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Law and Practice

Contributed by Brown Rudnick LLP

Contents

Brown Rudnick LLP (London) has offices in the United States and Europe, and represents clients from around the world in high-stakes investigations, litigation, international arbitration and complex business transactions. The firm has a leading white-collar crime practice with clients including public and private corporations, multinational businesses and start-up enterprises. Founded more than 70 years ago, Brown Rudnick has approximately 250 lawyers and regularly serves clients around the world.

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1. Offences

1.1 Legal Framework for Offences

1.1.1 International Conventions

The UK is a signatory to the Organisation for Economic Co-operation and Development's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the OECD Convention). The OECD Convention focuses upon the 'supply side' of bribery transactions and it establishes binding standards to criminalise bribery of foreign public officials in international business transactions. Implementation and enforcement of the Convention is monitored by the OECD Working Group on Bribery.

Other European conventions to which the UK is a signatory include the Council of Europe's Criminal Law Convention on Corruption, which aims to co-ordinate the criminalisation of corrupt practices, and the European Union Convention against Corruption involving Officials, which focuses upon EU officials or national officials of EU Member States.

The UK is also a signatory of the United Nations Convention against Corruption, the only legally binding universal anti-corruption instrument.

1.1.2 National Legislation

In July 2011, UK criminal law regarding bribery and corruption offences was substantially overhauled through the implementation of the Bribery Act 2010 (the Bribery Act), which is the main legislation in the UK. This sets out all the bribery and corruption offences in the UK, although offences committed prior to July 2011 continue to be prosecuted under the old law. Prior to the Bribery Act, the UK's law regarding corruption was seen as fragmented, complex and insufficiently clear (see The Law Commission Consultation Paper No 185, 2007). A significant criticism of the UK's enforcement was that there had been very few corporate convictions under the old legislation. Of those companies investigated, the aborted prosecution of BAE Systems regarding alleged corruption affecting the Al-Yamamah fighter jet contract with Saudi Arabia was frequently cited as an example of the UK's inadequate approach to pursuing companies for bribery offences.

The current UK legal framework is, in many ways, cast more broadly than the notoriously far-reaching US Foreign Corrupt Practices Act 1977 (FCPA), as the Bribery Act covers bribery in a private and public setting, and prohibits facilitation payments. The Bribery Act is often described as the leading standard by which companies measure their legal risk regarding corruption and in relation to which they therefore devise their corporate policies and procedures.

There have been other relevant legal reforms since the Bribery Act became law (principally the introduction of Deferred Prosecution Agreements through the Serious Crime and Courts Act 2013) and a series of aggressive enforcement actions against corporates. For example, in January 2017, Rolls-Royce plc entered a Deferred Prosecution Agreement (DPA) with the Serious Fraud Office (SFO), paying a total penalty of £497,252,645 in the UK, the largest financial penalty secured by the SFO.

The most significant feature of the current framework is application of the failure to prevent bribery offence (in Section 7 of the Bribery Act), which requires no knowledge of offending behaviour by the corporate for it to be held liable for the criminal offence. This represented a substantial break from tradition in English law, which had only imposed criminal liability upon corporates where it could be shown that the organisation's directors or senior management knew of the criminal conduct at the relevant time.

Typically, investigations into bribery will also interact with the UK money laundering regime, which is governed by the Proceeds of Crime Act 2002 (POCA). In practice, the Bribery Act and POCA are closely related as any benefit flowing from a bribe is likely to constitute the proceeds of crime or "criminal property" under POCA. Consequently, any company or individual dealing with the proceeds of bribery may have potential criminal exposure under POCA. Those engaged in the regulated sector – including financial services firms, accountants and lawyers – have particularly onerous obligations, and direct liability, under POCA as they must report known or suspected money laundering by third parties; failure to do so is itself a criminal offence. It is important to note that individuals in the regulated sector may be convicted under POCA even where they did not subjectively suspect money laundering but where, objectively, they had reasonable grounds for doing so.

Similarly, bribery cases also often involve subsidiary issues regarding fraud (see the Fraud Act 2006), common law conspiracy to defraud and/or false accounting (Theft Act 1968).

1.1.3 Guidelines for the Interpretation and Enforcement of National Legislation

The key guidance is listed below.

- The Bribery Act 2010: Guidance About Procedures Which Relevant Commercial Organisations Can Put Into Place To Prevent Persons Associated With Them From Bribing (Section 9 Of The Bribery Act 2010), published by the Ministry of Justice (the MOJ Guidance).
- The Bribery Act 2010: Joint Prosecution Guidance Of The Director Of The Serious Fraud Office And The Director Of Public Prosecutions(the Joint Prosecution Guidance), published March 2011.

- From the CPS, The Code For Crown Prosecutors, published October 2018.
- From The Sentencing Council, Fraud, Bribery And Money Laundering Offences: Definitive Guideline, effective 1 October 2014.
- Depending upon the circumstances of each case, the following guidance may also be relevant: the joint Guidance On Corporate Prosecutions, and, from the SFO and CPS, the Deferred Prosecution Agreements Code Of Practice: Crime and Courts Act 2013, published 2014 (the DPA Code of Practice).

1.2 Classification and Constituent Elements

1.2.1 Bribery

The Bribery Act sets out four main offences:

- bribery – the offering, promising or giving of a bribe (commonly referred to as 'active bribery');
- requesting or receiving a bribe – the requesting, agreeing to receive or accepting of a bribe (commonly referred to as 'passive bribery');
- bribery of a foreign public official – bribery of a foreign public official to obtain or retain business, or a business advantage; and
- failure to prevent bribery – a corporate offence of failing to prevent bribery by an associated person on behalf of a relevant commercial organisation. This is a strict liability offence, meaning that the prosecutor need not prove that the company, acting through its senior management, possessed any particular state of mind at the time of the bribery offence.

Bribery and Requesting or Receiving a Bribe

It is an offence under Section 1 of the Bribery Act for a person to offer, promise or give a bribe. It is equally an offence under Section 2 of the Bribery Act to ask for, agree to receive or receive a bribe. A bribe is a financial or other advantage to another person and it must be intended that the bribe should induce or reward improper conduct, or that the acceptance of the bribe in itself would be improper conduct. The improper conduct must relate to the exercise of a public function or be carried out in a business or employment context and the conduct must be in breach of an expectation to act in good faith, impartially or in breach of an expectation arising out of the person's position of trust (see Sections 3, 4 and 5 of the Bribery Act).

It is important to note that:

- the offence can arise even where no financial or other advantage is actually given or received;
- both offences can be committed through third parties. The bribe can be offered or accepted through a third party and the person performing the improper conduct need not be the same person to whom the bribe is offered or given; and
- the offences apply to conduct outside the UK; the Bribery Act has wide extraterritorial effect. The bribe does not need to be agreed, paid or received in the UK and the conduct that is, or is intended to be, performed improperly need not be performed in the UK. For more on jurisdiction, see **1.3 Scope**.

Definition of a Bribe

A bribe is "a financial or other advantage," which is not defined in the Bribery Act but according to the Joint Prosecution Guidance and the explanatory notes to the Act, the term is a matter of fact for the jury to determine, based on its ordinary meaning.

