisers and the SFO'. It goes on to provide a non-exhaustive list of indicators of good practice about preserving and providing material, witness accounts, and waiving privilege, noting in particular that 'if the organisation claims privilege, it will be expected to provide certification by independent counsel that the material in question is privileged'.

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).

11 <https://www.sfo.gov.uk/download/corporate-co-operation-guidance/>.

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 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.¹²

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.¹³

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.¹⁴

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

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

13 The Bribery Act 2010, Section 11.

14 The Bribery Act 2010, Section 12.

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.

V ASSOCIATED OFFENCES: FINANCIAL RECORD-KEEPING AND MONEY LAUNDERING

The commission of bribery offences often also entails ancillary offences such as false accounting,¹⁵ money laundering,¹⁶ and failure by a company to keep adequate records.¹⁷

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 (POCA), 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. They also have duties under anti-money laundering regulations to collect information on the sources of wealth and beneficial ownership of their customers, enhanced where a politically exposed person (PEP) is involved (due to the potential for PEPs to be involved in corruption), breach of which is also an offence.¹⁸

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 was 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

15 The Theft Act 1968, Section 17.

16 The Proceeds of Crime Act 2002, Part 7.

17 The Companies Act 2006, Section 387.

18 The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017.

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.

Notwithstanding the apparent success of Mr Alderman's strategy, 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 2012.¹⁹

The SFO under Mr Green obtained convictions under the 2010 Act, as well as the first conviction, after a contested trial, of a corporate entity for foreign bribery, the first conviction of a corporate entity for failing to prevent bribery under Section 7 of the 2010 Act (the Sweett Group PLC, ordered to pay £2.25 million in February 2016), and three deferred prosecution agreements (DPAs) in relation to bribery (see Section VIII.i).

Meanwhile, 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 legislative programme that began in June 2017. Instead, a new National Economic Crime Centre (NECC) was 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

It was in that context that Lisa Osofsky, a former Federal Bureau of Investigation counsel, took over as the SFO's latest director in August 2018.²¹ Since then, there have been a number of developments and announcements in connection with the SFO's foreign bribery work, including convictions in its cases involving Alstom,²² FH Bertling²³ and Unaoil,²⁴ and the closure of investigations in connection with GlaxoSmithKline and Rolls Royce²⁵ (the

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

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 <https://www.sfo.gov.uk/2018/12/19/five-convictions-in-sfos-alstom-investigation-into-bribery-and-corruption-to-secure-e325-million-of-contracts/>.

23 <https://www.sfo.gov.uk/2019/06/03/fh-bertling-sentenced-for-20m-angolan-bribery-scheme/>.

24 <https://www.sfo.gov.uk/2019/07/19/former-unaoil-executive-pleads-guilty-to-conspiracy-to-give-corrupt-payments/>.

25 <https://www.sfo.gov.uk/2019/02/22/sfo-closes-glaxosmithkline-investigation-and-investigation-into-rolls-royce-individuals/>.

latter following a DPA with the company – see Section VIII.i). A House of Lords committee set up to review the working of the 2010 Act, meanwhile, reported that it was ‘an exemplary piece of legislation’.²⁶

In terms of Ms Osofsky’s personal impact on the SFO, the most eye-catching development so far has been her suggestion, in an interview with London’s *Evening Standard*, that individuals involved in criminal conduct could ‘spend 20 years in jail for what [they] did, or wear a wire and work with us’.²⁷ While such an approach may well work in the United States, it is unlikely to do so here, not least because of the shorter sentences typically imposed and the much more limited role of the prosecutors in setting them.

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 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

26 <https://publications.parliament.uk/pa/ld201719/ldselect/ldbriact/303/30302.htm>.

27 <https://www.standard.co.uk/news/crime/wear-wire-or-face-jail-whitecollar-criminals-are-warned-by-top-british-law-enforcement-official-a4127346.html>.

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'.)²⁸

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 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).²⁹

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 successful completion of the DPA, on its expiry after three years, was confirmed in December 2018.)³⁰ The second, in July 2016, was with Sarclad Limited, and involved financial orders of £6,553,085, comprising a £6,201,085 disgorgement of gross profits and a £352,000 financial penalty. Sarclad 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

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

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

30 <https://www.sfo.gov.uk/2018/11/30/uks-first-deferred-prosecution-agreement-between-the-sfo-and-standard-bank-successfully-ends/>.

triggered by an external source and not by self-reporting. In his judgment, Sir Brian Leveson 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 was 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’.³¹

Another source of controversy about DPAs has been their relationship with the prosecution (or lack thereof) of associated individuals, with the SFO facing criticism of its decision not to prosecute individuals associated with Rolls Royce,³² and of its failure to secure the conviction of individuals associated with Sarclad³³ (which followed a similar failure to convict those associated with a fourth, non-bribery DPA, against Tesco).³⁴

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 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.³⁵

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

32 Reported in *The Guardian*, 22 February 2019.

33 Reported in *The Financial Times*, 16 July 2019.

34 Reported in *The Financial Times*, 9 December 2018.

35 ‘Fraud, Bribery and Money Laundering Offences: Definitive Guideline’ (see www.sentencingcouncil.org.uk).

iii Proceeds of crime developments

Authorities in the UK have a number of options under POCA to freeze and recover assets on the basis that they represent the proceeds of crime or are intended for use in 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 would be available to satisfy a confiscation order at the end of criminal proceedings,³⁶ and freezing assets pending proceedings for civil recovery.³⁷

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.³⁸ The NCA announced several uses of these powers in 2019 in the context of alleged foreign corruption, securing the forfeiture in January of a diamond ring worth around £1 million belonging to a Mrs Zamira Hajiyeva (the wife of an Azeri state banker, who had been convicted in Azerbaijan of corruption offences),³⁹ and in February of nearly £500,000 from accounts held by the son of the former prime minister of Moldova, and announcing in August 2019 the freezing of £120,000 in bank accounts that it said was suspected to have derived from bribery and corruption in an unnamed overseas nation.⁴⁰

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,⁴¹ and 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.⁴² Importantly for foreign bribery cases, a UWO can be made against a foreign PEP where an interest in a property appears inconsistent with his or her known sources of wealth.⁴³ The first UWO was obtained in July 2018, and survived a challenge from the respondent, the aforementioned Mrs Hajiyeva.⁴⁴ The second use of the power, in May 2019, was said to involve a foreign PEP with an interest in real property in London worth around £80 million.⁴⁵

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, possible debarment from participating in public contracts in the European Union, and potential breaches of regulatory provisions. Two points should be noted in the specific context of England and Wales.

36 The Proceeds of Crime Act 2002, Section 41.

37 The Proceeds of Crime Act 2002, Section 245A.

38 The Proceeds of Crime Act 2002, Part 5, Chapters 3. 3A and 3B.

39 <https://www.bbc.co.uk/news/uk-46870782>.

40 <https://nationalcrimeagency.gov.uk/news/100m-account-freezing-orders-are-largest-granted-to-nca>.

41 The Proceeds of Crime Act 2002, Section 336A.

42 The Proceeds of Crime Act 2002, Sections 362A to 362U.

43 The Proceeds of Crime Act 2002, Section 362B (3), (4)(a) and (7).

44 *National Crime Agency v. Mrs Zamira Hajiyeva* [2018] EWHC 2534 (Admin).

45 <https://nationalcrimeagency.gov.uk/news/nca-secures-unexplained-wealth-orders-for-prime-london-property-worth-tens-of-millions>.

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),⁴⁶ 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.

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.

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

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

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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