THE ANTI-BRIBERY AND ANTI-CORRUPTION REVIEW

NINTH EDITION

Editor
Mark F Mendelsohn

THE LAWREVIEWS

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Mark F Mendelsohn

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PREFACE

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

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

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

Given the political turmoil and the global health crisis confronting us in the remainder of 2020 and into 2021, this book and the wealth of country-specific learning that it contains will help guide practitioners and their clients when navigating the perils of corruption in

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

Mark F Mendelsohn
Paul, Weiss, Rifkind, Wharton & Garrison LLP
Washington, DC
October 2020

Chapter 7

ENGLAND AND WALES

Christopher David, Fred Saugman, Alice Lepeuple and Josef Rybacki[1]

I INTRODUCTION

In the past decade, the anti-bribery regime in England and Wales has seen significant developments in legislation governing the prosecution and punishment of bribery offences, particularly for corporations. The introduction of the Bribery Act 2010 marked a step-change in anti-corruption enforcement, most notably by introducing, to a limited extent, strict liability and by expanding the territorial reach of criminal liability for bribery offences. In February 2014, deferred prosecution agreements (DPAs) were introduced in the UK and, after a slow start, DPAs are becoming an increasingly common tool for resolving corporate misconduct.

II DOMESTIC BRIBERY: LEGAL FRAMEWORK

i Sources of legislation

The primary source of UK anti-bribery and corruption legislation is the Bribery Act, which is used to prosecute conduct that took place on or after 1 July 2011, the date the legislation came into force. Earlier conduct may be prosecuted under the Prevention of Corruption Act 1906; the Public Bodies Corrupt Practices Act 1889 and the common law offences of bribery and accepting a bribe.

The Bribery Act has broad territorial application. It applies not only to offences that took place within the UK, but also to offences that took place outside the UK and were carried out by individuals with a close connection to the UK by way of nationality or residence.[2]

ii Offences

There are three domestic bribery offences within the Bribery Act:

a Section 1: bribing another person;
b Section 2: being bribed; and
c Section 7: failure of commercial organisations to prevent bribery.

Central to all domestic bribery offences is the improper performance of a relevant function or activity.[3] These include:

a any function of a public nature;

1 Christopher David is a counsel and Fred Saugman, Alice Lepeuple and Josef Rybacki are associates at WilmerHale.

2 Section 12, Bribery Act 2010.

3 Section 3, Bribery Act 2010.

b any activity connected with a business;
c any activity performed in the course of a person's employment; and
d any activity performed by or on behalf of a body of persons (corporate or unincorporate).

The function or activity is relevant even if it has no connection with the UK. A function or activity is performed improperly when it is performed in breach of an expectation of good faith or impartiality, or in breach of a person's position of trust.[4] Bribery of private individuals and bribery of public officials are not separate offences.

Section 1 – Bribing another person

Bribing another person occurs when a person promises or gives a financial or other advantage to another person, directly or through a third party, intending that advantage to induce any person to perform a relevant function improperly or to reward past improper performance,[5] or when the offeror knows the offer, promise or gift would itself constitute the improper performance of a relevant function.[6]

Section 2 – Being bribed

There are four ways in which this offence can be committed:

a a person requests, agrees to receive or accepts a financial or other advantage, intending a relevant function to be performed improperly, either by himself or another person;[7]
b a person requests, agrees to receive or accepts a financial or other advantage, and that act itself constitutes improper performance;[8]
c a person requests, agrees to receive or accepts a financial or other advantage as a reward for improper performance;[9] and
d a relevant function or activity is performed improperly as a consequence of or in anticipation of a request, agreement to receive or acceptance of an advantage.[10]

Section 7 – Failure of commercial organisations to prevent bribery

The most significant development within the Bribery Act is the introduction of a strict liability offence that makes it possible for relevant commercial organisations to be liable for failing to prevent bribery by associated persons.

A relevant commercial organisation is any corporate body or partnership formed in the UK or carrying on business in the UK.[11] A person is associated with an organisation if they perform services for that organisation.[12] This is a deliberately broad definition designed to include, but not be limited to, employees, agents and subsidiaries.

The offence is committed where an associated person commits an offence of bribing another person or bribing a foreign public official (see Section IV), whether or not they are

4 Section 4, Bribery Act 2010.
5 Section 1(2), Bribery Act 2010.
6 Section 1(3), Bribery Act 2010.
7 Section 2(2), Bribery Act 2010.
8 Section 2(3), Bribery Act 2010.
9 Section 2(4), Bribery Act 2010.
10 Section 2(5), Bribery Act 2010.
11 Section 7(5), Bribery Act 2010.
12 Section 8(1), Bribery Act 2010.

convicted of that offence, where the associated person intends to obtain or retain business or a business advantage for that organisation.[13] It does not matter where the offending conduct takes place.[14]

It is a defence against the charge of failure to prevent bribery for an organisation to have in place adequate procedures designed to prevent associated persons from committing bribery offences.[15]