Facilitation Payments

Although some jurisdictions (eg, the USA) tolerate genuine facilitation payments, they remain unlawful in the UK. Facilitation payments are not differentiated from bribes and making such payments can be an offence under Section 1 or 6 of the Bribery Act. Where that offending involves a relevant commercial organisation (RCO), it will be exposed to liability under Section 7. However, it is important to note that prosecutors retain an element of discretion. In deciding whether to prosecute in relation to a facilitation payment, prosecutors will consider the Full Code Test set out in the Code For Crown Prosecutors, the Joint Prosecution Guidance and (where relevant) the joint Guidance On Corporate Prosecutions.

The Full Code Test requires that prosecutors consider (i) whether there is sufficient evidence to provide a realistic prospect of conviction and, if so, (ii) whether a prosecution is required in the public interest. The prosecution should proceed only if both stages of the Full Code Test are met. The Joint Prosecution Guidance sets out specific public interest considerations in relation to facilitation payments and factors tending in favour of and against prosecution. Factors tending in favour of prosecution include (p.8):

- large or repeated payments;
- facilitation payments that are planned or a standard way of conducting business, indicating premeditation;
- payments that may indicate an element of active corruption of the official; and
- instances where an appropriate policy regarding facilitation payments was not correctly followed.

Factors tending against prosecution include (p.8):

- a single small payment likely to result in only a nominal penalty;
- payments that came to light due to a genuinely proactive approach involving self-reporting and remedial action;
- instances where a clear and appropriate policy regarding facilitation payments has been correctly followed; and

- where the payer was in a vulnerable position given the circumstances in which the payment was demanded.

The MOJ Guidance recognises (at paragraph 48) that there may be circumstances in which a person has no realistic alternative but to make payments and suggests the common law defence of duress is available where payments are made to prevent "loss of life, limb or liberty." Whilst those are narrow circumstances, companies operating in relevant industries and/or locations should ensure that their anti-bribery policies and training programmes include guidance on duress.

Failure to Prevent Bribery

Section 7 of the Bribery Act introduced strict corporate criminal liability for any "relevant commercial organisation" (an RCO, defined broadly in Section 7(5) of the Bribery Act, considered further below) where bribery is committed by an "associated person" (AP) of that business. The only defence is to demonstrate that the business had "adequate procedures" in place to prevent bribery by its employees and other associated persons.

To convict under Section 7, the prosecution must prove that:

- a person was associated with a relevant commercial organisation (an AP of an RCO);
- the AP committed a bribery offence; and
- in doing so, the AP intended to obtain or retain business or a business advantage for the RCO.

The Section 7 offence only relates to the failure to prevent acts of bribery under Sections 1 and 6; it does not apply to the demand side of bribery, ie, the request or receipt of a bribe under Section 2.

The RCO can be liable under Section 7 even where the AP was not prosecuted or convicted for the underlying offence. However, there must be sufficient evidence to prove that an offence under Section 1 or 6 of the Bribery Act was committed.

All UK companies as well as foreign companies that carry on business or part of a business in the UK are caught within the scope of Section 7 through the definition of a "relevant commercial organisation." Courts in the UK will have jurisdiction over an RCO regardless of where in the world the underlying bribery was committed.

A person is associated with the RCO if they perform services for or on behalf of the RCO, in whatever capacity. The definition of an associated person (under Section 8 of the Bribery Act) is very broad and may include an employee, agent or subsidiary but whether the person "performs services for or on behalf of" the RCO will be a matter of fact in each case, depending upon the circumstances.An employee of an RCO will be presumed to be an associated person unless the contrary is shown. The MOJ Guidance (at paragraphs 42 and 43) emphasises the importance of evidence as to what the associated person intended when committing the bribery (emphasis added): "Even if it can properly be said that an agent, a subsidiary, or another person acting for a member of a joint venture was performing services for the organisation, *an offence will be committed only if that agent, subsidiary or person intended to obtain or retain business or an advantage in the conduct of business for the organisation*. The fact that an organisation benefits indirectly from a bribe is very unlikely, in itself, to amount to proof of the specific intention required by the offence. Without proof of the required intention, liability will not accrue through simple corporate ownership or investment or through the payment of dividends or provision of loans by a subsidiary to its parent. So, for example, a bribe on behalf of a subsidiary by one of its employees or agents will not automatically involve liability on the part of its parent company, or any other subsidiaries of the parent company, if it cannot be shown the employee or agent intended to obtain or retain business or a business advantage for the parent company or other subsidiaries. This is so even though the parent company or subsidiaries may benefit indirectly from the bribe. By the same token, liability for a parent company could arise where a subsidiary is the 'person' which pays a bribe which it intends will result in the parent company obtaining or retaining business or vice versa."

Bribery of Foreign Public Officials

It is an offence to bribe a foreign public official (which is defined broadly in Section 6) with the intent to influence that person in their official capacity, but only where the bribe is intended to obtain or retain business, or a business advantage. If the written law applicable to the foreign public official allows or requires them to be influenced by a financial or other advantage, no offence will be committed. This offence can be committed where the bribe is offered through a third party. It is important to note that the Section 6 offence does not require intention by the briber that the foreign public official should perform their role improperly; if the evidence shows that the briber intended to influence the official to obtain or retain a business advantage then he or she will be guilty of the offence.

Hospitality and Promotional Expenditures

The MOJ Guidance recognises that bona fide, reasonable and proportionate hospitality and promotional expenditure is an important part of doing business. However, such expenditure can constitute a bribe if (i) it is intended to induce or encourage improper performance by the recipient, or (ii) if, in the case of foreign public officials, it is intended to influence the recipient in their official role to secure business or a business advantage. The Joint Prosecution Guidance notes that prosecutors need to consider the full circumstances of each case; where hospitality is lavish and beyond what may

be reasonable in those circumstances, or there were attempts to conceal it, there will be a greater inference that it was intended as a bribe. As David Green, the director of the SFO, emphasised shortly after the Bribery Act entered law: "The sort of bribery we would be investigating would not be tickets to Wimbledon or bottles of champagne."

Bribery Between Private Parties in a Commercial Setting

Sections 1, 2 and 7 of the Bribery Act (see above) apply to bribery whether it occurs in the public sector, or between private parties in a commercial setting. Section 16 of the Bribery Act specifically provides that the Act "applies to individuals in the public service of the Crown as it applies to other individuals."

1.2.2 Influence-Peddling

As noted above, the definition of bribery in the substantive offences includes "financial or other advantage." Similarly, the definition of the bribe recipient's intended "improper performance" could well catch 'influence-peddling'. It would, however, be a matter of fact to be determined by a court as to whether any exchange of influence amounted to some kind of "other advantage."

1.2.3 Financial Record-Keeping

The Bribery Act contains no specific accounting or bookkeeping offences. However, the Companies Act 2006, the primary source of company law in England and Wales, does require companies to keep adequate books and records. Specifically, failure to keep adequate accounting records constitutes an offence under Sections 386 and 387 of the Companies Act 2006.

In addition, the way bribes are accounted for will often constitute a false accounting offence under Section 17(1) of the Theft Act 1968, ie, the falsification of accounting records with the intent to gain for oneself, or cause loss to another. The offence includes providing materially misleading or false documents, or omitting relevant documents when accounts information is requested.

