



UK Anti-Corruption Regime: 2014 Year-in-Review

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Presenters

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Agenda

- **UK Anti-Corruption Regime Primer**
- **Key Players in UK Enforcement**
- **Enforcement Update: International and UK**
- **Tools in the UK Prosecutors' Tool-Kit: Deferred Prosecution Agreements; Sentencing Guidelines**
- **New UK Government Anti-Corruption Plan**
- **What To Expect in 2015?**
- **Compliance Tips**
- **Take Aways**

UK ANTI-CORRUPTION REGIME PRIMER

UK Bribery Act 2010

- Came into force 1 July 2011 – prior anti-corruption laws still apply to activities before that date
- Affects UK companies, as well as non-UK companies and their non-UK affiliates that do business in the UK
- Covers private and public bribery and acceptance of bribes, both domestic and overseas
- Both individual and company liability
- Strict liability corporate offence for failure to prevent bribery by associated persons
 - Statutory defence – adequate procedures
 - OECD Report 2014 found 3rd parties are involved in most cases of bribery of foreign officials so this is a real risk for companies
- Risk of significant penalties and other costs (e.g. jail time, large fines, prosecution costs, costs of ongoing monitoring, debarment from public procurement, debarment by public institutions such as the World Bank)

Comparison to the FCPA

The UK Bribery Act:

- includes domestic as well as foreign bribery;
- includes acceptance of a bribe (“passive bribery”);
- includes private bribery (not just bribery of foreign officials);
- does not have a “corrupt intent” or “improper performance” element in the bribery of foreign officials offence;
- does not have any limitation period - though if there has been an excessively long delay in prosecuting an offence and that has reduced the chances of a fair trial, the judge may decide not to hear the case;
- does not have a statutory carve-out for facilitation payments (but prosecution is dependent on prosecutorial discretion);
- does not have a statutory carve-out for reasonable and bona fide promotional expenses (again guidelines for prosecutorial discretion).

Shareholder Liability

- Generally shareholders not liable for acts of bribery by affiliates without collusion or unless the affiliate is performing services for or on behalf of the shareholder
- Use of civil recovery orders under the UK Proceeds of Crime Act (POCA) to recover dividends paid to shareholders (Mabey Engineering)
- SFO intention to seek similar orders in the bribery context, with focus on institutional investors better able to conduct due diligence (Oxford Publishing Limited)
- Possible private prosecutions? (eg Virgin Media fraud analogy)
 - confiscation order (criminal profits) paid to State, compensation order paid to private prosecutor, prosecution and investigation costs may be recoverable

KEY PLAYERS IN UK ENFORCEMENT

Serious Fraud Office (SFO)

- Serious, complex fraud, overseas corruption - *“lead agency on bribery & corruption”*
- Types of cases often involve *“blue-chip, household names” “nationally, internationally and strategically important companies”* – but not all
- Independent, works alongside NCA & police
- Investigator and prosecutor - not educator/advisor:
“SFO does not and cannot provide a blueprint for avoiding prosecution; any more than local police force would be willing to give advice on how to avoid being arrested for a crime.”
- Recent challenges – negative publicity, collapse of high profile cases
 - Historic management practices, overpaying departing senior execs, loss of data in BAE Systems case, Tchenguiz brothers civil claims for improper prosecution (settled July 2014 for £4.5m plus costs – nb £300m had been claimed), collapse of Dahdaleh case
- Fought off attempt by Home Secretary to fold SFO into NCA
- Budgetary/resource constraints - budget circa £35.2 million (\$54 million)
 - Can request additional funding from HM Treasury if case likely to cost +10% of budget: Sought £24m in 2014 including for Tchenguiz civil cases, legal costs, “blockbuster” cases (LIBOR, Rolls Royce and Barclays/Qatar). Sought further £26.5m in Oct 2014 for 2015
- Recent successes = more confident, aggressive SFO (aims to be akin to DOJ)

National Crime Agency (NCA)

- Established in 2013, replacing Serious Organised Crime Agency (SOCA)
- Investigator – *“leading the UK’s fight to cut serious and organised crime”*
- Also policing and coordinating role - power to compel assistance from regional police forces and SFO – but SFO Director has role in determining NCA strategic priorities
- Accountable to Home Office, Home Office to *“co-ordinate all domestic bribery and corruption policy”*, Home Office also controls NCA budget
 - “The Home Office will take control of all anti-corruption policy and the new NCA will lead on the assessment of bribery and corruption by organised crime”*
- Possible inter-agency turf war with SFO?