The Ministry of Justice has published guidance (the Ministry of Justice Guidance) concerning the adequate procedures defence, which sets out six principles designed to inform organisations of policies and procedures they should have in place to prevent bribery by associated persons.[16]

Broadly, the principles state that procedures should be:

a proportionate to the size, risk profile and complexity of the organisation;

b top-level commitment, ensuring prevention of bribery begins with top-level management;

c designed based on a documented assessment of the nature and extent of risks faced by the organisation;

d applied proportionately given the profile of persons who will perform services on behalf of the organisation, including by taking appropriate due diligence measures;

e communicated effectively to all relevant persons including through training; and

f kept under continuous monitoring and review.

iii Penalties

Convicted individuals may face up to 10 years' imprisonment or an unlimited fine, or both.[17] Convicted commercial organisations may face an unlimited fine.[18]

iv Public officials participating in commercial activities

The Bribery Act does not prohibit public officials from participating in commercial activities. However, public officials are subject to the Civil Service Management Code, which outlines terms and conditions of service for government departments and agencies (the Code).[19]

The Code prohibits civil servants from misusing their official position or information acquired in the course of their official duties to further their own private interests or those of others.[20] Civil servants must disclose their and their immediate family's business and shareholding interests, which they would be able to further as a result of their official position.[21]

13 Section 7(1) and (3), Bribery Act 2010.

14 Section 12(5), Bribery Act 2010.

15 Section 7(2), Bribery Act 2010.

16 Ministry of Justice, '*The Bribery Act 2010 – Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing*', March 2011.

17 Section 11(1), Bribery Act 2010.

18 Section 11(2)–(3), Bribery Act 2010.

19 Civil Service Management Code, November 2016.

20 Principle 4.1.3.c, Civil Service Management Code, November 2016.

21 Rule 4.3.9, Civil Service Management Code, November 2016.

v Gifts and entertainment

The Code states that 'civil servants must not receive gifts, hospitality or benefits of any kind from a third party which might be seen to compromise their personal judgement or integrity'.[22]

III ENFORCEMENT: DOMESTIC BRIBERY

Bribery and corruption offences are generally prosecuted by the Serious Fraud Office (SFO) and Crown Prosecution Service (CPS).

i Corporate convictions

In the first few years after the implementation of the Bribery Act, prosecutions were thin on the ground. It was not until 2015 that the SFO secured a conviction against an organisation. Sweett Group PLC entered a guilty plea to a charge under Section 7 of the Bribery Act linked to the activities of its agent in the UAE. Sweett Group was ordered to pay a total financial penalty of £2.25 million, plus costs.[23]

There followed a period of over two years without a corporate conviction, before Skansen Interiors Limited was convicted of a Section 7 offence in a CPS prosecution linked to office refurbishment contracts. This was the first corporate conviction under the Bribery Act following a contested trial, almost seven years after its implementation. Because the company was dormant, no financial penalty was imposed.[24]

ii Deferred prosecution agreements

While successful prosecutions against organisations have been rare and financial penalties have been insubstantial, or perhaps because of these, the SFO has made better use of DPAs.

A DPA results in proceedings against the organisation being suspended for a set period of time so long as the organisation complies with agreed conditions, which may include the payment of financial penalties, cooperating with the prosecution of linked individuals, and implementing compliance controls.

The first DPA was secured against ICBC Standard Bank in November 2015 in relation to a Section 7 offence linked to payments to government officials in Tanzania by a subsidiary.[25] Under the agreement, Standard Bank agreed to pay a penalty of US$16.8 million plus US$7 million compensation to the Tanzanian government and a disgorgement of profits of US$8.4 million.

Seven further DPAs have been agreed between organisations and the SFO, although three of those did not relate to Bribery Act offences. Most notable among these are agreements reached with Rolls-Royce Plc and Airbus SE. The financial penalties involved demonstrated what a powerful revenue-generating tool DPAs can be. In the 2017 Rolls-Royce agreement, the organisation agreed to pay a total fine of £671 million across three jurisdictions, almost

22 Principle 4.1.3.d, Civil Service Management Code, November 2016.

23 *R v. Sweett Group PLC* (unreported).

24 *R v. Skansen Interiors Limited* (unreported).

25 *Serious Fraud Office v. Standard Bank Plc (now known as ICBC Standard Bank Plc)* [2015].

£500 million of which was paid in the UK.[26] In the January 2020 Airbus agreement, the organisation agreed to a total financial penalty of €991 million in the UK as part of a global penalty of €3.6 billion.[27]

When assessing DPAs, courts have placed a heavy emphasis on the extent to which the organisation has cooperated with the investigation, including voluntary disclosure and waiver of privilege, and the majority have involved the organisation self-reporting misconduct identified during internal investigations. Cooperation with the investigation has also led to discounts of up to 50 per cent being applied to financial penalties.[28]

One of the most interesting aspects of several of these DPAs has been the subsequent lack of convictions of individuals whose conduct formed the basis of the DPAs. In cases brought against individuals linked to DPAs agreed with Sarclad Limited and Güralp Systems Ltd, all defendants were acquitted, and the SFO closed its investigations into individuals linked to the Rolls-Royce DPA.