Regulated firms in the financial sector may be sanctioned by the Financial Conduct Authority (FCA) for failing to maintain effective systems and controls in relation to bookkeeping, bribery and corruption. For example, insurance brokers Aon Ltd and Willis Ltd were fined GBP5.25 million (in 2009) and GBP6.895 million (in 2011) respectively for failings in their systems and controls that allowed bribery to occur.

1.2.4 Public Officials

There is no specific offence as such relating to the misappropriation of public funds by a public official, while glaring conflicts of interest are likely to be caught by the offence of misconduct in public office, discussed below.

The embezzlement of public funds by a public official is likely to be charged as fraud. See below.

Public officials who misappropriate or misuse funds are liable to be prosecuted under a number of criminal offences, including offences under the Fraud Act 2006. They may also be charged with the offence of misconduct in public office, which is a complex and archaic offence that has recently been subject to scrutiny by the Law Commission. The offence of misconduct in public office may be loosely defined as a public officer, acting as such, who wilfully neglects to perform his or her duty and/or wilfully misconducts him or herself to such a degree as to amount to an abuse of the public's trust in the office holder without reasonable excuse or justification.

Depending on the factual matrix of the offence, the public officer may find themselves charged with fraud (if they have benefited in some way from their alleged criminality), or with misconduct in public office if there has been some kind of wider interference with the public interest.

As noted above, the definition of "other advantage" used in the substantive Bribery Act Offences is likely to cover situations in which a person offers something other than money in return for improper performance.

1.2.5 Intermediaries

The use of intermediaries is an important, and often pivotal, issue in many corruption cases. Each of the Bribery Act offences could arise through the use of an intermediary. The Section 1, 2 and 6 offences explicitly cover the use of a third party for bribery, requesting or receiving a bribe or bribery of a foreign public official. Whilst each case will turn upon its own facts, intermediaries are likely to be 'associated persons' for the purposes of Section 7, thereby creating corporate liability for companies.

1.3 Scope

1.3.1 Geographical Reach of Applicable Legislation

The Bribery Act has extensive extraterritorial jurisdiction. An offence can be committed in certain circumstances even where the alleged offending occurs wholly outside the UK.

In relation to Sections 1, 2 and 6, each offence is committed where any act or omission constituting part of the offence occurs in the UK (see Section 12). If the person committing the act or omission has a "close connection" with the UK, it is irrelevant that his or her conduct occurred entirely outside the UK. Under Section 12(4), a close connection with the UK includes where the person is a British national, British

citizen, ordinarily resident in the UK, or a body incorporated under UK law.

The corporate offence (Section 7) of failure to prevent bribery in the course of business applies to any "relevant commercial organisation." An RCO, which is a body corporate or partnership (wherever incorporated) that carries on any part of its business in the UK, could be prosecuted for failure to prevent bribery even where the bribery takes place wholly outside the UK and the benefit or advantage to the company is intended to accrue outside the UK.

The Bribery Act does not define what constitutes "part of a business;" however, the MOJ Guidance provides some assistance in this regard, noting (at paragraph 36) that organisations without a "demonstrable business presence" in the UK are not caught. The MOJ Guidance notes, for example, that being listed on the LSE would not in and of itself mean a company was carrying on a business or part of a business in the UK for the purposes of Section 7. The MOJ Guidance further states (at paragraph 36) that "having a UK subsidiary will not, in itself, mean that a parent company is carrying on a business in the UK, since a subsidiary may act independently of its parent or other group companies." Where there is a dispute as to whether a business presence in the UK satisfies the test, the final arbiter will be the courts; it should be noted that the SFO may not take a conservative approach to this issue if it is otherwise confident about the strength of its evidence in any particular case.

The following are examples of recent cases.

- Sweett Group plc, the first corporate convicted under Section 7, pleaded guilty in December 2015 to the offence of failing to prevent an act of bribery by its subsidiary company, Cyril Sweett International, based in the United Arab Emirates. The subsidiary had made corrupt payments to two senior directors at Al Ain Ahlia Insurance Company to secure a contract with that company for construction of the Rotana Hotel in Abu Dhabi.
- Standard Bank plc entered a DPA in respect of a suspended charge under Section 7 in relation to its Tanzanian sister company, Stanbic, regarding a bribe paid to a local partner in Tanzania. Standard Bank subsequently entered a DPA with the SFO in November 2015. Although Standard Bank had no interest in, oversight or control over Stanbic, the latter was an associated person because it was performing services on Standard Bank's behalf and for its benefit; both companies stood to benefit from the transaction in relation to which the bribe was paid.
- Rolls-Royce plc and Rolls-Royce Energy Systems, Inc entered a DPA in respect of a suspended charge of failure to prevent bribery under Section 7 (amongst other charges) in relation to bribes paid by intermediaries and Rolls-Royce employees in Indonesia, Nigeria, China and Malaysia.

As will be apparent, each of those cases centred upon conduct overseas, often through an overseas office or subsidiary of the UK company.

1.3.2 Corporate Liability

Individuals and corporates can commit the offences of active bribery, passive bribery and bribery of a foreign public official under Sections 1, 2 and 6. Because these offences require mens rea, the liability of a corporate for the offences must be established through the 'identification principle', which establishes that only the acts and state of mind of those who represent the "directing mind and will of the corporation" can be imputed to the corporation itself (Lennard v Asiatic Petroleum [1915] AC 705). The case of Tesco Supermarkets Ltd v Nattrass [1972] AC 153 defined the directing mind and will of a company as extending to the "board of directors, the managing director and perhaps other superior officers of the company who carry out functions of management and speak and act as the company." Under the Bribery Act, where the directing mind and will of the company has the necessary criminal intent, the corporate will be directly liable for the offences under Sections 1, 2 and 6.

Where an offence under Section 1, 2 or 6 of the Bribery Act is committed by a body corporate and it can be proved that the offence was committed with the consent or connivance of a senior officer or a person purporting to act in that capacity, the senior officer or person is also guilty of the offence as an individual under Section 14 of the Bribery Act. However, where the offending was outside the UK, they will only be liable if they have a "close connection" to the UK under Section 12.

By contrast, only a relevant commercial organisation can be liable for the offence of failure to prevent bribery by an associated person under Section 7. The RCO will incur liability for an offence or offences by the associated person unless it can prove it had adequate procedures in place to prevent bribery, even where it was not aware of the offence.

The situation is more complex where a company has been subject to a merger or an acquisition. There is no specific doctrine of 'successor liability' in England and Wales. Consequently, prosecutors and the courts would have to ensure that any successor company shared the relevant mens rea of the purchased or acquired company. In cases where a successor company became suspicious of money laundering or other suspicious activity, they would have to consider whether to make a suspicious activity report as outlined above.

Individuals and companies can be held liable for the same offence or same underlying misconduct. By way of example, Rolls-Royce entered a DPA in respect of failure to prevent bribery offences and the SFO is now considering which individual employees of Rolls-Royce to charge in respect of the

underlying bribery offences. Likewise, in XYZ, the company entered a DPA in respect of failure to prevent bribery and individuals are currently being prosecuted for the underlying misconduct. A company and an individual could both be prosecuted for the same offences under Section 1, 2 or 6, provided the necessary mens rea was present.