Police & Crown Prosecution Service

- City of London Police – Economic Crime Directorate is UK’s national policing lead for investigating fraud and corruption – domestic cases
- But the Overseas Anti-Corruption Unit (OACU) established in 2006 has a global remit to investigate allegations of UK companies or individuals involved in bribery in developing countries overseas (funded by Department for International Development)
- OACU is active - since 2006 it has commenced over 155 cases of corruption/bribery, investigated over 115 suspects, interviewed or arrested 80 individuals, charged 28 individuals and 1 corporate entity
- Information sharing, joint investigation with global counterparts - European Cross Border Bribery Taskforce; MOU with World Bank Integrity Unit, International Foreign Bribery Task Force etc etc
- Crown Prosecution Service (CPS) – responsible for advising on investigations & prosecuting criminal cases investigated by NCA and police

Financial Conduct Authority (FCA)

- UK's financial regulator - established in 2013, replacing the Financial Services Authority (FSA)

“Preventing financial crime is a vital element to achieving our objective of protecting and enhancing the integrity of the UK financial system”

- Power to impose fines and sanctions on regulated firms
- Increasing focus on anti-bribery & corruption, anti-money laundering systems and controls
 - Active in sanctioning firms
 - Active in reviewing sectors - recent FCA market reviews have found that many regulated sectors fail to effectively manage financial crime risk
 - FCA warning in January 2015 that it intends to focus on bribery and corruption systems and control
- No evidence of criminal offence (i.e. bribery) required – mere breach of rules sufficient to impose sanction
- Challenge possible but difficult
- Increasing co-operation between FCA, SFO, NCA

ANTI-CORRUPTION ENFORCEMENT UPDATE

Enforcement: OECD Progress Reports

- Globally, again the US leads the league in enforcement, but enforcement is increasing in other jurisdictions
 - since 1999 through 1 June 2014, 263 individuals and 164 entities have been sanctioned under criminal proceedings in 17 of the 41 OECD Convention signatory countries
 - 80 individuals sentenced to prison (plus 38 with suspended sentences) – 13 years being the longest sentence (was US, but UK recently matched that)
 - 261 fines on individuals and companies – highest being \$149 million (US)
- Active enforcement: US, Germany, Korea, Italy, Switzerland and UK
- Moderate enforcement: France, Norway, Canada and Japan
- Limited enforcement: Belgium, Bulgaria, Hungary, Luxembourg, Netherlands, Poland, Sweden,
- The rest are little or no enforcement

Enforcement: OECD Progress Reports

Who is bribing?

- Almost half the bribes to foreign officials were paid from highly to very highly developed countries – corruption is not solely a developing country problem
- Two thirds of bribes were paid in 4 key sectors - extractive, construction, transportation & storage, information & communication
- Third parties/Intermediaries involved in 3 out of 4 cases
 - 41% were agents, distributors and brokers
 - 35% were corporate vehicles, subsidiary companies, local consulting firms, offshore companies
- Senior management involved in over 50% of cases

UK Enforcement – Prosecutions

- Continued enforcement under prior corruption and current anti-money laundering laws
- Fines and (serious) jail time for individuals, as well as civil recovery under money laundering laws
- SFO finally obtains 1st Bribery Act convictions - Sustainable AgroEnergy executives and agents
- Before that, CPS prosecuted and convicted 3 individuals under Bribery Act - cab driver, court clerk and student
- Also SFO obtains 1st corporate bribery conviction but under prior law
 - Note: the company convicted, Smith and Ouzman Ltd, is a SME and the corrupt payments amounted to £400,000 – SFO doesn't just investigate large corporates and large bribes
- Still no Bribery Act corporate conviction yet

Recent UK Penalties - SFO

- Sustainable AgroEnergy PLC – 3 former execs or agents convicted under Bribery Act – sentenced to total of 28 years jail (13, 9 and 6 years)
- Alcoa/Hall (related to collapsed Dahdaleh case) – former Alba CEO, Mr Hall who pleaded guilty under prior laws, was sentenced to 16 months jail and ordered to pay £3 million (\$5.1 million) confiscation order plus £500,000 compensation to Alba plus £100,000 as contribution to prosecution costs
- Innospec – 4 individuals convicted under prior laws for bribing Indonesian officials – sentenced to total of nearly 9 years
 - Note: Innospec follow-on civil damages action by third parties. On the facts, that civil action failed due to issues with proving causation but its clear such claims are viable