According to media reports, there are a number of ongoing SFO investigations and prosecutions under both the old corruption legislation and the Bribery Act (Amec Foster Wheeler, British American Tobacco, Chemring Group Plc, ENRC, Glencore, GPT Special Project Management Ltd, KBR Inc, Petrofac Plc, and Rio Tinto).

IV FOREIGN BRIBERY: LEGAL FRAMEWORK

i Overview of UK foreign bribery law and its elements

Section 6 – Bribery of foreign public official

The Bribery Act contains a specific offence of bribing a foreign public official. A person commits an offence contrary to Section 6 of the Bribery Act if he or she bribes a foreign public official with the intention of influencing the public official in his or her capacity as a public official, and with the intention of gaining or retaining business or an advantage in the conduct of business. A person bribes a public official if he or she offers, promises or gives a financial or other advantage to the public official, or to another person at the public official's request, or with the official's assent. Unlike the Sections 1 and 2 offences, there is no requirement that the advantage induce the public official to perform improperly a relevant function or activity. The offence is not committed, however, if the public official is permitted or required by law to be influenced in their capacity by the advantage. For instance, the offence is unlikely to be committed where a commercial organisation offers benefits to a local community alongside a bid, and a foreign public official is required by procurement laws to consider such benefits in selecting the winning bid.[29]

Foreign public officials are defined as appointed or elected officials who hold legislative, administrative or judicial positions of any kind in countries or territories outside the UK. They also include persons who exercise public functions for or on behalf of a country or territory outside the UK, or for a public agency or enterprise of these countries or territories.

26 *Serious Fraud Office v. Rolls-Royce* [2017].

27 *Serious Fraud Office v. Airbus* [2020].

28 For example, *Serious Fraud Office v. Rolls-Royce* [2017].

29 Ministry of Justice Guidance, paragraph 25.

Taking an example from recent a recent DPA,[30] a person working in a senior position in the research centre of a national institute is likely to be a public official within the meaning of Section 6 of the Bribery Act. The Bribery Act does not define 'public functions'. The Ministry of Justice Guidance notes that 'the exact nature of the functions of persons regarded as foreign public officials is often very difficult to ascertain with any accuracy'. Finally, foreign public officials include officials of public international organisations, such the OECD and the World Trade Organization.

Extraterritorial application of bribery offences

The Bribery Act provides for the extraterritorial application of bribery offences. Criminal proceedings for offences contrary to Sections 1, 2 and 6, may be initiated in the UK irrespective of where the offence took place, provided that the person who committed the offence has a close connection with the UK. A person has a close connection with the UK if they are a British or British overseas citizen or national, a British subject or protected person under the British Nationality Act 1981, a UK resident, a body incorporated in the UK, or a Scottish partnership. Given the extraterritorial application of these offences, a person with a close connection to the UK may be charged with either Section 1 or Section 6 of the Bribery Act for bribing a foreign public official outside of the UK.

Similarly, the corporate offence of failing to prevent bribery may be prosecuted in the UK irrespective of where the bribery took place.[31] The person who committed the bribery is not required to have a close connection to the UK. However, the offence applies to a body incorporated in the UK, a body incorporated elsewhere that carries on business in the UK, a partnership formed in the UK, or a partnership formed elsewhere that carries on business in the UK (for more on this offence, see Section II.ii).

Conspiracy to commit an offence outside England and Wales

The Criminal Law Act 1977 enables enforcement agencies in England and Wales to investigate and prosecute conspiracies to commit foreign bribery under certain circumstances. Section 1A of the Act provides that the offence of conspiracy contrary to Section 1 of the 1977 Act extends to a foreign conspiracy that satisfies four conditions:

a the course of conduct agreed by the parties to the conspiracy must involve an act or other event intended to take place in a country outside England and Wales;

b the act or other event must constitute an offence under the law in force in that country or territory;

c the agreement would constitute an agreement to commit an offence within the meaning of Section 1 but for the fact that the offence would not be an offence triable in England and Wales; and

d a party to the agreement or a party's agent did anything in England and Wales in relation to the agreement before its formation or in pursuance of the agreement, or became a party to the agreement in England and Wales.

30 *Güralp v. Serious Fraud Office* [2019]. While there was no specific count of bribing a foreign public official on the indictment, the judgment referred to Dr Chi, who received corrupt payments, as a foreign public official.