1.4 Limitation Periods

There are no limitation periods for the prosecution of indictable offences. However, only offences occurring on or after 1 July 2011 will be prosecuted under the Bribery Act. Offences committed before that date are covered by the common law and statutory offences, including the (now repealed) Public Bodies Corrupt Practices Act 1889, the Prevention of Corruption Act 1906 and the Prevention of Corruption Act 1916. Furthermore, conduct that constitutes bribery may also be covered by other common law offences such as misconduct in public office or conspiracy to defraud. Other statutory offences include conspiracy (to corrupt) under the Criminal Law Act 1977 or those set out in the Honours (Prevention of Abuses) Act 1925 or the Criminal Justice and Courts Act 2015, Section 26 of which relates to the corrupt or other improper exercise of police powers or privileges. Cases such as the Rolls-Royce Deferred Prosecution Agreement demonstrate that conduct of a historic nature can and will be pursued; the statement of facts in that case related to criminal conduct covering the period between 1989 and 2013.

2. Defences and Exceptions

2.1 Defences

The sole statutory defence to corporate liability for failure to prevent bribery is the adequate procedures defence, found in Section 7(2) of the Bribery Act. The court must be satisfied that the company had adequate procedures in place to prevent bribery. The procedures must be proportionate to that organisation's bribery risks and to the nature, scale and complexity of the organisation's activities. The MOJ Guidance recognises that no anti-corruption measures can prevent all instances of bribery and specifies six principles that should inform the procedures implemented by a relevant commercial organisation:

- proportionate procedures;
- top-level commitment;
- risk-assessment;
- due diligence;
- communication (including training); and
- monitoring and review.

It is critical that the procedures in place are effective in practice. In this context, it is notable that Standard Bank chose to enter a DPA despite having a number of committees, policies and procedures in place designed to address bribery and corruption. In approving the terms of the DPA, Sir Brian Leveson, sitting as judge of the Crown Court, noted (at paragraphs 20-21) that the applicable policy was unclear and was not reinforced effectively through communication and training. Whether a relevant commercial organisation has adequate procedures in place will be a question of fact in each case.

It is a defence under Section 13 of the Bribery Act for a person to prove that his or her conduct was necessary for the proper exercise of any function of an intelligence service or of the armed forces, when engaged in active service.

As mentioned above, the common law defence of duress is available where payments are made to prevent "loss of life, limb or liberty."

2.2 Exceptions

There are no further exceptions to the statutory defences outlined above.

2.3 De Minimis Exceptions

There are no de minimis exceptions to the offences in the Bribery Act. However, when considering whether prosecution is in the public interest, a prosecutor may decide against enforcement where the bribe was of a low value. As noted above in relation to facilitation payments, the Joint Prosecution Guidance includes amongst the factors tending against prosecution "a single small payment likely to result in only a nominal penalty" (at p.8).

2.4 Exempt Sectors/Industries

There are no sector or industry exemptions.

2.5 Safe Harbour or Amnesty Programme

See the defence of adequate procedures above and the outline of the self-reporting regime and DPAs below.

3. Penalties

3.1 Penalties on Conviction

The maximum penalty for an individual convicted on indictment under the Bribery Act is ten years' imprisonment and/or an unlimited fine.

A corporate convicted of an offence under the Bribery Act faces an unlimited fine. Conviction is likely to result in a compensation order for any loss resulting from the offence and/or the confiscation of any criminal proceeds. An order to reimburse the cost of the investigation and prosecution of the offence is also likely.

When considering what penalty to impose, a court must follow any sentencing guidelines issued by the Sentencing Council, or its predecessor, the Sentencing Guidelines Council. The Sentencing Council has, for example, issued

guidelines in relation to three of the offences created by the Bribery Act and a sentencing court will be bound to apply them. Where there is no sentencing guideline in existence, then courts must follow any guidance provided by the Court of Appeal (Criminal Division) and consider the factors outlined in Part 12 of the Criminal Justice Act 2003.

Even where there are no criminal proceedings, it is open to a prosecutor to apply for a civil recovery order under Part 5 of POCA to recover property obtained through unlawful conduct. In practice, however, prosecutors will be aware of the serious criticism voiced by Lord Justice Thomas in the case of R v Innospec Limited [2010] EW Misc 7 (EWCC). In that judgment, Thomas LJ referred to civil recovery orders in the following terms: "Those who commit such serious crimes as corruption of senior foreign government officials must not be viewed or treated in any different way to other criminals. It will therefore rarely be appropriate for criminal conduct by a company to be dealt with by means of a Civil Recovery Order; the criminal courts can take account of co-operation and the provision of evidence against others by reducing the fine otherwise payable. It is of the greatest public interest that the serious criminality of any persons, including companies, who engage in the corruption of foreign governments is made patent for all to see by the imposition of criminal and not civil sanctions. It would be inconsistent with basic principles of justice for the criminality of corporations to be glossed over by a civil as opposed to a criminal sanction. There may, of course, be a place for a civil order, for example, as a means of compensation in addition to a fine."

The DPA Code Of Conduct suggests that the appropriateness of a Civil Recovery Order should be considered where neither limb of the evidential stage can be met by the conclusion of DPA negotiations and it is not considered appropriate to continue the criminal investigation.

Recent Corporate Penalties

In December 2015, Sweett Group plc pleaded guilty to a charge of failing to prevent an act of bribery intended to secure and retain a contract under Section 7 of the Bribery Act. Upon conviction, the company was ordered to pay a total of £2.34 million, which was made up of a fine of £1.4 million, a confiscation order of £851,152.23 and costs of £95,031.97 awarded to the SFO.

Recent examples of companies entering DPAs with the SFO include the case of Rolls-Royce plc. In January 2017, the company paid a total of £497.25 million plus interest and the SFO's costs of £13 million (as well as large sums in settlement with enforcement authorities in the US and Brazil) in relation to offences including conspiracy to corrupt, false accounting and failure to prevent bribery. In that case, the conduct covered by the DPA spanned three decades, involved multiple parts of the business and took place across seven jurisdictions.

In July 2016, the SFO entered a DPA with a UK company, referred to only as "XYZ Limited," regarding the failure to prevent bribery offence. XYZ paid a total of £6,553,085, comprised of disgorgement of gross profits of £6,201,085 and a £352,000 financial penalty.

As noted above, the first DPA in the UK regarding bribery was that agreed between the SFO and Standard Bank plc (now known as ICBC Standard Bank) in November 2015. Standard Bank paid financial orders of USD25.2 million and was required to pay the government of Tanzania a further USD7 million in compensation. The bank also agreed to pay the SFO's costs of £330,000 in relation to the investigation and subsequent resolution of the DPA.

Other consequences of conviction may include disqualification of an individual to act as a company director, EU procurement bans and exclusion from projects funded by the World Bank or its partner development banks and cross-debarment. A conviction under Section 1, 2 or 6 of the Bribery Act will lead to the mandatory exclusion of an economic operator (defined in Section 2 of the Public Contracts Regulations 2015) from participation in public tenders, under the Public Contracts Regulations 2015. The Section 7 offence of failure to prevent bribery will not trigger mandatory exclusion, but may give rise to grounds in support of a discretionary exclusion under the Public Contracts Regulations 2015. Clearly, for any company with a significant portion of revenues derived from public contracts, such debarments could prove fatal to the business.