Recent UK Cases - SFO

- Smith & Ouzman Ltd, ex-chairman and sales/marketing director convicted under prior laws (2 sales agents acquitted)
 - Sentencing due February 2015
 - Note: Several “unnamed Smith & Ouzman agents” were not charged but “agreed to make payments to SFO”
- Alstom – In June 2014, 4 years after 2010 dawn raids, SFO charged Alstom’s UK subsidiary and former directors. Also investigations in US, Brazil, Italy, France, Mexico, Slovenia, Switzerland, World Bank, EIB & EBRD (debarment by one development bank means debarment by all)
- Hewlett Packard/Autonomy - SFO closed investigation & ceded jurisdiction to US – SFO outsourcing? Also US (DOJ & SEC), Canadian & German investigations

Recent UK Cases - FCA

- Besso Limited, a general insurance broker, was fined £315,000 in March 2014 for failing to establish and maintain effective anti-bribery and anti-corruption systems and controls (early settlement reduced fine by 30% from £450,000)
 - Main FCA criticism was in respect of assessing and dealing with third party risk
 - Note: Besso had controls in place and even had a law firm advise on them, BUT it ignored FCA warnings to the industry and to Besso that they were not adequate
- Standard Bank PLC (UK subsidiary of South Africa's largest banking group) fined £7.6m for failures in its anti-money laundering controls

Enforcement - UK Investigations

There are in addition a large number of ongoing investigations:

- GlaxoSmithKline – SFO formal investigation opened in May 2014 into allegations of bribery in the conduct of the company's business. Also China, US (DOJ & SEC) and Poland investigations
- Rolls Royce – SFO investigation into alleged bribes paid in China & elsewhere. Also US (DOJ) and Indian investigations
- ENRC – SFO investigation into alleged corruption in Kazakhstan and Africa. Also US investigation
- BHP Billiton – BHP reported SFO investigation. Alleged bribes to Cambodian and Chinese officials. Also US (DOJ & SEC) and Australian investigations
- Sweett Group – SFO investigation into alleged bribes paid secure large contracts in North Africa
- GPT (an affiliate of EADS) – SFO investigation into its activities in Saudi Arabia in particular a subsidiary's business relationship with the Saudi National Guard

Enforcement – UK Investigations

- News Corp – News Corp reported SFO investigation. Alleged bribes paid by journalists to police. Also US (DOJ & SEC) and Chinese investigations
- BSG Resources – SFO investigation into alleged bribes paid to secure rights to mine in Guinea. Also US (DOJ) and Government of Guinea investigation
 - Note – in January 2015, Government of Guinea formally requested assistance from UK in obtaining evidence. SFO exercised its compulsory powers (under criminal sanction) to request 80,000 documents from BSGR's financial and legal advisers.
 - BSGR has brought a judicial review of the decision to use these compulsory powers
- Barclays Bank/Qatar - investigation into certain commercial arrangements between Barclays Bank and Qatar Holdings in 2008 (circumstances surrounding Barclays' £8bn re-capitalisation in 2008)
- Tradition Financial Services of Switzerland (TFSS campaigned to retain the Gaddafi Govt first sovereign-wealth account) - OACU investigation into alleged corruption. Also US (DOJ, SEC) investigation
- CanBaikal Resources Inc – OACU investigation into alleged corruption in grant of development loan. Also Russian and EBRD investigation

TOOLS IN THE UK PROSECUTORS' TOOL-KIT

Deferred Prosecution Agreements

- As of February 2014, DPAs available to prosecutors (SFO & CPS) – none yet
- Legislative response to legal difficulties with entering into plea bargains
- Corporate bodies, partnerships, unincorporated associations - not individuals
- Differences to US system – in particular, greater judicial oversight/approval
- Prosecutorial guidance whether DPA likely to be appropriate etc
- “*Co-operation, co-operation, co-operation*” SFO wants:
 - proactive, self-reporting
 - speedy access to potential witnesses (prior to them being interviewed in internal investigation)
 - broad, less restrictive consideration of material for privilege
- SFO attack on privilege?
- Voluntary disclosure won’t guarantee an offer of a DPA
 - SFO says it is “*first & foremost, a prosecution agency*” but views DPAs as “*a useful tool in prosecutors’ tool-kit*” in appropriate cases