31 Section 7(3)(b), Bribery Act 2010.

UK enforcement agencies have used Section 1A to prosecute foreign bribery in relation to conduct that took place before July 2011, because the bribery legislation predating the Bribery Act did not cover foreign public officials or extraterritorial conduct.[32] In the recent Güralp DPA, the indictment contained one count of conspiracy to make corrupt payments from April 2002 to September 2015, and one count of failing to prevent bribery from July 2011 to September 2015.

ii Hospitality and promotional, or other similar business expenditure

In relation to the offence of bribing a foreign public official, the Ministry of Justice Guidance states that the Act is not intended to criminalise 'bona fide' or 'reasonable and proportionate' hospitality and promotional business expenditure aiming to 'improve the image of a commercial organisation, better to present products and services, or establish cordial relations.' Similarly, the Bribery Act Joint Prosecution Guidance (JPG) accepts that such expenditure is 'an established and important part of doing business', which the Bribery Act 'does not seek to penalise'.[33]

However, hospitality and promotional, or other similar business expenditure, such as gifts, travel, meals and entertainment, can in certain circumstances amount to bribery. It will do so if it constitutes a financial or other advantage, is intended to influence the foreign public official and to gain business or a business advantage, and there is a 'sufficient connection' between the advantage offered and the business or business advantage sought. In assessing whether such expenditure amounts to a bribe, prosecuting authorities will consider 'the full circumstances of each case'.[34] They may have regard to factors including, for example, the type and level of expenditure, the way in which the advantage was offered, whether the advantage was concealed, the ability of the foreign public official to award business and industry standards and norms.[35] For example, an offer to a foreign public official of standard travel and accommodation to allow him or her to visit a commercial organisation's office or site in order for the organisation to present a project requiring the foreign public official's approval is unlikely to amount to bribery.

iii Facilitation payments

The Bribery Act does not permit facilitation payments, and such payments can amount to an offence under Sections 1, 6 or 7. The Ministry of Justice Guidance notes that allowing facilitation payments would 'create artificial distinctions that are difficult to enforce, undermine corporate anti-bribery procedures, confuse anti-bribery communication with employees and other associated persons, perpetuate an existing "culture" of bribery and have the potential to be abused.' The Guidance does though acknowledge 'the problems that commercial organisations face in some parts of the world and in certain sectors'. It also accepts that duress would be available as a defence to persons 'left with no alternative but to make [facilitation] payments in order to protect against loss of life, limb or liberty'.

32 See Section 7 of the Public Bodies Corrupt Practices Act1889, which specifies that the expression 'public body' does not include any public body outside the UK.

33 *Bribery Act 2010: Joint Prosecution Guidance of The Director of the Serious Fraud Office and The Director of Public Prosecutions,* September 2019.

34 ibid.

35 ibid.

The JPG lists the fact that a person followed the procedure set out in his or her commercial organisation's 'clear and appropriate policy' on facilitation payments as a factor tending against prosecution. Conversely, the fact that the person did not follow such procedure is a factor tending in favour of prosecution.

iv Payments through third parties or intermediaries

The Bribery Act prohibits bribery in the form of payments made through third parties or intermediaries. The bribery offences under Sections 1, 2, and 6, cover advantages offered or received 'directly or through a third party'. The offence of failing to prevent bribery contrary to Section 7 also covers intermediaries who perform services for or on behalf of the commercial organisation and are, as such, persons 'associated' with that organisation.

The Ministry of Justice Guidance gives 'the use of intermediaries in transactions with foreign public officials' as an example of relationships involving 'higher risk' in its list of risks commonly encountered by commercial organisations. In the Airbus DPA, four of five counts on the indictment involved payments made through intermediaries.

v Civil and criminal enforcement

Civil and administrative enforcement and penalties

Businesses regulated by the FCA must take reasonable care to establish and maintain effective systems and controls for countering the risk that they might be used to further financial crime, including bribery.[36] The FCA may initiate civil or administrative proceedings against a regulated business with 'deficient anti-bribery and corruption systems and controls' irrespective of whether bribery has in fact taken place.[37]

Criminal enforcement and penalties

An individual guilty of an offence under Sections 1, 2 or 6 of the Bribery Act may be sentenced to imprisonment for up to 10 years, a fine, or both. The Sentencing Council's Definitive Guideline for Fraud, Bribery and Money Laundering Offences sets out the principles and steps for the calculation of these terms of imprisonment and fines.

A commercial organisation guilty of an offence under Sections 1, 2, 6 or 7 of the Bribery Act may be fined. Under the UK Public Contracts Regulations 2015,[38] public authorities must exclude from the procurement process any organisation that has been convicted of an offence contrary to Sections 1, 2, and 6 of the Bribery Act, Section 1 of the Public Bodies Corrupt Practices Act 1889, Section 1 of the Prevention of Corruption Act 1906 or the common law offence of bribery. Accordingly, one of the key advantages of entering into a DPA is that it is not considered a conviction. In respect of companies guilty of an offence under Section 7 of the Bribery Act, public authorities have a discretionary power to exclude.

36 FCG 6.1.3.

37 FCG 6.1.4.

38 Which implement the EU Public Contacts Directive 2014/24/EC.

vi Cooperation with enforcement agencies

There is no leniency programme available to individuals or businesses who self-report to the enforcement agencies under UK foreign bribery laws. However, the DPA Code states that 'genuinely proactive' cooperation with enforcement agencies may be given 'considerable weight' in deciding that a DPA, rather than prosecution, is in the public interest. The SFO's Corporate Cooperation Guidance further sets out its expectations in relation to cooperation.[39]

vii Deferred prosecution agreements

DPAs may be entered into in relation to offences contrary to Sections 1, 2, 6 and 7 of the Bribery Act.[40] DPAs may also be available in relation to offences of attempting or conspiring to commit, aiding and abetting, and encouraging or assisting the commission of these offences.