3.2 Guidelines Applicable to the Assessment of Penalties

The Sentencing Council's Fraud, Bribery And Money Laundering Offences Guideline came into effect on 1 October 2014 and specifies the range of sentences appropriate for each offence under the Bribery Act. For each offence, the Council has specified categories with sentencing ranges reflecting varying degrees of seriousness and a starting point for each category. Once the starting point is determined, the court will take into account aggravating and mitigating factors set out in the guidance. Credit for a guilty plea is taken into consideration only after the appropriate sentence has been identified. In order to identify the appropriate category, the court must consider the culpability of the offender and the harm caused by the offending.

For corporate offenders, the harm is represented by a financial sum. For corporate offences under the Bribery Act, the guidelines state that the relevant figure will generally be the gross profit arising from the contract obtained (or otherwise affected) by the bribery. The resultant harm figure is then multiplied by a percentage according to whether there is low, medium or high culpability. The starting point for high culpability is a multiplier of 300%, with a range between 250% and 400%. Aggravating and mitigating factors are

considered, which may change the appropriate range. Once the court has arrived at an appropriate figure, the guidance notes it should 'step back' and consider the overall effect of its orders. The guidance states: "The combination of orders made, compensation, confiscation and fine ought to achieve the removal of all gain, appropriate additional punishment, and deterrence."

In the Standard Bank DPA (December 2015), the financial penalty was calculated in consultation with US authorities. In a media interview at the time, the SFO's then joint head of bribery and corruption, Ben Morgan, stated that it was "the new norm" for the financial penalty to be calculated having regard to whether it would have parity with a fine in the USA. He suggested that the courts expect to see parity with corporate punishment in the USA and that it was necessary to prevent forum shopping. He went so far as to suggest that even where a case has no connection to the USA, the SFO should consider whether a penalty would have been appropriate in the USA, given its enforcement history.

A defendant who intends to plead guilty may seek an advance indication of sentence, commonly known as a 'Goodyear indication' (R v Goodyear (Karl) [2005] EWCA 888). The Attorney General's Guidelines On The Acceptance Of Pleas And The Prosecutor's Role In The Sentencing Exercise, published on 30 November 2012, provide guidance regarding such an indication. The basis of the plea should be agreed before an indication is sought. The CPS's Instructions For Prosecuting Advocates states that the judge should not be invited to give an indication on what would be, or what would appear to be, a 'plea bargain'. In giving an indication, the judge is confined to the maximum sentence if a guilty plea were entered at the time the indication is sought. Once an indication is given, it is binding on the judge who has given it and any other judge who may become responsible for the case.

4. Compliance and Disclosure

4.1 National Legislation and Duties to Prevent Corruption

Section 7 of the Bribery Act 2010 places an explicit duty to prevent bribery on corporations incorporated or carrying on business within the United Kingdom. The Act creates a specific defence for corporations who can demonstrate that they had in place "adequate procedures" to prevent bribery. In 2011, the UK Government published The Bribery Act 2010: Guidance, which sets out six principles to be adopted by "commercial organisations wishing to prevent bribery [from] being committed on their behalf":

- proportionate procedures;
- top-level commitment;
- risk assessment;
- due diligence;
- communication (including training); and
- monitoring and review.

4.2 Disclosure of Violations of Anti-bribery and Anti-corruption Provisions

Regarding disclosure, individuals and corporates operating in the 'regulated sector' (which may be loosely defined as financial institutions, professionals and those dealing with high-value transactions) also have concurrent duties to report and prevent money laundering under the Proceeds of Crime Act 2002. The duties under this Act require those in the regulated sector to report activities and transactions they reasonably consider to be suspicious. Failure to do so may result in that individual or corporation being prosecuted in their own right under the 'failure to disclose' offence.

4.3 Protection Afforded to Whistle-blowers

Whistle-blowing protection is afforded to UK workers under the Employment Rights Act 1996 (ERA), as amended by the Public Interest Disclosure Act 1998 (PIDA) and the Enterprise and Regulatory Reform Act 2013 (ERRA). It was introduced to protect employees from being unfairly dismissed, or otherwise subjected to detriment, where they had disclosed information about an alleged wrongdoing in certain defined circumstances.

To qualify for protection, numerous requirements need to be met. The key requirements are that there must be a disclosure of information that is a 'qualifying disclosure', which means that the worker must reasonably believe the disclosure is made in the public interest and that it tends to show that one or more of six relevant failures has occurred (including, for example, a criminal offence and a breach of any legal obligation), is occurring or is likely to occur. The disclosure must also be 'protected'. The issue of whether a disclosure is protected depends on the nature of the person to whom the disclosure is made and, depending on to whom it is made, other specified conditions.

The ERRA strengthened the whistle-blowing protections under the ERA in 2013 by introducing personal liability for co-workers, or agents of an employer, where they subject a whistle-blower to detriment in the course of their employment because they have made a protected disclosure. Employers also have vicarious liability where other workers or agents subject a whistle-blower to detriment, unless the employer has taken all reasonable steps to prevent that behaviour.

In October 2015, the FCA and the Prudential Regulation Authority introduced new rules requiring banks and insurers to introduce whistle-blowing procedures internally.

4.4 Incentives for Whistle-blowers

There are no financial incentives for whistle-blowers to report bribery or corruption in the UK, although the Competition and Markets Authority now offers incentives of up to £100,000 for information that leads to the successful investigation and prosecution of cartels. The House of Lords recently debated the inclusion of a clause in the Criminal Finances Bill, now the Criminal Finances Act 2017, that would have incentivised whistle-blowing and strengthened protections for whistle-blowers, but it was ultimately not included (HC Deb 28 March 2017 Vol 782 cols 535-541). The proposed clause would have allowed whistle-blowers to be awarded financial compensation of between 10% and 30% of the total financial penalty collected as a result of any enforcement action resulting from the whistle-blowing. The FCA also confirmed in a policy statement published in May 2017 (Whistleblowing In UK Branches Of Foreign Banks: Response To Consultation Paper 16/25) that it has no plan to offer incentives to whistle-blowers.

Where a person admits to offending and agrees formally to co-operate with a criminal investigation and any subsequent prosecution, they may be eligible to enter a 'SOCPA agreement' with the prosecutor under the Serious Organised Crime and Police Act 2005 (SOCPA). In exceptional cases, a person might receive immunity from prosecution in exchange for their co-operation. In practice, however, it is more common to see co-operation lead to a reduction in sentence, separately and in addition to the usual discount a defendant receives upon entering a guilty plea. The relevant provision in SOCPA (Section 73) does not allow the prosecutor to guarantee a reduction but states: "In determining what sentence to pass on the defendant the court may take into account the extent and nature of the assistance given or offered."

The Court of Appeal in R v Blackburn [2007] EWCA Crim 2290 held that the discount for a co-operating witness should normally be between one third and two thirds of the sentence that would otherwise have been passed, but that in a most exceptional case it could exceed three quarters of the sentence. However, the Court also emphasised that every sentencing decision would be fact-specific.

In R v Dougall [2010] EWCA Crim 1048 the Court stated that where the appropriate sentence for a defendant would be 12 months' imprisonment or less – taking into account the level of criminality, features of mitigation, a guilty plea and (at paragraph 36) "full co-operation with the authorities investigating a major crime involving fraud or corruption, with all the consequent burdens of complying with his part of the SOCPA agreement" – a suspended sentence should normally follow. The Court emphasised that it was not suggesting a suspended sentence would always be appropriate and reiterated that sentencing was fact-specific in each case.