Voluntary Disclosure

- New SFO director withdrew prior SFO guidance which inferred civil, rather than criminal, sanctions in the case of a voluntary disclosure – SFO focus now is on prosecution
- Voluntary disclosure is still encouraged - but “no guarantees”
 - May mitigate against prosecution if genuinely proactive and forthcoming with remedial action
 - Opens up possibility of DPA
 - Failure to report timely may be a factor in favour of prosecution
 - Failure to report may also involve criminal offences of money laundering
 - “moral and reputational imperative”
- Case example – Rolls Royce made disclosures after SFO request for information about allegations of malpractice in China, India
- Possibility of multiple enforcement and disclosures in other jurisdictions may affect decision and timing (eg RR – UK, US, India, China)

Deferred Prosecution Agreements

- Proceedings instituted by indictment charging the offence but then suspended (while in place, no other person may prosecute)
- Judicial supervision at all stages:
 - After negotiations commence but before terms are agreed, prosecutor must apply to court for declaration that entering into DPA is in the interest of justice and the proposed terms are fair, reasonable and proportionate
 - Court approval also required for final terms and any variations
- Guidance:
 - Joint Code of Practice for Prosecutors - prosecutorial guidance & general principles
 - Criminal Procedure Rules - framework for the various hearings
 - Sentencing Guidelines - influences acceptable DPA terms

Deferred Prosecution Agreements

- Content of a DPA
 - Statement of facts (nb. treated as admissions in criminal proceedings)
 - Admission of guilt not required but must admit wrongdoing
 - Must be agreed by parties - court will not resolve areas of dispute
- Requirements imposed may include:
 - Compensation; financial penalty (to be broadly comparable to fine that a court would impose on conviction - Sentencing Guidelines); prosecution costs; co-operation in investigation; compliance measures; ongoing monitoring; disgorgement of profits
 - But no terms mandatory
- Prosecutor may apply to court if there has been a failure to comply
 - Sanction will be agreed remedies or termination of DPA

Corporate Sentencing Guidelines

- Previously none for bribery offences or corporate liability
- First consider a compensation order, then a confiscation order, then a fine
- Fine is calculated by multiplying harm by 250%-400% (depending on culpability), then further adjusting for mitigating or aggravating factors
 - **Harm** may be gross profit from the contract corruptly obtained, retained or sought. Or 10%-20% of revenue related to the offending (e.g. worldwide revenue derived from product or business area during the period of offending). Or, in the case of failure to prevent bribery, the likely cost avoided by failing to put in place appropriate measures to prevent bribery
 - **Aggravating** factors/those increasing **culpability** include playing an active role in the corrupt conduct, wilful obstruction, corrupting public officials, culture of wilful disregard of misconduct
 - **Mitigating** factors/those lessening **culpability** include having anti-corruption systems & controls (albeit inadequate), voluntary co-operation and compensation, no prior offending
- Then consider yet further adjustments: combination should achieve removal of all gain, appropriate additional punishment, and deterrence – but must be fair and proportionate
- Ability to pay may be considered, but:

“The fine must be substantial enough to have a real economic impact to bring home to both management & shareholders the need to operate within the law. Whether the fine will have the effect of putting the offender out of business will be relevant; in some bad cases this may be an acceptable consequence.”

NEW UK GOVERNMENT ANTI-CORRUPTION PLAN

UK Government Anti-Corruption Plan

- More coordination amongst those responsible
- A new central bribery and corruption unit within the NCA
- Integration of approach to international and domestic corruption
- Governmental review of *“enforcement response to bribery and corruption.. a full consideration of the powers, capabilities and structures involved in the response to bribery and corruption”* – SFO still in danger?
- Support for the new Anti-Corruption Champion
- MOJ considering the case for a new strict corporate liability offence of failure to prevent acts of economic crime by associated persons
- In international corruption cases, the UK will now seek to recover its full costs from any confiscated funds before returning the funds to the requesting country

WHAT TO EXPECT IN 2015?

Things to Come?