V ASSOCIATED OFFENCES: FINANCIAL RECORD-KEEPING AND MONEY LAUNDERING

i Substantive money laundering offences

The Proceeds of Crime Act 2002 (POCA) creates three substantive money laundering offences:

a concealing, disguising, converting, transferring, or removing criminal property from England and Wales;[41]

b entering into or becoming concerned in an arrangement that the person knows or suspects facilitates the acquisition, retention, use or control of criminal property by or on behalf of another person;[42] and

c acquiring, using or having possession of criminal property.[43]

Criminal property is defined as property that constitutes or represents a benefit from criminal conduct, and which the alleged launderer knows or suspects constitutes or represents such benefit.[44] Criminal conduct is defined as conduct that constitutes an offence in any part of the UK or would constitute an offence if it occurred there.[45] In other words, the criminal conduct underlying a substantive money laundering offence may take place outside of the UK. Bribery is an example of criminal conduct.

There are four defences or exemptions to the substantive money laundering offences under the Proceeds of Crime Act. These can broadly be summarised as follows:

a making a disclosure to, and obtaining consent from, a police constable, a customs officer, or a person authorised by the National Crime Agency, prior to doing the prohibited act, or intending to make such a disclosure but having a reasonable excuse for not doing so;

b carrying out the prohibited act as part of a function relating to enforcement of POCA or similar legislation;

39 *SFO Operational Handbook: Corporate Co-operation Guidance*, ID163 Version OGW 1, Published August 2019.

40 Crime and Courts Act 2013, Schedule 17.26.

41 Section 327, POCA.

42 Section 328, POCA.

43 Section 329, POCA.

44 Section 340, POCA.

45 Section 340, POCA.

c having reasonable grounds to know or believe that the underlying criminal conduct took place outside the UK, provided the criminal conduct was not unlawful in that jurisdiction when it took place (i.e., 'the overseas defence'); and

d in the case of a deposit-taking body, concealing, acquiring, etc., criminal property as part of operating an account, where the value of the criminal property is less than £250.

In addition, a person has a defence to a Section 329 offence if they acquired, used or had possession of the property for adequate consideration. The defence is available to professional advisers, such as lawyers or accountants, who receive money on account of costs, for instance.[46]

A person guilty of a substantive money laundering offence may be sentenced to up to fourteen years' imprisonment or a fine, or both.

ii Ancillary offences: failure to disclose

POCA also creates some ancillary offences, including three failure to disclose offences. A person commits an offence if they know or suspect, or have reasonable grounds to know or suspect, that another person is engaged in money laundering, and they fail to make a disclosure of that fact to a nominated officer or to the NCA.[47] The information on which the person's knowledge or suspicion is based, or which gives reasonable grounds for such knowledge or suspicion, must have come to the person in the course of a business in the regulated sector, such as banking and accounting. The person must also be able to identify the person engaged in money laundering, or the whereabouts of the laundered property, or believe or be reasonably expected to believe that they have information that may assist in identifying the person engaged in money laundering or the whereabouts of any of the laundered property.

There are a number of defences available for the failure to disclose offences:

a the person has a 'reasonable excuse' for not making such a disclosure;

b in relation to Section 330, the person is a professional legal adviser or other relevant adviser and the information came to the person in privileged circumstances;

c in relation to Section 330, the person has not been provided with appropriate training by his or her employer, where the person does not know or suspect, but has reasonable grounds to know or suspect, money laundering; and

d the overseas defence (see above).

A person guilty of a failure to disclose may be sentenced to imprisonment for up to five years or a fine, or both.

The 'tipping off offence' under POCA prohibits a person from disclosing to a third party either the fact that the person has made a relevant disclosure to the NCA, or that an investigation into alleged POCA offences is being carried out, where the information on which the disclosure is based came to the person in the course of a business in the regulated sector and is likely to prejudice an investigation.[48]

46 CPS Guidance on Part 7.

47 Section 330, POCA. Sections 331 and 332 create variants that apply to nominated officers.

48 Section 333A, POCA.

VI ENFORCEMENT: FOREIGN BRIBERY AND ASSOCIATED OFFENCES

Cases involving foreign bribery and corruption are usually investigated and prosecuted by the SFO. As discussed in Sections VIII.ii and IX.iii, the SFO has acquired extensive powers that enable it to gather evidence effectively from overseas. Investigations into bribery alleged to have taken place in foreign jurisdictions have become more common, for instance, Airbus and Rolls-Royce.