4.5 Location of Relevant Provisions Regarding Whistle-blowing

The relevant provisions regarding whistle-blowing are located in the Employment Rights Act 1996 as amended by the Public Interest Disclosure Act 1998, the Enterprise and Regulatory Reform Act 2013, the FCA Handbook and Guidance, and the Serious Organised Crime and Police Act 2005.

5. Enforcement

5.1 Enforcement Body

In England, Wales and Northern Ireland, the SFO is the lead prosecution body for offences under the Bribery Act. The SFO was established under the Criminal Justice Act 1987 to investigate and prosecute offences involving serious and complex fraud. In deciding whether to pursue a particular case, the director of the SFO considers whether the criminal conduct undermines UK commercial or financial interests, the scale of the actual or potential financial loss and whether there is a significant public interest issue. In Scotland, the primary prosecutor is the Lord Advocate. The CPS also pursues cases brought by individual police forces around the UK.

The other major enforcement bodies are the National Crime Agency (NCA), a criminal investigative agency, and the FCA. The NCA's economic crime division contains a specific international corruption unit, which has a particular focus on money laundering offences arising from corruption overseas and recovering the proceeds of crime. The NCA investigates cases for subsequent prosecution by the CPS. By contrast, the FCA does not typically prosecute offences under the Bribery Act but it has a wide remit for regulating the financial services industry, which includes the imposition of rules and requirements for systems and controls to prevent financial crime, including bribery and corruption. The interplay between the FCA and SFO is often critical to the outcome of a financial services investigation, particularly in relation to any agreement as to the scope of each respective agency's investigation.

The SFO's stated approach to co-ordination with these, and other, UK authorities is that it is a close and collaborative relationship. Following publication of the UK government's Anti-corruption Plan in December 2014, which (amongst other things) led to the formation of the NCA's international corruption unit, the government began considering whether to merge the SFO and NCA. That review faced significant opposition from those, including many private practice lawyers, concerned about the harm that such a merger could cause to the SFO's independence (it is overseen by the Attorney General, whilst the NCA reports to the Home Office) and unique model of joint teams composed of investigators and prosecuting lawyers. Whilst it remains to be seen how, if at all, the government will reform it as an organisation

following the Cabinet Office review of the economic crime agencies, it seems likely that the SFO's more recent successes – the conviction of Sweett Group plc in 2016 and the DPAs regarding Standard Bank plc (2015), XYZ Ltd (2016) and Rolls-Royce plc (2017) – have strengthened arguments for its survival during a time of political uncertainty.

5.2 Process of Application for Documentation

Under Section 2 of the Criminal Justice Act 1987 (CJA 1987), the SFO has extensive and intrusive powers to compel the production of information. Put simply, the SFO need only issue a formal letter of demand specifying the categories of information, including documents, that it requires from the recipient. In practice, investigating authorities, including the SFO, often start from the premise of issuing a broadly defined demand for documents. Any person receiving a notice issued under Section 2 should carefully consider the scope of the disclosure required and promptly engage with the SFO to negotiate the scope of the demand and the timeframe for response (wherever possible).

Wide-ranging demands present significant practical difficulties for companies, which may hold data for thousands of affected contracts or employees and store the data in paper and/or digital format in various locations, including overseas. The legal issues that this presents include the clash with data privacy laws; various jurisdictions require specific informed consent before personally identifiable information is processed for specific purposes, such as a criminal investigation. Similarly, the company should be alive to its potential legal risk in other jurisdictions where its disclosure of documents to the SFO would run contrary to any banking secrecy statutes, blocking statutes, or state secrecy laws. Wherever possible before disclosing material to the SFO, the recipient of the Section 2 notice should take appropriate legal advice, including local counsel input.

Jurisdiction of the Enforcement Body/Bodies

As noted above, the SFO's remit is to investigate and prosecute serious and complex frauds, and bribery and corruption. In deciding whether formally to open an investigation, the director of the SFO considers whether the criminal conduct undermines UK commercial or financial interests, the scale of the actual or potential financial loss and whether there is a significant public interest issue.

Regarding the NCA, there are two relevant points to note here. First, amongst its various policing and criminal intelligence functions, the NCA receives all suspicious activity reports regarding potential money laundering. It has, therefore, accumulated a vast database of information that can, and does, provide valuable intelligence for the SFO and other agencies. The SFO has stated publicly that it has developed its own intelligence capabilities, which draw upon a range of sources, including the suspicious activity reports filed with the NCA. Secondly, the NCA's International Corruption Unit (established in 2015) has the stated purpose of investigating the following:

- money laundering in the UK related to corruption of high-ranking officials overseas;
- bribery involving UK–based companies or nationals that has an international element; and
- cross-border bribery where there is a link to the UK.

Consistent with those objectives, the NCA has utilised its enforcement powers to assist the SFO with its investigation of Soma Oil & Gas, a UK company investing in Somalia.

Separately, the CPS can, and does, prosecute Bribery Act offences that do not rise to the threshold of an SFO investigation. An example is the case of R v Yang Li (2013) (unreported) in which the CPS successfully prosecuted an undergraduate student, who was sentenced to 12 months' imprisonment for attempting to bribe his university tutor to secure a pass mark.

General Powers and Limitations of the Enforcement Body/Bodies

For present purposes, the most relevant enforcement body is the SFO. The investigative powers of which derive from Section 2 of the Criminal Justice Act 1987. Where the SFO formally opens a case, or where it is deciding whether to open an investigation regarding overseas corruption, it can exercise its Section 2 powers to compel individuals or companies to provide information without first obtaining a court order. The powers are:

- to compel people to attend an interview and to answer questions (Section 2(2));
- to compel persons to produce documents or any other information (Section 2(3)); and
- to apply for warrants to search property (Section 2(4)).

The SFO may also exercise these powers following a request for assistance from an overseas enforcement agency. The SFO regularly co-operates with law enforcement agencies in other countries. A particular example is the relationship with the USA, where the SFO recently announced that it and the FCA would, between them, host a prosecutor seconded from the criminal division of the US Department of Justice. By comparison, where the SFO needs to obtain overseas co-operation more formally, it can apply through the Mutual Legal Assistance (MLA) Treaty with the relevant country. Such assistance could, for example, include the obtaining of documents, the freezing of bank accounts, or the conduct of interviews. In practice, however, responding to these MLA requests often takes significantly longer than utilising a direct relationship the SFO has with contacts at the overseas enforcement agency.

By contrast, where an individual is to be interviewed as a suspect, the interview will be governed by the provisions of the Police and Criminal Evidence Act 1984 (as amended) and its related Codes of Practice. Interviews of suspects are conducted under caution, meaning that the individual has a right to remain silent but it may harm his or her defence if they do not mention information when questioned that they subsequently seek to rely on in court. All individuals are entitled to be represented by a solicitor during an interview under caution and can elect to consult their legal representative in private at any stage prior to and during the interview. For obvious reasons, it is important that the solicitor attending a client interviewed under caution be familiar with the issue of adverse inferences, the Police and Criminal Evidence Act 1984, its related Codes of Practice and any relevant guidance.