- Likely to see the first DPA (GSK or Rolls Royce cases?)
- Will DPAs increase voluntary disclosure?
- Increased use of monitors?
- Higher fines under new Sentencing Guidelines?
- Closer international cooperation between enforcement authorities – more risk of being caught and, if caught, of multiple prosecutions
- BUT SFO says it has the “most demanding caseload ever” – Resources? Will it struggle to take on new cases? Will we see SFO “outsourcing” cases to US?
- More FCA fines for regulated firms – ignore warnings at your own peril!
- A new strict liability corporate offence of failure to prevent any financial crime? – cross-party support so far
- Corporate offences to be included within EU mandatory public procurement exclusion rules? - currently, s7 offence is discretionary ground for exclusion

COMPLIANCE TIPS

Essential Elements

- Commitment from senior management and a clearly articulated policy against corruption – tone at the top
- Oversight, autonomy, and resources
- Code of conduct and compliance policies and procedures
- Risk assessment
- Training and continuing advice
- Incentives and disciplinary measures
- Third-party due diligence and monitoring/M&A due diligence
- Confidential reporting and internal investigation
- Monitoring and review

Compliance Programs

- One size does not fit all
- Requires a careful analysis of your business and an identification of your risks
- Risk of multiple enforcement requires consideration of other anti-corruption laws as well as Bribery Act
- Best practices in the UK are evolving – but do take note of FCPA guidance
- Counsel or the head of compliance should be sure to stay on top of best practices and consider whether they are appropriate for his or her company

Risk Assessment

- At a minimum, risk assessments should ask the following questions:
 - Do I do business in countries and/or sectors with a reputation for corruption?
 - Do I do business with state-owned enterprises?
 - Does my business require licensing or permits by local authorities?
 - Do I need to deal with customs or other import authorities?
 - Do I use third party agents or distributors?
- Risk assessments should consider qualitative and quantitative factors
- Should also consider internal risks, including adequacy of compliance
- After you assess the risk faced, you can begin to design an appropriate anti-corruption compliance program

Sources of Guidance: Bribery Act

- **MOJ Bribery Act Guidance**
www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf
- **SFO** – limited guidance as view themselves as prosecutorial agency
www.sfo.gov.uk/bribery--corruption/bribery--corruption.aspx
www.sfo.gov.uk/media/225554/enforcement_of_the_uks_bribery_act_facilitation_payments_061212.pdf
- **FCA Financial Crime: A Guide for (Regulated) Firms** <http://fshandbook.info/FS/html/handbook/FC/link/PDF>
- **Transparency International**
www.transparency.org.uk/our-work/business-integrity/bribery-act
www.transparency.org.uk/our-work/publications/15-publications/833-how-to-bribe-a-typology-of-bribe-paying-and-how-to-stop-it
- **OECD**
<http://www.oecd.org/corruption/keyoecdanti-corruptiondocuments.htm>
- **DOJ and SEC FCPA Resource Guide** (and FCPA enforcement generally)
<http://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf>

Sources of Guidance: Prosecution, DPAs

- **Joint DPP and SFO Bribery Act Prosecutorial Guidance**
[www.sfo.gov.uk/media/167348/
bribery_act_2010_joint_prosecution_guidance_of_the_director_of_the_serious_fraud_office_and_the_director_of_public_prosecutions.pdf](http://www.sfo.gov.uk/media/167348/bribery_act_2010_joint_prosecution_guidance_of_the_director_of_the_serious_fraud_office_and_the_director_of_public_prosecutions.pdf)
- **DPP, SFO and HMRC Guidance on Corporate Prosecutions**
www.sfo.gov.uk/media/65217/joint_guidance_on_corporate_prosecutions.pdf
- **Joint SFO and CPS Deferred Prosecution Agreements Code of Practice**
www.sfo.gov.uk/media/264623/deferred%20prosecution%20agreements%20cop.pdf
- **Definitive Sentencing Guidelines for fraud, bribery and money laundering offences**
[www.sentencingcouncil.org.uk/wp-content/uploads/
Fraud_bribery_and_money_laundering_offences_-_Definitive_guideline.pdf](http://www.sentencingcouncil.org.uk/wp-content/uploads/Fraud_bribery_and_money_laundering_offences_-_Definitive_guideline.pdf)

KEY TAKE AWAYS

Key Take Aways

- Failure to comply with anti-corruption laws can have severe consequences
- Not just legal penalties, but also reputational consequences and effects on the ability to do business
- Corruption is on the agenda – not just at the SFO but the various local and international agencies
- Risks of multiple enforcement
- It is not just high profile companies or big bribe payers that need to take care – everyone is at risk

QUESTIONS AND ANSWERS

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