Recently the SFO has enjoyed mixed success in cooperating with foreign law enforcement in investigations. Communications leaked to *The Guardian* in July 2020 suggested an apparent breakdown in trust between the SFO and US Department of Justice (DOJ) in relation to the SFO's Unaoil investigation, with both organisations vying to prosecute the same individuals.[49] On the other hand, the SFO's DPA with Airbus involved a significant degree of international co-operation. The SFO formed part of a joint investigation team (JIT), along with the French National Financial Prosecutor, each taking responsibility for conduct in different jurisdictions, and worked alongside the DOJ. The UK DPA took account of the fines paid by Airbus in France and the US. Although the JIT was formed under an EU framework, it is possible to establish a JIT between a member and non-member state. Bribery cases can involve significant jurisdictional overlap and carry a risk of enforcement authorities 'piling on' to prosecute the same substantive wrongdoing, so this case is a promising indicator of the future for cross-border SFO investigations.

VII INTERNATIONAL ORGANISATIONS AND AGREEMENTS

The UK is a signatory to the following conventions:

a the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (commonly known as the OECD Anti-Bribery Convention);
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 Criminal Law Convention on Corruption;
d the UN Convention against Corruption; and
e the UN Convention against Transnational Organised Crime.

The UK is also a member of the following organisations:

a the Financial Action Task Force (on Money Laundering);
b the Extractive Industries Transparency Initiative;
c the Group of States Against Corruption, which monitors the implementation of the CLCC but does not require members to be EU member states; and
d the European Anti-Fraud Office, which investigates fraud and corruption involving EU funds.

At the time of writing, the UK has left the EU and the transition period will expire on 31 December 2020. Depending on the agreement that is negotiated with the EU, areas

49 Evans R and Pegg D, (2020) '"We look like fools": UK–US ties threatened by corruption case row' *The Guardian,* 23 July.

that may be impacted include the UK's membership of Europol, the use of European Arrest Warrants, application of European money laundering rules and the harmonisation of financial sanctions regimes.

VIII LEGISLATIVE DEVELOPMENTS

i Anti-money laundering

Criminal Finances Act 2017

The Criminal Finances Act 2017 gave UK authorities significant powers to investigate and recover criminal assets. Unexplained Wealth Orders (UWOs) enable an enforcement authority to apply to a court to require a person to explain the origin of assets that appear disproportionate to that person's income. To make an order the High Court must be satisfied that:

a the person holds the property;
b the property is worth more than £50,000;
c the person's known lawfully obtained income would be insufficient to obtain the property; and
d the person is a politically exposed person, or is connected to someone who has been involved in serious crime.

If the person cannot explain the origin of the asset, the assets are deemed to be recoverable property, and the authority can apply to forfeit the property. The way in which the income requirement is to be calculated in respect of some respondents, such as trusts, is currently unclear, and this may form the basis of litigation in the future.[50]

By contrast account freezing and forfeiture orders (AFFOs) are dealt with in the magistrates' court. An officer may obtain a freezing order where there are reasonable grounds to suspect that the funds are the proceeds of crime or intended for use in unlawful conduct. The court may then grant a forfeiture order if it is satisfied, on the balance of probabilities (i.e., lower than the criminal standard of proof), that the funds are the proceeds of crime or are intended for use in unlawful conduct. The NCA latest annual report shows that AFFOs are being used extensively and suggests that AFFOs are the more significant of the two powers.[51]

50 *NCA v. Baker* [2020] EWHC 822 (Admin).
51 Annual Report and Accounts 2019-20, NCA, 21 July 2020.

Fifth Money Laundering Directive

On 10 January 2020, the Fifth Money Laundering Directive was transposed into UK law,[52] amending the Fourth Money Laundering Directive.[53] This expanded the scope of the UK's anti-money laundering regime, primarily by expanding the 'regulated sector' to include, for instance, crypto-asset and wallet services firms. The UK has opted out of the Sixth Money Laundering Directive.[54]

ii Data sharing

The UK–US Bilateral Data Access Agreement came into effect in July 2020 and will influence the manner and speed with which law enforcement authorities in these jurisdictions obtain data held in the other jurisdiction.[55] Typically UK law enforcement agencies obtain data held overseas via a mutual legal assistance treaty (MLAT) request, which is overseen and approved by the foreign government. The new agreement allows law enforcement agencies to bypass the MLAT process and request the information directly from the person in the foreign jurisdiction. This procedure is likely to expedite the obtention of evidence from overseas and streamline UK investigations, although the requestee may resist the request in the Crown Court. The penalty for non-compliance is contempt of court, and it remains to be seen whether this level of penalty provides a sufficient incentive to ensure compliance. The agreement operates under the Crime (Overseas Production Order) Act 2019 in the UK and the Clarifying Lawful Overseas Use of Data Act in the US. This legislative framework was designed to be expanded to other jurisdictions, and it is probable that similar systems will be introduced with different jurisdictions.

IX OTHER LAWS AFFECTING THE RESPONSE TO CORRUPTION

i Reporting obligations

The reporting obligations outlined in Section V, and the fact that any delay in self-reporting is a factor weighing in favour of prosecution, put pressure on companies to self-report at an early stage.[56] The risks of delaying action were illustrated in the case of *SFO v. Sweett,* where the company self-reported only a week before an article was published outlining the alleged wrongdoing, and continued to make payments under the contract in question after the SFO confirmed that it had commenced an investigation.[57] Sweett did not obtain a DPA and was the first company to be convicted under Section 7 of the Bribery Act.