Powers of the Enforcement Bodies to Require Documentation

Where an individual provides information in a Section 2 interview (ie, where he or she has been compelled to attend), that information cannot be used in any later prosecution of that same individual for the offence that was the subject of the relevant Section 2 notice. There are exceptional circumstances where the information can be used against the individual, under Section 2(8) and (8AA) of the CJA 1987, including where the interviewee is prosecuted for making a false or misleading statement in their Section 2 interview or where the interviewee is prosecuted for another offence and advances an account that is inconsistent with what they said in their Section 2 interview.

It had been thought that Section 2 notices extended only within the jurisdiction and could not be used to compel a recipient to produce documents located overseas. However, this point was considered recently by the High Court in KBR v Serious Fraud Office[2018] EWHC 2368 (Admin). In KBR, the SFO had begun an investigation into suspected bribery at KBR Ltd, a UK registered company that was a subsidiary of KBR Inc, a company registered in the USA. The SFO issued KBR Ltd with a Section 2 notice in respect of 21 categories of material; however, it became concerned about the company's co-operation. In due course, the SFO issued Section 2 notices against two officers of KBR Inc, requesting the disclosure of material.

KBR Inc issued judicial review proceedings, arguing that the Section 2 notice was unlawful principally on the basis that Section 2 did not have extraterritorial effect. The High Court disagreed. Finding for the SFO, the court held that Section 2 notices did have extraterritorial effect where a "sufficient connection" existed between the company and the jurisdiction. The court was concerned that SFO investigations should not be "frustrated or stymied" on the basis that a company held documents on a server outside the jurisdiction. Since KBR Ltd was the UK operating arm of KBR Inc, the court held in favour of the SFO.

Generally, the use of the SFO's powers are open to challenge by way of judicial review before the High Court. Accordingly, it would also be open to an individual to initiate judicial review proceedings against the SFO in relation to a Section 2 notice that demanded the delivery of documents to the UK from outside the jurisdiction. Note, however, that the grounds for judicial review and the overall process are beyond the scope of this chapter.

Whilst its Section 2 powers are wide-ranging, the SFO is not entitled to demand information protected by legal professional privilege (LPP). The two main forms of LPP are legal advice privilege and litigation privilege. Legal advice privilege is concerned with confidential communications between a lawyer and a client for the purpose of giving or receiving legal advice or assistance, in a litigation context or a non-litigation context. Litigation privilege is concerned with confidential communications between a lawyer and a client or with third parties for the dominant purpose of litigation that is reasonably in contemplation.

LPP is a substantive right. The privilege always belongs to the client and not the lawyer, and therefore it is a matter for the client to waive or assert it. It can be asserted in answer to any demand for documents by the SFO (or other authorities) and not only in the context of civil or criminal proceedings. LPP is absolute and cannot be overridden other than in exceptional circumstances, particularly the crime/fraud exception, ie, where the information or document itself forms part of a criminal or fraudulent act, or communications between client and solicitor take place to obtain advice with the intention of carrying out an offence.

Litigation might not be reasonably in contemplation when carrying out an internal investigation. For this reason it is important to ensure that particularly sensitive communications are, as far as possible, covered by legal advice privilege. Prosecutors, as shown recently by the SFO, may attempt to challenge any assertion of privilege regarding notes prepared by lawyers when interviewing witnesses during an internal investigation. The High Court ruled in RBS Rights Issue Litigation, Re [2016] EWHC 3161 (Ch) that RBS could not claim legal advice privilege over notes of interviews with current and former employees as part of an investigation by in-house and external lawyers because the RBS employees who were interviewed were not 'the client'. The judge also found that the interview notes did not fall within the scope of legal advice privilege as comprising "lawyers' working papers."

In SFO v Eurasian Natural Resources Corporation Ltd [2018] EWCA Civ 2006, the Court of Appeal reversed the decision of the High Court (Andrews J). In so doing, it restored the former position that legal professional privilege applied to material generated where the dominant purpose was to resist or avoid adversarial proceedings. The court held that proceedings had been in "reasonable contemplation,"

that the documents had been generated for the dominant purpose of resisting such proceedings and that, as such, the material that the SFO wished to inspect was subject to litigation privilege.

The Court of Appeal noted that the position in relation to legal advice privilege was out of step with the wider common law position, in that legal advice privilege would only cover communications between legal advisers and certain categories of company officers and employees at ENRC. The Court took the step of noting that this point would require resolution by the Supreme Court; however, the SFO has declined to appeal the Court of Appeal's judgment further.

5.3 Discretion for Mitigation

Although the UK courts determine individual sentences, prosecuting bodies can affect the sentence that an individual receives. In particular, a prosecuting agency is responsible (alongside the defence) for bringing to the attention of the sentencing court the mitigating and aggravating factors present in the case that may impact the court's assessment on sentence. Furthermore, plea agreements are available to individuals in certain circumstances. These agreements afford individuals a degree of foresight and certainty in the sentencing process. When considering a plea agreement, prosecutors must adhere to specific guidance in the Attorney General's Guidelines On Plea Discussions In Cases Of Serious Or Complex Fraud (published November 2012) and the relevant Criminal Procedure Rules. The general principles of the Guidelines are that prosecutors must, when conducting plea discussions, act openly, fairly and in the interests of justice. Put briefly, those principles require the prosecutor to ensure:

- that the defendant has sufficient information to participate in the plea discussions;
- transparency before the court, ie, that any agreement put to the court does fully and fairly reflect the terms agreed;
- fairness in its dealings with the defendant, ie, not applying any improper pressure on them or misrepresenting the strength of the prosecution case; and
- that they act in the interests of justice, meaning that the plea agreement reflects the severity and extent of the offending behaviour, and pay careful attention to the impact of the plea agreement on the victims and on the chances of bringing a successful prosecution against any other person involved in the underlying offences.

Deferred Prosecution Agreements

DPAs have been available to the SFO, and other prosecutors, since February 2014, following the entry into force of the relevant part of the Crime and Courts Act 2013. They have become an important aspect of the prosecutorial toolkit for economic crimes such as bribery and corruption.

DPAs apply only to fraud, bribery and other business crimes committed by companies or other organisations; they are not available for individual defendants. Under a DPA, the defendant is charged with a criminal offence but proceedings for it are suspended immediately on the condition that the company performs the agreed terms. Unlike some other jurisdictions, those terms must be first scrutinised and approved by a judge sitting in open court.

If the company reneges on this agreement or does not comply with the conditions to a satisfactory standard then the prosecutor may immediately commence criminal proceedings against it. For the company, the fundamental benefit of a DPA is that it enables the company to obtain certainty, ie, atoning to the court for underlying criminality, without having to endure a lengthy and public criminal trial, and the risk of eventually being convicted.

The defendant is not entitled to a DPA; rather, it must be invited to enter negotiations that may culminate in a DPA. When considering whether to invite a company under investigation to negotiate a potential DPA, the prosecutor must pay due regard to:

- the Full Code Test for Crown Prosecutors;
- the joint Guidance On Corporate Prosecutions; and
- the Deferred Prosecution Agreements Code Of Practice.