52 Fifth Money Laundering Directive (EU) 2018/843, transposed by the UK's Money Laundering and Terrorist Financing (Amendment) Regulations 2019.

53 Fourth Money Laundering Directive (EU) 2015/849, transposed by the UK's Money Laundering and Terrorist Financing (Amendment) Regulations 2017.

54 Eighth Annual Report to Parliament on the Application of Protocols 19 and 21 to the Treaty on European Union (TEU) and the Treaty on the Functioning of the Union (TFEU) in Relation to EU Justice and Home Affairs (JHA) Matters (1 December 2016–30 November 2017).

55 Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America on Access to Electronic Data for the Purpose of Countering Serious Crime, 3 October 2019.

56 *Deferred Prosecution Agreements Code of Practice*, 14 February 2014, 2.8.1.v.

57 Crown Court (Southwark), 19 February 2016.

Some sectors are also subject to similar reporting obligations in relation to sanctions, that require them to submit reports to the UK Treasury's Office of Financial Sanctions Implementation.[58]

ii Whistle-blowers

Whistle-blowers are afforded some protection if they make a protected disclosure to the authorities. In the context of a corruption allegation, a disclosure may be protected it tends to show that a criminal offence has been, is being or is likely to be committed or concealed.[59] In the event that an employee makes such a protected disclosure and is subsequently dismissed or is subjected to detriment by their employer, and the principle reason for the dismissal or detriment is the disclosure, that may amount to grounds for a claim before an employment tribunal.

iii SFO powers

The SFO has extensive investigative powers. 'Section 2' or 'here and now' notices empower the SFO to compel a person to answer questions or provide information, compel a person to produce specified documents, or apply for a search warrant for a premises.[60] Failing without reasonable excuse to comply with a Section 2 notice, or making a false or misleading statement in response to one, are imprisonable offences, breaches of which have resulted in convictions.[61] In one case, the defendant received a sentence of imprisonment for two counts of destruction of evidence (Section 2(16)); however, in another the defendant received a fine of £800 for failing to comply with a Section 2 notice (Section 2(3)).

Section 2 notices are subject to some limitations. They do not override legal professional privilege and any information provided by a person can only be used as evidence against that person in two ways:

a as evidence that the person has misled the investigation; or

b on prosecution for another offence, if the person gives evidence that is inconsistent with the information provided in response to the Section 2 notice.

In 2018 the High Court found that Section 2 notices can apply to evidence held by a company overseas if there is a sufficient connection between the overseas company and the UK.[62] In that case, the connection was made out because the alleged corrupt payments had been paid through the US parent company. This jurisdictional reach, combined with the possible introduction of further agreements giving effect to the OPO Act (see above) means that the SFO's already substantial evidence-gathering powers will probably grow in the near future.

iv Privilege

There are two types of privilege in the UK. Legal advice privilege protects communications between lawyer and client created for the dominant purpose of giving or receiving legal advice, and is broadly equivalent to attorney client privilege in the US. Litigation privilege protects

58 *Financial Sanctions Guidance*, Office of Financial Sanctions Implementation, January 2020.

59 Section 43B(1), Public Interest Disclosure Act 1998.

60 Section 2, Criminal Justice Act 1987.

61 *SFO v. Kingston* (unreported); *SFO v. Machkevitch*, Magistrates Court (Hendon), 30 January 2020.

62 *The Queen on the application of KBR Inc v. The Director of the Serious Fraud Office* [2018] EWHC 2368 (Admin), 6 September 2018.

documents created by the client or lawyer, or communications between either of them and a third party, created for the dominant purpose of litigation that is ongoing or reasonably contemplated. Litigation privilege is broadly equivalent to work product in the US. The stage at which an investigation may become one in which litigation can be considered to be reasonably in contemplation is highly fact-specific.[63] For either type of privilege to apply, usually the document or communication must be confidential (although communications with third parties can be covered by common interest privilege).

X COMPLIANCE

i Compliance as a defence

Compliance is an increasingly prominent aspect of corporate criminal law in the UK, for instance in the Section 7 'adequate procedures' defence (see above). The seemingly paradoxical nature of this wording (i.e., proving that procedures were adequate notwithstanding that they were actually breached) has been underscored by the fact that a similar defence for failure to prevent tax evasion is one of the 'reasonable' procedures.[64]

ii Compliance in sentencing

The UK's DPA regime is designed to reward and encourage a rigorous corporate compliance culture. For instance, the DPA code of conduct states that one factor weighing against a deferred prosecution agreement and in favour of prosecution, is whether the offence was committed at a time when the company had no or an ineffective compliance programme, and has not significantly improved its compliance programme since the offence took place.[65]

Similarly, where a company has taken disciplinary action against culpable individuals, or corporate structures or processes have been changed to minimize the risk of recidivism, that will weigh in favour of a deferred prosecution agreement.[66] The terms of a DPA may include establishing a robust compliance programme, the implementation of which may be reviewed by a third party. The most recent DPA between the SFO and G4S included particularly stringent requirements regarding the imposition of a third-party reviewer.[67] This may be a reflection of the sensitivity of G4S's position as a significant government contractor, or mark the start of a movement towards a more intrusive DPA compliance regime, closer in style to a US monitorship.