In deciding whether to invite DPA negotiations, the public interest limb of the Full Code Test is particularly important. Where the SFO believes that the evidence provides a realistic prospect of conviction and that the public interest would be met by a prosecution of the company, the SFO will prosecute. Where there is sufficient evidence or "a reasonable suspicion based upon some admissible evidence that the company has committed the offence and there are reasonable grounds for believing that a continued investigation would provide further admissible evidence within a reasonable period" (paragraph 1.2 of the DPA Code Of Practice), but the public interest may not warrant a prosecution of the company, the SFO will consider whether a DPA may be an appropriate disposal of the case. Amongst the factors tending towards a DPA disposal instead of prosecution, the DPA Code Of Practice and the recent case regarding Rolls-Royce make clear that considerable weight will be attached to genuinely proactive and co-operative conduct by the company.

If the SFO invites the company to negotiate a DPA, the two sides will enter confidential discussions to achieve agreement on a statement of facts, which describe the company's involvement in the offences. As with the diluted evidential threshold for DPAs, the prosecutor's approach to the agreed statement of facts creates the potential for significant tensions between the interests of the company and individual employees or other associated persons, who already are or may become the subject of criminal investigation them-

selves. The agreed statement of facts is a narrative setting out in detail the circumstances in which the company was involved in criminality. In the Standard Bank case, the statement of facts named specific individuals; by contrast, the DPA issued to an "XYZ (a UK SME)" did not identify individuals or even the company that it was issued to.

It remains to be seen whether any individuals who are identified in a DPA or its accompanying statement of facts will bring a challenge to protect their own position in relation to potential proceedings against them for offences described in the company's DPA. Those advising individuals who may be identified in a DPA process may wish to give careful strategic consideration to pre-emptive discussion with the SFO and/or the relevant company in an effort to obtain an agreement that the individual will not be named in any publicly available DPA document. If an agreement as to anonymity cannot be reached and the individual is prosecuted, it will be open to the defendant to make an application to halt proceedings if a fair trial cannot be achieved.

The terms of the DPA may include a remedial programme to improve internal compliance policies and procedures, specific undertakings to co-operate with the SFO in any subsequent investigation or prosecution regarding other persons connected with the offences, disgorgement of profits and payment of compensation.

The matter will then be put before the court for judicial approval of the suitability of a DPA disposal and, if it is suitable, the specific terms of the agreement. The first hearing at court will be held confidentially; if the DPA is to be pursued beyond that, there must be a public hearing to finalise the terms. In that open hearing, the court will be asked to declare that the DPA is in the interests of justice and that its terms are fair, reasonable and proportionate in the circumstances of the specific case. If the court does so, the judge will provide their reasoning for making such declarations.

5.4 Jurisdictional Reach of the Body/Bodies

As outlined above, the SFO's Section 2 powers have limited extra-jurisdictional effect where the 'sufficient connection test' is met.

The SFO may also seek mutual legal assistance from overseas authorities via the Crime (International Co-operation) Act 2003. Under that statute, the SFO may utilise the assistance of overseas authorities to serve various documents (eg, summons, Section 2 notices), obtain evidence (including witness statements on oath, documentary and banking evidence) and execute search and seizures.

6. Review and Trends

6.1 Assessment of the Applicable Enforced Legislation

On 17 May 2018, a parliamentary select committee regarding the effectiveness of the Bribery Act 2010 was appointed, which is due to consider whether the Act has led to greater prosecution of corruption, a higher conviction rate and any reduction in offences. The committee will also consider the impact of the legislation on SMEs, as well as the relationship between the 2010 Act and Deferred Prosecution Agreements. The committee is due to report by 31 March 2019.

6.2 Likely Future Changes to the Applicable Legislation or the Enforcement Body

Recent developments at the SFO are likely to result in a change in the way corruption and bribery are prosecuted in England and Wales.

The new director, Lisa Osofsky, formerly of the US Department of Justice (DOJ), took up her role at the SFO on 28 August 2018. In a speech given shortly after, she stated her intention to be a "different kind of director," noting that she wished to focus on co-operation between the SFO's international peers (such as the DOJ) and domestically between the SFO and other prosecuting agencies. In addition, she noted that she wished to develop relationships with regulators, NGOs and the private sector.

More recently, the SFO has announced an expansion and restructuring of its management team, including the appointment of a head of intelligence to "accelerate the drive to a more proactive approach to sourcing new cases." This has been augmented by secondments from the private sector.

It is also likely that Artificial Intelligence (AI) will play an increasing role in the SFO's investigations and prosecutions. The SFO's recent testing of an 'AI Robot' led to 80% savings in a review for isolating legally privileged material. In a speech in June 2018, Camilla de Silva, the joint head of bribery and corruption, noted that the SFO is embracing technology more widely and has adopted a new review platform to allow the SFO to "more easily and quickly pursue relevant lines of inquiry that we choose."

In addition to developments at the SFO, the government has recently announced a National Economic Crime Centre to be led by the National Crime Agency. The intention of the Centre is to provide a multi-agency, multidisciplinary approach to economic crime, by bringing representatives of the main prosecuting agencies into one team. The Centre will have a budget of approximately £6 million and will employ a staff of around 55.

Other developments include a further use of Unexplained Wealth Orders (UWO), a tool implemented in the Criminal

Finances Act 2017. Such orders allow prosecutors to apply to the High Court to force an individual to reveal details about their interests in property where there are reasonable grounds for suspecting that the known sources of that person's lawful income would have been insufficient for the purposes of enabling the respondent to obtain the property. Such orders may only be made against politically exposed persons (PEP), or where there are reasonable grounds for suspecting that the person is or has been involved in serious crime. In National Crime Agency v Mrs A [2018] EWHC 2534 (Admin), Supperstone J declined to discharge such an order, giving particular consideration to what constitutes a state-owned enterprise and how a person employed by such an enterprise can be considered a PEP.

In recent years, some commentators had remarked that following much publicity regarding its wide scope and strict corporate criminal liability, the Bribery Act seemed to sit unenforced by the SFO. This fed into some longstanding, and recurring, criticism of the SFO and its efficacy as a prosecutor of corporate crime. However, there has been a discernible shift in perception since the introduction of DPAs in 2014. By way of example, in June 2016, the SFO issued controversial new guidance regarding the presence of legal representatives in interviews of witnesses under Section 2 of the CJA; the effect of which was, in essence, seriously to limit the circumstances in which a witness could be joined by a lawyer for his or her interview with the SFO. The guidance states that the lawyers may be admitted in return for certain undertakings as to confidentiality. In response, the Law Society issued its own guidance to solicitors in May 2017 that encourages legal representatives to take a robust stance when faced with SFO objections to their presence in witness interviews. However, it remains to be seen whether and how the SFO's more aggressive approach is tested by way of judicial review.

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Separately, but perhaps related to its increased confidence, the SFO has become a leading proponent for expanding the strict liability corporate offence beyond bribery, to create a new offence of failure to prevent economic crime, thereby encapsulating fraud, tax evasion, money laundering and other business-related offending (see the speech in June 2018 by Camilla de Silva at the SFO at https://www.sfo.gov.uk/2018/06/21/corporate-criminal-liability-ai-and-dpas/). This would have a dramatic effect upon businesses connected to the UK. Whilst it remains to be seen whether Parliament will approve such a wide-ranging expansion, the Criminal Finances Act 2017, which came into force on 30 September 2017, includes a new offence of corporate failure to prevent the facilitation of tax evasion.

Taken together, the increasing efficiency and bullish approach of the SFO, and the wider legislative (and political) mood suggest that the next couple of years will feature increased enforcement activity by the SFO and/or other prosecutors regarding corruption-related offences by corporates and individuals.