The UK's efforts to encourage corporate compliance appear to be working, and self-reports and SARs form a significant part of the UK anti-corruption regime. Last year the NCA reported that it received 478,439 SARs, and the majority of the UK's DPAs have been concluded in cases that were commenced after a self-report.[68]

63 *Eurasian Natural Resources Corporation Limited v. The Director of the Serious Fraud Office* [2018] EWCA Civ 2006.

64 Section 45(2)(a), Criminal Finances Act 2017.

65 *Deferred Prosecution Agreements Code of Practice*, 11 February 2014, 2.8.1.iii.

66 ibid., 2.8.2.v.

67 *SFO v. G4S Care and Justice Services (UK) Limited,* Crown Court (Southwark), 17 July 2020.

68 National Crime Agency Annual Report and Accounts 2018–19.

XI OUTLOOK AND CONCLUSIONS

Successive SFO directors have complained that the identification principle is a substantial barrier to securing corporate convictions. The introduction of offences for failure to prevent bribery and failure to prevent tax evasion have partly eroded the identification principle; however, they have also created a number of intellectual inconsistencies in the law of corporate criminal liability in England and Wales. First, strict liability and the identification principle apply to different types of economic crime, with no logical justification for the different regimes. Second, it is unclear why failure to prevent bribery should be subject to a defence of adequate procedures, while the equivalent defence for failure to prevent tax evasion should be one of reasonable procedures.

The SFO seems to have hit its stride in securing DPAs, with four agreed in the past two years. The key issue for the agency going forward will be proving that it has the ability to convert prosecutions of individuals linked to DPAs into convictions.

Appendix 1

ABOUT THE AUTHORS

CHRISTOPHER DAVID

WilmerHale

Christopher David is a counsel whose practice focuses on representing both companies and individuals in international white-collar crime matters mainly involving allegations of fraud, bribery and corruption, insider dealing, tax evasion, cartels or money laundering. Mr David has considerable experience in cross-border investigations, corporate and internal investigations, export controls and economic sanctions advice, and his contentious case work predominantly involves matters under investigation by the Serious Fraud Office (SFO), the Financial Conduct Authority or the National Crime Agency, as well as overseas agencies, such as the US Department of Justice (DOJ) and Securities and Exchange Commission. He is recognised as a Future Leader in the 2020 edition of *Who's Who Legal: Investigations*, as well as the UK 2020 editions of *Chambers* and *The Legal 500*.

FRED SAUGMAN

WilmerHale

Fred Saugman is an associate who represents individuals and corporate clients in white-collar criminal defence, criminal investigations and regulatory matters. Mr Saugman has defended clients in proceedings brought by the Serious Fraud Office, Crown Prosecution Service and regulatory authorities, including cases involving fraud, money laundering, and bribery and corruption. Recent representations include a global internal investigation for a FTSE 100-listed company in response to investigations by US and UK authorities into allegations of bribery and corruption, and the representation of an individual as part of a Serious Fraud Office investigation into allegations of fraud at a FTSE 250-listed organisation. Fred also has experience representing a requested person in extradition proceedings brought by the state of Germany related to allegations of fraud. Fred is a member of the Young Fraud Lawyers Association and the Howard League for Penal Reform.

ALICE LEPEUPLE

WilmerHale

Alice Lepeuple is an associate who advises on all aspects of white-collar crime. Ms Lepeuple has particular experience in representing clients in complex bribery and fraud investigations.

Prior to joining WilmerHale, Ms Lepeuple trained as a solicitor at a leading UK criminal defence firm. Ms Lepeuple also worked at the Law Commission of England and Wales, where she contributed to projects relating to proceeds of crime and corruption of public officials.

JOSEF RYBACKI

WilmerHale

Josef Rybacki is an associate who represents individuals and corporations in white-collar crime and regulatory matters. Mr Rybacki has defended clients in cases brought by the Serious Fraud Office, Crown Prosecution Service and National Crime Agency. He has experience of investigations and prosecutions alleging fraud, bribery and money laundering. Mr Rybacki joined the firm from the Criminal Bar (England and Wales), where he prosecuted and defended a range of criminal and quasi-criminal cases, and was instructed on a public inquiry. As a Harold G Fox Fund Scholar, Mr Rybacki worked at a leading litigation boutique in Toronto.

WILMERHALE

49 Park Lane
London W1K 1PS
United Kingdom
Tel: +44 20 7872 1000
Fax: +44 20 7839 3537
christopher.david@wilmerhale.com
frederick.saugman@wilmerhale.com
alice.lepeuple@wilmerhale.com
josef.rybacki@wilmerhale.com
www.wilmerhale.com

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